

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 August 2012

Public Authority: Mid Yorkshire Hospitals NHS Trust (the Trust)
Address: Halifax Road
Dewsbury
West Yorkshire
WF13 4HS

Decision (including any steps ordered)

1. The complainant has requested a copy of the external report into women's services commissioned by the Trust as well as a list of serious untoward incidents regarding maternity services since 2009 with dates and descriptions. The Trust has now made the report publicly available but has redacted some information on the basis of section 36(2)(b)(i) and (ii) and 40(2) and has also provided a list of serious untoward incidents but withheld any further detail on the basis of section 40(2).
2. The Commissioner's decision is that the Trust has correctly applied section 36 and 40(2) to redact information from the report and, after considering the public interest arguments, has concluded the public interest favours withholding the remaining information. The Commissioner also considers section 40(2) has been correctly applied to withhold further detail on the serious untoward incidents.

Request and response

3. On 11 August 2011, the complainant wrote to the Trust and requested information in the following terms:

"please send me the recently completed external review report into women's services commissioned by the trust.

Please also send me a list of serious untoward incidents at the trust concerning maternity services since April 2009.

Please list the month and year when the incident occurred, the location of the hospital and details of what happened to make it a serious incident."

4. The Trust responded on 9 November 2011. It refused to provide the report on the basis of section 36(2)(b) and (c). The Trust provided figures for the number of serious incidents reported within the timeframe requested but refused to provide further details on the basis of 'staff and patient confidentiality'.
5. On 21 November 2011 the complainant requested an internal review of this decision. The Trust wrote to the complainant with the outcome of this review, following intervention from the Commissioner, on 10 February 2012. It upheld its original decision and continued to withhold the information on the basis of sections 36 and 40.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. Since the date of the request, the Trust has now made a redacted copy of the report available. As such the complainant has agreed the scope of the Commissioner's investigation to be to consider the Trust's application of section 36 and 40 to withhold the remaining information from the report and the use of section 40 to withhold any further information on the serious untoward incidents (SUI's).

Reasons for decision

Serious Untoward Incidents

8. The Trust has argued that it believes section 40(2) applies as providing any more information than the number of incidents by year already provided, could be used to identify the person or people involved in the incident.
9. Section 40(2) states that information is exempt if it constitutes the personal data of a third party (other than the applicant) and one of the conditions listed in section 40(3) or 40(4) are satisfied.
10. During the investigation of the case the Commissioner asked the Trust to clarify its reliance on section 40(2) particularly with regards to why the information would be considered personal data. The Trust did provide some further explanations beyond simply stating the information

could not be disclosed for staff and patient confidentiality reasons. However, the explanations given were not very prescriptive. The Commissioner has therefore, after considering the nature of the withheld information and the limited arguments presented by the Trust, proceeded on the basis that the Trust is relying on section 40(3)(a)(i) to engage the exemption i.e. that the information is that of a third party and disclosure would contravene any of the principles of the Data Protection Act 1998 ("DPA").

11. In order to establish whether section 40 has been correctly applied the Commissioner has first considered whether disclosing details of SUI's along with locations and dates would constitute the personal data of third parties.
12. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified from that data, or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
13. The information held by the Trust consists of SUI report forms with descriptions of the reported incidents along with the location of the hospital the incident occurred at. The Trust considers that due to the relatively small number of SUI's report (5 in 2009/2010, 10 in 2010/2011 and 3 up to the date of the request in 2011/2012) individuals could be identified by disclosure of this information.
14. The Commissioner notes that the overall figures provided already by the Trust relate to SUI's throughout the Trust but that there are three hospitals which make up Mid-Yorkshire Hospitals Trust. If the Trust were to disclose the location of the hospitals along with the descriptions of the incidents and specific dates, given the small number of incidents each year and the fact that the incidents are limited to SUI's within maternity services at the hospitals; the Commissioner considers it would be possible to identify the individuals concerned from the information.
15. The Commissioner does however note that the chances of any member of the public being able to cross-reference this information to identify specific individuals may not be high but given the low numbers involved, he does consider there is a risk that specific individuals could be identified by cross-referencing by a person with local knowledge particularly as there has been some media interest in the maternity services of the Trust. Therefore on the balance of probabilities, the Commissioner considers the information is personal data.
16. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first data protection principle. The first principle requires that the processing of personal data is fair

and lawful and he has first considered whether disclosure of the information would be fair.

17. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - The individual's reasonable expectations of what would happen to their information; and
 - Balancing the rights and freedoms of the data subject with legitimate interests.
18. In order to reach a view on whether the disclosure of this information would be fair, the Commissioner has placed specific emphasis on the nature of the information itself. The requested information includes a description of the incident and these descriptions have been provided by members of staff at the hospitals concerned describing the events leading up to the SUI. As some of these incidents resulted in the death of new born babies, the Commissioner considers that disclosure of the information would cause distress should the individuals concerned be identified.
19. The individuals who could be identified from the disclosure of this information, mainly the patients, would have no expectation that their information would be disclosed in any circumstances. There is an inherent confidentiality in medical information and patients would have no expectation that their information would be disclosed, particularly given the level of detail included in some of the descriptions.
20. In relation to the final factor, the Commissioner notes there is a legitimate interest in the public understanding how maternity services are run at the Trust given the recent scrutiny. The Commissioner recognises that knowing how many SUI's have been reported assists in the public's understanding; however the specific details of incidents together with locations and dates that could lead to identification of individuals would not add to this understanding and would prejudice the rights and freedoms of those individuals. The Commissioner therefore accepts that the rights and freedoms of the data subjects outweigh the public's legitimate interest in disclosure of this information.
21. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the further information relating to SUI's should be withheld.

Women's services report

22. As the Trust has now made the majority of the report available the Commissioner confirmed with the Trust the basis on which it was continuing to withhold the remaining information, redacted from the publicly available report. The Trust confirmed it was relying on section 36(2)(b)(i) and (ii). Although not specifically stated by the Trust the Commissioner has also considered the application of section 40(2) to information in the report.
23. The information redacted from the report includes specific accounts of incidents involving members of staff and managers with frank accounts of these incidences, used to highlight the current situation in maternity services. As well as this the Trust also continues to withhold certain frank and honest statements made by staff which the Trust considers would not have been provided if there was any expectation the information may be published. The Trust has also redacted names of individual members of staff and references to specific managers and doctors from the report.

Section 36 – prejudice to the effective conduct of public affairs

24. Section 36(2)(b) states that information is exempt if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit –
 - (i) The free and frank provision of advice, or
 - (ii) The free and frank exchange of views for the purposes of deliberation
25. For section 36(2)(b) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the Trust is the Chief Executive. The Trust has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the Chief Executive was a reasonable one.
26. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following:

“ The most relevant definition of ‘reasonable’ in the Shorter Oxford English Dictionary is ‘In accordance with reason; not irrational or

absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.”¹

27. In order to determine whether section 36(2)(b)(i) or (ii) is engaged the Commissioner will consider:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
28. The Trust has explained that the report was compiled from the views and opinions of staff and was intended to assist in continuing service development within the Trust. The report was not commissioned with the intention of it being publicly disclosed as it was considered that to do so would be likely to inhibit the free and frank exchange of views as staff would be less willing to engage in the future and it would have a detrimental impact on the on-going service development.
29. The Commissioner is aware that Women's Services at the Trust has been the subject of some media attention following a survey conducted by the Care Quality Commission. Following the Trust's decision to disclose the majority of the requested report the Commissioner notes there was some media attention, particularly in the local area.
30. The Commissioner's view is that the nature of the remaining withheld information is such that the disclosure of the information and the potential surrounding media coverage is likely to impact on the free and frank exchange of views and staff contributing to future reports. In turn the Commissioner recognises that if staff do not feel they can provide open and frank views to the Trust to inform these types of reports this will be likely to decrease the effectiveness of these reports and any proposed service improvements.

¹ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

31. The Trust has provided sufficient evidence to illustrate that the Chief Executive had prior knowledge of the issues to which the information relates. The Chief Executive was provided with an email explaining that she was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information withheld by the Trust in this case. It is clear that having reviewed this information the Chief Executive formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
32. For the reasons outlined above the Commissioner is satisfied that the opinion of the Chief Executive is a reasonable one. Therefore, he considers that section 36(2)(b)(ii), specifically, is engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

33. The Commissioner recognises the general public interest argument that disclosure of information increases transparency and accountability within public authorities. He also accepts that this is particularly relevant in NHS bodies and Trusts where disclosure can help to promote public confidence in the NHS and those who work within it.
34. With more specific reference to the withheld information, the Trust did recognise that disclosure would increase transparency given that the purpose of the report was to feed into ongoing service development within the Trust in an area that has been under scrutiny following the CQC's Survey of Women's Services at the Trust. The Commissioner agrees that there is a public interest in promoting confidence in the NHS and that disclosing this information would allow the public to determine whether the Trust had undertaken a thorough review based on the honest assessments of its staff and whether any subsequent action or improvements taken by the Trust has been an appropriate response to the issues raised.
35. However, whilst the Commissioner has afforded some weight to these factors, in light of the Trust's subsequent decision to release the majority of the report, the Commissioner does not consider these arguments as strong as they would have been when applied to the whole of the report.

Public interest arguments in favour of maintaining the exemption

36. The Commissioner considers that a lot of the public interest factors in favour of disclosure have been met by the release of all but the redacted parts of the report. The Trust argues that the remainder of the

information in the report which is being withheld is information which, if released would be likely to inhibit the free and frank exchange of views.

37. Hospital services are subject to a high level of scrutiny from regulatory bodies and the public. Information about hospital services is regularly publicised through these channels and by the Trust itself. At the same time, staff need to be confident that they can have a safe space to openly and frankly discuss and exchange ideas internally and away from public scrutiny. This aids internal service scrutiny and a robust decision making process so that difficult and sensitive decisions can be reached.
38. The requested report was compiled using views and opinions of staff and it was never intended (by the Trust or the contributing staff) that the report would be in the public domain. The Trust argues that disclosure of the report would seriously undermine the confidence of staff and inhibit future quality, open and frank discussion, exchange of ideas and provision of advice for fear of public disclosure. Inhibition of this process would be to the detriment of service scrutiny and development.

Balance of the public interest arguments

39. The Commissioner has considered the public interest in maintaining the exemption. Having taken into account the content of the information that the Trust continues to maintain should be withheld, he considers that the inhibition to the free and frank exchange of views, which in the reasonable person's opinion is likely to result from disclosure of the disputed information, is real. The Commissioner considers that the information already disclosed by the Trust meets a large amount of the public interest factors in favour of disclosure by increasing transparency and accountability. At the same time by disclosing the majority of the report the Trust has already taken a risk that staff may feel less willing to openly exchange views in the future.
40. The Commissioner recognises that should the remainder of the withheld information be disclosed, particularly in light of the nature of it, this would be likely to erode any remaining trust that staff may have that information they provide will not be made publicly available. As such the Commissioner affords significant weight to this factor.
41. Having taken into account the public interest factors outlined above, the Commissioner considers that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Trust is therefore not obliged to disclose the information withheld on the basis of section 36 from the Women's Services Report. The Commissioner has next gone on to consider the remainder of the information in the report which appears to engage the section 40 exemption.

Section 40 – personal information

42. The Trust provide arguments in relation to its use of section 40(2) in relation to the information requested on SUI's and did not specifically refer to this in relation to the names redacted from the report. However, the Commissioner considers that, as a responsible regulator, he should consider the application of section 40(2) to the report.
43. When considering section 40(2) the Commissioner's first consideration is whether the information constitutes the personal data of a third party (other than the applicant).
44. The Trust has redacted information from the report where a specific member of staff is named or described in such detail that they could be identified; this has been done whether a frank statement has been made which is attributed to a member of staff or where the statement itself identifies a specific individual by reference to their name. The Commissioner therefore accepts that this information would constitute personal data.
45. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first data protection principle. The first principle requires that the processing of personal data is fair and lawful and he has first considered whether disclosure of the information would be fair, based on the criteria referred to in paragraph 17.
46. As much of the information constituting personal data that has been withheld is the opinions of other members of staff, some of the information is emotive and may well cause distress to the individuals who can be identified from the information. In the case of the members of staff who are named as the people making the comments, given the frankness of the comments the Commissioner considers that disclosure would result in distress by exposing them to increased scrutiny from their colleagues and peers.
47. The members of staff who contributed to the report did so with no expectation that the report would be disclosed in full or in part, even in light of the subsequent disclosure of the majority of the report the Commissioner considers staff would still have no expectation that their personal information would be disclosed. For those staff who could be identified from comments made, similarly the Commissioner accepts that they would have no expectation that they would be identified and used as examples in a report that is then made publicly available.
48. As with the consideration given to section 40(2) in relation to the information on SUI's, the Commissioner accepts there is a legitimate

interest in the public understanding how maternity services are run at the Trust. However, he does not consider that identifying individuals who contributed to the report and offered opinions would assist in the public's understanding of maternity services at the Trust. The Commissioner also does not consider that revealing information which could identify specific individuals who have been referenced as examples of behaviour within the Trust would be reasonable. The Commissioner has therefore concluded that the rights and freedoms of the data subject outweigh the public's legitimate interests in disclosure of this information.

49. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information withheld from the report constituting personal data is exempt from disclosure.

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

51. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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