

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 October 2013

**Public Authority:** The Professional Standards Authority for Health and Social Care

**Address:** 157-197 Buckingham Palace Road  
London  
SW1W 9SP

#### Decision (including any steps ordered)

---

1. The complainant has requested a copy of a specific British Association for Counselling and Psychotherapy portfolio. The Professional Standards Authority for Health and Social Care ("The PSA") refused to provide this information as it considered it exempt on the basis of section 36(2) of the FOIA.
2. The Commissioner's decision is that the exemption is engaged and, on balance, the public interest favours maintaining the exemption. He requires no steps to be taken.

#### Request and response

---

3. On 25 December 2012, the complainant wrote to the PSA and requested information relating to the British Association for Counselling and Psychotherapy (BACP) accredited voluntary register. The complainant asked:

*"I ask for a copy of their application portfolio please?"*

4. The PSA responded on 10 January 2013 and confirmed that the information was held but was being withheld on the basis of section 36(2)(b)(ii) and (c). The PSA considered that disclosure of the requested information would prejudice its ability to assess organisations for accreditation by inhibiting the free and frank exchange of views thus rendering the PSA unable to perform its statutory duties under the National Health Service Reform and Health Care Professions Act 2002 (NHS Reform Act).

5. Following an internal review the PSA wrote to the complainant on 13 February 2013. It stated that it had reconsidered the public interest test in relation to section 36(2) but concluded that it still maintained that the public interest favoured withholding the information.

## **Background**

---

6. The PSA is responsible for setting standards for organisations holding voluntary registers for health and social care occupations and accrediting those that meet them. Accreditation means that a voluntary register is managed effectively and the registrant adheres to good practice. Organisations applying for accreditation have to demonstrate they meet the standards set out by the PSA.
7. The BACP submitted an application for accreditation to the PSA and the PSA issued a 'call for information' on 12 December 2012 giving interested parties (including patients, service users, the public, professionals and representative organisations) the opportunity to comment on the application and put forward details of any experiences they had with the BACP which may impact on their ability to comply with the PSA's standards. The deadline for submissions was 16 January 2013.

## **Scope of the case**

---

8. The complainant contacted the Commissioner on 27 March 2013 to complain about the way his request for information had been handled. The complainant particularly stressed that he considered the balance of the public interest favoured disclosure.
9. The Commissioner considers the scope of his investigation to be to determine if the PSA correctly applied the section 36(2)(b(ii) and (c) exemption to withhold the requested information and if so where the balance of the public interest lies.

## **Reasons for decision**

---

10. Section 36(2) of the FOIA states that

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –*

*(b) 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, or*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

11. The exemptions listed in section 36(2) are qualified exemptions so are subject to the public interest test. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
12. For any of the exemptions listed in section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person is the Chief Executive, Harry Clayton. The PSA 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 qualified person was a reasonable one.
13. The Commissioner has 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.*"<sup>1</sup>
14. In order to determine whether any of the subsections of 36(2) are engaged the Commissioner will consider:
  - whether the prejudice claimed relates to the specific subsection of section 36(2) that the PSA 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.

---

<sup>1</sup> 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](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.

15. The withheld information consists of the application submitted by the BACP to the PSA for accreditation of its voluntary register. This included detailed information and evidence to demonstrate how the BACP met the standards of accreditation.
16. The PSA has stated that releasing the full application portfolio at the time of the request would have prevented it from being able to carry out its statutory functions with regard to the accreditation of applicant organisations as laid out in the NHS Reform Act, section 25G as inserted by the Health and Social Care Act 2012, section 229<sup>2</sup>.
17. The PSA has explained that organisations can choose to apply for accreditation of their voluntary register of people working in health and social care occupations. The Commissioner understands there is no obligation on an organisation to apply for accreditation but if they choose to do so they must be able to demonstrate they meet the required standards of the PSA.
18. The PSA states that accreditation of voluntary registers allows the public, employers and commissioners to choose to use people who are on a register which has been independently assessed and approved as meeting the high standards of personal behaviour, technical competence and business practice set out by the PSA.
19. At the time of the request the BACP had submitted its application portfolio for accreditation and the PSA had sent out a 'call for information' offering interested parties the opportunity to provide evidence regarding the BACP's suitability for accreditation of its voluntary register. The deadline for submissions had not passed when the request was made.
20. The timing of the request would therefore seem to be important, coming at a time when the application was still being considered and information and evidence gathered. This required a safe space for the PSA to gather information to ensure it could fairly consider the application and make the right decision regarding accreditation. Premature disclosure of the application would have been likely to inhibit this process.
21. The PSA has also highlighted the fact that confidentiality is inherent in the application process and it does not publish application forms or supporting documentation. The PSA does publish outcome letters with

---

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2012/7/section/229/enacted>

detailed information about the assessment following a panel meeting. In addition a summary of the BACP's portfolio was published after the decision had been made<sup>3</sup>.

22. To support this position the PSA did consult with the BACP who made it clear they would consider it a breach of confidentiality for the application portfolio to be disclosed but also pointed out that disclosure could prejudice the accreditation scheme as the BACP would have been reluctant to apply for accreditation if they had thought that information would be disclosed in this way. The PSA has also received comments from other organisations who have made it clear they would be unwilling to provide information they consider sensitive as part of the application process if there was a possibility of disclosure.
23. The Commissioner recognises that there is merit to the argument that at the time of the request, whilst the application was still being considered and was still in the information gathering stage, should the portfolio have been disclosed this may have had a prejudicial effect on the effective conduct of public affairs as it may have made other organisations more reluctant to apply for accreditation if they considered there was a risk of their application portfolio being made public, particularly while the application process was still underway.
24. The Commissioner has been supplied with sufficient evidence to illustrate that the qualified person was provided with an explanation that he 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 PSA in this case. It is clear having reviewed this information the qualified person formed the opinion that the disclosure of the withheld information would be likely to inhibit the effective conduct of public affairs.
25. For the reasons outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one and that the possibility of the prejudice occurring is real. Therefore, he considers that section 36(2)(b)(c) 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.

---

<sup>3</sup> <http://www.professionalstandards.org.uk/docs/voluntary-registers/british-association-for-counselling-psychotherapy-avr-panel-decision.pdf?sfvrsn=2>

*Public interest arguments in favour of disclosure*

26. The Commissioner recognises the general public interest argument that disclosure of information increases accountability within public authorities.
27. The PSA accepts there may be a public interest in allowing access to the portfolio to allow for scrutiny and comment on the submissions provided to the PSA during the application process. This would allow the public to be assured there are no inaccuracies in the applications of organisations seeking to be accredited.
28. With more specific reference to the withheld information, the PSA did recognise the genuine and legitimate public interest in the need for the public to be confident in the PSA's processes and decision-making and the accredited voluntary registration scheme; which would be enhanced by releasing as much information as possible used to inform the decisions of the PSA.

*Public interest arguments in favour of maintaining the exemption*

29. The PSA considers there is a fear within organisations applying to be accredited that sensitive or confidential information provided to the PSA will be disclosed. As the accreditation scheme is voluntary the PSA has no powers to compel organisations to apply or to submit information and it is in the public interest to establish a successful accreditation scheme to help raise standards and improve public protection.
30. The PSA has explained that the application portfolio contains information which is the intellectual property of the BACP and some of the information is available only to members. As such disclosure of the portfolio would allow this information to be widely available to third parties who could then use it freely. The PSA has speculated that this could enable some organisations to use this in their applications and weaken the rigorousness of the process. This would affect the application process and the ability of the PSA to conduct an effective accreditation scheme.
31. The PSA has also highlighted the comments made in the Caldicott review<sup>4</sup> that there is an expectation that more non-regulated members

---

4

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/192572/2900774\\_InfoGovernance\\_accv2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192572/2900774_InfoGovernance_accv2.pdf)

will join the voluntary register scheme which would promote good practice in private organisations. The Review noted that an increasing number of accredited organisations would give the public greater assurances. The PSA therefore considers that disclosure of the application portfolio would not be in the public interest as it would be likely to discourage applications to the voluntary registration scheme.

32. The timing of the request was also considered important by the PSA when considering the public interest in disclosure. The PSA explained that applications are part of an on-going process and are subject to numerous changes as they progress. Disclosure at the time of the request, when the application had not been approved and the 'call for information' was still underway, would have been likely to be prejudicial to the application and the scheme.

#### *Balance of the public interest arguments*

33. The PSA itself recognised that a blanket ruling on releasing information considered part of the application process could not be made and did not intend that this decision be seen in that way. However, the PSA did put great emphasis on the fact that at the time of the request this was a new scheme which required the trust of organisations involved in it to allow the scheme to succeed and therefore the PSA to fulfil its statutory functions. The Commissioner agrees that this is important and that a significant amount of weight should be given to the argument that disclosure at such an early stage of the establishment of the accreditation scheme could have a significant impact on the future success of the scheme.
34. Conversely, the Commissioner recognises that as the voluntary accreditation scheme was a new scheme and the BACP application was one of the earliest applications, there is a public interest in ensuring the scheme is transparent and the public can assess that it is being administered properly. That being said, the Commissioner is not minded to accept that the disclosure of the application at the stage in the process it was at would serve to meet this public interest. This is supported by the fact that the PSA does publish a summary assessment with the rationale for accepting that the applicant meets the required standards, this includes key facts on which the judgement was made. The PSA considers this meets the public interest in transparency and demonstrates that decisions are being made on a sound basis.
35. The Commissioner considers the timing of the request to be significant in terms of the establishment of the scheme in general but more specifically with regard to the specific application by the BACP in this case. He accepts the argument that disclosure of the application at a time when no decision had been made on whether to accredit the

voluntary scheme would have been likely to impact on the application going forwards and the likelihood of future applications.

36. The complainant has argued that disclosure at the time of the request would have served the public interest as it would have allowed those parties responding to the call for information to be fully aware of the information supplied in the application portfolio. However, the PSA has argued that the call for information was intended to allow third parties to comment on the organisation applying for accreditation not on the application. The Commissioner accepts the explanation offered by the PSA as to the purpose of the call for information and as such does not see how disclosure of the full application portfolio would have enabled better submissions in the call for information.
37. Whilst the Commissioner would accept that better engagement and more informed submissions would generally be in the public interest as it would lead to decisions being based on all available information, in this case he is not minded to accept that disclosure of the application portfolio at the time of the request would have had any impact on the quality of submissions or the outcome of the application as this was not relevant to the call for information.
38. The Commissioner, having accepted that the exemption is engaged, recognises that the prejudice that would be likely to occur adds weight to the public interest in favour of maintaining the exemption. He does not consider it would be in the public interest for the voluntary accreditation scheme to be prejudiced by disclosing information which may inhibit other organisations from applying for accreditation.
39. 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 PSA is therefore not obliged to disclose the BACP's application portfolio it withheld on the basis of section 36.



## Right of appeal

---

40. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

41. 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.
42. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**