

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2013

Public Authority: East of England Ambulance Trust
Address: Hospital Lane
Chelmsford
CM1 7WS

Decision (including any steps ordered)

1. The complainant requested copies of management documents relating to concerns about the ambulance service's planned rota review.
2. The Commissioner's decision is that by withholding the information under s41(1) of the FOIA the East of England Ambulance Trust (the trust) did not deal with the request in accordance with the FOIA.
3. The Commissioner requires the public authority to disclose the information withheld under section 41(1) within 35 calendar days of the date of this decision notice.
4. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 August 2012 the complainant requested information concerning the trust's target times for ambulance attendance at life threatening incidents and ambulance arrival times at hospitals. She added, "*I would also be grateful if you could provide a copy of all documents relating to the rota review, in the planning stage, particularly any documents from management to the executive board relating to areas of specific concern*"
6. On 1 October 2012 the trust informed the complainant that it did not hold information in relation to the first parts of her request. In relation to the rota review the trust said that all its board minutes could be

found on its website and supplied the complainant with its website address.

7. On 22 October 2012 the complainant responded as follows:

"I have a copy of the board papers, thank you. My request related to a document that does not appear to form part of the board minutes. I am aware from an Assistant General Manager, that there were documents of concern sent to the Executive Board, regarding the planned rota review. These consisted of a main document signed by managers and individual letters of concern. These are the documents that I wish to request under the FOI please."

8. On 25 April 2013 the trust informed the complainant that a letter had been sent by a manager on behalf of colleagues to the trust's Associate Director - Special Operations. The trust said the letter had been sent with the expectation that it would not be released into the public domain and it had therefore been withheld under s41 FOIA.
9. The complainant appealed on 29 April 2013 against the trust's decision to withhold the letter. She said she had been advised that the letter had been signed by a group of managers in their substantive roles and that it detailed their concerns relating to the trust wide 'rota redesign.' The complainant questioned that there could be any substantial harm by releasing the information and queried how any breach of confidence could be actionable. She said that if concerns had been raised but then ignored, the public interest in disclosure outweighed any public interest in keeping confidence.
10. On 10 May 2013 the trust informed the complainant that its internal review had upheld the exemption because of the following reasons: the letter from managers to their management team was considered to be confidential; it was written within a context of discussions at the time; the letter did not contain this context and therefore interpretation would be with hindsight; the managers' own views may have changed since the letter was written and some of them had moved on to different roles or different organisations.

Scope of the case

11. The complainant contacted the Commissioner on 16 May 2013 to complain about the way her request for information had been handled.
12. On 20 August 2013 the Commissioner asked the trust for a copy of the letter in order to determine the appropriateness of the exemption that had been applied.

13. This decision notice addresses the trust's withholding of the information under s41(1) FOIA.

Reasons for decision

14. Section 41(1) FOIA provides that information is exempt if it was obtained from another person and if disclosure to the public would give rise to a breach of confidence actionable by that or any other person.
15. The Commissioner's examination of the letter determined that the majority of its content had been generated by the managers who compiled it. It contained some references to the ambulance trust's partner/client trusts and it also contained information which had been generated by the ambulance trust itself.
16. The Commissioner considers that a duty of confidence can be owed by a public authority to employees in their private capacity. However, if information should be disclosed in the course of employment when individuals are acting solely in the capacity of employees there can be no duty of confidentiality for the purposes of s41.
17. The Commissioner is satisfied that the information in the letter was not 'obtained' by the trust from its own employees in the sense that s41 requires. Subsequently the exemption is not engaged in respect of the managers who authored the letter.
18. During the course of the Commissioner's investigation the trust said the reasons for the s41 exemption were that:
- (a) the letter mentioned operational activities of other trusts
 - (b) the letter covered on-going issues at a time of operational change and as such it was considered commercially sensitive
 - (c) the letter could be taken out of context and this could cause unwarranted criticism of the trust and unnecessary concern for the general public.
19. With regard to 18(a) the Commissioner has noted that some activities of partner/ client trusts were referenced by the authors of the letter. He understands that the references were to information shared in the normal course of business regarding the levels of ambulance cover required for the partner/ client trust areas. It was not information "obtained" in the sense that the application of s41 requires.
20. Even if the references in the letter were to be considered as obtained from another person, for the exemption to be engaged disclosure must also constitute an actionable breach of confidence.

21. In the Commissioner's view a breach would be actionable if:
- i. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (Whether there is an implied obligation of confidence will depend upon the nature of the information itself and/or the relationship between the parties.)
 - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or to any other party.
22. The Commissioner informed the trust that in order for the exemption at s41 to stand it needed to establish that an actionable breach of confidence would succeed. He noted that the trust had not presented any evidence from the partner/client trusts that they considered the references in the letter to be confidential. The trust did not explain to the Commissioner why it considered the references had the necessary quality of confidence or how the references had been communicated in circumstances importing an obligation of confidence. Without any argument from the trust as to why the information was considered to have the quality of confidence or evidence to support that it was communicated in circumstances importing an obligation of confidence, the Commissioner must conclude that its disclosure would not give rise to an actionable breach of confidence.
23. As disclosure of the information would not result in an actionable breach of confidence the Commissioner has not proceeded to consider the public interest defence to disclosure.
24. With regard to 18(b) the Commissioner has observed that the trust did not specify the commercial interests' exemption at s43 when it withheld the information nor did it rely on the exemption when it reviewed its refusal to disclose. The trust did not explain to the Commissioner during his investigation why any of the information might be commercially sensitive nor did it explain how prejudice might result from its disclosure. Without any argument or supporting evidence from the trust as to why the information should be considered to be commercially sensitive the Commissioner cannot consider the application of this exemption. Commercial sensitivity is not a relevant consideration to the application of s41.

25. With regard to 18(c) the possibility or otherwise that information might be taken out of context or that a public authority may be criticised as a result of disclosure is not a valid ground for exemption under the FOIA.

26. The Commissioner therefore finds that s 41(1) is not engaged .

Section 40(2) (personal information)

27. The letter was addressed to the trust's Associate Director-Special Operations and its signatories were named managers of the trust.

28. Although the trust did not rely on the exemption at s40(2) FOIA in order to exempt the names or job titles of individuals in the letter the Commissioner has considered the appropriateness of the exemption in relation to those individuals.

29. Section 40(2) FOIA provides that third party personal data is exempt from disclosure if its release would contravene any of the Data Protection Principles set out in Schedule 2 of the Data Protection Act 1998 (DPA).

30. The names and job titles of individuals constitute personal data. The Commissioner has therefore considered whether their disclosure would contravene the first data protection principle. The first principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met.

31. In considering whether disclosure would be fair the Commissioner has taken the following factors into account:

- whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned
- the individuals' reasonable expectations of what would happen to the information
- whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subjects.

32. The trust did not provide the Commissioner with any specific arguments as to how or why disclosure of the names and job titles would cause any unnecessary or unjustified damage or distress to the data subjects.

33. When considering the release of information identifying an employee the Commissioner takes into account whether it relates to the employee's public or private life. He considers the threshold for releasing professional information to be generally lower than that for releasing personal information.

34. All the individuals referenced in the letter are senior members of staff. The Commissioner considers it reasonable to expect that a public authority would disclose more information relating to senior employees than junior ones. In his view senior employees should expect their posts to carry a greater level of accountability.
34. In relation to the individuals' reasonable expectations, the Commissioner considers that given the nature of the information it would not be unreasonable or unexpected that the public interest would require transparency in all aspects of the matter.
35. With regard to the legitimate interests of the public the Commissioner considers that:
- there is a legitimate public interest in the openness and accountability of a public authority responsible for the provision of ambulance services across a large part of the UK and for which substantial public funds are expended
 - disclosure of the information would assist the public's understanding of the complexity of ambulance service delivery and the operational logistics involved in maintaining safe cover and effective outcomes
 - when concerns about the safety or effectiveness of public service provision have been raised an orderly disclosure of the information will set the record straight
36. Taking the above factors into account, the Commissioner is satisfied that the legitimate interests of the public are sufficient to justify any negative impact to the rights, freedoms and interests of the individuals concerned. He therefore considers that disclosure of the information would be fair.
37. Having decided that disclosure of the information would be fair the Commissioner has gone on to consider whether disclosure would be lawful. The names and job titles of the individuals concerned are not protected by any duty of confidence or statutory bar and he therefore considers their disclosure to be lawful.
38. The Commissioner has considered whether any of the schedule 2 conditions of the DPA are met for disclosure of the information.
39. Schedule 2 condition 6 permits disclosure where it is:
- "necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*

40. In order for the condition to be met, the Commissioner considers that disclosure must satisfy a three part test:
 - (i) there must be a legitimate interest in disclosing the information
 - (ii) the disclosure must be necessary for that legitimate interest
 - (iii) even where the disclosure is necessary it must not cause unwarranted interference or harm to the rights, freedoms and legitimate interests of the data subject.
41. The Commissioner has detailed the legitimate interests in disclosure of the information at paragraph 35 of this notice. He considers that disclosure of the information is necessary for these legitimate interests.
42. Having already established that the processing is fair, the Commissioner is also satisfied that release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interest of the data subjects. He is therefore satisfied that the schedule 2 condition is met.
43. As disclosure of the names and job titles of the individuals cited in the letter would not contravene the first principle of the DPA the Commissioner does not consider the information to be exempt under s40(2).

Other matters

44. The request was made on 28 August 2012. The trust provided a response on 1 October 2012. The complainant re-confirmed her request on 22 October 2012 but the trust did not provide the required response until 25 April 2013.
45. The trust breached s10(1) FOIA by failing to provide the required response within 20 working days.

Right of appeal

46. 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

47. 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.
48. 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

Rachael Cragg
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