

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2017

Public Authority: NHS England
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to a complaint he made under the whistleblowing procedure. NHS England provided the complainant with some information which fell within the scope of the request which amounted to his own personal data. This was provided under the Data Protection Act 1998 (DPA). It refused to disclose the requested information under FOIA as it applied section 31(1)(g) and 36(2)(c) to all of the withheld information and section 41, 40(1) and 40(2) to parts of the withheld information.
2. The Commissioner's decision is that NHS England correctly applied section 36(2)(c) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 15 May 2016 the complainant requested information of the following description:

"Please provide me with the following information and/or documentation within the timescale stipulated in your procedure and in law

1). The full report provided to you in writing by [named individual] regarding her investigation of my complaint

- 2). All and any drafts of this or any other related report, corrected versions, notes, interview notes
- 3). All emails between [named individual] and [named individual] from the start of the investigation both received and sent
- 4). All emails to and from [named individual] and you during this investigation from 28 March 2016 to 15 May 2016
- 5). All emails to and from all other parties supposedly spoken to in respect of this investigation
- 6). All notes of telephone calls, dates of calls, time of call and full content"
5. On 7 June 2016 NHS England contacted the complainant to ask for clarification to enable it to process the request. On the same date the complainant provided the following clarification:

"In response

All notes taken from investigation interviews preparing reports and of telephone face to face discussions

In answer to your second point - yes you are correct
I will not submit evidence of your malpractice to you but to the OIC"
6. On 24 June 2016 NHS England provided the complainant with some information under the Data Protection Act 1998 (DPA) in response to some parts of the request.
7. On 5 September 2016 NHS England responded to the FOIA elements of the request. It refused to provide the complainant with the information it held under section 31(1)(g), 36(2)(c), 40(1), 40(2) and 41 FOIA.
8. The complainant requested an internal review on 10 September 2016. NHS England sent the outcome of its internal review on 7 October 2016. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 4 August 2016 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether NHS England was correct to apply section 31(1)(g), 36(2)(c), 41, 40(1) and 40(2) FOIA to the withheld information.

Reasons for decision

11. The Commissioner has considered the application of section 36(2)(c) FOIA in the first instance as this exemption has been applied to all of the withheld information.

Section 36

12. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(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

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

13. NHS England has applied section 36(2)(c) FOIA to the withheld information.
14. In determining whether the exemption was correctly engaged by NHS England, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;

- Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
15. NHS England explained that the qualified person is the Chief Executive. The qualified person's opinion was provided on 2 September 2016. The qualified person's opinion was that section 36(2)(c) was applicable in this case as disclosure would be likely otherwise to prejudice the effective conduct of public affairs. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person and the qualified person's opinion was provided to the Commissioner.
 16. NHS England's explained that it considers that disclosure would be likely to inhibit NHS England's ability to robustly investigate allegations or serious concerns about misconduct or criminality, and more widely investigate the concerns of staff. The effective conduct of that aspect of NHS England's public affairs depends very substantially on individuals' willingness to raise such concerns and provide input in a candid way. The willingness of individuals to co-operate, in turn, depends in a large part on them feeling confident that they can provide their input confidentially, without fear of disclosure (including to the public and the media) prematurely or without adequate justification.
 17. A substantial amount of the information which falls within the scope of the request was information that identified individuals, and was provided by them to the investigator confidentially. NHS England staff understand that interviews and correspondence which are generated as part of such investigations will take place in a confidential setting, unless they are expressly informed otherwise. In this case, staff were asked to keep the investigation confidential, and were given to understand that the evidence they gave would not be shared more widely. It said that staff would certainly not anticipate that evidence of this nature could be published in response to a FOIA request.
 18. In this case staff were visibly distressed at the suggestion that their comments, and identifying information, may be put into the public domain. The view of the Qualified Person is that the disclosure of this information would unfairly prejudice the interests of these staff, and they would be understandably hesitant to contribute to similar investigations in the future. Without confidence in the confidentiality of the investigatory process, individuals are likely to express themselves in a manner that is more guarded and less frank, if they are willing to contribute at all. The Qualified Person's opinion, does not however consider that this comment should be taken to mean that staff are not sufficiently robust, or would shirk their professional duties, merely that

they would be understandably hesitant about speaking freely and frankly in future investigations.

19. The complaint in relation to this request was made under the whistleblowing policy which guarantees whistleblowers a certain amount of confidentiality and anonymity. There is an additional concern that those who may consider blowing the whistle would think twice if they thought the details of their investigation would likely to be made public. This prejudice would not just be likely to occur within the organisation, as NHS England is a "prescribed body" for the purposes of the whistleblowing legislation and therefore receives concerns from persons outside its organisation. This prejudice is particularly likely to occur when whistleblowers are not fully assured of their complaint, but where this is based on hearsay and they feel it cannot be robustly evidenced. The Qualified Person also notes that NHS England would not wish to dissuade those individuals from raising concerns, which may transpire to be very serious, for fear that the process would not be kept confidential.
20. NHS England will inevitably be required to carry out internal investigations in the future, initiated by both the grievance and whistleblowing procedure. Such investigations will inevitably involve a number of staff, who will be asked to provide comment/evidence on the allegations and on the actions of their colleagues. This is clearly a difficult process for all involved. It is therefore essential that there continues to be a safe space for these investigations to take place, in order to ensure that staff remain open and willing to participate in investigations of this nature. In summary, the view of the Qualified Person is that the loss of a safe space would be likely to prejudice investigations going forward because investigators will not be sufficiently sighted on all the necessary facts to come to a full and fair conclusion.
21. The Commissioner considers that the withheld information relates to an investigation due to a complaint made under the whistleblowing procedure. The gathering of evidence from staff was necessary to enable the whistleblowing complaint to be investigated. Furthermore those that provided evidence did so on the basis that their contribution would be confidential. If individuals were inhibited from providing full and frank evidence or even coming forward at all, this would be likely to inhibit such investigations going forwards. The Commissioner is aware in this case that the complainant is the whistleblower and would therefore appear to be happy to waive his anonymity by requesting the information under FOIA which constitutes disclosure into the public domain. However regardless of his willingness to waive anonymity, other whistleblowers are less likely to be of the same view and could still interpret a disclosure in response to this request as an indication

that confidentiality could no longer be assured. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore the exemption was correctly engaged.

22. As the Commissioner has decided that the exemption is engaged, she has gone 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 disclosing the requested information

23. As a public body, NHS England has a duty to be open and transparent. This duty is of particular importance where wrongdoing or fraud has been alleged. At this point NHS England clearly has a duty to establish accountability and ensure openness around the incident(s), and any system failures which may have contributed to the circumstances in question.
24. However, whilst there were some issues identified around the programme management (and consequently recommendations made to ensure that future systems function more efficiently), the allegations of wrongdoing and fraud were not substantiated. The view of the Qualified Person was that enough distress had already been caused to those who were put under investigation, without the details of the complaint being made public.
25. NHS England has been transparent with the complainant as to the outcome of his complaint, and provided him with a thorough explanation of the investigation and outcome. NHS England has also disclosed to the complainant, from within the investigation file, all that he is entitled to under the DPA.

Public interest arguments in favour of maintaining the exemption

26. NHS England considers that the public interest is best served when staff and others feel able to speak up and contribute to investigations and NHS England is able to act on this information, ensuring that investigators come to a fair and accurate conclusion. This culture of openness gives NHS England the strongest possible ability to investigate when complaints are made. Therefore NHS England believes that publication of this investigation file, which has not established fault or fraud would not serve the public interest in this respect.

Balance of the public interest arguments

27. The Commissioner does consider that there is a public interest in NHS England operating in an open and transparent manner, particularly in relation to investigations into allegations of fraud. The Commissioner also notes that the investigation in question was complete at the time the request was made.
28. However as NHS England has highlighted the allegations were investigated and were unfounded which to some extent lessens the public interest in disclosure.
29. The Commissioner does consider that there is a strong public interest in allowing such investigations to be carried out and considered without the fear that information will be disclosed into the public domain, particularly where allegations ultimately prove to be unfounded. This is because disclosure may inhibit whistleblowers from coming forward in the first place or could inhibit evidence gathering and the candour of staff contribution. This in turn would hinder NHS England's ability to conduct such investigations in the future. It would not be in the public interest to prejudice this culture of openness referred to by NHS England.
30. The Commissioner therefore considers that the balance of the public interest in disclosure is outweighed by the public interest in maintaining the section 36(2)(c) FOIA exemption.
31. As the Commissioner considers that section 36(2)(c) FOIA was correctly applied, she has not gone on to consider the application of any of the other exemptions any further.

Right of appeal

32. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Gemma Garvey
Senior Case Officer

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