

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 August 2017

**Public Authority:** Parliamentary and Health Service Ombudsman  
**Address:** Millbank Tower  
Millbank  
London  
SW1P 4QP

#### Decision (including any steps ordered)

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1. The complainants submitted a request to the Parliamentary and Health Service Ombudsman (PHSO) for details of two clinicians who had reported to the PHSO in connection with its investigation of a complaint about a medical trust. The complainant had previously received a redacted copy of the reports.
2. The PHSO refused the request, citing as its basis for doing so the exemptions provided by sections 44 (statutory prohibitions) and 40(2) (third party personal data) of the FOIA.
3. The Commissioner has determined that section 44 was applied correctly and does not therefore require any steps to be taken in response to this notice.

#### Request and response

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4. On 10 February 2017 the complainants wrote to the PHSO in the following terms:

*"We make this further Freedom of Information Act request in the above-noted matter. The 2 external medical reports have been provided albeit heavily redacted. Further to our substantive submission to you personally dated 7 February 2017, we now require the names and contact details for the two experts. The reason:*

1. *We need to check their status/bona fides with the General Medical Council (GMC) to ensure that they are of good standing in the Medical Profession.*
2. *We need to be satisfied that they have both received the totality of paper copies of the medical records and analysis which we provided for them via you personally (our submission of 7 February 2017)"*
5. The reports had been obtained by the PHSO from two medical experts in connection with its investigation of a complaint made by the complainants about the treatment and care provided by a particular medical trust to their daughter (now deceased).
6. The PHSO responded on 14 March 2017 by explaining that the requested information was held but considered it to be exempt from disclosure under section 44(1)(a) (statutory prohibitions) of the FOIA and was therefore being withheld. This was principally on the basis that information was caught by section 15 of the Health Service Commissioners Act 1993 (HSCA) and was therefore subject to the exemption provided by section 44 of the FOIA.
7. The PHSO received a letter from the complainants on 19 April 2017 which expressed dissatisfaction with the PHSO's decision to refuse the request, and asked the PHSO to conduct an internal review.
8. The PHSO presented the findings of its internal review on 14 June 2017, which upheld its original response in relation to section 44, and also applied an additional exemption under section 40(2) (third party personal data).

## **Scope of the case**

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9. On 21 June 2017 the complainants contacted the Commissioner to complain about the refusal of the PHSO to provide the requested information, and asked her to encourage the PHSO to provide an unredacted copy of the two medical reports. They considered that a deliberate decision to withhold information within reports prepared in connection with a complaint about the gross negligence of a medical trust leading to their daughter's death, was in itself collusion in a 'cover up'; by reason of its own failure to provide the appointed medical experts with complete and accurate medical records.
10. The scope of the Commissioner's investigation is whether the PHSO was correct in its application of sections 44 and 40(2) of the FOIA to the withheld parts of the reports.

## Reasons for decision

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### Section 44 - statutory prohibitions

11. Section 44(1)(a) of the FOIA provides that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment, “

12. In this case the relevant statutory prohibition is contained within the HSCA 1993.

### The HSCA 1993

13. Section 11(2) of the HSCA 1993 explains that the PHSO has a duty to conduct an investigation in private.

14. Section 15(1) of the HSCA 1993 further specifies that information obtained by the PHSO in the course of an investigation should not normally be disclosed. However section 15 does set out a number of exceptions to this provision.

15. For it to be possible for the PHSO to disclose information under the Act it is necessary for the information to:

- have been ‘obtained’ other than “... by the Commissioner or his officers in the course of or for the purposes of an investigation” under the HSCA 1993. If the information falls outside of this condition then the statutory bar would not be appropriately applied; or
- fall within one of the exceptions found in section 15(1)(a) to (e) of the HSCA 1993.

16. The Commissioner has addressed these points in turn.

### Was the withheld information ‘obtained’ by the public authority for the purposes of an investigation?

17. The Commissioner considers that the term ‘obtained’ should be given its natural meaning. ‘Obtained’ refers to both information that the public authority proactively obtains as part of an investigation and information supplied by those wishing the public authority to carry out an investigation.

18. In this case the PHSO sought reports from two independent clinicians in order to facilitate an investigation into a complaint made against a specific NHS Trust.
19. In previous cases involving the application of section 44 the Commissioner has drawn a distinction between information received by a public authority and information created by a public authority (where this does not reveal the content of information obtained by a public authority). The former category of information will be caught by the statutory bar, while the latter is unlikely to be.
20. The Commissioner is satisfied in this case that the reports fall into the category of information 'obtained' by the PHSO for the purposes of an investigation. She therefore has concluded that the withheld parts of the reports are caught by the statutory bar. Accordingly the Commissioner has gone on to consider whether any of the exceptions to the statutory bar found in section 15(1)(a) to (e) of the HSCA 1993 apply.

Do any of the exceptions found in the HSCA apply?

21. The Commissioner considers that the only relevant exceptions in the HSCA 1993 are those set out at sections 15(1)(a) and 15(1)(e). This is because sections 15(1)(b) to (d) will only apply where a body is charged with investigating an offence and a limited disclosure of information would not be required for this purpose.
22. Such a scenario is not applicable in this situation and, in any event, a limited disclosure would not be commensurate with the provisions of the FOIA which makes information available to the world at large.
23. Section 15(1)(a) of the HSCA 1993 permits the PHSO to disclose information where it is for the purposes of its investigation and any report in respect of it.
24. The Commissioner is aware that the PHSO has previously supplied the complainant with redacted versions of the reports relating to its investigation. These reports set out the views of the independent clinicians and upon which the PHSO has relied when forming its view on the complaint against the medical trust. The PHSO however has not deemed it appropriate to provide further information, specifically the names and contact details of the clinicians it instructed to prepare the reports.
25. In *Ofcom v Morrisey and the Information Commissioner* [2011] UKUT 116 (AAC) the Upper Tribunal confirmed that the Commissioner does not have the power to question how a public authority exercises its discretion in relation to any 'gateway' to disclosure contained in a relevant statutory enactment. Therefore, the discretion remains with the

PHSO with regards to the level of information it considers should be released under section 15(1)(a) for the purposes of its investigation.

26. Following this line of reasoning, the Commissioner finds that in all the circumstances the exception provided by section 15(1)(a) does not apply to the withheld information. The Commissioner has therefore considered the possibility that section 15(1)(e) would apply in the alternative.
27. The Commissioner observes that section 15(1)(e) has been restricted by section 15(1)(1B), which explains that disclosure can only be made to *"any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients...."*
28. Allegations of negligence have been made against an NHS Trust which, if proven, may allow the PHSO to contact relevant individuals under section 15(1)(e) to protect the health and safety of patients. However the discretion to disclose information once again lies with the PHSO and cannot be challenged by the Commissioner.
29. The Commissioner has therefore decided that no exceptions apply to the statutory bar provided by section 15(1) of the HSCA 1993.
30. Where a statutory bar is found to be engaged, the Commissioner must necessarily conclude that the information is exempt by virtue of section 44 of the Act. This is because section 44 is an absolute exemption and, as such, there is no requirement for the Commissioner to consider whether there is a public interest attached to the release of the information.
31. On the basis that the Commissioner has decided that section 44 of the FOIA is engaged in this case she has not deemed it necessary to consider the PHSO's application of section 40(2).

## **Other matters**

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32. Section 10 of the FOIA provides that a public authority's response to a request must be provided within 20 working days of receipt. In this case the PHSO received the request on 13 February 2017 and responded on 14 March 2017, outside the 20 working days and accordingly this is a breach of section 10. The Commissioner notes that the PHSO apologised for the delay in its response to the complainants.
33. The Commissioner is also concerned by the time taken for the PHSO to complete an internal review. The request for review was received by the PHSO on 19 April 2017. However the outcome of the internal review was

only provided to the complainants on 14 June 2017. The Act does not stipulate a time limit for the completion of an internal review, although section 45 of the Code of Practice associated with the Act states that they should be dealt with in a reasonable timeframe. The Commissioner's view is that a reasonable timeframe is within 20 working days or, in exceptional cases, 40 working days. It is evident in this case that the PHSO failed to subscribe to the recommended timeframe.

## Right of appeal

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34. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**