

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 03 October 2017

Public Authority: Leeds Teaching Hospitals NHS Trust
Address: Trust Headquarters
St James's University Hospital
Beckett Street
Leeds
LS9 7TF

Decision (including any steps ordered)

1. The complainant has requested information about a 'Concerns in Audiology' Report. The Leeds Teaching Hospitals NHS Trust (the Trust) provided some information within the scope of the request outside FOIA but refused to provide the remainder, citing the exemption in section 41 (information provided in confidence).
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

3. On 16 March 2017 the complainant requested the following:

'There has recently been a report regarding 'Concerns In Audiology' commissioned by the Head & Neck CSU. The report has been produced by the 'Public Concerns At Work' authority on whistleblowing.

Contacts within the Trust who have access to this report are [redacted name and title A] & [redacted name and title B].

As a previous Head of Adult Audiology within the LTH NHS Trust, I have a personal interest in seeing this report in full.'

4. On 19 April 2017 the Trust responded and refused to provide the information citing section 41(1) of FOIA (information provided in confidence).
5. The complainant requested an internal review on 19 April 2017. The Trust sent him the outcome of its internal review on 22 May 2017 upholding the decision citing section 41(1) of FOIA.
6. The Commissioner notes that the complainant was a contributor to the report; on 21 April 2017 [redacted name C], Director of Human resources and Organisational Development sent a confidential email to the complainant; on 26 April the new Clinical Director of the Head and Neck CSU offered to address any concerns in an individual meeting; and on 22 May 2017 the complainant received a Summary of themes and staff solutions from the Public Concern at Work review.

Scope of the case

7. The complainant contacted the Commissioner on 23 May 2017 to complain about the way his request for information had been handled. He still requested '*access to the full original Report*' or a redacted report to remove names of contributors. The provided summary '*falls well short of my request & also, there is no way of knowing if the themes of this summary actually represent the findings of the report.*'
8. During the Commissioner's investigation, the Trust also applied section 40(2) (Personal Information) to the report.
9. The Commissioner considers the focus of the investigation to be whether the Trust handled the request in accordance with the FOIA, and will initially consider, whether the Trust is entitled to rely on exemption Section 41 as a basis for refusing to provide the withheld information.

Reasons for decision

Section 41 – information provided in confidence

10. Section 41(1) of the FOIA states that:

"Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and*

b) the disclosure of the information to the public (otherwise that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Was the information obtained from another person?

11. The Trust stated that the information was provided to it by the Public Concern at Work (an independent charity that provides support and advice on Whistleblowing). The Commissioner is satisfied that this is the case.

Would disclosure constitute an actionable breach of confidence?

12. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

13. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
14. The Trust has explained: *'The document was created by Public Concern at Work in relation to a request made by the Trust to conduct a "listening exercise". During the listening exercise all the individuals that contributed to the report were informed that all conversations were confidential and where specific, identifying examples were provided, consent of the individual was obtained. The Trust is of the opinion that the consent was only provided for the compilation of the report that was to be given to the Trust in confidence.'*
15. The Trust has explained that it *'is of the opinion that the information is not trivial, nor is it available by any other means. If the Trust were to disclose the requested information individuals could issue legal proceedings as the release of the information could be unwarranted and is likely to cause substantial damage or substantial distress to the individuals who have contributed to the report or to relatives that have been referenced within it.'*

16. Having viewed the withheld information the Commissioner considers that the concerns covered (including working relationships) are 'more than trivial'. The Commissioner will not detail the contents of the full report in the decision notice in case it reveals any of the withheld information some of which is very sensitive personal data.
17. Having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The Commissioner also accepts that the information is not trivial. Therefore, the Commissioner is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

18. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

19. The Trust explained that '*individuals that contributed to the report were informed that all conversations were confidential.*'
20. The Trust considered providing a copy of a redacted version of the report to the complainant but as an ex-employee, the complainant has a detailed knowledge of the organisational structure of the team to which the report relates to. Only the Summary of themes and staff solutions was provided to the complainant and to the current employees of the team.
21. The Commissioner recognises that the full report was commissioned by and provided to the Trust in order to help improve the concerns within the Audiology Department. Considering the circumstances, nature of and way in which the withheld information was supplied to the Trust by Public Concerns At Work, the Commissioner accepts that there is an obligation of confidence.

Would disclosure be of detriment to the confider?

22. The Commissioner has considered this question in the context of the withheld information. The loss of privacy can be a detriment in its own right. The Commissioner considers that the working relationships of a small team constitute information of a personal nature. It is therefore not necessary for there to be any detriment to the confider in terms of tangible loss, for this information to be protected by the law of

confidence. The Commissioner has therefore not considered this issue further.

Is there a public interest defence for disclosure?

23. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
24. The Commissioner notes the personal interest of the complainant but has not been presented with any evidence to suggest that the public interest in disclosing this report is of such significance that it outweighs the considerable interest in maintaining the confidence of the contributors to and the contents of the report.
25. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
26. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA and has not gone on to consider section 40(2).

Right of appeal

27. 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

28. 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.
29. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
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