

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

Public Authority: NHS Improvement
Address: Wellington House
133 – 155 Waterloo Road
London, SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information relating to a review of the gastroenterology department at Great Ormond Street Hospital (GOSH).
2. The Commissioner's decision is that NHS Improvement (NHSI) has correctly applied section 42(1) and section 41 to the withheld information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 28 September 2017, the complainant wrote to NHSI and requested information in the following terms:

"Please supply all correspondence and information including, but not limited to, emails, letters, minutes of meetings and telephone conversations, relating to Great Ormond Street Hospital's review of its gastroenterology department between July 2015 and the present date.

If the time/cost of retrieving this information is above the appropriate limit under section 12 of the FOIA, or other exemptions apply, please advise how to refine the request as per section 16 of the FOIA."

5. NHSI responded on 30 October 2017 and advised the complainant that it required more time to consider the public interest. It provided its substantive response on 23 November 2017 and refused to disclose the

requested information. It cited section 31 of the FOI as its basis for doing so.

6. Following an internal review NHSI wrote to the complainant on 23 February 2018. It revised its position and provided some of the information requested, however, it maintained that the remaining information should continue to be withheld on the basis of section 41 (information provided in confidence).
7. During the course of the Commissioner's investigation NHSI disclosed some further information to the complainant. It also identified some additional information that fell within the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 26 March 2018 to complain about the way his request for information had been handled.
9. In response to the Commissioner's correspondence NHSI undertook a full reconsideration and review and provided its findings in a letter to the complainant dated 19 September, a copy of which was also sent to the Commissioner. NHSI decided to release some of the information that was previously withheld. This was primarily on the basis that there is now further information in the public domain about this matter so it considered that not all the information withheld retains the quality of confidence. It also carried out further searches of its records and identified some additional correspondence within the scope of the request, which it also decided to release with minor redactions for personal information under section 40. It stated however that it was of the view that section 41 applies to some of the remaining information and considers that section 31, 40(2) and 42 also apply to some of the information.
10. Following receipt of this submission, the Commissioner wrote to the complainant to see if he was content to exclude consideration of the exemption at section 40(2) as this related to patient information and the names and contact details of staff members. She advised the complainant that if we didn't hear from him to the contrary she would assume this could be excluded from her investigation. The complainant did not respond and therefore she has not included it in this decision notice.
11. The Commissioner considers the scope of this investigation is to determine if NHSI has correctly applied the exemptions it has cited to the remaining withheld information.

Background

An overview of NHS Improvement's statutory functions

12. Since 1 April 2016, Monitor and the National Health Service Trust Development Authority have been operating as an integrated organisation known as NHS Improvement (NHSI). The information held by NHSI in relation to this request is information held pursuant to Monitor's functions. Accordingly, references to NHSI mean Monitor.
13. NHSI is the sector regulator for health services in England. Its main duty in exercising its functions is to protect and promote the interests of people who use health services by promoting the provision of health services which are economic, efficient and effective and which maintains or improves the quality of the services (section 62 of the Health and Social Care Act 2012 ("the 2012 Act")).
14. In that context NHSI is responsible for the licencing of providers of health services (Chapter 3 of Part 3 of the 2012 Act). Any person who provides a health care service for the purposes of the NHS must hold a licence (section 81 of the 2012 Act). Licenced providers include NHS foundation trusts. NHSI determines standard licence conditions in this respect (section 94 of the 2012 Act).
15. NHSI has a range of statutory enforcement powers that give it the ability to intervene formally where it assesses, or has reasonable grounds to suspect, that licenced providers have been or are in breach of licence requirements. These powers include the power to impose discretionary requirements (section 105); the ability to accept enforcement undertakings (section 106); the power to revoke a licence (section 89); and the power to impose additional licence conditions where NHSI is satisfied that the governance of a trust is such that the trust will fail to comply with conditions of its licence (section 111).
16. NHSI has other statutory powers and duties that are not relevant to this complaint. These are also set out in the 2012 Act.
17. The Enforcement Guidance explains NHSI's enforcement powers in more detail and sets out the process NHSI will follow for prioritising issues and deciding on what action to take when NHSI finds that a provider has breached its licence.

NHSI's approach to overseeing NHS providers

18. The Single Oversight Framework ("SOF") sets out NHSI's approach to overseeing NHS providers, including NHS foundation trusts. Under the SOF, NHSI gathers information about providers' performance including:

(a) regular performance information (such as monthly A&E performance data), (b) annual submissions and publications (such as annual plans and statements); and (c) exceptional information relating to specific issues and concerns at individual providers that are not captured by the routine information gathering exercises. In respect of the latter, providers are expected to notify NHSI of actual or prospective risks falling outside of the routine data collection exercises where there are material risks to the provider's ability to deliver safe and sustainable services.

19. In reality, NHSI receives a wide range of exceptional information from the providers that it regulates about their operations. Some of it is provided in response to specific requests, some it is provided voluntarily in anticipation of what is likely to concern it. NHSI benefits from the confidence of those organisations, such that they are invariably willing to share a wide variety of information with it voluntarily and freely. Given the scope of its regulatory remit and the resources that it can apply, NHSI consider that this is critical to efficient and effective regulation of the sector.
20. NHSI uses the information gathered by the exercises outlined above, to identify whether providers have support needs including whether enforcement action is needed. If the information gathered raises concerns about the level of support required by a provider, NHSI may carry out an investigation which may result in enforcement action.
21. Although NHSI's oversight approach was revised in October 2016 (prior to the SOF, the Risk Assessment Framework set out the oversight approach), the relevant enforcement powers have not changed, nor has NHSI's overall approach to information gathering and assessing whether enforcement action is required.

The Trust (GOSH)

22. GOSH is a world-renowned provider of healthcare services, specialising in care for children. It became a foundation trust in 2012. To date, GOSH has not been subject to any enforcement action by NHSI.
23. NHSI was pro-actively notified by GOSH that it was going to carry out a review of its gastroenterology services further to internal and external concerns raised and a high number of complaints and concerns raised through its Patient and Liaison Services about gastroenterology services.
24. Together with its partners the CQC and NHS England, NHSI held several meetings and phone calls with GOSH to keep updated on the progress of the review to consider whether it was necessary to investigate whether there had been a licence breach.

25. GOSH also voluntarily provided NHSI with information relating to the services and the review, including copies of correspondence from journalists in which they proposed to air a documentary for ITV and a related newspaper article.
26. The review concluded and found that a number of patients may have been subject to unnecessary treatment. GOSH published details of the review on its website. NHSI worked with GOSH to understand the actions being taken by GOSH in response to the findings and sought assurance that GOSH was taking appropriate steps to ensure this could not happen again. On the basis of the information available (including the CQC's view as the quality regulator), NHSI considered that the GOSH response to the concerns raised had been adequate and decided not to investigate or take any further action.
27. NHSI stated that an article was published and a documentary aired further to the correspondence from journalists referred to above.

Reasons for decision

Section 42 - legal professional privilege

28. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
29. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
30. NHSI explained that the information being withheld includes details of legal advice given to GOSH by its lawyers. This advice was shared with the CQC, NHS England and NHSI to assure them that GOSH was taking appropriate steps to meet its duty of candour in relation to the review of gastroenterology service. GOSH has not shared this advice with the world at large so legal privilege should be retained.

31. Having reviewed the withheld information, the Commissioner considers that it is confidential as it has not been made publicly available. The information reflects legal advice relating to the review in question. The Commissioner is satisfied that the exemption was correctly engaged.
32. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.
33. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."

34. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest must be "*clear, compelling and specific*".

Public interest arguments in favour of disclosure

35. NHSI has not provided any public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

36. There is a strong public interest in protecting the confidentiality of legal advice provided to trusts and (where circumstances require it) communications between trusts and their regulators and commissioners outlining details of that advice.
37. The advice contains the frank opinion of the lawyer concerned which was not intended to be shared with the public at large. If trusts were unable to maintain the confidentiality of their legal advice then they may be

reluctant to seek legal advice, which may put them at risk of acting unlawfully. Releasing this advice could also adversely impact upon trusts' willingness to share their legal advice with NHSI in the future, which would reduce its effectiveness at overseeing the trusts and carrying out its statutory role. There would not seem to be any clear, compelling or specific reason for disclosure of legal advice and it is NHSI's opinion that the public interest is best served by applying this exemption.

Balance of the public interest

38. The Commissioner considers that there is a strong public interest in promoting openness, transparency and to further public understanding in relation to patient treatments.
39. The Commissioner does also consider that there is a very strong public interest in public authorities being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain.
40. It is recognised that the concept of Legal Professional Privilege (LPP) reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients and there is a public interest in safeguarding openness in communications between a client and their lawyer to ensure access to full and frank legal advice.
41. On balance therefore, given the information already in the public domain, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption as there is a strong public interest in maintaining legal professional privilege and allowing a public authority to be able to seek and obtain legal advice in such circumstances. Section 42(1) was therefore correctly applied in this case.

Section 41 – information provided in confidence

42. 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 than 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?

43. NHSI stated that the withheld information was provided by GOSH. The patients mentioned gave their consent for their cases to be discussed by the journalists with GOSH, which they do so in the correspondence contained in those documents. The Commissioner is satisfied that the information was obtained from another person(s).

Would disclosure constitute an actionable breach of confidence?

44. 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?

45. 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.
46. NHSI stated it did not have any information indicating that patients have given their consent for that information to be released to the world at large so a duty of confidence would be owed to them.
47. However, NHSI considers that a duty of confidence is also owed to the Bureau of Investigative Journalism, Amazing Productions and a number of patients whose confidential information is contained within the information being withheld.
48. Due to the nature of the withheld information the Commissioner does not consider it is appropriate to detail it in this decision notice. However, the Commissioner is satisfied that the withheld information has the necessary quality of confidence and is more than trivial.
49. NHSI has withheld two emails from GOSH which attach copies of correspondence between GOSH and Amazing Productions and the Bureau of Investigative Journalism. The correspondence contains a series of allegations about GOSH and its staff which the authors proposed to cover in a TV documentary and associated article.

50. The Commissioner notes that although a documentary was made, and an article published, they did not cover most of the matters raised in the correspondence. Therefore, the Commissioner is satisfied that information is not publicly available or otherwise accessible and still retains the necessary quality of confidence.

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

51. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend on the nature of the information itself, and/ or the relationship between the parties.
52. NHSI explained that it has an open relationship with the foundation trusts that it regulates and relies upon the full and frank disclosure of relevant information by those bodies in order to carry out its regulatory functions efficiently and effectively. In order for this relationship to function effectively, trusts must be confident that the information shared with it will be remain confidential (except where it indicates criminal activity or something of equivalent severity). The information being withheld under this exemption was provided to NHSI voluntarily in the context of this open relationship.
53. NHSI also explained that some of the information is correspondence from third parties to GOSH (i.e. Amazing Productions and the Bureau of Investigative Journalism) and is marked as 'confidential', indicating that it is not intended to be shared. As explained above, the correspondence arises out of a proposal to create a documentary and an article about the gastroenterology services at the GOSH. It is likely that the letter was sent to avoid the risk of defaming GOSH and/or its staff in the proposed documentary or article. The correspondence is contentious as a result.
54. The Commissioner is mindful of 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".*
55. Following this, the Commissioner considers that the circumstances, nature of, and way in which the withheld information was supplied to NHSI implies that it would retain a confidential quality and that it would

not be shared as part of this process under FOIA. The Commissioner is satisfied that an obligation of confidence has been created.

Would disclosure be of detriment to the confider?

56. The information being withheld under this exemption includes highly sensitive, private and personal information about the health conditions and treatments of individual patients. Those individuals would be likely to be highly distressed by the publication of this information in relation to which they have a legitimate and reasonable expectation of confidence.
57. NHSI is of the view that disclosure of this information would amount to an actionable breach of confidence.
58. The Commissioner accepts that disclosure of the withheld information would be a loss of privacy which can be a detriment in its own right. 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.
59. The Commissioner accepts NHSI's contention that disclosure of the withheld information would be likely to constitute a breach of confidence and the confiders (patients and staff) would be entitled to take action against NHSI.
60. With regard to the other parties concerned, NHSI has not expanded on its view that they are also owed a duty of confidence. However, as the withheld information contains details of patients and staff, it follows that disclosure would also be likely to constitute a breach of confidence as they have confided in the other parties.

Is there a public interest defence for disclosure?

61. 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 NHSI could successfully rely on such a public interest defence to an action for breach of confidence in this case.
62. The complainant has argued that the public interest overrides everything here. This is a public (in fact child) safety issue. Details of what went wrong, if and how patients were harmed and what preventative measures are now in place must be in the public domain. Full transparency in patient safety matters is now widely accepted as best practice.

63. The Commissioner accepts that there is a general public interest in public authorities being open and promoting transparency and accountability. However, as detailed above GOSH published details of the review on its website. The review concluded and found that a number of patients may have been subject to unnecessary treatment.
64. NHSI has worked with GOSH and sought assurance that appropriate steps were being taken to ensure this could not happen again.
65. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly.
66. Having considered all the circumstances of this case, the withheld information, and given the information already in the public domain the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the details contained in the withheld information.
67. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.
68. As all the withheld is exempt by virtue of section 41 or 42 of the FOIA, it has not been necessary for the Commissioner to consider the application of section 31.

Right of appeal

69. 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

70. 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.
71. 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