

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2020

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested all reports produced by the National Support Team for the Response to Sexual Violence in 2011/12. The Department of Health and Social Care (DHSC) withheld the information, citing the exemption under section 41 of the FOIA (exemption for information provided in confidence) as its basis for doing so.
2. The Commissioner's decision is that DHSC has correctly engaged section 41(1) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 8 January 2019, the complainant wrote to DHSC and requested information in the following terms:

*"Sexual Assault Referral Centres
Please provide all reports produced by the National Support Team for the Response to Sexual Violence (NSTforRSV) in 2011/12. The NST/RSV was jointly commissioned by the Home Office and Department of Health in 2009. Between 2009 and 2011 a team of experts visited 43 Police Force Areas and reviewed their SARCs or their plans for a SARC. Please provide this document as a pdf or doc."*
5. DHSC responded on 5 February 2019 and refused to provide the requested information citing section 41 of the FOIA as its basis for doing so.

6. The complainant wrote to DHSC on 6 February 2019 asking it to carry out an internal review. In particular, the complainant argued that the requested information was commissioned by DHSC and it therefore cannot be said that the information was provided by a third party independently. The complainant stated that the requested reports were also partly compiled by civil servants, according to accounts, and as such were clearly the result of collaboration between the two parties. The complainant explained to DHSC that multiple National Support Team reports into different issues were published so there was a clear precedent. The complainant stated that this information could not be argued to be confidential, which DHSC made no justification for in its response. The complainant stated that DHSC was not in a position where it could be sued for disclosure of the requested information.
7. The complainant also argued that there was an over-riding public interest in disclosure of the reports about the failings of Sexual Assault Referral Centres to provide adequate forensic examinations for pre-pubertal children, which he stated was something highlighted in the work for the National Support Team 8 years ago but not made public.
8. Following an internal review, DHSC wrote to the complainant on 26 February 2019 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 26 February 2019 to complain about the way his request for information had been handled.
10. During the Commissioner's investigation, DHSC revised its position at the Commissioner's invitation and provided some of the requested information to the complainant.
11. The Commissioner considers the scope of this case is to determine whether DHSC is entitled to rely on section 41 of the FOIA as a basis for refusing to provide the remaining withheld information.

Background

12. The following background information is from the DHSC's submission to the Commissioner. Following the publication of the cross-Government action plan on sexual violence and abuse in April 2007, the Home Office and Department of Health (now DHSC) agreed to jointly deliver the cross-Government tackling violence agenda through the National Support Team (NST) for Response to Sexual Violence (RSV).

13. The NST for RSV was responsible for ensuring the delivery of specific aspects of the cross-Government sexual violence agenda, which included development of Sexual Assault Referral Centres (SARCs) across England. The team's aim was to work across the Department of Health's policy departments for mental health, children and families, acute services and sexual health, and other Government departments such as Department for Children, Schools and Families, Government Equalities Office, Home Office and Crown Prosecution Service.
14. Between October 2008 and March 2009, a pilot scheme delivered 28 support visits across 16 police force areas over five months, focussing primarily on areas that did not have SARC provision and required support to set up local partnerships in order to develop a SARC. The pilot team also visited local area partnerships that had recently developed a SARC to ensure that adequate support was provided during the early stages to comply with the National Service Guidelines for Developing Sexual Assault Referral Centres (2005).
15. The NST for RSV was funded for a further two years (2009-2011) by the Department of Health, to work closely with the Home Office to undertake visits to all 39 police force areas in England. The aim of the NST for RSV was to ensure there was a SARC in each police force area by 2011, in line with the former Home Secretary's commitment to roll out the provision of SARCs. The complainant's request is for all reports produced as a result of this.

Reasons for decision

Section 41 – information provided in confidence

16. Section 41 of the FOIA sets out an exemption from the right to know when the information requested is subject to a duty of confidence.
17. Section 41(1) of the FOIA states that information is exempt from disclosure 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."*
18. Therefore, for this exemption to be engaged, two criteria have to be met; the public authority has to have obtained the information from a

third party and the disclosure of that information must constitute an actionable breach of confidence.

19. In his submission to the Commissioner, the complainant has reiterated the arguments put forward in his internal review request and detailed in paragraphs 6 and 7 of this decision notice.
20. DHSC has stated in its submission to the Commissioner that the information for the reports was provided by NHS primary care trusts (PCTs), the police, and the stakeholders (experts) that participated in the visits.
21. The Commissioner has considered the contents of these reports. In her view, the majority of the remaining withheld parts of the report can be correctly categorised as information being provided to DHSC by other public authorities. She is therefore satisfied that this information does meet the requirements of section 41(1)(a).
22. The Commissioner notes that the first and last parts of the reports also contain a small amount of information that does not meet the requirements of section 41(1)(a), as it does not appear to be information provided by a third party. However, as this information identifies the contributors to the report by name, job title and in some cases contact details, the Commissioner considers this information to be personal data.
23. Under section 40 of the FOIA, personal data is exempt from disclosure under the FOIA if that disclosure would breach data protection law (in particular, the General Data Protection Regulation and Data Protection Act 2018). In this case, as the contributors to the report were informed that their contributions were being made on a confidential basis, it is unlikely that they would expect information to be made public which could identify them. Disclosure of this personal data is therefore likely to be in breach of the first principle of the GDPR, on the basis that it would be unfair.
24. The Commissioner accepts that there is a legitimate interest in understanding who contributed to the formulation of these reports for the purposes of accountability and transparency. However, the disclosure of this personal data would not significantly add to the information already available about the third parties involved in the formulation of the reports. The Commissioner is therefore satisfied that it should be withheld.
25. With regards to the parts of the report to which the Commissioner accepts section 41(1)(a) applies (referred to in the rest of this decision notice as "the information provided to DHSC"), the Commissioner has

gone on to consider section 41(1)(b) (i.e. whether disclosure of the information would constitute an actionable breach of confidence by DHSC).

26. In her analysis of whether disclosure of the information provided to DHSC would constitute an actionable breach of confidence, the Commissioner must consider:
- whether the information had 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.
27. With regard to the first limb of this test, the Commissioner's published guidance¹ on section 41 sets out her interpretation that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. The Commissioner further considers that information which is of importance to the confider should not be considered trivial.
28. In this case, DHSC has stated in its submission to the Commissioner that *"the work of the NSTs relies on confidentiality. By undertaking intensive, 'diagnostic' visits to local areas, spending time with key leaders (commissioners and providers) including clinicians and front-line staff, the NSTs provided intelligence, support and challenge to local areas. This could not be done without confidentiality."*
29. DHSC further informed the Commissioner that *"the information has the necessary quality of confidence and the Department would be in breach of that confidence by disclosing the information as it would be an unauthorised use. Such a disclosure would be treated in these circumstances as a disclosure to the public. Additionally, a number of the reports include explicit confidentiality disclaimers."*

Disclosing this information may also cause a chilling effect by inhibiting free and frank discussion and the quality of advice received by the Government. There is a particular risk that service commissioners, providers or representative groups will be less likely to submit evidence

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

to DHSC in the future, if they believe that the evidence will be released into the public domain. Without this evidence, the Government will not be able to debate the issue as fully, which may lead to poorer decision making."

30. The Commissioner is satisfied that the information provided to DHSC does have the quality of confidence because it is not otherwise accessible and it is more than trivial.
31. The Commissioner has seen no evidence to demonstrate that the full, unredacted reports were in the public domain at the time of the request and is therefore satisfied that the information provided to DHSC is not accessible by other means.
32. The Commissioner also notes that the subject matter and content of the information provided to DHSC would not be considered trivial to those who provided it.
33. The Commissioner is therefore satisfied that the information provided to DHSC does have the necessary quality of confidence because it is not otherwise publicly available and is more than trivial.
34. With regard to the second limb of the test, the Commissioner considers that an obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself and/or the relationship between the parties.
35. DHSC has stated that each of the reports clearly states a commitment not to share the information more widely –

"Confidentiality

The NST will only circulate this report to the PCTs, Police, and to the stakeholders invited to participate in the visit. It may also be shared with Department of Health and Home Office colleagues to assist in developing future policy. The NST does not share this with anyone responsible for performance management of the PCT, Police, Local Authority or any of their services."

36. DHSC explained that the frank and honest feedback contained within the requested reports was provided on the basis of confidentiality, as quoted in the previous paragraph. DHSC stated the disclosure of the reports would be an unauthorised use of the information confidentially provided by the external parties and might discourage others from providing confidential feedback on services in the future.

37. In this case the Commissioner accepts that there was an expressed expectation that the information provided to DHSC should be treated confidentially, noting the confidentiality clause in the reports and that DHSC explicitly stated that the information was provided on a confidential basis.
38. The Commissioner has gone on to consider whether disclosure of the parts of the information provided to DHSC would have a detrimental effect on the confiders.
39. In addition to the arguments DHSC put forward in paragraphs 35 and 36 above, DHSC informed the Commissioner that the withheld information includes information that could identify the individual members of staff involved in service delivery even if their personal details were redacted. It has stated that if the withheld information were to be made public, this could be detrimental to those who provided the information.
40. DHSC has also stated that it expected that many of the professionals involved may still be working in the sector and publication of the remaining parts of the reports could pose a risk to their professional/public reputation, their positions in the sector, the services they provide and the funding for those services.
41. The Commissioner accepts that disclosure of the information provided to DHSC would be an unauthorised use of the information and, as such, could be of detriment to the confiders of the information.
42. Section 41 is not subject to the public interest test at section 2(2) of the FOIA. However, an overriding public interest in disclosure may constitute a defence to an action for breach of confidence. Therefore, the Commissioner has considered whether there is such a public interest in disclosure in this case.
43. DHSC has stated that the requested reports were written in 2011/12, prior to significant reforms in the way Sexual Assault and Abuse services are funded, commissioned and delivered. DHSC stated that this included a five year strategic direction for sexual assault and abuse services which was published by NHS England (www.england.nhs.uk/publication/strategic-direction-for-sexual-assault-and-abuse-services).
44. DHSC stated that, subsequent to the reports being written, there has been greater investment in SARCs, which DHSC stated there are now 47 of, as well as changes to the local landscape (including commissioning arrangements) and improvements in the services.
45. DHSC has informed the Commissioner that the Care Quality Commission (CQC), which is the independent regulator of health and social care in

England, began their inspection programme of SARC's in 2018. It stated that these inspection reports are published on the CQC's website (www.cqc.org.uk).

46. DHSC stated that the CQC's inspection reports provide the most up-to-date information on existing SARC's, and the quality, safety and effectiveness of their provision.
47. DHSC stated that above all, it would not wish for people who have been sexually assaulted or abused to be dissuaded from attending this specialist service as a result of out-of-date information. It stated that the information provided to DHSC was used to help inform improvements to the service available today, which is now independently inspected by the CQC.
48. The Commissioner recognises that there is a public interest in disclosure of the information provided to DHSC because it would add to the public's understanding of the delivery of the cross-Government sexual violence agenda. However, she notes that inspection reports of SARC's are published. The Commissioner considers that these inspection reports provide transparency into the delivery of the cross-Government sexual violence agenda.
49. The Commissioner considers that there is an inherent public interest in preserving the principle of confidentiality. Her published guidance sets out that any disclosure of confidential information will, to some degree, undermine the relationship of trust between public authorities and confiders of information. The importance of maintaining confidentiality is demonstrated by the fact that parties may take legal action to protect confidentiality and seek damages when that confidentiality is broken.
50. The Commissioner is also mindful that, when considering the exemption at section 41, the public interest in disclosure must be sufficiently strong to override the duty of confidence that has been demonstrated. As pointed out above, this is a different consideration of the public interest to that set out at section 2(2) in respect of qualified exemptions. Put simply, the presumption is in favour of maintaining confidence under section 41.
51. In this case the Commissioner considers that whilst there is a public interest argument in favour of disclosure of the information provided to DHSC, it is not strong enough to override DHSC's duty of confidentiality to the confiders of that information. The Commissioner is not satisfied that DHSC could maintain a defence of overriding public interest should it be subject to an action for breach of confidence. Therefore, the Commissioner finds that the exemption at section 41(1) is engaged in respect of the withheld information.

Other matters

52. The Commissioner has concerns about the way in which DHSC responded to her enquiries and in particular, that DHSC failed to respond to the Commissioner's enquiries within any of the deadlines set by her.
53. The Commissioner also notes that DHSC appeared to apply the exemption under section 41 of the FOIA to the requested information in a blanket fashion, rather than considering each piece of information separately.
54. A public authority needs to consider each piece of information that falls within scope separately when deciding whether or not to disclose it. Exemptions should not be applied in a blanket fashion.
55. The Commissioner therefore recommends that DHSC review its handling of this request and complaint to ensure lessons are learned and improvements made.

Right of appeal

56. 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@justice.gov.uk

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

57. 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.
58. 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

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