

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2020

Public Authority: Manchester University NHS Foundation Trust
Address: Cobbett House
Oxford Road
Manchester
M13 9WL

Decision (including any steps ordered)

1. The complainant has requested a report detailing the findings and outcomes of an Invited Service Review (ISR) of the Trauma and Orthopaedics surgical service at Manchester University NHS Foundation Trust (the Trust). The Trust withheld the information, citing the exemptions under section 36 (prejudice to effective conduct of public affairs), section 40 (personal data), and section 41 (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 36(2)(b) of the FOIA and the public interest favours maintaining the exemption.
3. The Information Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 21 December 2018, the complainant wrote to the Trust and requested information in the following terms:

"A report into the orthopaedics department was carried out on August 6th and 7th of this year. I believe the reviewers were [name redacted] and [name redacted], but if this is not the case, I would still like this request to stand.

Under the Freedom of Information Act 2000, I would like to see a copy of this report. I understand that some personal details may need to be

redacted under section 11, but would request that this is kept to the minimum required under legislation."

5. The Trust responded on 25 January 2019 and refused to provide the requested information citing section 40(2) and section 41 of the FOIA.
6. The complainant requested an internal review of this decision because, in her view, the Trust could release a redacted version of the report to allow the facts in the report to be made public whilst redacting the information that may identify individuals.
7. Following an internal review, the Trust wrote to the complainant on 5 April 2019 maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 25 April 2019 to complain about the way her request for information had been handled.
9. In the complainant's submission to the Commissioner she explained that she was of the opinion that sections 40(2) and 41 would not prevent a redacted version of the requested report being released. The complainant drew the Commissioner's attention to a similar report released by Aintree University Hospitals NHS Foundation Trust as evidence that a redacted version of a report can be released.
10. During the course of the Commissioner's investigation, the Trust further revised its position and added further grounds for its refusal to provide the requested information. It stated that it believed section 36 applied to the requested report in its entirety, and that section 40(2) and 41 applied to some parts of the report.
11. The complainant has stated that reviews of this type are often carried out after incidents, or patterns of incidents, and it is not uncommon for the findings to be made public. The complainant has referred to a published summary of an ISR¹ of Children's Emergency Services at County Hospital, University Hospitals of North Midlands NHS Trust. The complainant stated that this review is freely available and was widely reported.

¹ <http://www.uhnm.nhs.uk/media/1254/rcpch-uhnm-review-full-report-final.pdf>

12. In addition, the complainant stated that in early 2019 the Health Service Journal (HSJ) published a story entitled *"Review Finds Chaos and Uncertainty at Teaching Hospital"* about Aintree University Hospitals NHS Foundation Trust. The complainant stated that this was based on a redacted report of an ISR which the HSJ had obtained under an FOIA Request.
13. The complainant argued that neither of these two other Trusts seemed to be of the view that the release of these ISR reports would make them unable to carry out similar exercises in the future.
14. The complainant stated that reports of this nature are not verbatim accounts from individual staff members but, considered reports based on the available evidence. The complainant did not therefore find it credible that the redacted publication of the requested ISR report would leave the Trust unable to hold future reviews.
15. The complainant stated that, with regards to the prejudice limb of section 36(2) of the FOIA, timing is an important factor, as it is with the safe space argument. The complainant referred to paragraph 66 of the Commissioner's guidance² on section 36 which states:

"Once the public authority has made a decision, a safe space for deliberation will no longer be required."
16. The complainant explained that the University Hospitals of North Midlands NHS Trust published its report in January 2017 and the inspections were carried out in September and November 2016, a gap of four and two months. The complainant also explained that Aintree University Hospitals NHS Foundation Trust's review was disclosed in early April 2019, and the report having been carried out in June 2018, a gap of ten months.
17. The complainant stated that the ISR into the orthopaedics department at Manchester Royal Infirmary was carried out at the beginning of August 2018. The complainant is of the view that by applying the section 36 exemption in November 2019, the Trust is essentially saying that it has failed to reach conclusions on what should be done to rectify

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

the issues raised by a major review some 15 months after it has taken place. She does not believe this to be credible.

18. In the first instance, the Commissioner's investigation has focussed on the Trust's reliance on section 36 and will only consider its reliance on sections 40(2) and 41 if necessary.

Background

19. In the Trust's submission to the Commissioner it provided the following information about the requested report. The Trust stated that it proactively wrote to the Chair of the Invited Review Mechanism (IRM) at the Royal College of Surgeons in May 2018 to request an Invited Service Review (ISR) of its Trauma and Orthopaedic surgical service. The Trust explained that ISRs assist healthcare organisations by providing independent, expert advice on surgical service delivery and how this might be improved.
20. The Trust went on to explain that the IRM protects patient safety by supporting staff to "speak up safely", highlights concerns and provides clear and robust conclusions and recommendations and all reviews are followed up to ensure recommendations are accepted and are being addressed. The Trust stated that the requested report details the findings and outcomes of the ISR.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

21. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure 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.
22. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
23. The Commissioner's definition of 'inhibit' in her section 36 guidance is to restrain, decrease or suppress the freedom with which opinions or

options are expressed. 'Deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision.

24. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
25. To determine, first, whether the Trust correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore, in order to establish that the section 36 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.
26. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Trust has confirmed that its qualified person is the Chief Executive, Sir Mike Deegan.
27. The Trust has explained that the qualified person considered the requested information and is of the opinion that the exemption at all three limbs of section 36(2) was engaged with regard to the report.
28. The Commissioner is satisfied that Sir Mike Deegan, as the Chief Executive of the Trust, meets the definition of a qualified person set out by section 36(5) of the FOIA.
29. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the *most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.

30. The qualified person's opinion in this case is that the prejudice envisioned under section 36(2) would be likely to occur if the Trust disclosed the requested information.
31. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
32. The Trust has argued that the process of undertaking an ISR fundamentally involves the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation.
33. The Trust stated that it needs to be able to conduct rigorous and candid reviews of its services, seek advice and consider the pros and cons of various options without the risk of premature disclosure.
34. The Trust went on to explain that the process also includes obtaining the views of staff and stated that this is undertaken in the expectation that such views will remain confidential, so as to ensure free, frank and candid views are provided by staff.
35. The Trust stated that, at the time of the original request and the date of the qualified person's opinion, the issue remained live and the implementation of the recommendations made by the Royal College of Surgeons remained ongoing.
36. The Trust argued that if the report was disclosed prematurely then staff would be discouraged from participating in future ISRs, reviews and discussions for fear of public disclosure. It stated that staff would be less inclined to assist, cooperate and provide their honest, free and frank opinions and information. The Trust pointed out to the Commissioner that this was an invited review, not a regulatory investigation, therefore the willingness of staff to participate and cooperate was essential.
37. The Trust also argued that if the report was disclosed prematurely this would be likely to prejudice its ability to carry out ISRs in future and consider and implement the necessary actions that are required to improve patient care.
38. The Trust stated that it would be likely to undermine its willingness to invite external organisations to conduct ISRs in the future.

39. The Trust argued that if the information requested was disclosed, the inhibition specified in sections 36(2)(b)(i) and 36(2)(b)(ii) would be likely to occur.
40. Much of the Trust's argument under section 36(2)(b)(i) and (ii) is based on the concept of a "chilling effect". The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.
41. However, public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.
42. Nonetheless, the Commissioner accepts the opinion that disclosure of the requested information would be likely to lead to the inhibition set out by the Trust. The opinion is one that a reasonable person could hold, and the exemption under sections 36(2)(b)(i) and 36(2)(b)(ii) are therefore engaged. She has therefore not gone on to consider whether section 36(2)(c) is engaged.

Public interest test

43. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the information

44. The complainant's argument for disclosure is that this Trust is one of the largest acute trusts in the UK and if the planned takeover of North Manchester General goes ahead this year it will be the largest.
45. The complainant also argued that the Trust treats more than a million patients each year and Manchester Royal Infirmary is one of the four hospitals selected to deal with major incidents in the Greater Manchester area.
46. The complainant is of the belief that the incident which led to the review was a serious one which exposed severe shortcomings in the orthopaedics department and this Trust. She is of the view that the people of Greater Manchester have a right to know about this.
47. The complainant also added that the public has a right to know if the Trust has still failed to decide on the necessary action to rectify the

issues identified since the review was carried out in August 2018 to applying the exemption under section 36 in November 2019.

48. The Trust accepts that there is a public interest argument in transparency in relation to public affairs and NHS services generally.
49. The Trust also recognises the public interest argument in transparency in relation to the specific issues identified within the report.

Public interest in maintaining the exemption

50. The Trust argued that there is an inherent public interest in not causing the inhibition/prejudice described in the qualified person's opinion.
51. The Trust also argued that there is a public interest in ensuring that ISRs are not prejudiced by the inhibition of free and frank advice/exchange of views as this is fundamental to the effectiveness of the ISR process, which is aimed at improving NHS services.
52. The Trust stated that there is a public interest in ensuring that it is able to consider and effectively implement the recommendations in this particular case, without unwarranted disruption, distraction or other prejudice, so as to improve the specific services in question.
53. The Trust also stated that there is a public interest in ensuring there is an effective means of independently reviewing and improving NHS services.
54. The Trust argued that there is also a public interest in not causing unwarranted damage, distress or upset to staff, and the knock on effects that has on the effectiveness of ISRs generally and the implementation of the recommendations in this case.

Balance of the public interest

55. When considering complaints regarding the application of the exemption at section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test favours disclosure.
56. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This

assists the public in understanding the basis and how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.

57. The Commissioner accepts that there is a strong public interest in understanding exactly what is going on in the trauma and orthopaedic surgical service at the Trust, what recommendations have been made and the reasons for those recommendations, and allow the public to participate in the decision making that is ongoing.
58. Although she recognises that there are strong and compelling arguments in support of disclosure in this case, the Commissioner considers the public interest is best served by maintaining the exemption. The Commissioner must consider the circumstances at the time of the request. Whilst the Trust had been in receipt of the report for over a year when it applied the exemption under section 36, it was still in the process of considering it.
59. In order to decide on the steps and resolutions required to address the recommendations made, the Trust requires a safe space to obtain and consider free and frank internal advice and deliberate openly, candidly and honestly on how to move forward.
60. The Commissioner considers that disclosure poses some risk of having a chilling effect on the willingness of staff that have participated from continuing to assist the Trust, and from participating in future discussions. In reaching this view she accepts that the Trust relies on its relationship of trust with its staff to enable free and frank discussion. Furthermore, at the time of the request, the Trust was still considering the recommendations made and what actions to take. The issue in question was therefore still fresh and ongoing for the staff involved.
61. Disclosure of the requested information could negatively impact the relationship of trust resulting in staff involved in this process becoming reluctant to share information freely and openly with the Trust, thereby hindering the Trust's ability to carry out such reviews and implement the changes that are required. This would compromise its ability to assure the public that it is taking the necessary action to improve patient care.
62. Considering the timing of the request, the Commissioner considers such consequences would be likely to occur and this would not be in the wider interests of the public. Rather it is in the interests of the public to allow the Trust the safe space it requires to consider its options and implement the right solutions in order to address the issues identified.

63. The Commissioner has therefore concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure.
64. In making her decision, the Commissioner has accepted the Trust's position that the requested information engages section 36(2). She has therefore not gone on to consider the application of sections 40(2) and 41.

Right of appeal

65. 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

66. 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.
67. 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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