

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2020

Public Authority: The Tavistock and Portman NHS Foundation Trust

Address: 120 Belsize Lane
London
NW3 5BA

Decision (including any steps ordered)

1. The complainant has requested copies of emails sent or received by the directors of The Tavistock and Portman NHS Foundation Trust (the "Trust") containing certain key words during a specified time frame. The Trust refused to provide the emails under section 36 and section 42 of the FOIA with the exception of one email. Later on the Trust also cited section 40(2).
2. The Commissioner's decision is that the Trust has cited section 36 appropriately and therefore the Trust need take no further steps.

Background

3. The Trust has provided the Commissioner with the following background. The request relates to -

"...one of the Trust's specialist services, the Gender Identity Development Service (GIDS). This service is commissioned by NHS England to provide psychological assessment and treatment to children and young people experiencing gender dysphoria.

GIDS has recently received significant media attention, resulting from an investigative review that was undertaken by the Trust's then

Medical Director. In February 2019, a copy of the confidential investigative report was disclosed, without the Trust's authorisation, to various national newspapers and broadcasters.

In June and July of 2019, BBC Newsnight advised the Trust that it would be broadcasting a programme relating to GIDS. As a result of this broadcast, there has been increased national media interest in the service."

Request and response

4. On 14 August 2019 the complainant made the following request for information under the FOIA:

"I would like to make a request under the Freedom of Information Act.

Please provide copies of all emails sent or received by members of the Tavistock Board of Directors that contain any of the following words:

- *"Newsnight"*
- *"BBC"*
- *"puberty"*
- *"[named person]"*

Please provide any such emails that were sent or received between 1 June 2019 and 31 July 2019.

Should any of these documents contain text that falls under FOI exemptions, please black-out the offending text so that the remainder of the documents can still be disclosed."

5. The Trust responded on 13 September 2019 providing one email from the search terms *"BBC"* and *"Newsnight"*. Some information relating to the search terms *"Newsnight"*, *"BBC"* and *"puberty"* was refused by the Trust citing sections 36(2)(b)(i) and (ii) and section 42.
6. The Trust refused any information falling within the scope of the request relating to the search term *"[named person]"* under the same exemptions as above but also cited section 40.
7. The complainant requested a review on the same day.
8. The Trust provided an internal review on 28 October 2019 in which it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 28 October 2019 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to be the Trust's application of sections 36, 42 and 40 to the requested information.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

11. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(2)(b) 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, or*

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

12. The Trust has cited section 36 in relation to all the requested information. The Commissioner has seen the emails to which section 36(2)(b)(i) and (ii) has been applied.
13. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. Therefore in order to establish that the 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.
14. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect

of the Trust is the Chief Executive, Paul Jenkins. The Commissioner is satisfied that the Chief Executive who gave his opinion was the appropriate qualified person. The opinion of the qualified person was provided on 13 September 2019.

15. The qualified person signed to the view that in respect of both section 36(2)(b)(i) and (ii) the inhibition to the free and frank exchange of views/advice “would” occur if the requested information was disclosed. For that reason the Commissioner has taken the higher threshold “would” which requires a higher evidential burden.
16. The Commissioner next needs to establish whether the qualified person’s opinion was reasonable.

Is the qualified person’s opinion reasonable?

17. The qualified person in relation to the exemption at section 36(2)(b)(i) and (ii) must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.
18. The Commissioner’s guidance¹ regarding the definition of “reasonable” is as follows:

“In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of ‘reasonable’ in the Shorter Oxford English Dictionary is: “in accordance with reason; not irrational or absurd”. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.”

19. In order to determine whether section 36(2)(b)(i) and (ii) is engaged the Commissioner must determine whether the qualified person’s opinion was a reasonable one. In doing so the Commissioner has considered the following factors -
 - Whether the prejudice relates to the specific subsection that has been cited, in this case 36(2)(b)(i) and (ii). If the inhibition is not

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

related to the specific subsection the opinion is unlikely to be reasonable.

- The nature of the information and the timing of the request.
- The qualified person's knowledge of, or involvement in, the issue.

20. The Trust argues that the request sought to obtain email correspondence from members of the Board of Directors at a period when media interest was high. That media interest remains high. The emails are largely concerned with the following matters -

- *Drafting and preparing of media lines and responses.*
- *Dialogue to inform decisions about best approaches to the issues being presented to the Trust, and*
- *Consideration of legal advice surrounding appropriate media lines.*

21. The Chief Executive was himself a direct recipient of the emails in question and therefore had access to the emails in question at the time. The emails contain advice given by external individuals such as the Trust's solicitors and the views of staff. The Trust contends that disclosure would affect the ability of the public authority's staff and others to express themselves openly, honestly and completely, or to explore extreme options when providing advice. This would impair the quality of decision-making by the Trust.

22. The particular concern is that the subject of the emails relates to the operation of GIDS and the referral of children to this service which is already the object of significant public scrutiny. The service is currently subject to a judicial review. The matters contained in the emails are sensitive in nature given the potential impact on services and public confidence. The Trust contends that it would consider it unfair to expose individual staff to criticism and points out that some staff have already been singled out in media coverage, such as the *Newsnight* report in June 2019. The Trust therefore asserts that it is particularly important not to disclose information where views are exchanged into the public domain.

23. The issue is still very much live and subject to scrutiny, and the Trust believes that it is important that the free and frank provision of advice is not inhibited in any way, given the significance of the issue at stake and the nature of the service.

24. The Trust suggests that the ICO has accepted the need for a 'safe space' to formulate policy and debate live issues and reach decisions without being hindered by premature external comment and media involvement.

25. For these reasons the Trust's view is that the free and frank provision of advice and the free and frank exchange of views would or would be likely to be inhibited by the release of this information and that the exemption is therefore engaged. The Chief Executive, as previously mentioned, has signed to the higher level of prejudice.
26. The Commissioner, having carefully considered the emails in question, agrees that they contain free and frank discussions/views, both internally between staff and externally, with lawyers and other individuals. She notes that these discussions have not been opened up for general external comment. There are strong reasons provided by the Trust for sections 36(2)(b)(i) and (ii) to be engaged and the Commissioner agrees that the qualified person's opinion that they are engaged at the higher level of prejudice is a reasonable one to hold, in all the circumstances, at the time of the request.

Public interest

27. Even though the exemption is engaged, the Commissioner needs to consider whether it is in the public interest to disclose the requested information or withhold it.

Public interest factors in favour of disclosing the information

28. The Trust states that disclosure promotes accountability and transparency in how public funds are spent and on the decisions public authorities take. It also assists individuals, companies and other bodies to understand decisions made that may affect their lives.
29. The complainant contends that the requested information relates to a matter of significant public interest following an investigation by BBC *Newsnight* regarding controversial practices by the Trust. He states that there are social and political implications and that he has a research interest. The complainant points out that the Trust is the only one of its type in the UK and that, if it is allowed to withhold these documents, it provides a veil of secrecy for the public authority and for the entire issue at stake for the whole of the country.

Public interest factors in favour of maintaining the exemption

30. The Trust argues that the subject of the correspondence relates to the preparation of media lines and surrounding matters relating to the GIDS service which was a matter of intense scrutiny at the time and remains so. Additionally, there are current legal proceedings against the Trust in relation to the service.
31. Disclosure would inhibit the free and frank provision of advice as staff and others would be less likely to express themselves openly, honestly

and completely or to explore options as part of the process of deliberation. This could lead to poorer decision-making. The Trust contends that it is especially important that such advice is not inhibited when it concerns issues that are still current and particularly sensitive which applies to this information. Any such disclosure would have a profoundly negative effect on Trust services.

32. The Trust acknowledges that the email content may be of interest to the public but that disclosure is not in the public interest. The requested emails relate to discussions about a media broadcast and the Trust's position or response to that broadcast. Public statements were subsequently published and there was a response following these email exchanges which, the Trust believes, lessens public interest in the underlying emails.

The balance of the public interest

33. The Commissioner has considered the public interest in this matter. Clearly there was, at the time of the request, significant public and media interest in the work of GIDS. There still is great public interest in this matter. Nonetheless, the Commissioner does not accept that this outweighs the maintenance of the exemption regarding this particular information. The Commissioner's view is based on the 'live' nature of the information at the time of the request, only two months after the *Newsnight* broadcast. She agrees that the detrimental impact on the Trust's decision-making would be significant if it had to deal with premature public and media involvement because of the loss of a safe space for the consideration and preparation of media lines.
34. As the Commissioner has concluded that the Trust has correctly cited section 36(2)(b)(i) and (ii) in relation to the whole of the requested information, she does not propose to look at the application of section 42 or section 40(2).

Right of appeal

35. 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

36. 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.
37. 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
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