

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2022

Public Authority: NHS England
Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation. The above public authority (the public authority) relied on section 41 of FOIA (actionable breach of confidence) in order to withhold the requested information.
2. The Commissioner's decision is that the public authority has correctly applied section 41 of FOIA to the withheld information. However, the public authority breached sections 10 and 17 of FOIA in responding to the request.
3. The Commissioner does not require further steps.

Request and response

4. On 15 November 2021, the complainant wrote to the public authority and, referring to a whistleblowing complaint he had previously made, requested information in the following terms:

"Please send me the information that you hold, this regarding NHS E/I investigation and subsequent outcomes or involvement, in respect of the protected disclosure information concerning governance and wider issues, this about the North East Ambulance Service NHS Foundation Trust."

5. The public authority responded on 21 February 2022. It stated that it had not carried out a formal investigation and thus held no relevant information.
6. Following an internal review the public authority wrote to the complainant on 30 June 2022. It now accepted that it did hold some information, but it wished to rely on section 41 of FOIA to withhold it.

Reasons for decision

7. The Commissioner has seen a copy of the withheld information and considers that, along with the detailed arguments provided in the public authority's internal review, this provides sufficient basis on which to reach a decision. He therefore did not seek further submissions from the public authority.
8. The public authority received the information in question from the Care Quality Commission (CQC). Therefore it was provided to the public authority by another party.
9. The public authority argued that publishing the information would create the basis for a breach of confidence action. It considered that the information was neither trivial nor already in the public domain. The information had been supplied by the CQC in conditions importing a duty of confidence and, when it was provided to the public authority by the CQC, that duty was extended to the public authority itself.
10. The Commissioner agrees that this information has the necessary quality of confidence and that the public authority would have been aware that, in receiving this information it was taking on an obligation of confidence both to the CQC and to the original provider of the information.
11. The Commissioner also agrees that both the CQC and the original provider of the information would suffer detriment if the information were to be published. The CQC would suffer detriment because the organisations it oversees would be less candid and less willing to share sensitive information with it in future – impeding its regulatory role. The original provider of the information would also suffer detriment if its financial and other risk assessments were placed into the public domain.
12. Finally, the Commissioner has considered whether the public authority would have a public interest defence to a breach of confidence action – he has concluded that, at the time the public authority responded to the request, it would not.

13. The Commissioner is required to consider matters as they stood at the point the public authority should have responded to the request – which in this case was December 2021. The Commissioner is aware from a parallel complaint that the CQC regarded the matter as ongoing, both at that point and today. Therefore disclosure would not have been a proportionate means of achieving any legitimate aim of ensuring that the allegations were investigated.
14. The Commissioner is thus satisfied that the public authority was entitled to rely on section 41 of FOIA to withhold the information.

Procedural matters

15. As the public authority failed to confirm, within 20 working days, that it held information within the scope of the request, it breached section 10 of FOIA.
16. As the public authority failed to issue a refusal notice within 20 working days, it breached section 17 of FOIA.

Right of appeal

17. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

18. 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.
19. 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

Roger Cawthorne
Senior Case Officer
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Wycliffe House
Water Lane
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SK9 5AF