

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2023

Public Authority: University Hospitals of Leicester NHS Trust
Address: Leicester Royal Infirmary
Infirmary Square
Leicester
LE1 5WW

Decision (including any steps ordered)

1. The complainant has requested a copy of an investigation report. The above public authority ("the public authority") relied upon section 36 (effective conduct of public affairs) and section 40(2) of FOIA (third party personal data) to withhold the requested information.
2. The Commissioner's decision is that the public authority has correctly engaged section 36 of FOIA, but the public interest favours disclosing the information. There is a small amount of identifiable information in the report which the public authority may rely on section 40(2) of FOIA to withhold. The remainder is not personal data.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, a copy of the withheld information. The public authority may redact the information specified in the confidential annex to this notice
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 September 2022, the complainant wrote to the public authority and requested information in the following terms:

"Please send me a copy of the Culture and Management Behaviour Report produced by external auditors in April 2021 which is held by the trust."
6. The public authority responded on 6 October 2022. It relied on section 41 of FOIA to withhold the requested information.
7. Following an internal review the public authority wrote to the complainant on 6 December 2022. It withdrew its reliance on section 41 and instead relied on section 36 of FOIA to withhold the requested information.
8. At the outset of the investigation, the Commissioner wrote to the public authority and set out his view that it was unlikely that the public interest would favour withholding the entire report. Following this intervention, the public authority did release some of the report's conclusions, but relied on section 36 and, additionally, section 40(2) of FOIA to withhold the remainder.

Reasons for decision

Section 36 – effective conduct of public affairs

9. Section 36 of FOIA allows a public authority to withhold information if a very senior figure within the organisation, known as the Qualified Person, provides an opinion stating that disclosure would prejudice the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice the effective conduct of public affairs.
10. The Qualified Person in this case is Richard Mitchell, the Trust's Chief Executive. He provided an opinion on 3 February 2023 stating that disclosing the remaining sections of the report would prejudice the free and frank provision of advice, as well as the free and frank exchange of views for the purposes of deliberation.
11. In the Qualified Person's opinion, disclosure would have this effect because:

"Senior officers of the Trust must be able to receive, discuss and make decisions about issues of a sensitive nature in a confidential

environment without fear of public disclosure. If we were to disclose the withheld information I believe it would inhibit the freedom to talk openly and confidentially.

“The Trust must be able to carry out candid and open discussion in a protected space to tackle and improve issues of a sensitive nature, without fear of disclosure. In this particular report, members of the finance team have spoken freely on the understanding the information was used in a confidential report. I believe staff would not be willing to be honest and open if their comments could be publicly available and this would undermine the intent and purpose behind the report.”

12. The Qualified Person’s opinion does not necessarily need to be one with which the Commissioner agrees. It need only be a reasonable opinion.
13. In the Commissioner’s view, an unreasonable opinion will be one which does not link to the specific interests identified in the exemption or is otherwise absurd or irrational.
14. Having viewed the material in question, the Commissioner considers that it is not irrational to believe that disclosure of a report such as this might make staff less likely to engage in frank discussions or give frank advice in future. This is sufficient to engage the exemption.

Public interest test

15. In the Commissioner’s view, the balance of the public interest falls firmly in favour of disclosure.
16. The Commissioner’s guidance on assessing the balance of the public interest states that there will always be a strong public interest in disclosure of information where there is a “suspicion of wrongdoing.”¹
17. In this case, there is more than a suspicion of wrongdoing. The Chair of the public authority’s audit committee has accepted that the Trust failed to comply with its statutory duty to provide true and fair accounts.² The National Audit Office reported to Parliament that there had been “significant weaknesses in internal control” and that the situation was

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit9>

² <https://www.leicestermercury.co.uk/news/local-news/leicesters-hospitals-broke-law-illegally-4966784>

"unprecedented."³ Finally, NHS England chose to refer two senior officials at the public authority to the Care Quality Commission to consider under its "fit and proper person" test.⁴

18. There is already a considerable amount of information in the public domain about the public authority's accounting practices. Most of the reporting focuses on the senior individuals at the top of the organisation. However, the withheld information goes beyond that and instead focuses on the systemic and cultural issues that allowed the problem to continue. It also looks at the reasons why the control measures, that should have prevented the situation from occurring, failed to do their job.
19. The Commissioner recognises that many of the individuals will have contributed to the report on an understanding of confidentiality. That should not be lightly dismissed and there is some danger that disclosure will either discourage engagement with such investigations altogether in future, or will restrict the candidness of any interactions.
20. The public authority also pointed out that the withheld information had been used to inform a wider discussion about the way in which its finance team should be structured in future (although it is not clear whether this work remained ongoing at the point the request was responded to).
21. The Commissioner is also not satisfied that any inhibition in reporting concerns is likely, or that, if it did occur, would be significant. The withheld information indicates that there were many reasons why concerns were not reported by the existing (confidential) channels – even when there was no adverse publicity.
22. However, whilst the Qualified Person is right to raise such concerns, in the Commissioner's view such is the serious nature of the report that is being withheld and the conclusions it reaches, any concerns have to be overridden.
23. None of the comments within the report are attributed to any particular member of staff. Although the Commissioner accepts that the

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956804/Department_of_Health_and_Social_Care_Annual_Report_and_Accounts_2019-20.pdf (p70-71 and 125-126)

⁴ <https://www.hsj.co.uk/finance-and-efficiency/nhse-refers-ex-trust-ceo-and-cfo-for-fit-and-proper-person-review-over-46m-accounting-failure/7029405.article>

contributors may be able to identify their own contributions, he considers it unlikely that they will be able to recognise anyone else's – although he has dealt with this further under the section 40(2) analysis.

24. Something clearly went badly wrong at this particular public authority. It may well have made significant reforms since the events featured in the withheld information, but that does not diminish the public interest in this report so that the local community can continue to hold the public authority accountable for its progress.
25. Therefore, whilst the Commissioner accepts that the exemption is engaged, the balance of the public interest favours disclosure.

Section 40(2) – third party personal data

26. Information is personal data if it can be linked to an identifiable individual.
27. The Commissioner is not persuaded that the majority of the information can be linked to any individuals. The report's author(s) wrote it in such a way as to make it difficult to identify any individual's contribution.
28. Even though the pool of individuals interviewed is relatively small, the Commissioner is still sceptical that any individuals are identifiable. However, out of an abundance of caution, the Commissioner has set out some information in the confidential annex that the public authority may withhold to ensure that no individual's contribution is identifiable. The public authority may rely on section 40(2) of FOIA to withhold this information.
29. The remaining information is not personal data and must be disclosed.

Other matters

30. The FOIA Code of Practice requires internal reviews to be completed within 40 working days. The Commissioner notes that the internal review in this case was only completed on the 42nd working day.

Right of appeal

31. 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

32. 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.
33. 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
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