

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2024

Public Authority: Leeds and York Partnership NHS Foundation Trust

Address: Trust Headquarters
2150 Thorpe Park
Leeds
LS15 8ZB

Decision (including any steps ordered)

1. The complainant has requested any internal correspondence relating to a BBC Panorama programme where a Trust doctor appeared. Leeds and York Partnership NHS Foundation Trust (the Trust) confirmed no notes or minutes were held but considered any internal emails were exempt under all the limbs of section 36(2) of FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 36(2) and the public interest in section 36(2)(b)(i) and (ii) outweighs the public interest in disclosure.
3. The Commissioner does not require further steps.

Request and response

4. On 18 June 2023, the complainant wrote to the Trust and requested information in the following terms:

"Can you provide all internal correspondence, notes and minutes of meetings, that discuss the BBC Panorama episode that aired on 15th May 2023 in which consultant Dr Mike Smith appeared."

5. The Trust responded on 11 July 2023. It stated that no notes or minutes were held as none were taken. With regard to any internal correspondence, the Trust stated this information engaged the section 36(2) exemption and was being withheld from disclosure.
6. Following an internal review the Trust wrote to the complainant on 26 July 2023. It stated that it upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 22 November 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to be to determine if the Trust has correctly applied the provisions of the section 36(2) exemption and, if so, if the public interest favours maintaining the exemption and withholding the information.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

9. Section 36(2)(b)(i) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person (QP), disclosing the requested information would inhibit, or would be likely to inhibit, the provision of advice.
10. Section 36(2)(b)(ii) says that information is exempt information if, in the reasonable opinion of a QP, disclosure would inhibit, or would be likely to inhibit, the exchange of views.
11. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a QP, disclosing the requested information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
12. To determine, first, whether the Trust correctly applied these exemptions, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
13. In its submission to the Commissioner, the Trust states that it sought the opinion of the QP on 20 June 2023 and their opinion was given on the same date. The QP was the Trust's Chief Executive. The Commissioner is satisfied that, under subsection 36(5)(a) of FOIA, Dr Sara Munro is an appropriate QP.

14. The information that is being withheld is internal correspondence relating to the appearance of a doctor at the Trust's (Dr Mike Smith), appearance on a BBC Panorama programme about ADHD Private clinics¹. The Trust has stated it was briefed about the plans for the programme and the participation of Dr Smith and he received guidance from the Trust's Head of Communications and Executive Team. It is communications relating to this that are being withheld by the Trust.
15. The QP's opinion is not just incidental to the application of this exemption, it is the defining feature of this exemption. Given the importance placed on the opinion of the QP by the exemption, it therefore follows that that opinion must have been properly obtained. Generally speaking this will mean the QP giving their reasonable opinion that disclosure of the withheld information would (or would be likely to) inhibit the free and frank provision of advice, the exchange of views or otherwise prejudice the effective conduct of public affairs. The opinion does not have to be given in writing (even though that is obviously preferable) but a public authority should create some form of permanent record showing what the QP's opinion was.
16. In determining whether the opinion about sections 36(2)(b)(i) and (b)(ii) and section 36(2)(c) is reasonable the Commissioner has to determine if the opinion is one that a reasonable person could hold.
17. The test of reasonableness isn't meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
18. In the submission to the QP, background to the request was given, along with arguments relating to the public interest test.
19. Of relevance to both section 36(2)(b)(i) and section 36(2)(b)(ii), it was explained why disclosing the information being withheld "would" inhibit the provision of advice and exchange of views.
20. It was argued that by releasing the information there would be likely to be an inhibitory effect on similar discussions in the future and it would undermine the work and effectiveness of risk investigations into people potentially being misdiagnosed or given appropriate treatment, this in turn may hinder the Trust's ability to help such people in the future.
21. It was also argued that disclosure could be prejudicial to the effective conduct of public affairs as it would have an adverse effect on the Trust's ability to offer an effective public service and to meet its wider

¹ [ADHD: Private clinics exposed by BBC undercover investigation - BBC News](#)

objectives and purpose - an effect which would not only be on the Trust but would also effect other bodies and the wider public sector.

22. In its submission to the Commissioner, the Trust confirmed the QP's opinion in this case is that the prejudice envisioned under section 36(2) exemptions would be likely to occur.
23. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b) exemptions to form an opinion on the matter of whether reliance on those exemptions was appropriate with regard to all the information in scope.
24. The Commissioner accepts that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that the Trust is entitled to rely on section 36(2)(b)(i), (ii) and 36(2)(c) to withhold all the information.
25. The Commissioner will go on to consider the public interest test associated with the exemptions.

Public interest test

26. The complainant argued that releasing internal correspondence would not prevent free and frank discussions in the future and it was in the public interest to know everything possible about the Trust's participation in the documentary.
27. The Trust recognised the general public interest in transparency and accountability but also considered it equally important appropriate consideration be given to the opinion of the qualified person during the process of due diligence in competing public interests.
28. The Trust argued against disclosure being in the public interest as it would have a chilling effect and effect the decision-making process in the future. The Trust points to the fact an investigation into poor practice was being undertaken at the time of the request and given the timing it was reasonable to conclude that disclosure would be likely to inhibit free and frank discussions going forwards and that the loss of frankness and candour that might result would damage the quality of future advice and deliberations and hinder decision-making. It stated this was a real concern as there were discussions relating to ongoing and future exchanges.
29. The Trust does not consider it is in the public interest to know everything about its participation in the Panorama programme. It considers there is a clear public interest in engaging in activities which highlight failings within organisations and inhibiting the ability of its staff and others to express themselves openly, honestly and completely when

providing advice and giving their views as part of the process of deliberation could potentially impair quality of future service provision and risk people being misdiagnosed. The Trust therefore considers the public interest is better served by allowing its staff to express views openly and candidly and prevent impairment to services.

30. When considering the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition
31. The QP in this case was the Chief Executive of the Trust and, as such, had the requisite knowledge of the situation and the consequences of disclosure given that the discussions on the contribution to the Panorama programme took place with senior staff and Dr Smith. The Commissioner therefore gives the QP's opinion a measure of respect.
32. Moving on to the timing of the request, at the time of the request the Panorama programme had aired and the Trust had already published a response on its website² with further quotes from Dr Smith. The Trust has indicated there were discussions around future exchanges and provision of advice and the Commissioner can recognise there is merit to the argument that disclosing details of conversations that took place regarding the initial contributions and advice may have an inhibitory effect on staff considering contributing in similar ways in the future.
33. Whilst the Commissioner recognises professionals will still conduct themselves appropriately and carry out their roles and disclosure will not prevent them from doing so, there is a risk that they may be cautious in offering their views when it is outside their day to day roles if they felt they could not seek advice and support internally to do this without it being open to external scrutiny.
34. This process is important in holding organisations to account that may not be providing best service and in contributing to investigations that are seeking to expose bad practice and the Commissioner considers preserving this to be in the public interest.
35. The timing of the request, the QP's opinion and severity and extent of the envisioned prejudice carry weight. Transparency and accountability in public authorities actions and decision also carries weight. That being said the Commissioner does not consider disclosing information on internal advice around contributions to a programme in these specific circumstances would assist in meeting any specific public interest in the

² [Leeds and York Partnership NHS Foundation Trust -BBC Panorama documentary on Attention Deficit Hyperactivity Disorder \(ADHD\) private clinics – response \(leedsandYorkpft.nhs.uk\)](https://www.leedsandYorkpft.nhs.uk/attention-deficit-hyperactivity-disorder-adhd-private-clinics-response)

overall issue of ADHD diagnoses at private clinics and waiting lists for NHS clinics.

36. The Commissioner does not consider there are compelling arguments in favour of disclosing the information that would outweigh any potential inhibition that might be caused from disclosing this kind of information.
37. On balance therefore, the Commissioner finds that at the time of the request the public interest favoured maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions.
38. The Commissioner has decided that the Trust has correctly applied these exemptions and that the public interest favoured maintaining the exemptions.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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