

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2014

Public Authority: Cornwall Partnership NHS Foundation Trust

Address: Fairview House
Corporation Road
Bodmin
Cornwall
PL31 1FB

Decision (including any steps ordered)

1. The complainant has requested a copy of the report regarding Therapeutic Management of Aggression and Violence (TMAV), provided in March 2012, by the accrediting organisation, to the Trust before the TMAV training was disbanded. Cornwall Partnership NHS Foundation Trust (the Trust) refused to provide the requested information under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) of the of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the Trust has correctly applied section 36(2)(b)(ii) to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 25 March 2014 the complainant requested information of the following description:

"Please will you provide me with a copy of the report regarding TMAV, provided in March 2012, by the accrediting organisation, to the "Trust" before the TMAV training was disbanded."
5. On 26 March 2014 the Trust responded. It withheld the information the complainant requested under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA.

6. The complainant requested an internal review on 26 March 2014. The Trust sent the outcome of its internal review on 15 May 2014. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 27 May 2014 to complain about the way his request for information had been handled.

Reasons for decision

8. 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.

9. The Trust has applied section 36(2)(b)(ii) to the withheld information and the Commissioner has therefore considered this exemption first.
10. In determining whether section 36(2)(b)(ii) was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the 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.

11. The Trust explained that the qualified person is Mr Phil Confue, Chief Executive of the Trust. It explained that the qualified opinion was provided on 25 March 2014. The qualified person's opinion was that section 36(2)(b)(ii) FOIA was applicable in this case. It explained that the qualified person had access to all relevant material including the withheld report. A copy of the qualified person's opinion was provided to the Commissioner.
12. To summarise the qualified person's opinion is that the compilation of the requested of the report was dependent upon staff sharing their views openly and candidly with the organisation commissioned to undertake the investigation/report into TMAV. The qualified person's opinion is that if this report were disclosed into the public domain it would be likely to hinder the frankness and candour of staff participation in similar investigations/reports in the future.
13. The withheld information is a report into TMAV compiled by an external organisation. The Trust has explained that such a report requires open and candid discussion with staff and the free and frank sharing of staff views. The Commissioner considers the opinion of the qualified person is a reasonable one.
14. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
15. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present

¹ EA/2006/0011; EA/2006/0013

case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

16. The Trust considers that there is a public interest in disclosure of information that would demonstrate that it takes patient safety seriously by holding reviews and assessments.

Public interest arguments in favour of maintaining the exemption

17. The Trust has explained that it believes the following public interest arguments favour maintaining the exemption:

The Chilling Effect

18. The Trust said that in this case the views provided to the external reporters were full and frank views welcoming expression of their opinions, which staff would be unlikely to do so freely if those opinions were made available to the general public. It said that interviewees were told that the review would not reveal identities and would be used to advise the Trust. If this report was disclosed it is highly likely to affect the free expression of opinions in future.
19. The Trust explained that the report was used to assist the Trust in reviewing training and TMAV effectiveness by bringing together discussions with staff and observation of the trainers at work. The consequence of this disclosure would be that it would impair the quality of its decision making in future if it were not able to obtain the opinions of staff so freely and investigate issues which may have an impact of safety.
20. The Trust said that this review enabled it to gain views on a sensitive topic without the fear of repercussions for staff members. If the review were released for general dissemination it would find that Trust staff at all levels would be unlikely to provide information and views and opinions so freely in the future in other issues which may be of concern to staff, patients or the general public.

The Timing of the Request

21. The Trust has explained that the requested report is dated 30 January 2012 and the TMAV training has been updated, it therefore acknowledged that the matter is not as sensitive due to the passage of time.

22. However it also said that issues regarding training generally are always live and sensitive especially where there are specific requirements before someone can be physically held and supported due to deprivation of liberty safeguards, caselaw and guidance around seclusion. Patient safety is a serious matter and often takes place on the Trust's wards without any operational observation so the opportunity for an external organisation to be able to do this freely and observe and gain staff views and advise the Trust is imperative from an organisational point of view.

Balance of the public interest arguments

23. The Commissioner considers there is a strong public interest NHS bodies demonstrating that patient safety is taken seriously through an external review process.
24. The Commissioner does however consider that such a review process requires free and frank discussion and sharing of staff views. Disclosure of information which would be likely to inhibit the frankness and candour of this discussion would not be in the public interest as in turn it would be likely to have a negative impact upon the efficiency of the review process.
25. In this case the Commissioner acknowledges that the report was completed in January 2012 and that the training was amended as a result of the report which may reduce the chilling affect arguments to some extent. However as this case involved members of staff sharing open and candid views with an external organisation charged with reviewing the Trust's TMAV training the Commissioner still considers that disclosure of this report may hinder the frankness and candour of staff sharing their views under similar circumstances in the future. Furthermore the Trust has explained that training is continually under review particularly in such a sensitive area.
26. The Commissioner considers that the public interest in this case is finely balanced, whilst the report question was complete at the time of the request, the Commissioner considers that there is a very strong public interest in not disclosing information which would be likely to inhibit the Trust's training review processes by inhibiting the frankness and candour of staff engagement in this type of review process.27. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case. He has not therefore gone on to consider the application of the other exemptions.

Right of appeal

27. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

28. 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.
29. 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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