

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 August 2015

**Public Authority:** Surrey and Sussex Healthcare NHS Trust

**Address:** Headquarters  
East Surrey Hospital  
Canada Avenue  
Redhill  
RH1 5RH

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the review or investigation report in relation to a named consultant. The Trust refused to provide the requested information under section 21, section 36(2)(b)(ii), section 36(2)(c), section 41 and section 40(2) FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 36(2)(b)(ii) and section 36(2)(c) FOIA to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose Appendix 16 and 19 to the 'HR Report' as no exemptions have been applied to his information. Provide the complainant with a link to Appendix 17 which the Trust has confirmed is already in the public domain.
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

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5. On 17 October 2014 the complainant requested information of the following description:  
  
"Please provide a copy of the review or investigation report in relation to [named consultant]."
6. On 13 November 2014 the Trust responded. It refused to provide the requested information under section 40(2) FOIA.
7. The complainant requested an internal review on 13 November 2014. The Trust sent the outcome of its internal review on 13 February 2015. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 13 January 2015 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the Trust also applied section 21, section 36(2)(b)(ii), section 36(2)(c) and section 41 FOIA.
10. The Trust also said that Appendix 16 and 19 of the HR report could be disclosed to the complainant as no exemptions were applicable to this information. It said that Appendix 17 was publicly available. The Commissioner therefore requires it to disclose Appendix 16 and 19 to the complainant, and provide him with a link to Appendix 17.
11. The Commissioner has considered whether the Trust correctly applied any of the exemptions it has cited to the withheld information.

## Reasons for decision

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12. 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.

13. The Trust has applied section 36(2)(b)(ii) and section 36(2)(c) FOIA to the withheld information.
14. In determining whether the exemptions were 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.
15. The Trust explained that the qualified person is the Chief Executive, Mr Michael Wilson. It explained that the qualified opinion was provided on 9 April 2015. The qualified person's opinion was that section 36(2)(b)(ii) and section 36(2)(c) FOIA were applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the qualified opinion was provided to the Commissioner.
16. Section 36(2)(b)(ii) has been applied to the parts of the withheld information containing evidence, statements, views and submissions of third parties inputting into the investigation into the consultant's conduct, section 36(2)(c) has been applied to factual analysis, processes, procedures and outcomes/recommendations. The Commissioner has therefore considered both subsections of section 36 FOIA in this case.
17. The submissions to the qualified person set out that disclosure would be likely to have a chilling effect on people's willingness to raise unpopular or difficult opinions or to speak freely. The submissions highlighted that disclosure would also be likely to expose safe space discussions where people may fear that the information they provide may be released into the public domain. Finally it was argued that

disclosure would be likely to prejudice ongoing disciplinary proceedings as it would provide significant detail about the matter which would prejudice the process going forward.

18. The qualified person's opinion is that disclosure would be likely to inhibit the free and frank exchange of views under s36(2)(b)(ii) and would be likely to prejudice the conduct of public affairs under section 36(2)(c). The qualified person considers that if the information were to be disclosed at this stage, individuals would be likely to feel inhibited in future in discussing the sensitive issues that arise in this context and would be likely to prejudice ongoing disciplinary proceedings.
19. Upon viewing the withheld information, the submissions to the qualified person and the qualified person's opinion, the Commissioner considers that the opinion of the qualified person is a reasonable one.
20. 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)<sup>1</sup>.
21. 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 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 perform 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 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 be likely to inhibit the free and frank provision of advice.

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<sup>1</sup> EA/2006/0011; EA/2006/0013

### **Public interest arguments in favour of disclosing the requested information**

22. The Trust argued that there is a public interest in transparency and accountability and acknowledged that the Trust had a duty of candour in this regard.
23. The complainant argued that there is also a public interest in patients who may have come to harm following alleged mistreatment having access to the withheld information.

### **Public interest arguments in favour of maintaining the exemption**

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

#### **Safe Space**

It said that it is important that a safe space is preserved, within which people can express views and deliberate issues. It said that this ensures the Trust is able to fully consider issues, take advice and form opinions in an informed manner. It has confirmed that disciplinary proceedings relating to the named consultant were not concluded at the time of the request.

#### **The Chilling Effect**

The Trust argued that the success and integrity of reviews of this nature depend upon those participating in them being willing to engage in an open and robust way.

#### **The Timing of the Request**

The Trust has explained that some high level information surrounding this review has already been put into the public domain but the disciplinary proceedings relating to this consultant were not concluded at the time of the request. It said therefore that disclosure of the more detailed information requested would be likely to prejudice the ongoing disciplinary proceedings and would be likely to prejudice third party individuals' input into this matter and in relation to future matters of a similar nature.

### **Balance of the public interest arguments**

25. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to a sensitive issue such as in this case relating to the conduct of a consultant. This is because it would

provide the public in addition to any individuals affected with a greater understanding and reassurance of how the Trust has tackled this matter and whether their actions are appropriate and sufficient to safeguard the patients they are responsible for.

26. The Commissioner does however consider that this kind of review does require a 'safe space' for it to be able to obtain, share, digest and discuss information. There is also a requirement for free and frank discussion and the sharing of views. Disclosure of information which would prevent this 'safe space' for consideration and which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest. This is particularly relevant in this case as at the time the request was made the disciplinary proceedings relating to this consultant had not been concluded.
27. The Commissioner considers that there is a strong public interest in disclosure of information relating to the review as it could potentially effect a number of individuals in the Trust's locality whom it is responsible for. However the Commissioner considers that there is a strong public interest in allowing the relevant parties safe space for discussion and to enable views to be shared freely and frankly relating to this matter. As stated above the disciplinary proceedings were ongoing at the time the request was made and therefore this adds greater weight to the arguments in favour of maintaining the exemptions.
28. 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 exemptions. Section 36(2)(b)(ii) and section 36(2)(c) were correctly applied in this case.
29. As the Commissioner considers that section 36(2)(b)(ii) and section 36(2)(c) FOIA were correctly applied and as these exemptions cover all of the withheld information, he has not gone on to consider the application of any of the other exemptions any further.

## Right of appeal

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30. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**