

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2022

Public Authority: Hywel Dda University Health Board
Address: foi.hyweldda@wales.nhs.uk

Decision (including any steps ordered)

1. The complainant requested a copy of an investigation report produced following concerns raised in relation to physiotherapy practices at Glangwili General Hospital in the initial stages of the COVID-19 pandemic. Hywel Dda University Health Board ('the Health Board') refused the request on the basis of section 41(1)(b) (information provided in confidence), section 40(1) (personal data of the applicant), section 40(2) (third party personal data), and section 38(1)(a) (endangerment to health).
2. The Commissioner exercised his discretion and considered whether section 31 (prejudice to law enforcement) applied. His decision is that the Health Board was entitled to refuse to disclose the withheld information in reliance on section 31 FOIA, and in particular section 31(1)(g) together with section 31(2)(j) FOIA to refuse the information which was not the personal data of the applicant.
3. The Commissioner does not require the Health Board to take any steps.

Request and response

4. On 30 March 2021, the complainant wrote to the Health Board and requested the following information:

"A copy of an investigation report produced following investigation of concerns raised in relation to physiotherapy practices during the initial stages of COVID-19."

5. The Health Board responded on 7 May 2021. It provided a redacted copy of the report and cited the following exemptions to refuse to disclose some information within the report:
 - Section 38(1)(a) – health and safety
 - Section 40(1) – personal data of the applicant
 - Section 40(2) by virtue of 40(3)(a)(i) – third party personal information.
 - Section 41(1)(b) – information provided in confidence
6. Following an internal review the Health Board wrote to the complainant on 6 August 2021. In respect of the exemptions cited it partly upheld the complainant's concerns in relation to section 40(2) disclosing the names of senior members of staff it had previously withheld. With regard to section 38, it provided the full details of how the public interest test was considered, and disclosed some of the information within the report it had previously withheld under this exemption.

Scope of the case

7. The complainant originally contacted the Commissioner on 27 June 2021 as the Health Board had not completed its internal review at this time. Following its internal review of 6 August 2021, the Commissioner accepted the complaint in respect of the exemptions cited by the Health Board as valid.
8. The complainant is not satisfied with the Health Board's reliance on the exemptions cited. In relation to section 41 the complainant believes that a Senior Negotiating Officer at the Chartered Society of Physiotherapy has received a copy of the report which he believes undermines any claim to section 41.
9. The complainant also considers that the Health Board is deliberately blocking or concealing part of the report and believes that this is evidence of an offence under section 77 FOIA (offence of altering etc records with the intent to prevent disclosure). The Commissioner has conducted a separate investigation and concluded that there is insufficient evidence to indicate that an offence under section 77 FOIA has been committed. This has been discussed in more detail in the 'other matters' section of this notice.
10. The Commissioner notes that some of the withheld information constitutes the complainant's own personal data and has been provided

to them under the Subject Access provisions of the Data Protection Act 2018.

11. The Health Board has cited both sections 40(2) and section 41 for a sizeable proportion of the withheld information, with a small amount refused solely on the basis of either section 41(1) or section 38(1)(a) FOIA
12. In respect of section 41, the Commissioner would point out that the withheld information was generated internally and cannot therefore engage section 41. He also considers that not all of the information refused under section 40(2) would fall within the definition of personal information. However, having reviewed the withheld information he does not consider it appropriate for disclosure into the public domain, therefore, as a responsible regulator, he has exercised his discretion to consider whether the withheld information in its entirety is exempt under section 31(1)(g) in conjunction with section 31(2)(j) FOIA.

Reasons for decision

Section 31 – law enforcement

13. Section 31 FOIA provides a prejudice based exemption which protects a variety of law enforcement interests. Having viewed the withheld information the Commissioner considers that section 31(1)(g) is engaged by virtue of section 31(2)(j). The relevant parts of section 31 FOIA provide that:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice...

(g) the exercise of any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are –

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

14. Section 31 is also subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but it can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

15. To engage the exemption at 31(1)(g), a public authority must:
- identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
 - confirm that the function has been specifically designed to fulfil that purpose; and
 - explain how disclosure would prejudice that function.
16. The exemption is not only available to the public authority that has a relevant function. It can be claimed by any public authority provided that it can specify who does have the relevant function and why disclosure would, or would be likely to prejudice it.

The Health Board's function for the purposes of section 31(2)(j)

17. For the exemption to be engaged, the function identified in relation to section 31(1)(g) must be one which is specifically entrusted to that public authority to fulfil.
18. The Commissioner is aware that healthcare authorities have specific statutory duties to protect the health and safety of patients against risks posed by the delivery of healthcare services. Section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 ('HCSA 2003') places a duty on all NHS bodies to:
- “put and keep in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body”.
19. The Commissioner must next consider how disclosure would prejudice that function. The prejudice test involves three steps:
- the actual harm alleged which would or would be likely to occur if the withheld information was disclosed, has to relate to the applicable interests within the exemption (in this case the purpose of protecting persons other than persons at work against risk to health and safety arising out of or in connection with the actions of persons at work).
 - there must be some causal relationship between the disclosure of the withheld information and the prejudice which the exemption is designed to protect against. Furthermore, the alleged resultant prejudice must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied on is met – 'would' or 'would be likely to'.
20. The Commissioner has considered whether the harm/prejudice under consideration relates to the applicable interests and notes that the

Health Board has stated that the individuals were interviewed as part of an investigation and they would not have been as open and honest when interviewed, had they not been advised that the information being shared was done in confidence and would not be shared outside the realms of the investigation.

21. The Health Board further stated that an introduction to each interview was made by the investigating officer which stated:

“...reminded employee that the process was confidential and therefore should not be disclosed without authority.”
22. The Health Board added that it would not have been within the expectation of the contributors for the interview transcripts or the wider report to be released into the public domain.
23. The Commissioner has reviewed the withheld information and notes that it concerns whether the provision of care to patients at Glangwili General Hospital was being compromised due to the practices of the physiotherapy department and specifically, whether they were putting patients at an increased risk of contracting Covid following concerns raised by the complainant. The report also includes staffing issues.
24. Much of the withheld information in this case can be fairly categorised as frank and open exchanges about sensitive matters, and as the report makes clear, the investigation was carried out in private. The methodology was deliberately adopted by the investigator to ensure that it had the confidence of witnesses and was able to carry out its work effectively without participants being concerned about what was going to be made public.
25. The Commissioner can confirm from the withheld information that the participants were volunteers. Witnesses were assured at the start of the interviews that their statements would be kept confidential. They were also advised that they should not divulge any information relayed to them during the investigation process.
26. The Commissioner accepts that disclosure of the withheld information would make it more difficult for future investigations of a similar nature to be conducted as individuals would be less likely to engage freely and frankly with such investigations for fear that the record of their contributions may be disclosed. This in turn would undermine the effectiveness of such investigations.
27. The Commissioner considers that investigations into concerns about service provision resulting in potential risks to patients, and allegations regarding staffing issues, need to be robust and reliable, and to this

end, it is important that individuals provide free and frank commentary on the understanding that their contributions will remain confidential.

28. The Commissioner is of the view that disclosure of information which has been collected in confidence into the public domain would be likely to deter staff from co-operating with such investigations in future, and would make staff less likely to provide full and frank contributions to similar future investigations. This in turn will adversely affect the quality of information available to reviewers in future investigations and be detrimental to the Health Board's ability to exercise its functions under section 45(1) of the HSCA 2003.
29. The Commissioner considers that there is a real and significant risk that disclosure would have a negative impact on the voluntary supply and free flow of candid information. Taking into account the subject matter, and the content of the withheld information the Commissioner believes that disclosure would be likely to prejudice the Health Board's ability to protect persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
30. In conclusion, the Commissioner has determined that section 31(1)(g), together with section 31(2)(j) is engaged in relation to the withheld information.

Public interest test

31. Section 31 is subject to the public interest test as set out in section 2 FOIA. This means that although section 31 is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Arguments in favour of disclosure

32. The Health Board accepts the general public interest in openness and transparency of information.
33. It also acknowledges that in this case, disclosure would demonstrate the thoroughness of the investigation through the information collected, considered and assessed as part of the report writing process.
34. The Health Board also accepts that disclosure could provide the public with assurance that policies and procedures were followed during a period of grave concern for the public as a whole.

35. In the Commissioner's view, there is a strong public interest in the disclosure of an investigation report into the procedures and practices around the prevention/minimisation of the spread of Covid-19 by a hospital department.

Arguments in favour of maintaining the exception

36. The Health Board was however mindful that consideration must also be given to the group of contributors, the requester and the wider public. It stated that where opinion and personal communications are concerned, unhappy colleagues and/or patients could seek to make contact with the contributors to express their opinion.
37. It has argued that disclosure could result in future employees, patients, or the public not raising concerns or wanting to contribute to investigations as they would feel they could not trust the process and would worry about the repercussions of contributing to the investigation.
38. The Commissioner is unaware of any wider public concerns regarding the provision of care to patients at Glangwili General Hospital being compromised by the practices of its physiotherapy department and specifically in relation to putting patients at an increased risk of contracting Covid.

The balance of the public interest test arguments

39. In reaching a view on where the public interest test lies in this case, the Commissioner has taken into account the clear public interest in openness and transparency of information relating to an investigation, and the nature of the withheld information, much of which contains frank comments and recollections of individual situations as examples of practices within the Health Board.
40. The Commissioner accepts that there is a legitimate public interest in disclosure of information about investigations carried out, particularly in cases where the investigation relates to the provision of care in frontline services at a time of, and in relation to the Covid-19 pandemic.
41. However, the Commissioner is mindful that there is a strong public interest in protecting the Health Board's ability to conduct effective investigations. The Commissioner is also mindful that disclosure of the withheld information would result in individuals being less likely to provide detailed and frank information ('chilling effect') in the future. This would prejudice the Health Board's functions to protect persons other than persons at work against risk to health or safety arising out of or in connection with the actions of person at work.

42. Taking into account the subject matter, the content of the withheld information and the lack of evidence of any wider public concerns regarding this matter, the Commissioner considers that in all the circumstances of the case, the balance of the public interest is weighted in favour of maintaining the exemption. The Health Board was not, therefore, obliged to disclose the withheld information.

Other matters

Section 77 allegation

43. Section 77 concerns the offence of altering records with intent to prevent disclosure. Section 77(1) states:

"Where-

- (a) a request for information has been made to a public authority,
- (b) under section 1 of this Act ...the applicant would have been entitled ...to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled."

44. The Commissioner notes that the complainant believes the Health Board's reliance on the exemptions cited is a deliberate attempt to conceal the information they have requested and constitutes an offence contrary to section 77 FOIA.
45. The Commissioner has investigated this allegation and could find no evidence to substantiate it. He would wish to highlight the final, and key part of section 77(1) which states:

"... of which the applicant would have been entitled."

and would point out that the Health Board had refused to provide information on the basis of various exemptions under Part II FOIA, so was therefore of the view that the complainant was not entitled to this information.

46. This is further supported by the Commissioner's conclusion in respect of 31(1)(g) with 31(1)(j) discussed in the main body of this notice. He

would wish to highlight that being dissatisfied with a public authority's reliance on exemptions, does not in itself indicate an offence under section 77 FOIA.

Right of appeal

47. 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

48. 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.
49. 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

Catherine Dickenson
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