

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 June 2007

Public Authority: Southport & Ormskirk Hospital NHS Trust
Address: Town Lane
Southport
Merseyside
PR8 6PN

Summary

The complainant requested information about the Local Awards Committee, in relation to an application he had made for a Clinical Excellence Award. By way of background, the Local Awards Committee assesses applications for these awards, and the members of the Committee score each of the candidates. The complainant specifically requested the identities of the Committee members in relation to the specific scores he had been awarded. The public authority provided a breakdown of the scores he had received. However it refused to identify which members had awarded which score, and cited the exemption at section 36(2)(c) of the Freedom of Information Act 2000, stating that the disclosure would prejudice the effective conduct of public affairs. The public authority then went on to state that the public interest in maintaining the exemption outweighed the public interest in disclosure. After considering the case the Commissioner decided that the requested information was exempt under section 36(2)(c). The Commissioner does not therefore require the public authority to take any further steps in relation to the complainant's request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 25 October 2005 the complainant wrote to the public authority and requested the following:

“...I would like to know, under the Freedom of Information Act, the names of the individual panel members associated with their scores for my application.”

This was made in connection with the Clinical Excellence Awards Scheme.

3. By way of background, the Clinical Excellence Awards are given annually and can be applied for by NHS consultants. The Department of Health publication, *'The new NHS consultant reward scheme: Clinical Excellence Awards'* describes the objectives of the Scheme:

“The Clinical Excellence Award Scheme will reward those consultants who contribute most towards the delivery of safe and high quality care to patients and to the continuous improvement of NHS services including those who do so through their contribution to academic medicine. All levels of award will be made against the same criteria to reflect nationally agreed objectives.”

4. The public authority responded to this request on 24 November 2005. In this letter it refused to disclose this information, citing the exemption listed at section 36(2)(c) of the Act. It stated that it believed that this exemption applied as the disclosure of this information would prejudice, or would be likely to prejudice, the effective conduct of public affairs. The public authority informed the complainant of his right to appeal this refusal, and provided him with the contact details of the Commissioner.

5. It should be noted that the public authority had previously provided the complainant with a breakdown of the scores which had been awarded to him. However, this breakdown was anonymised, and did not show which Committee members had awarded which scores.

6. On 5 December 2005 the complainant wrote to the public authority and asked for an internal review of this decision. He stated that the refusal was on spurious grounds, and wrote,

“I need the information requested to try and assess whether there is any underlying reason for the bizarre pattern of scoring which could imply discrimination, or if it is simply random.”

He argued that disclosure of this information would enable the public authority to review the process of awarding Clinical Excellence Awards Scheme, making the process more objective, fair and robust.

7. The public authority conducted an internal review and responded in a letter dated 5 January 2006, upholding the decision to withhold the information in question under section 36(2)(c). In this letter it stated,

“The decision to withhold the information you requested is to ensure that panel members can reach a decision regarding their peer’s application fairly and objectively. To identify individual panel members scores may mean that some individuals feel that they cannot give an objective view point if the information is disclosed, thus prejudicing the outcome. This would equally apply in other decision making processes within the Trust.”

The Investigation

Scope of the case

8. On 10 January 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the refusal to provide the information in question was correct.
9. Although not mentioned by the complainant, the Commissioner has also considered some procedural aspects in this case, namely the adequacy of the refusal notice.

Chronology

10. On 26 January 2006 the Commissioner wrote to the complainant and requested further information in order to allow him to investigate this complaint. The complainant responded on 27 January 2006 and provided the information requested.
11. On 1 February 2006 the Commissioner wrote to the public authority to inform it that he had received a complaint about it. In this letter he asked the public authority to provide him with a copy of the withheld information. The public authority replied to the Commissioner on 19 May 2006 and provided a copy of the information in question.
12. The Commissioner wrote again to the public authority on 13 February 2007 and asked for further information in relation to the complaint. The public authority responded on 3 April 2007 and provided the information requested.
13. On 26 April 2007 the Commissioner emailed the public authority and asked for further clarification in respect to an aspect of the case. The Commissioner specifically asked whether the identities of the Committee members were disclosed to those applying for a Clinical Excellence Award.
14. The public authority responded by email on 27 April 2007. It confirmed that the identities of the Committee members were published in the ‘Clinical Excellence Awards Annual Report’ which was distributed to all the consultants who worked for the Authority. It further confirmed to the Commissioner that the list of Committee members for 2005 had already been provided to the complainant.

Analysis

Procedural matters

15. The Commissioner considered whether the refusal notice issued by the public authority on 24 November 2005 complied with section 17 of the Act.
16. Section 17(3) requires a public authority that is relying upon a qualified exemption in order to withhold information, to inform an applicant in its refusal notice, "that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."
17. The refusal notice issued by the public authority did not inform the complainant of this.
18. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

19. In considering whether the requested information should be disclosed, the Commissioner took into account the fact that the Act is applicant blind and that disclosure under the Act should be considered in the widest sense – that is, disclosure to the public at large. In view of this, the Commissioner was unable to take into account the particular circumstances of the complainant when considering this request. Instead, the Commissioner had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.

Section 36(2)(c)

20. Section 36(2)(c) provides an exemption for information the disclosure of which, in the reasonable opinion of the qualified person, "would otherwise prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs."
21. The full text of section 36 can be found in the Legal Annex at the end of this Notice.
22. After considering the information provided to him the Commissioner is satisfied that the decision to apply the exemption under section 36(2)(c) to the information was taken by the qualified person, in this case the Chief Executive of the public authority.
23. The Commissioner has gone on to consider whether the opinion of the qualified person was in fact "reasonable."
24. The Commissioner has followed the approach taken by the Information Tribunal in *Guardian Newspapers and Heather Brooke vs. Information Commissioner and the BBC* (Appeal Numbers: EA/2006/0011 and EA/2006/0013). In this the

Tribunal agreed with the Commissioners view that a reasonable opinion is one which is both reasonable in substance and reasonably arrived at. The Tribunal went on to state that:

“On the wording of section 36(2) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable. We do not favour substituting for the phrase “reasonable opinion” for some different explanatory phrase, such as “an opinion within the reasonable opinions.” The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there is or is not the requisite degree of likelihood of inhibition. We do, however, acknowledge the thought that lies behind the reference to a range of reasonable opinions, which is that on such matters there may (depending on the particular facts) be room for conflicting opinions, both of which may be reasonable.”¹

25. It is important to note the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would have (or would be likely to have) the stated detrimental effect. That means that the qualified person has made a judgement about the degree of *likelihood* that the detrimental effect would occur. It “does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.”²
26. During the course of the investigation the Commissioner asked the public authority for details of the decision taken by the qualified person, in order to allow him to reach an opinion on whether the decision was objectively reasonable and reasonably arrived at.
27. On 3 April 2007 the public authority informed the Commissioner that the qualified person had first considered whether disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs. In order to reach a decision on this matter the qualified person has taken into account his own views, as he is a member of the Local Awards Committee, and the views of another Committee member.
28. The qualified person was of the opinion that based on custom and practice the Committee members believed that their identities would not be disclosed in conjunction with the individual scores that they had awarded to each candidate, and that this belief was, “fundamental to a system of objective scoring when assessing ones peers.”
29. The public authority informed the Commissioner that, after considering the above points, the qualified person was of the view that disclosing the identity of the Committee members in conjunction with the individual scores which they awarded to each candidate would, or would be likely to, affect the objectivity of the scoring and therefore prejudice the effective conduct of the process.

¹ Appeal Numbers EA/2006/0011 and EA/2006/0013, paragraph 60.

² Appeal Numbers EA/2006/0011 and EA/2006/0013, paragraph 91.

30. After considering this information the Commissioner has formed the view that the opinion of the qualified person is both objectively reasonable and reasonably arrived at. Therefore the Commissioner is satisfied that the opinion of the qualified person is reasonable in all the circumstances of this case, and that the exemption under section 36(2)(c) is engaged in relation to the requested information.
31. In reaching this view the Commissioner has taken into account the fact that those applying for a Clinical Excellence Award are consultants, and that a large number of those on the Local Awards Committee were also consultants employed by the same public authority. The Commissioner recognises that should the individual Committee members be linked to the individual scores which they have awarded their peers, they may be inhibited in scoring objectively in the future. The Commissioner further recognises that such inhibition may lead to a less objective rewards scheme which would affect the NHS nationwide and to the quality of decision making in the rewarding of awards being undermined.
32. The Commissioner then went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest test

33. Whilst considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner recognises that there are competing public interest arguments. In considering the competing arguments the Commissioner has been mindful of the findings of the Information Tribunal in *Guardian Newspapers and Heather Brooke vs. Information Commissioner and the BBC*.
34. In particular, the Commissioner has been mindful of the Tribunal's views on the application of the public interest test in relation to this exemption, "In our judgment the right approach...is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that the disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgement required by s.2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."³
34. In favour of disclosure, the Commissioner is mindful of the strong public interest in openness, accountability and transparency in the decision making process. The complainant has argued that the release of this information would encourage better decision making, and that "if an individual has given an objective view they would have nothing to hide, and would certainly not be prevented from continuing to give an objective view."

³ Appeal Numbers EA/2006/0011 and EA/2006/0013, paragraph 92.

35. In favour of maintaining the exemption the Commissioner recognises the public interest in providing decision makers in public authorities with free thinking space, and allowing them to make objective decisions. The Commissioner gives full weight to the qualified person's reasonable opinion that disclosure would, or would be likely to, prejudice the effective conduct of public affairs, as disclosure would inhibit the objectivity of the Committee members when reaching a decision on scoring candidates for the awards.
36. The Commissioner recognises that the preservation of the anonymity of the Committee members in relation to the actual scores they have awarded would afford the Committee members some protection from the fear of repercussions or undue pressure from their peers, allowing them to give their most objective views in scoring the candidates.
37. The Clinical Excellence Awards Scheme exists to "reward those consultants who contribute most towards the delivery of safe and high quality care to patients and to the continuous improvement of NHS services including those who do so through their contribution to academic medicine."⁴ Given this purpose, the Commissioner believes that there is a substantial public interest in this scheme being run effectively, and awards being given in a fair and objective manner.
38. After considering all of the points above the Commissioner has formed the view that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner believes that the public interest factors in favour of disclosure such as transparency and better decision making are, to a large extent, already met by the degree of openness under which the awards scheme operates within the public authority – the applicants for the awards are made aware of their individual scores, and are also informed of the identity of the Committee members. The Commissioner also believes that the information which is provided to the applicants, in itself, already reflects a reasonable degree of transparency in this process, and encourages objective decision making.
39. As stated above the Commissioner believes that there is a substantial public interest in the Clinical Excellence Awards Scheme operating in an effective, fair and objective manner. The Commissioner accepts that if the information in question was disclosed there would be a real risk of prejudice to the objectivity of the decisions of the Committee members, especially as several of the Committee members are also consultants, employed by the same authority as the candidates.
40. Having recognised the substantial public interest in the effective running of this scheme the Commissioner finds that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

⁴ Department of Health publication, *'The new NHS consultant reward scheme: Clinical Excellence Awards'*.

The Decision

41. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

Section 36 as it correctly applied the exemption to the requested information.

42. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

By failing to issue an adequate refusal notice the public authority breached section 17 of the Act.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 14th day of June 2007

Signed

**Jane Durkin
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where –
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where:
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under subsection (1), (3) or (5) must-
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 36

- (1) This section applies to-
- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.
- (2) 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-
- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
 - (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
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".
- (5) In subsections (2) and (3) "qualified person"-
- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
 - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
 - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
 - (d) in relation to information held by the House of Commons, means the Speaker of that House,
 - (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
 - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
 - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
 - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
 - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
 - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
 - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
 - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
 - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
 - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
 - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,

- (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

- (6)** Any authorisation for the purposes of this section-
 - (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.

- (7)** A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
 - (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.