

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 17 April 2007

Public Authority: The Commission for Patient and Public Involvement in Health
Address: National Centre
7th Floor
120 Edmund Street
Birmingham
B3 2ES

Summary

The complainant requested a copy of an internal report prepared by the Commission for Patient and Public Involvement in Health following an investigation into the relationship between some NHS Patients' Forum members and their support organisation. The request was initially refused under section 30 (investigations and proceedings conducted by public authorities). The public authority subsequently argued that the report was exempt under sections 31 (law enforcement) and 41 (information provided in confidence). The Commissioner has concluded that sections 31 and 41 were not applicable and that the report should be disclosed to the complainant. In addition, he decided that the public authority had breached section 17(1), as it failed to state in its refusal notice that sections 31 and 41 were applicable to the information, and section 17(7), as it failed to state in its refusal notice whether it had a procedure for dealing with complaints about the handling of requests for information.

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 the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. **On 6 February 2006.** The complainant wrote to the Commission for Patient and Public Involvement in Health ("the CPPIH") asking for a copy of a report ("the report") produced by the CPPIH following an investigation into the relationship between the CPPIH, some of the Patients' Forums in London and the Creative Industries Development Agency ("CIDA"), an organisation which was contracted

by the CPPIH to provide administrative support to some of these Forums. Patients' Forums were set up for every NHS Trust as part of reforms designed to introduce greater public participation in the NHS. The CPPIH has responsibility for establishing, funding, monitoring and supporting the Forums. The report was produced following concerns voiced by some forum members about CIDA.

3. **On 20 February 2006.** The CPPIH wrote to the complainant to inform him that it would provide him with a copy of the report if he would agree to treat it as confidential. If he was unable to agree to this, the CPPIH informed him that it believed the report was exempt from disclosure under section 30 (investigations and proceedings conducted by public authorities). The complainant subsequently informed the public authority that he was not prepared to accept a copy of the report on a confidential basis.
4. **On 1 March 2006.** The complainant wrote to the CPPIH to complain about its refusal to release a copy of the report to him under the Act.
5. **On 23 March 2006.** The CPPIH wrote to the complainant to confirming its decision to refuse to release the report to him on the basis of section 30 of the Act.

The Investigation

Scope of the case

6. **On 9 March 2006.** The complainant contacted the Commissioner to complain about the fact that he had been refused a copy of the report under section 30 of the Act.

Chronology

The main communications which took place as part of the investigation are outlined below.

7. **On 18 August 2006.** The Commissioner wrote to the CPPIH requesting a copy of the report and seeking submissions from it in support of its decision to apply the exemption contained in section 30.
8. **On 19 October 2006.** The CPPIH wrote to the Commissioner enclosing a copy of the report and indicated that it had relied on section 30(2)(a)(iii) to withhold the report after receiving legal advice.
9. **On 20 December 2006.** The Commissioner wrote to the CPPIH indicating that in order to rely on section 30 it would need to explain why it believed that it had the appropriate investigative powers to engage the exemption. He also noted that no public interest arguments had been identified in the refusal notice and sought the CPPIH's view on this.

10. **On 5 February 2007.** The CPPIH wrote to the Commissioner stating that, in the light of his comments, it no longer sought to exempt the information under section 30. However it now sought to rely on sections 31 (law enforcement) and 41 (information provided in confidence) as a basis for withholding the report. The basis in which the CPPIH argued that these exemptions were applicable to the report is discussed in detail at paragraphs 15-40. As part of these arguments it made reference to its complaints procedure for dealing with complaints regarding the CPPIH itself and the Patients' Forums.
11. **On 7 February 2007.** The Commissioner requested a copy of the CPPIH's complaints procedure, a copy of which the CPPIH provided on the same day.

Analysis

Procedural matters

12. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant points are summarised below. The procedural matters are considered initially and then matters relating to the application of the exemptions.

Section 17 – Refusal notice

13. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should state in its refusal notice which exemptions are applicable and explain why the exemption applies. In this case the public authority failed to state in the refusal notice that it believed that sections 31 and 41 were applicable to the requested information. It also did not explain why the exemption it quoted applied to the information requested. It therefore breached section 17(1).
14. Section 17(7) of the Act requires that a refusal notice should contain details of any procedure for dealing with complaints about the handling of requests for information or state that such a procedure is not provided. The public authority gave no indication in its refusal notice whether such a procedure existed and therefore breached section 17(7).

Exemptions

Section 31 - Law enforcement

15. In its letter of 5 February 2007, the CPPIH stated that it believed that section 31(1) (g) was applicable to the report requested by the complainant as its disclosure would be likely to prejudice the exercise by the CPPIH of a function for a purpose specified in section 31(2). In this particular case it believed that the purpose affected would be that contained in section 31(2)(b), determining whether any person was responsible for any conduct which was improper.

16. The CPPIH explained that it had a function to investigate complaints made by Forum members or Forum support organisations, such as CIDA. Its complaints policy made it clear that complaints would be treated as confidential and that the complaint would be seen only by those directly involved in processing and responding to it.
17. The CPPIH's view was that the disclosure of the report might deter future complainants from coming forward, or others from volunteering information, if they believed that the complaint or information volunteered might be made public. It regarded the report as the outcome of an investigation into a private matter, the relationship between members of a Forum and employees of CIDA. If details of the investigation into a private matter were to be disclosed it would be likely to prejudice the effectiveness of future investigations.
18. The CPPIH believed that the public interest did not favour disclosure for the above reasons. In addition, it argued that CIDA might be unduly affected by the disclosure of the report as it continued to provide support services to other Forums. It also considered that the public interest had been adequately served by the publication of a section of the report detailing the general lessons learnt regarding the relationship between Patients' Forums and the Forums' support organisations.
19. The Commissioner believes that section 31 was applicable to the report rather than section 30, which was the original basis on which it was withheld. Section 30 provides an exemption in relation to particular criminal investigations and proceedings brought by public authorities. Section 31 is a wider exemption than section 30, providing an exemption, as in this case, for general steps taken in relation to law enforcement and other official investigations. Where section 30 applies, section 31 can not be used.
20. After considering the contents of the report, the Commissioner accepts that it relates to an investigation to determine whether there may have been conduct of an improper nature. The terms of reference of the report, and the report itself, include an examination of whether unjustified threats of legal action were made and issues related to financial accountability.
21. The investigation carried out by the CPPIH was not an internal investigation but involved it carrying out an investigation into separate organisations, Patients' Forums. This therefore raised an issue as to whether, in carrying out such an investigation, CPPIH was exercising one of its own functions so as to bring it within section 31. However, under section 20 of the National Health Service Reform and Health Care Professions Act 2002, the CPPIH is required to set and monitor quality standards in relation to how Patients' Forums exercise their functions. The Commissioner was therefore satisfied that this brought the investigation, and the subsequent report, by CPPIH within section 31.
22. In determining whether the disclosure of the report would be likely to prejudice CPPIH's ability to ascertain whether a person has acted improperly, the Commissioner notes that disclosure of this type of information could deter people from complaining and contributing to similar investigations in future, particularly

where people had understood that their complaint and views would be treated with a degree of confidence.

23. However, in this case, the Commissioner is aware that a significant amount of the detail of the complaints which were investigated, including the names of the parties involved, was available on web sites on the internet prior to the completion of the report. In addition, there was a national newspaper article which contained extracts from interviews with both sides to the dispute, which was the main focus of the report, discussing issues related to the complaints which were detailed in the report. Given the public nature of the dispute which resulted in the investigation and the amount of information some of the parties involved were willing to place in the public domain, the Commissioner is not convinced that the release of this particular report would have been likely to deter people from complaining to CPPIH in future or to prejudice its ability to carry out effective investigations once a complaint was received.
24. The Commissioner has also taken account of the fact the report did not concentrate solely on the specific complaints that were made to the CPPIH. Significant parts of the report considered broader issues, particularly how the system set up to support Forums operated in practice, looking more generally at the relationship between the Forum members, CIDA and the CPPIH.
25. In light of the above considerations the Commissioner is not satisfied that the release of the report would have prejudiced the CPPIH's ability to investigate complaints of improper conduct and therefore does not believe that the exemption contained in section 31 was engaged.

Section 41 – Information provided in confidence

26. In its letter of 5 February 2007, the CPPIH indicated that it believed that some of the information contained in the report was obtained from CIDA as part of the complaints investigation. As the CPPIH complaints policy states that complaints will be treated as confidential, it considered that the information provided by CIDA was subject to an actionable duty of confidentiality and exempt from disclosure under section 41.
27. The CPPIH stated that it adopted a consistent approach in protecting confidential information obtained as part of a complaints investigation. It believed that the information obtained from CIDA was by its nature confidential as it related to a private matter, that of relationships and working practices between CIDA employees and certain Forum members. CPPIH believed that it could not disclose this information as it had discussed the matter with CIDA but that CIDA would not consent to disclosure.
28. Section 41(1) provides that information is exempt from disclosure if:-

- (a) it was obtained by the public authority from another person and

- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

29. In order to determine whether section 41(1) applied to the information provided by CIDA, the Commissioner took into account the guidance on the application of the section provided by the Information Tribunal in *Derry City Council v The Information Commissioner EA/2006/0014* at paragraph 30. The issues he considered were:-

- (a) was the information obtained by the CPPIH from a third party?; and if so
- (b) would the disclosure of the information constitute an actionable breach of confidence, that is
 - i. did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so
 - ii. was the information communicated in circumstances that created such an obligation?; and, if so
 - iii. would disclosure of the information be a breach of that obligation?;

and, if this part of the test was satisfied;

- (c) would the CPPIH nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

(a) Was the information obtained from a third party?

30. It is clear that some of the information contained within the report was obtained by CPPIH from CIDA and that, in relation to that information, this requirement was satisfied.

(b) Would disclosure constitute an actionable breach of confidence?

(i) Did the information have the necessary quality of confidence to justify an obligation of confidence?

31. The information obtained from CIDA gave some details regarding the background and substance of its dispute with certain Forum members. The Commissioner is satisfied that this information is not trivial in nature and therefore that it could, potentially, be regarded as having the necessary quality of confidence.

32. However, the Commissioner does not accept the CPPIH's argument, that because the information provided by CIDA related to the relationships between and working practices of CIDA employees and Forum members, it was by its nature confidential. Whilst such information could be subject to a duty of

confidentiality, the Commissioner would need to look carefully at the circumstances of each case before deciding whether such a duty existed.

33. The Commissioner has noted earlier the public nature of the dispute between the parties and the amount of information about this dispute which was in the public domain, in newspaper articles and on web sites on the internet at the time that the request was made. As a consequence he is not convinced that the information provided by CIDA had the necessary quality of confidence which would give rise to an actionable breach of confidence, if disclosed. However, he acknowledges that there might be an argument that not all of the information provided by CIDA was in the public domain at that time and he therefore went on to consider whether the other elements necessary for an actionable duty of confidence to arise existed.

(ii) Was the information communicated in circumstances that created an obligation of confidence?

34. The CPPIH's complaints procedure states that all complaints will be treated as confidential and that they would only be seen by the people directly involved in processing, handling and responding to the complaint. It is therefore reasonable to assume that when CIDA provided information in relation to complaints being investigated by the CPPIH that it would have expected the CPPIH, as the recipient of the information, to keep it confidential. This would therefore have given rise to an obligation of confidence.

(iii) Would disclosure of the information be a breach of that obligation?

35. If the information were held under a duty of confidentiality then disclosure of it would give rise to a breach of that obligation.

(c) Would the CPPIH have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

36. Section 41 is an absolute exemption and therefore there is no public interest to be applied under the Act. However, under the common law relating to confidentiality, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information subject to the duty of confidentiality. The public interest under the Act assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. However, under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. Under the law of confidence the burden of proof is therefore the reverse of that under the Act.
37. In *Derry City Council v The Information Commissioner (EA/2006/0014)*, it was argued before the Information Tribunal that an exceptional case has to be made for the disclosure of information which was subject to a duty of confidentiality. However, the Tribunal's view was that no exceptional case has to be made to override the duty of confidence that would otherwise exist. All that is required is a

balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence. Disclosure would be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

Public interest arguments in favour of maintaining the duty of confidence

38. CPPIH stated that it believed that there was a public interest in maintaining the duty of confidentiality as disclosure might prejudice future investigations. It reiterated its belief that the public interest had been served by the publication of a section of the report related to lessons that had been learned regarding the Forums and their support organisations.
39. As explained earlier (paragraphs 18-23), the Commissioner is not convinced that disclosure of any of the information contained in the report would have been likely to prejudice its future investigations because of the public nature of the dispute between CIDA and some Forum members.
40. CPPIH also argued that disclosure of the information might have caused prejudice to CIDA because it provided support services to other Forums. The Commissioner is not persuaded that the disclosure of the information in this report would have been likely to have an adverse affect on CIDA's relationship with the members of other Forums. The information related to a specific dispute between CIDA and particular Forum members. He sees no reason why this should impact on its relationship with members of other Forums who were not party to that dispute. In any event, it seems likely that members of other Forums would have been aware of the substance of the issues as a result of the information which had been published and through contact with fellow Forum members.

Public interest arguments in favour of disclosure of the information

41. The Commissioner recognises that there is a general public interest in the disclosure of this type of information as it would promote accountability and transparency in the spending of public money, particularly as some of the issues involved in the report related to whether contracts entered into on behalf of the public were operating effectively and producing value for money.
42. He also believes that there is a public interest in furthering the understanding of and participation in the public debates of issues of the day. At the time that the request was made, there was significant interest in the issue of public participation in health services at a local level. A considerable amount of discussion had taken place about the effectiveness of the system that was in operation at the time, a lot of which centred on the role of the CPPIH and the operation of the Patients' Forums. The Government had announced that the CPPIH was to be abolished (which it is anticipated will occur in 2008) and that new arrangements were to be put in place in relation to the Forums. There was consequently a lot of debate about what alternative mechanisms might be put in place in this area. Disclosure of this information would therefore have provided a useful insight into some of the problems which had been encountered with the

existing system and would have assisted in allowing lessons to be learnt for the development of a new system of public participation.

43. Having carefully considered the contents of the report and, given the public nature of the dispute to which it related, the Commissioner does not feel there was a strong public interest in maintaining any duty of confidentiality which it could be argued existed in relation to any information not already in the public domain.
44. The Commissioner is satisfied that, even if a duty of confidentiality existed in relation to some of the information provided by CIDA to CPPIH, the public interest in the disclosure of that information outweighed the duty of confidentiality so as to provide a defence to CPPIH for a claim that it breached that duty. He is therefore not satisfied that section 41 was applicable to this information.

The Decision

45. The Commissioner's decision is that the public authority has not dealt with the following elements of the request in accordance with the requirements of the Act:
 - section 17(1) as it failed to state in the refusal notice that it believed that sections 31 and 41 were applicable to the requested information. It also did not explain why the exemption it quoted applied to the information requested;
 - section 17(7) as it failed to state in its refusal notice whether it had a procedure for dealing with complaints about the handling of requests for information;
 - section 31 and 41 as it incorrectly applied the exemptions to the complainant's request.

Steps Required

46. The Commissioner requires the public authority to disclose to the complainant the information he requested.
47. The Commissioner does not require the public authority to take any steps in relation to the breach of section 17(1) or 17(7)
48. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

49. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

50. 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 17th day of April 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Refusal of Request

Section 17(1) provides that -

“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.”

Section 17(7) provides that -

“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.”

Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources."

Section 30(3) provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

Section 30(4) provides that –

"In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department."

Section 30(5) provides that –

"In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957."

Section 30(6) provides that –

“In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.”

Law enforcement

Section 31(1) provides that –

“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-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (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."

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”