

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 March 2010

Public Authority: The Rotherham NHS Foundation Trust
Address: Moorgate Road
Rotherham
South Yorkshire
S60 2UD

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Rotherham NHS Foundation Trust (the "Trust") for a copy of the monthly update and the business development quarterly update from the Board of Directors meeting held on Thursday 24 July 2008. The Trust provided the information to the complainant with a number of redactions made under section 36(2)(b)(i) and (ii). Upon the commencement of the Commissioner's investigation some of the redactions were removed and therefore some further information was provided to the complainant. The Commissioner has reviewed the remaining redactions and considers that the Trust correctly applied the section 36(2)(b)(ii) exemption. The Commissioner does however consider that the Trust breached section 1(1)(b) and section 10(1) in its handling of the 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 the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made a request to the Trust on 27 August 2008. The complainant asked the Trust to provide him with a copy of the monthly update and the business development quarterly update from the Board of Directors meeting held on Thursday 24 July 2008. These reports include information relating to legal issues, financial issues, risk

assessment of existing services, potential service withdrawal or potential future service development and addition amongst other information.

3. On 8 September 2008 the Trust provided the complainant with a copy of the monthly update and the business development quarterly update from the Board of Directors meeting held on Thursday 24 July 2008, however some of the information had been redacted. The Trust explained that the information had been redacted under the exemption contained at section 36 of the Act.
4. On 15 September 2008 the complainant asked the Trust to provide him with its detailed reasoning for applying this exemption to make the redactions, including the public interest test it had carried out.
5. On 23 September 2008 the Trust provided the complainant with the reasoning behind its application of section 36(2)(b)(i) and (ii) in relation to the redactions it had made.
6. As the complainant remained dissatisfied with the Trust's response it carried out an internal review. On 24 December 2008 the Trust wrote to the complainant with the result of the internal review it had carried out. It upheld its application of section 36(2)(b)(i) and (ii) in relation to the redactions made.

The Investigation

Scope of the case

7. As the complainant was dissatisfied with the result of the internal review, he made a formal complaint to the Information Commissioner's Office on 9 February 2009.
8. During the course of the Commissioner's investigation the Trust removed some of the redactions it had originally made and provided this information to the complainant. The Commissioner has therefore only considered the remaining redactions within this notice.

Chronology

9. On 8 July 2009 the Commissioner wrote to the Trust in order to obtain a copy of the withheld information and the Trust's further arguments in relation to its application of section 36(2)(b)(i) and (ii) to the redactions made.
10. On 5 August 2009 the Trust provided the Commissioner with a copy of the withheld information. The Trust also provided further arguments in relation to its application of section 36(2)(b)(i) and (ii) to the redactions

made.

11. On 21 August 2009 the Commissioner wrote to the Trust to gain further clarification in relation to its application of section 36(2)(b)(i) and (ii) to the redactions made.
12. On 18 September 2009 the Trust responded to the Commissioner. It removed some of the redactions originally made and provided this information to the complainant. It also submitted further arguments supporting its application of section 36(2) (b)(i) and (ii) to the remaining redactions.

Analysis

Section 36(2)(b)(i) and (ii)

13. Sections 36(2)(b)(i) and (ii) state 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-

(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

14. A full text of section 36 is available in the Legal Annex at the end of this Notice.
15. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to prejudice the free and frank provision of advice. However having considered the information and the arguments presented by the Trust in relation to section 36(2)(b)(ii) the Commissioner considers that it is more appropriate in this case to consider the application of section 36(2)(b)(ii) first before reaching a decision in relation to section 36(2)(b)(i).
16. Information may be withheld under section 36(2)(b)(ii) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that, “On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable...” (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, "...in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at..." (paragraph 64) "...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

17. 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 objectively reasonable and reasonably arrived at.
18. The Trust has explained that the Chief Executive is the qualified person and his opinion was obtained on 8 September 2008. The Trust has not provided the Commissioner with a copy of the qualified person's opinion or a copy of the submissions put to the qualified person to enable him to reach his opinion. It has however explained what the qualified person's opinion is and what was taken into account when coming to that opinion. The Commissioner would normally insist on seeing a copy of the submissions put to the qualified person and the qualified person's opinion, however in this case the submissions were made and the opinion was provided orally and therefore this has not been possible. The Tribunal commented in the case of *University of Central Lancashire v the Information Commissioner EA/2009/0034* that it would normally expect a public authority to have documented the process undertaken when applying section 36.
19. The Trust has explained that verbal discussions took place between the qualified person, the Head of Information and the Chief of Business Development to enable the qualified person to reach his opinion. The Commissioner is satisfied that these verbal discussions took place and that the submissions set out below were put to the qualified person to enable him to reach his opinion. The Trust has explained that the qualified person's opinion is that if the information requested were disclosed it would limit the amount of future information provided to the Board. It explained that this would inhibit discussions that take place which help ensure the organisation is run effectively.
20. The Trust has explained that in coming to the reasonable opinion set

out above the qualified person was provided with advice by the Head of Information and the Chief of Business Development. It explained that the Chief of Business Development was the author of the Business Development Quarterly Report which forms part of the requested information. They provided advice as to the redactions that may need to be made as release of this information they suggested would be likely to impact upon the board's ability to operate effectively.

21. The Trust has confirmed that the qualified person took account of the following factors when coming to the reasonable opinion. In relation to the Chief Executive's report to the Board dated July 2008, the qualified person was mindful that information needs to be shared with the Board to ensure it is advised as to the full and current position and to alert it to possible challenges ahead. It explained that it believed disclosure would have a limiting effect on the discussions taking place. In relation to the Business Development Quarterly Report to the Board (July 2008), it explained that the Trust operates in a competitive environment and needs to operate in a commercial manner. It explained that release of internal information relating to internal thinking of the Trust could have a detrimental impact on discussions and decisions made. It explained that the Trust needs to be able to explore options and discuss risks without the fear of this information being disclosed. It stated that release of this information would inhibit future information reporting, causing the Trust to lose the potential for enhancing efficiency and developing its business, thereby adversely impacting on the services it provides to the public. It explained that this is recognised in the Commissioner's Guidance 25 which can be accessed at the following link:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/effectiveconductofpublic%20affairs.pdf

The Guidance states that "Section 36(2)(b) acknowledges that the disclosure of information which reveals internal thinking processes may be detrimental to the ultimate quality of either policy-making (for non-section 35 bodies) or to other decision-making within a public authority. Some disclosures may lead to less candid and robust discussions, hard choices being avoided and ultimately the quality of government being undermined."

22. Upon considering the above, the Commissioner accepts that it was reasonable to conclude that disclosure would reveal free and frank exchanges of views which would or would be likely to lead to the Board being less willing to discuss issues and share information in a free and frank nature in the future. This is because staff would be concerned that such discussions and information may be placed into the public domain. The Commissioner also accepts that it is important for the Board to be able to share information and enter into discussions on issues relating to the Trust freely and frankly in order for the Trust to be able to run effectively. Furthermore the Commissioner is mindful of the

short period of time which had elapsed between the Board meeting and the time of the request. He has therefore borne in mind that discussions surrounding certain issues were ongoing and at an early stage.

23. Before moving on to consider the public interest test, the Commissioner also notes that the Trust has not clearly identified whether it considers the prejudice would or would be likely to occur. The Commissioner is therefore mindful of the Tribunal decision in McIntyre in which it was stated that:

“...in the absence of designation as to the level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.”

24. The Commissioner has therefore proceeded upon the basis that the lower prejudice threshold applies, that the prejudice would be likely to occur, in the absence of evidence to the contrary.
25. The Commissioner has taken into account the factors which were considered by the qualified person in relation to the application of section 36(2)(b)(ii). These primarily concerned the likely prejudicial effect of disclosure on the frankness and candour of internal Board discussions in order to enable the Trust to run effectively as described in paragraphs 21 and 22 above. Therefore having considered the circumstances in which the opinion was given and the content of the withheld information to which it relates the Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) was correctly engaged.
26. 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 Appeal)¹, where the Tribunal considered the law relating to the balance of the public interest in cases where the section 36 exemption applied.² The Tribunal held that the application of the public interest test in section 36 cases entails a consideration of the following factors:
- (a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that

the balance of the public interest will favour maintaining the exemption.

- (b) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
 - (c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.
 - (d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the free and frank exchange of views by public officials for the purposes of deliberation.
 - (e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
27. 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 s 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, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

28. The Trust has explained that it recognises that there is a public interest in ensuring that the Trust is properly and responsibly managed and is efficient. It suggested that this did not however extend to full and detailed knowledge of every aspect of the Trust's existing and future business.
29. The Trust also recognised that there is a public interest maintaining public confidence in the Trust.
30. The Commissioner agrees that there is an inherent public interest in ensuring that there is public confidence in public authorities through being transparent and open in the decisions they make. The Commissioner also accepts that there is a strong public interest in disclosing information where to do so would help determine whether public authorities have acted, or are acting appropriately.

Public interest arguments in favour of maintaining the exemption

31. The Trust has explained that whilst it recognises that there is a public interest in ensuring that the Trust is properly and responsibly managed and is efficient, it suggested that this did not however extend to full and detailed knowledge of every aspect of the Trust's existing and future business.
32. It also acknowledged that whilst there was public interest in maintaining public trust and confidence in the Trust through openness and transparency, it was suggested that trust and confidence could be undermined if information about risks is disclosed at an inappropriately early stage, causing premature alarm and distress if it relates to health provision, or if the potential provision of new services generates hope and expectation that may not be realised should the Trust decide not to pursue such a service. It explained that the Trust needed to be able to explore options and discuss risks without fear of disclosure and the impact that could have on public confidence in itself or other NHS bodies.
33. The Commissioner agrees with the Trust that frank and honest internal discussion including the exchange of views and information is essential in enabling the Trust to operate effectively. Therefore there is a strong public interest in the Trust Board being able to enter into discussion, share information and exchange views freely and frankly. Furthermore the Commissioner agrees that depending upon the issues being discussed, if information were released at the early stages of discussions it could cause alarm and distress. However the Commissioner considers that it would be possible to mitigate such concerns to a certain extent by release of other information to explain the fact that discussions are at an early stage.

Balance of the public interest arguments

34. In considering the balance of the public interest, the Commissioner has again considered the nature of the withheld information and the factors he has cited in paragraph 26.
35. The Commissioner agrees with the Trust's public interest arguments in favour of disclosure relating to openness, transparency and accountability. He also considers that disclosure may enhance public confidence in the Trust.
36. The Commissioner considers that there is a strong public interest in the Trust being able to operate effectively and making quality, well thought out decisions. In order for the Trust to be able to do this it is inherent that the board can hold meetings in which they can discuss issues openly and with a full exchange of views and information.
37. The Commissioner considers that there is great potential for the Trust's decision making processes to be undermined by disclosure of the redacted information. He notes that the views expressed in the Reports are of a free, frank and robust nature. Furthermore the Commissioner is mindful that the request for information was made only one month after the date of the Board reports and therefore the issues discussed were very much live and ongoing. The Commissioner also recognises that following his involvement the Trust did disclose further information to the complainant which it had previously considered exempt under section 36. In doing so he acknowledges the Trust's opinion that this further disclosure goes some way in meeting the public interest in transparency and openness. The Commissioner therefore considers that the public interest in favour of disclosure of the redacted information is outweighed by the public interest in maintaining the exemption contained at section 36(2)(b)(ii) of the Act.
38. As the Commissioner has concluded that all of the outstanding information was correctly withheld under section 36(2)(b)(ii) he has not considered the application of section 36(2)(b)(i) any further.

Procedural Requirements

Section 1(1)(b)

39. As the Trust removed some of the redactions that it had originally withheld, during the course of the Commissioner's investigation, it breached section 1(1)(b). This is because it failed to provide the complainant with information which it held, which was not exempt, within the statutory time for compliance.

Section 10(1)

40. Section 10(1) of the Act provides that:-

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

41. The Commissioner has considered whether or not the Trust complied with section 10(1) of the Act.

42. As the Trust failed to provide the complainant with all information it held relevant to the scope of the request and which was not exempt prior to the Commissioner's investigation, it breached section 10(1) of the Act in its handling of the request.

The Decision

43. The Commissioner considers that the Trust correctly applied the exemption contained at section 36(2)(b)(ii) of the Act in relation to the remaining redactions.

44. The Commissioner considers that the Trust breached section 1(1)(b) and section 10(1).

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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 4th day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“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.

Section 36(2) 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-

- (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.

Section 36(3) provides that –

“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).”

Section 36(4) provides that –

“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”.

Section 36(5) provides that –
“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.”

Section 36(6) provides that –

“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.”

Section 36(7) provides that –

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.