

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 June 2011

Public Authority: NHS Wakefield District
Address: White Rose House
West Parade
Wakefield
WF1 1LT

Summary

The complainant requested information relating to details of all correspondence between NHS Wakefield District Primary Care Trust (the "PCT"), NHS Yorkshire and Humber Strategic Health Authority (the "SHA") and the Department for Health concerning plans to build a specialist surgical centre at Dewsbury and District Hospital. The PCT refused the request citing section 36(2)(b)(i) and (ii) of the Act.

The Commissioner finds that that the exemption under section 36(2)(b)(ii) was engaged and that the public interest in maintaining the exemption outweighed the public interest in favour of disclosing the information. The Commissioner did however record a procedural breach of the Act in relation to the PCT's handling of this 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. On 17 February 2010, the complainant made the following request to the PCT:

"Under the Freedom of Information Act, please send me the following:

Details of all correspondence between NHS Wakefield District and NHS Yorkshire and Humber concerning plans to build a specialist centre for cancer and urology surgery at Dewsbury and District Hospital since September 1 2009.

Details of all correspondence between NHS Wakefield District and the Department of Health concerning the same proposals over the same timescale".

3. On 17 March 2010, the PCT issued a refusal notice to the complainant advising it did hold a series of emails and letters between the PCT and the SHA however it held no correspondence with the Department of Health relating to the Dewsbury Business case. The PCT elected not to disclose the information it did hold citing section 36 of the Act. This was on the basis that disclosure would or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation and that the public interest favoured the maintenance of this exemption.
4. On 28 March 2010, the complainant requested an internal review of the PCT's decision not to disclose the information requested.
5. On 15 April 2010, the PCT wrote to the complainant to advise the internal review had upheld the PCT's original decision to withhold the requested information on the basis of the exemption at section 36 of the Act and again advised the public interest favoured non-disclosure.

The Investigation

Scope of the case

6. On 6 May 2010, the complainant contacted the Commissioner complaining about the PCT's decision not to supply the information requested. In particular, the complainant referred to:
- the fact that not all of the correspondence would concern expressions of opinion or recommendations but rather factual

or background information such as information regarding the shortfall in finance.

- the fact that statistical information such as projections/analyses and commentary upon these would not be covered by the opinion of the qualified person.
 - there was an overwhelming public interest case for the information to be released as the decision not to go ahead with the building of a new specialist surgical centre for patients with cancer would affect services serving more than 500,000 people in the area. The complainant also highlighted the long-running public consultation that had taken place regarding the proposals.
 - as the decision not to go ahead with the Dewsbury proposals had already taken place, the decision not to disclose due to assessing future options had no bearing as he was looking for information about why the previous scheme had been abandoned.
7. The PCT advised the complainant it held no correspondence with the Department of Health relating to the Dewsbury business case, therefore this aspect of the request has been scoped out of the Commissioner's investigation. The scope of the investigation will include the PCT's handling of this case, the application of the exemption claimed and the balance of the public interest as it applies to the qualified exemption cited.

Chronology

8. On 21 June 2010, the Commissioner wrote to the PCT advising a complaint had been received and requested a copy of the withheld information. A redacted copy of the requested information was supplied on 15 July 2010. The PCT explained that these redactions were made on the basis that the correspondence containing the requested information also related to other issues outside the scope of the request.
9. On 6 October 2010, the Commissioner wrote to the PCT requesting further information on the application of the section 36 exemption. The PCT replied on 4 November 2010 confirming it was relying on section 36(2)(b)(i) and (ii) of the Act to refuse the request.
10. On 10 December 2010, the Commissioner again wrote to the PCT and requested an unredacted copy of the withheld information which was supplied on 21 December 2010.

Analysis

Exemptions

Section 36 - prejudice to the effective conduct of public affairs

11. The PCT withheld the requested information under section 36(2)(b)(i) and (ii).
12. The relevant parts of Sections 36(2) 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, ..
13. This is a qualified exemption, and is therefore subject to the public interest.
14. The Commissioner has first considered the application of section 36(2)(b)(ii).

Opinion of the qualified person

15. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to lead to the adverse consequences described in that part of the exemption, in this case the inhibition of the free and frank exchange of views for the purposes of deliberation. In order to establish whether the exemption has been applied correctly the Commissioner will first consider whether the opinion was reasonably arrived at. He will then go on to consider whether the opinion was reasonable in substance.
16. In deciding whether the opinion was ‘reasonable’ the Commissioner has been led by the Tribunal’s decision in the case of *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the sense in which the qualified person’s opinion is required to be reasonable. The Tribunal concluded that ‘in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at’ (paragraph

- 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).
17. If the Commissioner decides that the exemption is engaged he must then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
 18. In considering whether the opinion was reasonably arrived at in this case, the Commissioner has established that the reasonable opinion was given by Mr Alan Wittrick, who at the time of this request was Chief Executive of the PCT and therefore an employee of the public authority authorised for the purposes of the section by a Minister of the Crown in accordance with section 36(5)(o)(iii) of the Act.
 19. In its submissions to support the application of section 36, the PCT has explained the process by which this opinion was provided, advising that the request was discussed at a meeting held in March 2010 between Mr Wittrick in his capacity as 'Qualified Person', the PCT's Director of Strategy and its Information Governance Manager. The outcome of that meeting and rationale was communicated to the complainant by the qualified person in the PCT's refusal notice dated 17 March 2010.
 20. Unfortunately this leaves the Commissioner in a difficult position. Although the PCT submissions suggest why Mr Wittrick reached the opinion he did, the PCT has not provided the Commissioner with the date of the meeting, any notes taken at that meeting or the substance of all the arguments that may have been taken into account at that meeting to help the qualified person form his opinion. It is also not clear whether he was provided with any of the withheld information to which section 36(2)(b)(ii) was applied. As the PCT has failed to document its procedures and has therefore not been able to evidence what took place and when the Commissioner has been provided with no evidence that the meeting took place at all. This therefore presents a difficulty for the Commissioner in being able to conclude that the opinion was reasonably arrived at.
 21. However despite not being provided with evidence that explicitly explains why the qualified person considered the information in question to be exempt, on this occasion the Commissioner is satisfied that the opinion appears to be reasonably arrived at for the following reasons.
 22. The PCT provided the Commissioner with a copy of the refusal notice signed by the qualified person which set out the rationale for the use of the section 36 exemption and is a clear indicator that an opinion was given.

23. The PCT advised the Commissioner that in coming to his decision, the qualified person had taken into account that the case for a specialist oncology centre in Dewsbury was currently on hold and was still subject to wide ongoing discussions in respect of how best to proceed. The qualified person considered that disclosure of the information at that time would inhibit effective debate on the subject and could have the potential to limit available options because of adverse public reaction.
24. 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), which primarily concerned the likely prejudicial effect of disclosure on the frankness and candour of internal discussions surrounding the Dewsbury business case that it was argued needed to be wide ranging and covering all available options. The central tenet of these factors is that, at the time of the request, the PCT had not made the final decision as to the future development of Dewsbury and District Hospital. The complainant has argued that this is not true, and that at the time of the request such decisions had been made and that part of the decision making process is over. This should not therefore in his opinion have any bearing on or relate to what future plans are considered. As such the decision not to go ahead with the plans has been taken. The PCT has repudiated this and in its internal review response to the complainant attached a copy of a press release dated 16 Feb 2010, the day before the request was made, which supports its assertion that plans to build a new facility for a specialist urology and cancer surgery centre due to substantial additional investment being required were only on hold and had not been abandoned.
25. The Commissioner has noted that the PCT has stated again to him that final decisions had not been made, and nor has he been provided with any evidence to suggest otherwise. Bearing this in mind, the Commissioner is satisfied that at the time of the request the PCT had not made the final decision on the future development of the hospital. Therefore he is satisfied that the qualified person did take into account relevant factors when reaching his opinion.
26. Furthermore the Commissioner is satisfied that the substance of the withheld information is not such that the qualified person could not reach a reasonable opinion that the exemption is engaged, despite flaws in the application of section 36. Therefore he is satisfied that the qualified person's opinion was reasonably arrived at.
27. The Commissioner has gone on to consider whether the qualified person's opinion was reasonable in substance.

28. The basis of the qualified person's opinion in relation to section 36(2)(b)(ii) is that disclosure would, or would be likely to, have an inhibitory effect on NHS staff contributing to discussions and discussing options. The PCT stated that key stakeholders need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes or projects. It commented that the complexity and inter-relatedness of its service configuration requires their discussions and analysis to be free-ranging, covering all available options. These discussions need to be able to take place freely, without raising false expectations which wouldn't be possible if the information was released into the public domain at the stage the request was made. As stated above the qualified person noted that hospital plans were on hold and therefore further options were still under consideration.
29. Bearing this point in mind the Commissioner has examined all the withheld information in this case and accepts that it was reasonable to conclude that disclosure of the withheld information would reveal free and frank discussions which could lead to NHS staff being less willing to discuss issues in a free and frank nature in the future.
30. Therefore, despite not being provided with details of the explicit evidence which led Mr Wittrick to reach the conclusion that the information was exempt on the basis of section 36(2)(b)(ii) the Commissioner is of the view that the opinion can be considered reasonable in substance. He is therefore satisfied that section 36(2)(b)(ii) is engaged in relation to the information withheld under that section.

Level of prejudice

31. Before moving on to consider the public interest test, the Commissioner notes that the qualified person's opinion does not clearly identify the likelihood of the inhibition in the case of section 36(2)(b)(ii) occurring. The qualified person had initially indicated disclosure **would** inhibit effective debate, at internal review this had changed to **may** end up closing off better options. In its submissions to the Commissioner, the PCT advised that disclosure **would** prevent the free and frank exchange of views and **may** end up closing off better options.
32. The Commissioner considers that where the level of prejudice has not been specified then, unless there is clear evidence that the higher level should apply, the lower threshold should be used and has therefore proceeded on the basis that the lower prejudice threshold level applies.

Public interest test

33. Under section 2(2) of the Act, exempt information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has considered public interest arguments in relation to section 36(2)(b)(ii). In accepting that the opinion of the qualified person was reasonable, the Commissioner has accepted that disclosure of the information in question would be likely to inhibit this process. The role of the Commissioner here is to consider whether these concerns outweigh the public interest in disclosure.
34. As noted in the case of *McIntyre v Information Commissioner and the MOD (EA/2007/0068)*, the reasonable opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice may occur and 'does not necessarily imply any particular views as to the severity or extent of such inhibition or prejudice, or the frequency with which it may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. The Commissioner understands this to mean that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the nature, severity, extent and frequency of prejudice or inhibition.

Public interest arguments in favour of disclosing the requested information

35. The PCT recognised there is public interest argument for providing greater transparency for decision making processes and in promoting openness and public participation within the Trust.
36. The Commissioner agrees with the PCT's public interest arguments in favour of disclosure relating to transparency, accountability and participation. He also considers that disclosure of the withheld information in this case would show the public how a key mechanism within the PCT makes decisions that impact on the healthcare system and how this process happens. Furthermore, disclosure of officials' advice and deliberations could provide a certain level of encouragement to ensure the quality of advice they provide in the future and actually improve decision making processes.
37. The complainant has argued that there is an overwhelming public interest case for disclosure of the information given its importance to the future of Dewsbury Hospital, particularly as the decision affects services serving more than 500,000 people in the area.

Public interest arguments in favour of maintaining the exemption

38. The PCT argued that disclosure of the withheld information would inhibit effective debate, stressing that it was important its staff are able to freely and frankly record and discuss the risks to particular programmes or projects. The PCT considered release of the information in this case whilst discussions were still taking place would be severely detrimental to its ability to explore all the available options and to discuss risks openly. The PCT advised that it was trying to work towards a solution that would achieve the best outcome for patients and that disclosure, whilst this process remained ongoing would only serve to raise false hopes and expectations.

Balance of the public interest arguments

39. In considering where the balance of the public interest lies, the Commissioner notes that the arguments for non-disclosure outlined above rely on the fact that the content of the information requested indicates frank discussions having taken place, and that disclosure would inhibit similar discussions in the future. The Commissioner is not generally persuaded that disclosure of one set of discussions would necessarily inhibit future discussions, but is of the view that such arguments must be considered on a case by case basis.
40. Having reviewed the withheld information, the Commissioner considers that the opinions and views expressed by the NHS staff internally and to the SHA and other parties were given freely and frankly and with the intention of providing views and opinions in dealing with the proposed Dewsbury business case. In relation to any 'chilling effect' on the future frankness and candour of discussions that might result in poorer decision making, the guiding principle is the robustness of officials – i.e. they should not be easily deterred from doing their job properly.
41. However, the Commissioner considers that in this particular case, the views expressed by PCT officials related to discussions aimed at exploring all the available options. The Commissioner accepts that public authorities need time, space and privacy when deciding how best to proceed with significant projects and that in this particular case, there is a real and likely risk that similar discussions would be inhibited in future if officials are not able to give such opinions freely and frankly. The PCT has advised the Commissioner that at the time of the request, the Dewsbury decision had been placed on hold and discussions in respect of the best way forward remained ongoing with the PCT, along with other parties involved still actively considering their options. The Commissioner accepts that a chilling effect in the frankness and candour of discussions would be significant if disclosure of the requested information had been made at this stage. He has

therefore given significant weight to the timing of the request and the impact that this would have on the openness of discussion of options relating to this issue between the PCT and other parties, both current and future.

42. The Commissioner acknowledges that disclosure could provide the public with further information on an issue that will affect health provision within the Mid Yorkshire Hospitals NHS Trust and in particular Dewsbury and District Hospital, and that the matter was the subject of much local debate. However, the Commissioner is also mindful of the role free and frank discussion plays in enabling early stage discussions about issues threatening the delivery of objectives, providing officials with the opportunity to think strategically, develop thinking and explore options and their implications in a frank and candid way.
43. The Commissioner concludes that the public interest in maintaining the exemptions contained at section 36(2)(b)(ii) outweighs the public interest in disclosing this information.
44. As he has come to the conclusion that all of the information falling within the scope of the request has been correctly withheld under section 36 (2)(b)(ii), the Commissioner has not gone on to consider the application of section 36(2)(b)(i).

Procedural Requirements

Section 17(7): refusal of request

45. Section 17(1) of the Act 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 be otherwise apparent) why the exemption applies.

46. The PCT’s response to the request of 17 February 2010, dated 17 March 2010 and its internal review dated 15 April 2010, failed to comply with section 17(1)(b) as it did not specify the subsection of section 36 that was deemed to apply.

The Decision

47. The Commissioner's decision is that the PCT dealt with the following elements of the request in accordance with the requirements of the Act:
- The PCT correctly withheld the information under section 36(2)(b)(ii) of the Act.
48. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Section 17(1)(b) of the Act in that the PCT failed to specify the subsection of section 36 that was deemed to apply.

Steps Required

49. The Commissioner requires no steps to be taken.

Other matters

50. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
51. For the purposes of the section 36 exemption, in order to establish whether a qualified person's opinion was reasonable the Commissioner will consider the information that the qualified person had in front of them when making a decision. This approach accords with the Information Tribunal's findings in *McIntyre v Information Commissioner* (EA/2007/0068), in which it stated at paragraph 47 that:

"We would recommend to the Commissioner that in future investigations for complaints where a s.36 (2) exemption has been claimed that he should require to see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses."

52. During his investigation, the Commissioner asked the PCT to provide him with the information that the qualified person had access to when coming to a decision. While the PCT provided detail on some of the

arguments that were considered it did not provide detail on the substance of any arguments that may have been taken into account at a meeting to help the qualified person form his opinion. Whilst the section 36 exemption was considered to be engaged in this case, the Commissioner would have preferred to see a better documented process of obtaining the qualified person's opinion and would refer the PCT to the case of *University of Central Lancashire v the Information Commissioner (EA/2009/0034)* in which the Tribunal commented that it would normally expect a public authority to have documented the process undertaken when applying section 36. The Commissioner has published guidance on what records he would expect a public authority to keep at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_36_practicalities_v1.pdf

Right of Appeal

53. 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

54. 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.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of June 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
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,
- (a) specifies the exemption in question, and
- (b) states (if that would not otherwise be apparent) why the exemption applies."

Prejudice to effective conduct of public affairs

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.