

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 February 2012

**Public Authority:** Belfast Health and Social Care Trust  
**Address:** Nore Villa  
Knockbracken Healthcare Park  
Saintfield Road  
Belfast  
BT8 8BH

### Decision (including any steps ordered)

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1. The complainant has requested all internal correspondence across the Belfast Health and Social Care Board in relation to articles that she had written regarding Serious Adverse Incidents at Belvoir Park Hospital in April 2011.
2. The Commissioner's decision in this case is that the exemption under section 36(2)(b)(i) is engaged and that the public interest in maintaining the exemption outweighs the public interest in favour of disclosing the information. The Commissioner requires no further steps to be taken.

### Request and response

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3. On 14 April 2011, the complainant requested the following information under the Freedom of Information Act 2000 ("the FOIA"):

*"Could you please provide me with all internal correspondence, including emails, memos, mobile phone messages on work phones, between operational officers, press officers and those at director level and above across the [Belfast] Health and Social Care Board in relation to queries I forwarded and articles I wrote on Belvoir Park Hospital and SAIs [Serious Adverse Incidents] in April 2011".*

4. The complainant subsequently clarified her request advising the articles referred to were dated 11, 12, and 13 April 2011.

5. The Trust provided its response on 15 June 2011. It refused the request, stating that mobile phone messages were outside the scope of FOIA and advising that the remaining requested information ("the withheld information") was being withheld under section 36(2)(b) (i) and (ii) of the FOIA.
6. The complainant requested an internal review of the Trust's decision not to disclose the withheld information. The result of this was provided to the complainant on 14 July 2011 and upheld the Trust's original decision.

### Scope of the case

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7. On 15 July 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled arguing that the provisions of the section 36 exemption do not apply in this case as the withheld information is categorised as operational decision making and not policy discussion. The complainant also considered there is a strong public interest in the information being disclosed. She did not complain about the Trust's refusal to provide the mobile phone messages which were part of her request, therefore the Commissioner has not investigated this.

### Reasons for decision

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#### **Section 36 – prejudice to the effective conduct of public affairs**

8. The Trust withheld the requested information under section 36(2)(b)(i) and (ii).
9. 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.*
10. This is a qualified exemption, and is therefore subject to the public interest test.

11. The Commissioner notes that the Trust has claimed more than one limb of section 36(2) in this case. The Commissioner has reviewed the withheld information and has first considered the application of section 36(2)(b)(i).

### **Section 36(2)(b)(i)**

12. Section 36(2)(b)(i) provides that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice.
13. 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, which in this case is the inhibition of the free and frank provision of advice.
14. In order to engage section 36, the 'qualified person' must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
15. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
  - ascertain who is the qualified person for the public authority;
  - establish that an opinion was given;
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
16. 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.
17. The Commissioner has established that the opinion was given by the appropriate qualified person. In its submissions to support the application of section 36, the Trust has explained in full the process by which this opinion was provided, advising that after having considered all the available evidence, the qualified person signed a statement to the effect that it was his reasonable opinion that disclosure of the withheld information would inhibit the free and frank provision of advice or exchange of views.
18. The Trust told the Commissioner that the qualified person in this case was the Trust's Chief Executive, Mr Colm Donaghy, who is 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) of the FOIA.

19. The Trust advised the Commissioner that on 1 June 2011 a meeting was held between senior Trust staff to examine the section 36 exemption and application of the public interest test. A report was prepared following the meeting and on 14 June 2011, the Trust's Chief Executive, in his capacity as qualified person, was verbally briefed on the issue by the Trust's Head of Corporate Communications as she had a detailed understanding of the case. The qualified person was also presented with the report and a sample of the withheld information, which, when coupled with the verbal briefing, helped him to formulate his reasonable opinion that the exemption was engaged and he signed a statement to that effect. The Commissioner considers this is a clear indicator that an opinion was given.
20. The Trust told the Commissioner that in coming to his decision, the qualified person had also taken into account that the requested information related to an ongoing investigation that contained information that was not currently in the public domain and shows managers within the Trust sharing developments and contributing openly and honestly to the management of an alleged data breach at the former Belvoir Park Hospital in Belfast. The Trust considered that disclosure of the emails in question would inhibit the quality of the frankness and productive debate, upon which it relies heavily because of the size and geographical spread of the organisation.
21. 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)(i) which primarily concerned the prejudicial effect of disclosure on the frankness and candour of internal discussions surrounding the Trust's response to the alleged data breach at the former hospital site in Belfast. The Trust advised that disclosure would inhibit the ability of Trust staff when deliberating or providing advice to express themselves openly, honestly and completely, or to explore various options which it considers would inhibit frankness and candour in debate and decision making. The central tenet of these factors is that at the time of the request, an investigation into the alleged data breach remained 'live' and which at the time of writing this Notice remained under investigation by the Commissioner. Bearing this in mind the Commissioner is satisfied that the qualified person did take into account relevant facts when reaching his opinion.
22. The basis of the qualified person's opinion in relation to section 36(2)(b)(i) is that disclosure would have an inhibitory effect on Trust staff's ability, when deliberating or providing advice, to express themselves openly when exploring options in the course of managing an issue.

23. The Commissioner has examined the withheld information which in this case contains a number of emails responding to questions from the relevant minister's office, requests for advice from colleagues, and discusses strategies to manage a meeting with an external agency. The Commissioner accepts that it was reasonable to conclude that disclosure of that information would cause officials involved to be less candid in the advice they provide in relation to ongoing and future similar issues. Whilst the Commissioner does not accept that officials will be put off providing advice in full, it is not unreasonable to conclude that the depth and rigour of advice provided would be affected which would have a damaging impact on the decision making process.
24. The Commissioner considers that it was reasonable to conclude that disclosure would inhibit the free and frank provision of advice in the future. He considers that the information does contain free and frank advice and that if it were disclosed, officials would be more restrictive in relation to the frankness of such advice provided in the future. Therefore, the Commissioner is of the view that the opinion can be considered reasonable. He is satisfied that section 36(2)(b)(i) is engaged in relation to the entirety of the withheld information.

### **Level of prejudice**

25. Before moving on to consider the public interest test, the Commissioner notes that the qualified person's opinion has clearly identified the likelihood of the inhibition in the case of section 36(2)(b)(i) and (ii) occurring as 'would prejudice' and he has therefore proceeded on the basis that the higher prejudice threshold level applies.

### **Public Interest Test**

26. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information. Whilst it is not for the Commissioner to form an independent view on the likelihood of prejudice (as per the Tribunal's comments in *Guardian and Brooke*<sup>1</sup>), it does not prevent him from considering the severity, extent and frequency of any prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified

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<sup>1</sup> EA/2006/0011 and EA/2006/0013

person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by disclosure of the information withheld under section 36 and any relevant subsections.

### **Public interest arguments in favour of disclosing the withheld information**

27. The Trust recognised there is a public interest argument for providing greater transparency and accountability for decision making processes and in promoting openness within the Trust. The Commissioner agrees with this point.
28. The complainant believes that if the withheld information related to a policy making process the section 36 exemption could be justified however in this case the complainant believes the withheld information to be categorised as operational decision making. The Commissioner is of the view that the real issue in this case is whether disclosure of the withheld information would inhibit the process of providing advice or exchanging views (which he has concluded it would, as determined in paragraph 24) and it is on that basis that he will weigh up the public interest in this case by considering the severity, extent and frequency of this inhibition occurring if the information was disclosed.
29. The complainant has further argued that the public interest in disclosure is reinforced by the fact that there is a clear anomaly between the Trust's first public statements on the matter and its subsequent position and that it is in the public interest to understand how that happened and how it was resolved by the Trust. The Commissioner accepts that this may be a strong argument in favour of disclosure.

### **Public interest arguments in favour of maintaining the exemption**

30. The Trust has argued that the withheld information relates to an ongoing investigation and contains information that is not currently in the public domain.
31. The Trust also considers that disclosure would inhibit the frankness and candour in debate and decision making in that it would inhibit the ability of its staff when deliberating or providing advice, to express themselves openly, honestly and completely or to explore various options. Furthermore the Trust believes that disclosure would inhibit the imparting or commissioning of advice or the offering of opinions or considerations.
32. The Trust also argued that the impact of disclosure in this case would not be beneficial to individuals and the wider public arguing that it

would be harmful to the public if the information disclosed was taken out of context - which may raise concern among members of the public affected by this sensitive issue.

33. The Trust again highlighted the likelihood and severity of any harm or prejudice that disclosure could cause and the fact that the matter was a live case under investigation by the Commissioner and stresses the need for a 'safe space' for Trust staff to formulate and debate issued away from public scrutiny.

### **Balance of the public interest arguments**

34. The Commissioner agrees with the Trust's public interest arguments in favour of disclosure relating to accountability and openness and considers there is a public interest in furthering understanding of the decision making process within a public authority.
35. The Commissioner also considers that disclosure of information relating to discussions behind the Trust's decision-making processes may help to improve the quality of those discussions and lead to greater transparency of the decisions made within government.
36. The Commissioner notes the complainant's view point that disclosure would go some way to addressing the anomaly between the Trust's first public statements on the matter and its subsequent position. He accepts that these arguments in favour of disclosing the withheld information are strong but the weight in favour of disclosure is not compelling.
37. The Commissioner has placed less weight on the Trust's argument that disclosure could mean the information is taken out of context – and considers this concern could be mitigated through an appropriate communications strategy.
38. The Commissioner finds however that disclosure of this particular information, given the ongoing investigation into the matter at the time of the request, would cause prejudice of some impact on other similar circumstances in the future. He considers there is a strong public interest in the Trust and other government departments being able to discuss similar sensitive issues freely and frankly to ensure that every aspect is considered with a view to making a full and informed decision. He has therefore given significant weight to the timing of the request when considering where the balance of the public interest lies.
39. The Commissioner considers that the public interest in favour of disclosure of the withheld information is outweighed by the public interest in maintaining the exemption at section 36(2)(b)(i) of the FOIA.

40. As the Commissioner has found that section 36(2)(b)(i) is engaged in respect of the entirety of the withheld information, he has not gone on to consider the application of section 36(2)(b)(ii).

**The decision**

41. The Commissioner's decision is that the Trust dealt with the request for information in accordance with the FOIA.

**Steps Required**

42. The Commissioner requires no steps to be taken.



## Right of appeal

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43. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
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