

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 June 2013

**Public Authority:** NHS Business Services Authority  
**Address:** Stella House  
Goldcrest Way  
Newburn Riverside Business Park  
Newcastle Upon Tyne  
NE15 8NY

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the NHS Business Services Authority (NHS BSA) for a copy of a report outlining details of an allegation of fraud made against 2 individuals. The NHS BSA refused the request under the exemptions in section 30(1)(a)(i) (investigations), section 40(2) (personal information) and section 41 (information provided in confidence). The Commissioner has investigated the complaint and found that section 30(1)(a)(i) exemption is engaged and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### Request and response

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2. On 7 September 2012 the complainant made a freedom of information request to the NHS Business Services Authority for the following information:

*"the summary document which you sent to Norfolk Constabulary informing them that a significant fraud [to the tune of almost £3 million] had, in your view, occurred at Cawston Park Hospital between [I think it was] 2004 and 2006. This particularly relates to the CEO at the time, [name redacted], along with his finance Director."*

3. NHS BSA responded to the request on 21 September 2012 when it explained that the information was exempt from disclosure under

section 40(2) (personal information) of FOIA.

4. NHS BSA subsequently carried out an internal review of its handling of the request and presented its findings on 5 November 2012 when it informed the complainant that it was upholding the decision to refuse the request under section 40(2). It also said that the information was found to be additionally exempt under section 30(1)(a)(i) (investigations) of FOIA and that it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

### **Scope of the case**

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5. On 15 November 2012 the complainant contacted the Commissioner to complain about the NHS BSA's decision to refuse his request for information.
6. During the course of his investigation NHS BSA informed the Commissioner that it was also seeking to rely on the exemption in section 41 (information provided in confidence) to the withheld information.

### **Reasons for decision**

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7. The withheld information in this case is a copy of a report that was prepared by NHS BSA outlining details of an allegation of fraud made against individuals providing healthcare services to the NHS. NHS BSA has said that the exemptions in sections 30(1)(a)(i) and 41 apply to the information in its entirety and that section 40(2) applies wherever any individual is identified. The Commissioner has considered whether the exemption in section 30(1)(a)(i) would apply in the first instance.

### **Section 30 – Law enforcement**

8. Section 30(1)(a)(i) provides that:  
*(1) 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*

9. The phrase "at any time" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
10. Section 30 is what is known as a class based exemption. That means that it is not necessary for disclosure of information to result in any prejudice only that the information must fall within the particular class of information described in the exemption.
11. In this case the NHS BSA has explained that the withheld information concerns an investigation that related to allegations against senior figures in the public and private sector who, it was alleged, may have been falsifying accounting documents for the purpose of obtaining remuneration or greater remuneration from the NHS. The information was held for the purposes of this investigation because it was needed as a summary document regarding the whole case and which was used within NHS BSA and passed to the Police for their consideration for further action.
12. The NHS BSA's powers to carry out investigations are set out in *The NHS Business Services Authority (Establishment and Constitution) (Amendment) Order 2006* which provides that its functions shall include:  
  
*"the prevention, detection and investigation of fraud, corruption and unlawful activities against or affecting the health service in England and the Secretary of State in relation to her responsibilities for the health service in England including investigations for the purposes of proceedings".<sup>1</sup>*
13. The Commissioner also notes that NHS Protect, a division of NHS BSA, is the lead agency in identifying and tackling crime across the Health Service. It describes one of its three main objectives as:  
  
*"to hold to account those who have committed crime against the NHS by detecting and prosecuting offenders and seeking redress where viable".<sup>2</sup>*

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<sup>1</sup> [http://www.nhsbsa.nhs.uk/Documents/Sect\\_1\\_-\\_A2\\_-\\_SI\\_2006\\_amend\\_632.pdf](http://www.nhsbsa.nhs.uk/Documents/Sect_1_-_A2_-_SI_2006_amend_632.pdf)

<sup>2</sup> <http://www.nhsbsa.nhs.uk/3349.aspx>

14. Whilst the Commissioner is aware that in this case it was Norfolk Constabulary and the Crown Prosecution Service (CPS) who were ultimately responsible for investigating the allegations and bringing charges, it is clear that when the withheld information was created it was being used within NHS BSA for the purposes of its own investigation and to consider whether there was evidence of an offence having been committed.
15. Taking into account the above the Commissioner is satisfied that the information relates to a particular investigation which the NHS BSA had a duty to conduct and that therefore the exemption is engaged. The Commissioner has gone on to consider the public interest test.

### **The public interest test**

#### **Arguments in favour of disclosure**

16. As regards the public interest in disclosure the Commissioner is aware that the investigation to which the withheld information relates was a very controversial one. It led to a court case which subsequently collapsed due to lack of evidence. The decision to bring the case to court was criticised by the Judge and the accused individuals were later offered an apology in Parliament by the Solicitor General.
17. The Commissioner understands that the complainant, who is the brother of one of the accused, wants to see the information so as to better understand the reasons why the case was prosecuted.
18. The public authority itself acknowledged that there was a public interest in disclosure insofar as it would promote greater accountability.

#### **Arguments in favour of maintaining the exemption**

19. NHS BSA put forward the following arguments which it said supported maintaining the exemption:
  - Release of the requested information would highlight methods used during investigations and would harm any future investigations undertaken by the NHS BSA.
  - Potential effects of disclosure (e.g. serious risk of distress to informants, witnesses, victims, suspects or offenders)
  - Release of information provided in confidence would have a significant detrimental effect on the on-going success of the fraud reporting line.

- Hamper the gathering of intelligence from confidential sources
  - Impede other on-going or future proceedings
20. The Commissioner has also considered the public interest inherent in the section 30(1) exemption. This is the effective investigation and prosecution of crime, which inherently requires, in particular:
- The protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
  - The maintenance of independence of the judicial and prosecution processes;
  - Preservation of the criminal court as the sole forum for determining guilt.

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

21. The Commissioner accepts that there is a legitimate public interest in knowing more about the reasons why this case was prosecuted. All sides have acknowledged that there were serious flaws in the prosecution case and in instances such as this the Commissioner takes the view that there is a public interest in transparency and accountability especially so that any lessons can be learnt and things put right. However, the Commissioner is also aware that the accused have received very public apologies and the failings in bringing the prosecution have been addressed as part of a review undertaken by the CPS. Moreover, the Commissioner has reviewed the withheld information and in his view there is nothing which is extraordinary or concerning which would heighten the public interest in disclosure. The information is a summary of the allegations which was written at an early stage in NHS BSA's investigation and discusses potential action. Disclosure of the information would reveal little that would shed light on the concerns expressed regarding the quality and thoroughness of the investigation.
22. On the other hand the Commissioner has given particular weight to the arguments surrounding the public interest in protecting the ability of NHS BSA to conduct investigations in future. The withheld information includes details of the methods used by NHS BSA to further the investigation and the Commissioner considers that disclosure would be likely to be of use to any person who may come under investigation for similar allegations in future.

23. The Commissioner has also given considerable weight to the public interest in protecting witnesses. The information in this case discussed in detail evidence and statements obtained from a number of witnesses and informants. These individuals had approached NHS BSA in the expectation that the information would remain confidential and not be disclosed outside of a court of law. Disclosure in response to a freedom of information request would discourage other potential witnesses or informants from providing evidence to NHS BSA and in particular would undermine the operation of the NHS Fraud and Corruption reporting line. This facility allows individuals to report concerns in confidence and callers may remain anonymous if they wish. The Commissioner understands that this is an important tool used by NHS BSA to investigate fraud and therefore the consequences of potential witnesses being discouraged in coming forward would be particularly damaging to the ability of NHS BSA to carry out its anti-fraud functions in future.
24. The complainant has suggested that the information could be anonymised to protect the identities of the individuals concerned. The Commissioner has considered this but does not think this is possible because given the complainant's knowledge of the case it would be clear to whom the information relates even if names of individuals were redacted. To prevent individuals being identified the information would have to be redacted to such an extent that any remaining information would be rendered meaningless.
25. The complainant also suggested that information may already be in the public domain due to the fact that witnesses had been cross examined in open court. On this point, the Commissioner would say that where information enters the public domain it will not necessarily remain there indefinitely and this is especially true where information has been revealed in open court during criminal proceedings. In the Commissioner's view knowledge obtained in the course of a criminal trial is likely to be restricted to a limited number of people and be relatively short lived. The Commissioner is also aware that this case was a high profile one and attracted a certain amount of media attention, however, the requested information is much more detailed than any media reports seen by the Commissioner.
26. The Commissioner has not given the arguments surrounding the distress that may be caused to individuals any weight as this is not relevant to the public interest in maintaining the section 30 exemption. These arguments are not matters that impact on the effective investigation and prosecution of offences.
27. The Commissioner has already said that he accepts that there is a public interest in disclosure. The investigation was complete at the time of the

request and the information was over 6 years old which together are factors which tend to weigh in favour of disclosure. However, whilst the investigation was complete the Commissioner has also found that disclosure would prejudice future investigations both by discouraging potential witnesses and providing information about how NHS BSA conducts its investigations. This goes to the heart of what the section 30 exemption is designed to protect and so the public interest in maintaining the exemption must be very strong in such a case. Taking this into account, and mindful of the fact that the errors made have been acknowledged and the defendants have been publicly exonerated, the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## Right of appeal

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28. 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)

29. 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.
30. 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  
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Information Commissioner's Office  
Wycliffe House  
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