

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 January 2018

**Public Authority:** North West London Collaboration of Clinical Commissioning Groups

**Address:** 15 Marylebone Road  
London  
NW1 5JD

### **Decision (including any steps ordered)**

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1. The complainant has requested information about the voting on delegated commissioning. North West London Collaboration of Clinical Commissioning Groups (the CCG) provided most of the information within the scope of the request but refused to provide the remainder, citing the exemption in sections 41 of the FOIA.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

### **Background**

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3. The CCG provided the following background.
4. CCGs are clinically led statutory NHS bodies that include all of the GP practices in their geographical area as their membership. Each practice acts as one member. They are responsible for the planning and commissioning of health care services for their local area. The membership vote for the makeup of the CCG's governing body which is responsible for making the final decisions within the CCG and are accountable to NHS England and its member practices.
5. Hillingdon CCG took on level 2 "joint commissioning" with NHS England in 2015/2016.
6. In 2016/2017 the CCG explored the possibility of taking on level 3 "delegated commissioning". Following a number of engagement events and dialogue with practices, on 22 February 2017 the CCG Governing

Body asked the membership to vote on whether it should take on this duty. This is the vote to which the request relates. The vote was conducted with votes made in private. The vote was overseen and verified by an independent organisation, Hillingdon Healthwatch.

## Request and response

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7. On 17 March 2017 the complainant made a 16 part FOIA request including the following:

*'This is regarding the vote that was conducted this year to take on level 3 (delegated) commissioning responsibility.*

*Voting sites- 1.Nothwood 2.Boundary House, Uxbridge*

*1. Names of practices that voted 'yes' ie in support of level 3 commissioning*

*2. Names of practices that voted 'no' ie against level 3 commissioning*

*3. Name of the practice that spoiled the ballot paper.'*

8. On 13 April 2017 the CCG responded to all parts of the request and provided the numbers of practices in questions 1-3 (26 practices voted 'yes', 8 voted 'no' and there was one spoiled paper) but refused to provide the names of the practices in questions 1-3 citing section 41(1) (information provided in confidence) of FOIA.

9. The complainant requested an internal review for the names of the practices in questions 1-3. The CCG sent him the outcome of its internal review on 2 June 2017 upholding its position to withhold the names of the practices under section 41(1):

*'The vote of the CCG's GP membership to decide whether or not to accept level 3 primary care commissioning was done in confidence. The vote was a secret ballot in the sense that each voting party voted in private and not in public. For example, it was not a show of hands where each practice could see how the others voted. It was not an anonymous vote as each ballot paper had the information of which practice the ballot paper represented. This information was submitted to the CCG in confidence and in the trust that the CCG was not going to disclose or make public.*

*For this reason, the CCG considered it correct to exempt the information for disclosure under the exemption outlined in section 41 of the Act.'*

## Scope of the case

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10. The complainant contacted the Commissioner on 19 July 2017 to complain about the way his request for information had been handled.
11. The Commissioner therefore considers the focus of the investigation to be whether the CCG is entitled to rely on exemption Section 41 as a basis for refusing to provide the withheld information, that is the names of the practices in questions 1-3 of the FOIA request.

## Reasons for decision

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### Section 41 – information provided in confidence

12. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

#### **Was the information obtained from another person?**

13. The CCG stated that the information was provided to it by third parties (the GP practices). The Commissioner is satisfied that this is the case.

#### **Would disclosure constitute an actionable breach of confidence?**

14. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
  - whether the information has the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

#### *Does the information have the necessary quality of confidence?*

15. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

16. The CCG has explained the voting system:

*'Hillingdon CCG's GP membership is made up of 46 GP practices. Each practice acts as one member and has votes according to its patient list size.*

*Hillingdon CCG's constitution states -*

*"3.1.2. Voting mechanisms at Council of Members Meetings*

*3.1.2.1. Voting is by a simple majority. Practices will have one vote per 1000 patient list size (as recorded on 1st April each year)...*

*3.1.2.2. Absence is normally defined as being absent at the time of the vote. Only in exceptional circumstances may an absent Member vote by proxy...'*

17. The CCG considered that the information was communicated to the CCG in private and in confidence that it was to remain private. The information relating to how individual practices voted is certainly not trivial but is very important and has a direct consequence for the business of the CCG.

18. Based on the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The Commissioner also accepts that the information is not trivial as it related to the future responsibilities of the CCG. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

*Was the information imparted in circumstances importing an obligation of confidence?*

19. The Commissioner notes the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

*"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".*

20. The Commissioner understands that the name of the GP practice was on the voting paper to establish the number of votes (one vote per 1000 patient list size) but that the name of the GP practice, and the way it voted, would remain confidential.

21. Following this, the Commissioner considers that the circumstances, nature of and way in which the withheld information was supplied to the CCG by the GP practices impliedly and expressly confirmed that it will not be shared as part of this process and would therefore retain a confidential quality.

*Would disclosure be of detriment to the confider?*

22. The CCG has confirmed that it considers that disclosure would be detrimental to its membership organisation. It must ensure it has the full confidence of its members. By disclosing information about how each practice voted in this instance, may jeopardise future votes. *'For example, if members felt they were not able to vote in private and have confidence that the information would not be made public, could lead to members feeling obliged to vote in a certain way or / and could lead to members being subjected to canvassing or receiving threats to vote in a particular way. Depending on the vote, it could also damage doctor - patient relationships if patients started to lobby their GPs to try and influence voting.'*
23. The Commissioner accepts that disclosure of the withheld information could prejudice the confidence of the members' ability to vote in private. Therefore, the Commissioner considers that the withheld information was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence.

**Is there a public interest defence for disclosure?**

24. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the CCG could successfully rely on such a public interest defence to an action for breach of confidence in this case.
25. For her part, the Commissioner accepts that there is a general public interest in public authorities being open and transparent on the ways in which further responsibilities are undertaken by CCGs. It follows that there is a public interest in scrutinising how this is done. However, the Commissioner notes that the vote was overseen and verified by an independent organisation, Hillingdon Healthwatch.

26. The Commissioner also considers that her own guidance is relevant here:

*"There is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions".<sup>1</sup>*

27. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
28. The Commissioner has not been presented with any evidence to suggest that the public interest in disclosing the names of the GP practices is of such significance that it outweighs the considerable interest in maintaining the confidence of the GP membership of the CCG.
29. Having considered all the circumstances of this case the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
30. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/SEC41\\_CONFIDENCE\\_PUBLIC\\_INTEREST\\_TEST\\_V1.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/SEC41_CONFIDENCE_PUBLIC_INTEREST_TEST_V1.ashx)

## Right of appeal

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31. 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: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
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