

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

Public Authority: North West London CCGs
Address: 15 Marylebone Road
London
NW1 5JD

Decision (including any steps ordered)

1. The complainant has requested information relating to the CCGs 'Shaping a Healthier Future' plans particularly in relation to Ealing Hospital. North West London CCGs (the CCGs) refused to provide the requested information under section 36(2)(b)(ii) and section 36(2)(c) FOIA.
2. The Commissioner's decision is that the CCGs incorrectly applied section 36(2)(b)(ii) and section 36(2)(c) FOIA to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld draft report.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 October 2017 the complainant requested information of the following description:

The document *Month 11/12 Budget Update, Consultancy Contracts Let, SaHF & NWL Strategy and Transformation Programmes* includes a contract awarded to Deloitte in the sum of 44,000 for 'Report on

Structural Deficit of Ealing Hospital (STW 30)' in October 2016. My recollection is that Ealing had no such deficit before 2012? indeed, it had met all its fiscal targets for at least five years.

I can find no detail of this deficit from either Ealing CCG or London North West Healthcare Trust before the Deloitte Report was rejected by the Ealing CCG Finance and Performance Committee in September 2016. Even then, all that is said is, 'The report was discussed in detail by the Committee. The Committee was disappointed in the quality of the analysis. The report did not give assurance in particular as to why there had been deterioration in financial performance at the site.'

The LNWHT Annual report 2015/16 says only, 'The Trust has an underlying financial deficit that will not be fully resolved until the North West London sector agrees resolutions to structural deficits at Ealing and Central Middlesex hospitals.' (p 45)

Under the terms of the Freedom of Information Act, please:

1. Explain when the 'structural deficit' at Ealing was first discovered, and how large it was;
2. Describe how large it was when Deloitte were contracted to 'understand' it;
3. Describe how large it is now;
4. Send me a copy of the original rejected Report from Deloitte;
5. Confirm whether or not Deloitte were paid 44,000 or any other sum for the Report;
6. Confirm or deny whether the deficit at Ealing arose as a consequence of the reduction in activity following changes made under Shaping a 'Healthier' Future ' the *LNWHT Clinical Strategy*, September 2017, includes as the first Weakness in the SWOT Analysis at p 13: 'Persistent operational and financial under-performance due to combination of factors including structural issues at CMH (PFI and under-use), EH (uncertainty and *under-use due to SaHF changes*)...?' (my italics);
7. Detail which other bidders were involved in the procurement of the contract or, if it was a Single Tender Action or negotiated procedure under the terms of Regulation 14 of the Public Contracts Regulations 2006, what documented rationale exists for the decision;
8. Explain why there is no financial competence within the LNWHT, Ealing CCG or the combined CCGs and SaHF Team capable of establishing the cause and nature of this deficit;
9. Detail what remedial action is now being taken if, as seems likely, the deficit is as a direct result of the removal of services (A&E, Maternity and Paediatrics) and the run-down of Ealing Hospital prior to its demolition."

6. On 20 December 2017 the CCGs provided the complainant with information in response to his request.
7. The complainant requested an internal review on 4 January 2018 as the CCGs had provided him with an incorrect version of the Deloitte report he was seeking at part 4 of the request. The CCGs sent the outcome of the internal review on 15 March 2018. The CCGs said that the draft report was exempt from disclosure under section 36(2)(c) FOIA.

Background information

8. The CCGs (NHS Brent CCG, NHS Ealing CCG, NHS Central London CCG, NHS Harrow CCG, NHS Hammersmith & Fulham CCG, NHS Hillingdon CCG, NHS Hounslow CCG, and NHS West London CCG) now have a single Chief Executive Officer (Accountable Officer). When the original request was received the eight CCGs were working together collaboratively and had a joint Strategy and Transformation Team which operated across the CCGs.
9. The CCGs were established on 1 April 2013 and the eight North West London CCGs decided to split themselves into two working groups each having a shared senior management team.
10. Since 2014 the CCGs operated as –

NHS Brent CCG, NHS Harrow CCG, and NHS Hillingdon CCG – single Chief Executive Officer.

NHS Central London CCG, NHS West London CCG, NHS Hammersmith & Fulham CCG, NHS Hounslow CCG, and NHS Ealing CCG – single Chief Executive Officer.
11. The information requested related to the wider Shaping a Healthier Future programme and was processed and responded to on behalf of the eight CCGs (via Central London CCG as host CCG for the Strategy and Transformation Team and governance reasons).
12. As Chief Executive Officer (Accountable Officer) and SRO for the Strategy and Transformation Team, Clare Parker was considered to be the qualified person as required by the exemption outlined in section 36(2) of the Freedom of Information Act.
13. Since the decision of the 15 March 2018 the eight CCGs have decided to formalise the collaborative working arrangements by moving to a single senior management team operating across the eight CCGs. A

single Chief Executive Officer (Accountable Officer) has subsequently been appointed. In light of this, it was considered prudent, as the CCGs have a new qualified person, to seek his opinion on whether the exemption outlined in section 36(2) FOIA is engaged.

14. On the 25 July 2018 Mark Easton, Chief Executive Officer (Accountable Officer), as the qualified person, provided his opinion whether the exemption outlined in section 36(2) FOIA was engaged.
15. It is in the opinion of the qualified person that the disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation under section 36(2)(b)(ii) and the effective conduct of public affairs under section 36(2)(c) FOIA.

Scope of the case

16. The complainant contacted the Commissioner on 11 October 2017 to complain about the way his request for information had been handled.
17. Given the new qualified person's opinion obtained on 25 July 2018, the Commissioner has considered whether the CCGs were correct to apply section 36(2)(b)(ii) and section 36(2)(c) FOIA to the withheld information.

Reasons for decision

Section 36

18. Section 36 FOIA 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-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

19. In this case the CCGs have applied section 36(2)(b)(ii) and section 36(2)(c) FOIA.
20. In determining whether the exemptions are correctly engaged, 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 reasonable.
21. As explained above the CCGs have confirmed that the qualified person in this case is Mark Easton, Chief Executive Officer. The opinion was provided on 25 July 2018. The qualified person's opinion was that section 36(2)(b)(ii) and section 36(2)(c) is applicable in this case as disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice the effective conduct of public affairs. The CCGs explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person were provided to the Commissioner as well as a copy of the qualified person's opinion.
22. The CCG explained that it is essential for the CCGs to be able to discuss and exchange views between officers for the purposes of drafting reports. It is essential for staff (including members of the Performance and Finance subcommittee) to be able to be free to raise comments or matters and is normal practice when drafting and completing reports. In this case, the minutes clearly concluded that the report had further work needed for it to be agreed.
23. It went on that were such matters disclosed in a draft report it is likely to diminish the quality of future deliberations. Staff would likely approach such discussions in a different way that could impact the successful completion of reports.
24. The CCG said that releasing multiple draft versions of reports is likely to inhibit reasonable discussions rather than help them. Reports which are finalised and signed off form the basis of the effective conduct of public affairs.

25. It continued that the report requested was an early draft by a third party and was a version for discussion and to progress to a final version. By disclosing a previous draft version of a report would be likely to confuse the public and deviate debate and discussion away from the correct information and real issues the final report raises. This would likely prejudice the effective conduct of public affairs in the overall implementation of the wider Shaping a Healthier Future plans.
26. The qualified person confirmed that the withheld information is a draft report and disclosure would be likely to diminish the quality of future deliberation and hinder the effective conduct of public affairs.
27. The Commissioner considers that the withheld information is a draft report and understands that the final agreed report has been published. The Commissioner does accept that a reasonable conclusion would be that disclosure of the draft would be likely to have some chilling effect upon future deliberation on similar matters should staff believe that drafts reflecting their earlier thinking were to be disclosed. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable in relation to the application of section 36(2)(b)(ii) and therefore the exemption was correctly engaged.
28. In relation to section 36(2)(c), the Commissioner does also accept that a reasonable conclusion would be that disclosure of the draft would be likely to have some disruptive affect upon the CCGs should any confusion this may cause deviate from the overall implementation of the wider Shaping a Healthier Future plans.
29. As the Commissioner has decided that section 36(2)(b)(ii) and section 36(2)(c) are engaged, she has gone on to consider whether the public interest in maintaining the exemptions outweigh the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

30. The CCGs recognise that there is a need for transparency and openness.

Public interest arguments in favour of maintaining the exemption

31. The CCGs explained that to provide draft versions or iterations of the same of report it is considered it would not be in the public interest. If different draft unverified versions of the same report were disclosed it would likely cause confusion for members of the public. This could hinder further public debate as information in previous versions,

whether accurate or inaccurate, would confuse members of the public and would require officers to provide clarification. There is a real potential that debate could become more about internal processes rather than the correct real issues in the final report.

32. Disclosure could result in inaccurate information or statistically unchecked information becoming information of fact by members of the public. Therefore, the CCGs consider it is not in the public interest to disclose this information.

Balance of the public interest arguments

33. The withheld information is a draft version of a report, the final version having now been published. The Commissioner considers that disclosure would demonstrate the CCGs thinking and decision making processes as it would show how this developed between the differing versions of the report. The Commissioner does consider that there is a public interest in the CCGs being open and transparent in this way.
34. The arguments for maintaining the exemption essentially focus on the 'chilling effect' argument, that officials would be likely to be less candid in the free and frank exchange of views for the purpose of deliberation going forwards.
35. The chilling effect argument will be strongest when an issue is still live. The withheld information is a draft version of a report. As the final version has been published, the matter cannot be considered to be ongoing or 'live'. This therefore reduces the weight attributed to this public interest argument.
36. The CCGs have not provided any particular example of differences between the draft and final versions that are particularly sensitive and which would add to the severity of the prejudice claimed. Without this link between the actual content of the withheld information and the prejudice claimed this further weakens the chilling effect argument in this case.
37. The CCGs have also argued that disclosure would be likely to cause confusion to the public which would have a detrimental effect on the overall implementation of the wider Shaping a Healthier Future plans. The Commissioner would however reiterate that as the CCGs have not provided any examples of why specific differences between the two versions of the report would cause confusion and thus skew debate and create a need for the CCGs to field questions regarding the differences, it would be difficult to attribute any significant weight to this argument. The Commissioner would also note that the CCGs are able to provide

any contextual information alongside disclosure as is seen to be appropriate. The CCGs would therefore be able to confirm that the disclosure is an early draft and does not reflect the final thinking and outcome which can be found in the final published report.

38. The Commissioner has weighed the public interest arguments and considers that given the limited weight she can attribute to the chilling effect argument in this case and the severity of any damage to the effective conduct of public affairs, the public interest in maintaining the exemption is outweighed by the public interest in disclosure in this case. This is because there is a strong public interest in the CCGs operating openly and transparently and providing the public with information to better understand its thinking and decision making processes. The issue to which the report relates will be of significant interest to the public the CCGs serve.

Right of appeal

39. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Gemma Garvey
Senior Case Officer

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