

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2021

Public Authority: Betsi Cadwaladwr University Health Board

Address: bcu.foi@wales.nhs.uk

Decision (including any steps ordered)

1. The complainant requested the testimonies which formed the basis of an independent report (the Robin Holden report) commissioned by Betsi Cadwaladwr University Health Board in 2013. Betsi Cadwaladwr University Health Board refused the request relying on sections 36(2)(b)(ii) and 36(2)(c), section 40(2) and section 41 of the FOIA. The Commissioner's decision is that Betsi Cadwaladwr University Health Board was entitled to rely on section 41 to withhold the requested information. As she has concluded that section 41 is engaged, she has not gone on to consider the other exemptions cited. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 20 October 2020, the complainant wrote to Betsi Cadwaladwr University Health Board (the Health Board) in respect of the Robin Holden report, which dealt with concerns about the management of the Mental Health Clinical Programme Group (MHCPG) and their dealings with the Hergest Unit in North Wales and requested:

"...those 700 pages of testimony"

which formed the basis of the report.
3. The Health Board responded on 13 November 2020. It confirmed that it held the requested information but refused the request in reliance on sections 36(2)(b)(ii) and 36(2)(c), section 40(2) and section 41 of the FOIA.

4. Following an internal review, the Health Board wrote to the complainant on 2 February 2021. It stated that it was upholding its decision to refuse the request on the basis of the exemptions cited in its original response.

Scope of the case

5. The complainant contacted the Commissioner on 3 February 2021 to complain about the way his request for information had been handled. He was not satisfied with the Health Board's refusal to provide the information, particularly as he is a relative of a former patient on the ward and considers the care and treatment she received while a patient at the Unit contributed at least in part to her death.
6. The Commissioner is mindful of the complainant's particular circumstances and would like to take this opportunity to convey her sincere sympathies for his loss, particularly in what has clearly been very distressing circumstances for him. She would however point out that any disclosures under the FOIA are considered to be to the world at large, therefore her decision must be based on whether the information is appropriate for public disclosure.
7. The Commissioner considers that the scope of her investigation is to determine whether the Health Board was entitled to refuse the information on the basis of the exemptions cited. Where she concludes that one exemption, in this case, section 41 is engaged, she has not gone on to consider the other exemptions cited (sections 36(2)(b)(ii) and 36(2)(c) and section 40).

Reasons for decision

Section 41 – Information provided in confidence

8. Section 41(1) of the FOIA states that:

Information is exempt information if –

- (a) *It was obtained by the public authority from any other person (including another public authority), and*
- (b) *The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"*

9. Section 41 is an absolute exemption, therefore is not subject to the public interest under the FOIA.

Was the information obtained from another person?

10. The Health Board has confirmed that the testimonies were provided by members of staff and management to the independent investigator Robin Holden in the light of concerns raised in relation to the management of the Mental Health Clinical Programme Group (MHCPG) and their dealings with the Hergest Unit.
11. The Commissioner is therefore satisfied that the information was obtained from third parties.

Would disclosure constitute an actionable breach of confidence?

12. In her analysis of whether disclosure of the information would constitute an actionable breach of confidence the Commissioner must consider:
- 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 and to the detriment of the confider.

Does the information have the necessary quality of confidence?

13. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
14. The Health Board considers that the information is worthy of protection as the testimonies were provided in accordance with the All Wales Procedure for staff raising concerns. One of the key aims of this procedure is to encourage staff to report more serious concerns and suspected wrongdoing as soon as possible, in the knowledge that their concerns will be taken seriously and investigated as appropriate, and that their confidentiality will be respected.
15. The Commissioner has seen no evidence that the withheld information has been put in the public domain and accepts the assurances from the Health Board that the information remains confidential. She is therefore satisfied that the information is not accessible by other means. Furthermore, she does not consider this information trivial.

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

16. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
17. The Health Board has stated that the withheld information was provided subject to an explicit obligation of confidence.
18. Its staff and management provided the testimonies on the basis that it would be treated confidentiality, and that there would be no detrimental effect to their employment or to their relationship with colleagues.
19. The Commissioner has also viewed the withheld information and notes that they are marked private and confidential. Each individual was also promised that their testimony would be treated confidentially.
20. Based on the above, the Commissioner therefore considers that there is a clear and explicit obligation of confidence in relation to the withheld information.

Detriment to the confider

21. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.
22. The Health Board has referred to comments in paragraph 14 of this notice that the information was provided in accordance with the All Wales Procedure for staff raising concerns and suspected wrongdoing on the basis that the information would be treated confidentially and there would no detrimental effect to their employment of their relationships with colleagues.
23. Having considered the withheld information, the Commissioner notes that the testimonies contain personal accounts of events relating to the Hergest Unit and very candid opinions in respect of colleagues and management, the disclosure of which is likely to cause significant distress, and possibly detriment to the confiders.

Is there a public interest test defence for the disclosure?

24. Section 41 is an absolute exemption therefore there is no requirement to consider the public interest test. However, within the Common Law of Confidence, there is a defence to an action for a breach of confidence, if it can be demonstrated there was an over-riding public interest defence.

The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.

25. 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 requested information against both the wider public interest in preserving the principle of confidentiality and the impact disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest test factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality and gross immorality.
26. The Commissioner accepts that there is a public interest in the disclosure of the information regarding staff concerns about the management of a mental health unit, and acknowledges that while the testimonies refer to concerns regarding the style and actions of management, which in some cases the confiders believed compromised patient safety, these concerns were outlined in the summary to the Robin Holden report which is in the public domain, and the Robin Holden report itself, which was the subject of the Commissioner's decision notice referenced FS50882004 in which she concluded that the Health Board was not entitled to rely on section 41 of the FOIA and is currently under appeal by the First-tier Tribunal (Information Rights).
27. In weighing this against the public interest in maintaining trust between confider and confidant, and the likely distress and possible detriment to the confiders, the Commissioner considers that the Health Board would not have a public interest defence for breaching its duty of confidence.
28. Having considered all the circumstances of this case, and the information withheld under section 41 of the FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Other matters

Internal review

29. The Commissioner acknowledges that it is not a formal requirement for a public authority to conduct an internal review under the FOIA. However, the Section 45 Code of Practice recommends that public

authorities do undertake an internal review and that it should be done promptly. The Commissioner has also produced guidance in relation to this matter which recommends that it takes no longer than 20 working days in most cases, and in exceptional circumstances, no longer than 40 working days.

30. The Commissioner notes that the complainant requested an internal review of the Health Board's response of 13 November 2020 on 13 and 30 November 2020. However, the Health Board did not provide its internal review until 2 February 2021.
31. The Health Board has stated that it has reviewed its generic FOI mailbox, mailboxes of members of the Information Governance team and the Chief Executive's office along with any Royal Mail post received by the Chief Executive's team and have been unable to locate any request for an internal review from the complainant. Furthermore, it has stated that it only became aware of the complainant's dissatisfaction when contacted by the Commissioner.
32. However, whilst it appears that the requests have been missed on this occasion, the complainant did provide copies of his requests for an internal review to the Commissioner, and she expects the Health Board to deal with requests for an internal review appropriately in future.

Right of appeal

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

34. 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.
35. 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

Catherine Dickenson
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