

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2022

Public Authority: Oxford Health NHS Foundation Trust

Address: Littlemore Mental Health Centre
Sandford Road
Littlemore
Oxford
OX4 4XN

Decision (including any steps ordered)

1. The complainant has requested information regarding public participation and on legal costs. The above public authority ("the public authority") stated that it did not hold some of the information. It withheld the remaining information relying on section 36 (prejudice to the effective conduct of public affairs), section 40(2) (personal data) and section 41 (actionable breach of confidence) to withhold information.
2. The Commissioner's decision is that the public authority does not hold any information within the scope of element [1]. In respect of element [2], he is satisfied that the public authority has appropriately applied sections 40(2) and 41 of FOIA. The Commissioner considers that section 36 is only engaged in respect of a small quantity of information but, where it is engaged, the public interest favours maintaining the exemption. Where the exemption is not engaged, the information does fall within the scope of the request. The public authority breached sections 10 and 17 of FOIA in responding to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, all of the information it has identified to the Commissioner as falling within the scope of the request, except for:

- Any information the public authority has identified as being exempt under either section 40(2) or 41 of FOIA.
 - The email sent on 14 April 2020 at 14:53
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 25 November 2021, the complainant wrote to the public authority and requested information in the following terms:

"[1] The Trust has long maintained that I am not treated differently to any other service-user/patient/complainant. I don't believe this.

- a. Could you please tell me how many other patients/service-users/complainants have been banned from participating at Trust Public Meetings (e.g. an AGM)?
- b. Could you please also inform me how many other service-users/patients/complainants have been disallowed from becoming Foundation Trust Members?
- c. Has the Trust ever banned someone other than me from being a Member of the Foundation Trust whose duty it owed (to the applicant) it did not breach, be that on one; two; or three-plus occasions.

"[2] I note from the Trust's recently published Annual Report that the clinical negligence liability, as provided to NHR, increased by an eye-watering 318% from 2019/20 to 2020/21. Could you please provide whatever information you can on the reasons for this massive increase – by whichever breakdowns you have."

6. The public authority responded on 6 December 2021. It denied holding any information within the scope of the request.
7. Following an internal review the public authority wrote to the complainant on 10 February 2022. It upheld its original position.

Reasons for decision

Element [1]

8. The complainant has explained to the Commissioner that he believes the public authority treats him differently to other patients and that his requests were aimed at establishing the facts.
9. The public authority disputed the complainant's description of the way he had been treated. It stated that whilst it may ask individuals to leave meetings due to their behaviour, it did not ban anyone from participating in meetings. It also stated that it did not ban or disallow anyone from becoming a member – although it did have both qualifying and disqualifying criteria for members.
10. The Commissioner is satisfied that the public authority holds no information within the scope of element [1a]. Whether the complainant's situation does or does not amount to a ban is irrelevant as the request refers specifically to individuals "other than" the complainant. The public authority has said that it has not banned any individual from participating in meetings and no evidence has been put forward to suggest that any other individual has been banned.
11. In relation to membership (elements [1b] and [1c]), the Commissioner is again satisfied that the public authority does not hold any information. The public authority has explained that it has both qualification and disqualification criteria. Once again, the complainant's precise situation is irrelevant here as the request refers to people "other than" him. The Trust has stated that it holds no information and no evidence has been put forward to suggest that other individuals have been banned from being members of the Trust.
12. If, as the complainant suggests, his situation is unique, that would only support the public authority's arguments that it holds no recorded information within the scope of the request.

Element [2]

13. In respect of element [2], during the course of the investigation the Commissioner asked the public authority to carry out further searches. Whilst he accepted that such costs would be determined by NHS Resolution (as the public authority confirmed to the complainant in its internal review), he still considered that, given the size of the increase, there would be correspondence to and from NHS Resolution querying how this came about.

14. After carrying out further searches, the public authority identified a letter from NHS Resolution and several emails with attachments.
15. The public authority explained that it did not consider that all the information it had identified fell within the scope of this part of the request. The complainant's request related to a specific part of its liability whereas the information it provided related to the public authority's liability in general. The public authority explained to the Commissioner that:

"the attached documents contain a complete overview of the Trust's contribution to the CNST [Clinical Negligence Scheme for Trusts] scheme generally. However, as the information is so intrinsically linked, and to remove some information could render it incomprehensible to the Commissioner, we have not sought to remove any of the information, but are instead providing it in its entirety."
16. The public authority did not identify to the Commissioner which information it considered did and did not fall within the scope so the Commissioner has had to make his own judgement.
17. In the Commissioner's view, all the identified information falls within the scope of the request. As the public authority has pointed out, the specific information requested and the more general information about the CNST are intrinsically linked – one is incomprehensible without the other. Therefore, whilst the Commissioner accepts that some parts of the information are more closely related to what the complainant wants than other parts, the information as a whole ultimately relates to the request.
18. The Commissioner is satisfied that the public authority has identified all the information that it holds. It explained that the specific matter the complainant has asked about had not been raised in board meetings – although as these are published any information would already be reasonably accessible. It noted that it could not rule out that some of its governors may have discussed the matter with each other outside of formal meetings, but this would not necessarily generate recorded information (informal meetings or conversations are unlikely to be minuted) and even if it had, the material may not necessarily have been held by the public authority for the purposes of FOIA (if governors had communicated in a personal capacity).
19. On the balance of probabilities, the Commissioner is satisfied that the public authority has identified all the information within the scope of the request.

Section 41 and section 40(2)

20. The complainant accepted that he did not wish to see details of any individual's claim so the Commissioner will deal with these exemptions briefly.
21. The public authority has identified, within the withheld information, a number of items which relate to individual claims. The Commissioner is satisfied that this information could be linked with other information to identify individual claimants. He is therefore satisfied that disclosing this information would leave the public authority open to an actionable breach of confidence and therefore section 41 of FOIA would be engaged.
22. The public authority has also identified some information to which section 40(2) of FOIA applies. This information is names, contact details and a signature. The Commissioner has a long-standing approach that, unless the individuals concerned are very senior or public-facing (which does not appear to be the case here), there is no lawful basis for this personal data to be disclosed. He is satisfied that this is the case here and that section 40(2) of FOIA is engaged.

Section 36 – prejudice to the effective conduct of public affairs.

23. The public authority provided the Commissioner with a copy of a document that was signed by its Chief Executive and dated 30 September 2022. The Commissioner is satisfied that the Chief Executive is entitled to act as the qualified person for the purposes of section 36.
24. The qualified person argued that section 36(2)(b)(ii) and section 36 (2)(c) of FOIA were engaged for the following reasons:
 - (i) Information is confidential (provided by NHSR in confidence) - NHSR believe disclosure is not necessary
 - (ii) Personal information may be inferred.
 - (iii) Likely to inhibit free and frank exchange of views and could impact on the operation of the scheme for all contributors.
 - (iv) Disclosing this level of detail in terms of the Trust's contributions may also may have adverse consequences and/or cause disruption. [redacted]. This has the potential to be perceived negatively by the public and could potentially have a reputational impact on the Trust.
 - (v) It is not in the public interest, disclosure may impact on the fairness of the scheme on claimants and contributors. There is

also a substantial amount of transparency around the CNST scheme, which is published by NHSR annually. Therefore, the public interest is already satisfied by the information already in the public domain.

25. With the exception of one email, the Commissioner does not consider that the qualified person's opinion is reasonable for the following reasons:
- (i) No evidence has been put forward to verify that NHS Resolution has objected to disclosure or, more importantly, what its reasons for objection are. The withheld correspondence relates to a function of NHS Resolution and NHS Resolution is explaining its reasons for a decision it has taken. It is not reasonable to suggest that NHS Resolution would not explain its decision (or that trusts would not query such decisions) if it knew that the information would eventually be disclosed.
 - (ii) This ground falls away because this part of the withheld information is already exempt under either section 40(2) or 41.
 - (iii) Once again, the Commissioner is not satisfied that NHS Resolution would not explain its decision (or that trusts would not query such decisions) if it knew that the information would eventually be disclosed.
 - (iv) This exemption is not designed to protect a public authority's reputation. Disclosure may generate further enquiries, but these may well be legitimate enquiries given the amounts of money involved. The Commissioner is not satisfied that the opinion demonstrates that any unwarranted harm would arise as a result of the information being disclosed.
 - (v) The qualified person's role is to identify harms that may arise from disclosure, not to comment on the balance of the public interest – these are two distinct tests that should not be conflated..
26. The Commissioner notes that there is one email between two members of the public authority's staff. This email, in broad terms, discusses the way certain figures have been calculated.
27. In respect of the remaining information, the Commissioner is not satisfied that the qualified person's opinion is reasonable and therefore the exemption is not engaged.
28. The Commissioner is satisfied that this particular email does comprise a free and frank discussion between employees. It is not unreasonable for

the qualified person to believe that staff might be inhibited from sending such emails in future (or being less candid in the emails that were sent). The Commissioner is therefore satisfied that section 36(2)(b)(ii) is engaged in respect of this email. No other form of prejudice has been identified by the qualified person so the other limb of the exemption does not apply.

29. In respect of the single email which does engage section 36, the Commissioner is satisfied that the public interest favours maintaining the exemption. Once the remaining information is disclosed, the factual content of this particular email adds little to public debate, but would harm the ability of staff to discuss controversial matters candidly.

Procedural matters

30. The public authority breached section 10 of FOIA as it failed to identify all the information it held within the scope of the request within 20 working days.
31. The public authority breached section 17 of FOIA as it failed to issue a refusal notice, citing all the exemptions upon which it was relying, within 20 working days.

Other matters

32. The Commissioner notes that reference was made, in the qualified person's opinion, to the identity of the complainant. There are very limited circumstances in which the identity of the requester is relevant and the qualified person's opinion is not one.
33. Given the findings set out above, it is not necessary for the Commissioner to determine whether the qualified person's opinion would have been different if the request had been made by a different person. However, he would remind the public authority that the vast majority of exemptions (and particularly section 36) should be applied without consideration of the identity of the requester.

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Roger Cawthorne
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