

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2012

Public Authority: Alder Hey Children's NHS Foundation Trust

Address: Eaton Road
Liverpool
L12 2AP

Decision (including any steps ordered)

1. The complainant has requested a copy of the Alder Hey Centre report. Alder Hey Children's Centre NHS Foundation Trust (the Trust) refused to provide a copy of the report under section 31 and section 36 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the Trust has correctly applied sections 36(2)(b)(i) and (ii) to withhold the requested information.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made a request to the Trust on 27 July 2011 for the following information:

"I request that the Alder Centre Report is released to me, with any personal data appropriately redacted.

Witnesses present at this meeting report that [named individual] has been threatened with a legal slander action for mentioning a suicide of an Alder Hey worker some years ago. Please provide details on the law firm who have thought it appropriate to make this threat, and the costs incurred to Alder Hey in choosing this course of action."

5. The Trust provided a response to the complainant on 23 August 2011 in which it refused to disclose the report he had requested on the basis of the exemptions contained in sections 31(1)(g) with subsection (2)(i) and (j) and section 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA.

On 16 September 2011 it provided the complainant with the public interest arguments it had considered in relation to the application of these exemptions.

6. The complainant requested an internal review of the Trust's decision on 11 October 2011. On 8 November 2011 the Trust wrote to the complainant with the details of the result of the internal review it had carried out. It upheld its application of section 31 and section 36.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant focused his concerns upon the first part of the request for the Alder Centre Report. The Commissioner therefore wrote to the complainant on 23 February 2012 to confirm that the investigation would focus solely upon this part of the request. The complainant did not raise any issues with this approach.

Reasons for decision

8. Section 36 of FOIA states 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-

(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

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

9. The Commissioner has initially considered whether sections 36(2)(b)(i) and (ii) were correctly applied to withhold the requested report.

Section 36(2)(b)(i) and (ii)

10. Information may be withheld under sections 36(2)(b)(i) and (ii) if its disclosure, in the reasonable opinion of a qualified person, would or

would be likely to prejudice the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

11. The Trust has explained that the Chief Executive is the qualified person and her opinion was obtained on 15 September 2011. The Trust has provided the Commissioner with a copy of the submissions which were put to the qualified person and a copy of the qualified person's opinion. He is therefore satisfied that the opinion of the qualified person was sought and provided. The Commissioner will go on to consider whether the opinion of the Chief Executive was a reasonable one.

12. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following:

*'The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.'*¹

13. In determining whether Sections 36(2)(b)(i) and (ii) are engaged the Commissioner will consider:

- whether the prejudice claimed relates to the specified subsection of Section 36(2) that the Trust is relying upon;
- the nature of the information and the timing of the request; and
- the qualified person's knowledge of or involvement in the issue.

14. The Trust has explained that the withheld report relates to a confidential diagnostic investigation into stress within its Theatres Department. It said that staff involved in the confidential diagnostic investigation made a decision whether to participate and further whether to participate in individual sessions, group sessions or an anonymous telephone interview.

15. In obtaining the qualified person's opinion, the Trust set out to the qualified person what information was being withheld and provided her with a copy of the Ministry of Justice's guidance as well as the ICO's guidance on the application of this exemption.

¹ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailled_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

16. The qualified person's opinion is that staff members involved believed their discussions to be confidential and that they would not have taken part if they believed that information they disclosed and discussed during the sessions would be made available beyond the organisation. The qualified person also said that she considered it vital that the Trust is allowed private space in which to conduct such internal activities to allow the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation.
17. In this case the Trust has not specified whether the prejudice would or would be likely to occur. The Commissioner's position is that the lower threshold of "likely to prejudice" should be applied, unless there is clear evidence that it should be the higher level. As there is no such evidence in this case the Commissioner has looked at whether the prejudice would be likely to occur.
18. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that where it is claimed that prejudice "would be likely to" occur "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
19. The Commissioner considers that disclosure of the requested information would be likely to have a prejudicial effect on staff sharing views in an open and frank manner if another investigation were to be launched in the future. Furthermore it may limit the candour of advice given in response to the views provided. Furthermore the Commissioner considers that the requested report is fairly recent and therefore many of the issues or recommendations highlighted in the report may remain ongoing. This would increase the likelihood of the claimed prejudice occurring.
20. Upon viewing the withheld information the Commissioner does consider that it contains very free and frank staff views and free and frank recommendations and advice based upon the staff views obtained. He accepts that it was reasonable for the qualified person to conclude that if this information were disclosed this would be likely to prejudice the frankness of staff views shared under similar circumstances in the future as well as the frankness of the advice provided based upon those views. This is because staff may feel less free to discuss their views openly for fear of this being disclosed into the public domain and those tasked to undertake such an investigation may be less candid in

their evaluation of issues if they believed the report might be disclosed into the public domain.

21. Upon considering the withheld information to which sections 36(2)(b)(i) and (ii) have been applied to, the submissions put to the qualified person and the qualified person's opinion, the Commissioner accepts that it was reasonable to conclude that disclosure would be likely to inhibit the free and frank provision of advice in the future as well as the free and frank exchange of views for the purposes of deliberation.
22. As the Commissioner has decided that these exemptions are engaged, he has gone on to consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke Appeal)*.²
23. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would be likely to inhibit the free and frank provision of advice.

Public arguments in favour of disclosing the requested information interest

24. The Trust has acknowledged that disclosure would demonstrate openness and that the Trust was taking action to understand causes of stress in the Theatres Department. It would also promote public confidence in the NHS and those who work within it.

2. EA/2006/0011 and EA/2006/0013, 8 January 2007

Public interest arguments in favour of maintaining the exemption

25. The Trust has argued that disclosure of an internal diagnostic report is not in the public interest as it would be likely to inhibit participation in any future investigation.
26. Disclosure of the internal diagnostic report would also not be in the public interest as it may undermine the robustness of advice given in response to the views provided by staff.
27. It is not in the public interest to undermine such an investigative process.
28. It is not in the public interest to undermine staff trust within the organisation.

Balance of the public interest arguments

29. The Commissioner considers that there is a public interest in the Trust being open and transparent and demonstrating that where there are staff issues which may potentially affect the quality of care it is able to provide, that these issues are being dealt with sufficiently and appropriately.
30. However the Commissioner considers that there is a strong public interest in staff being able to respond to such investigations by giving very honest and open accounts of their experiences without the concern that the responses given could be disclosed into the public domain. He considers that if staff did have concerns that their views could be published into the public domain, even anonymously, staff would be likely to be less candid in their responses and therefore the investigators would not get a true or fair reflection of issues within the organisation. This would not be in the public interest as if the investigators are unable to obtain the full picture of the organisation from staff they will not be in a position to provide accurate and meaningful advice.
31. The Commissioner also considers that there is a public interest in those investigating and giving advice to be able to do so in a free and frank way, again without fear that any advice given may be disclosed into the public domain. Whilst he doesn't consider that investigators would be likely to be perturbed from providing advice, he does consider that they may be less candid if investigators believed that it may be disclosed into the public domain. He considers that this would not be in the public interest as it is important that the Trust is able to obtain full and frank advice to assist in responding to issues raised by staff.

32. Whilst the Commissioner considers that there is a public interest in the Trust being open, transparent and accountable he also considers that there is a very strong public interest in not undermining the investigatory process relevant to the requested report in this case. The Commissioner considers therefore in this case that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
33. As the Commissioner considers that sections 36(2)(b)(i) and (ii) were correctly engaged in this case he has not gone on to consider the application of section 36(2)(c) or section 31 FOIA any further despite the fact that the Trust has also provided arguments in relation to these exemptions.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

**Pamela Clements
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