

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 18 May 2015

Public Authority: Western Health and Social Care Trust
Address: Altnagelvin Hospital Site
Glenshane Road
Derry
BT47 6SB

Decision (including any steps ordered)

1. The complainant requested a report produced following allegations of abuse at a care home. The Western Health and Social Care Trust disclosed most of the requested information but withheld the remainder on the basis of section 31(1)(g) and section 40(2) of the FOIA. The Commissioner's decision is that the Trust was entitled to refuse the request, and does not require any steps to be taken.

Request and response

2. On 25 February 2014 the complainant wrote to the Trust. The complainant was aware that an investigation into allegations of abuse at a named residential care home was now complete, and requested a copy of the report before it was published. Following a conversation with the Trust the complainant confirmed the request on 6 March 2014.
3. The Trust responded to the complainant on 7 April 2014, refusing the request under section 31(2) and section 40(2) by virtue of section 40(3)(a)(i) of the FOIA.
4. The complainant requested an internal review on 11 April 2014. The Trust responded on 27 May 2014, upholding its refusal.

Scope of the case

5. The complainant contacted the Commissioner on 29 July 2014 to complain about the way the request for information had been handled. The complainant advised the Commissioner that he was representing some of the individuals employed at the care home. Therefore, he was of the view that he needed to have the full report in order to provide appropriate representation.
6. The Commissioner has stressed to the complainant that, under the FOIA, he can only decide whether or not information ought to be disclosed into the public domain. He cannot order the Trust to disclose the requested information solely to the complainant. Nor can he take into account any partial disclosure of information under the Data Protection Act 1998 (the DPA) to the individuals represented by the complainant outside the FOIA.
7. The Commissioner inspected the requested information in this case, and made recommendations to the Trust as to information he considered was not exempt and should be disclosed to the complainant. The Trust accepted the Commissioner's recommendation and consequently most of the requested information has now been provided to the complainant. Despite this the complainant does not accept that the Trust is entitled to withhold the remaining information and has requested that the Commissioner issue a decision notice.
8. In light of the above the Commissioner's decision relates solely to the remaining withheld information, ie extracts from the Adult Safeguarding Investigation report produced in February 2014.

Reasons for decision

Section 40(2): personal data of third parties

9. Section 40(2) of the FOIA states that a public authority is not obliged to disclose information if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the DPA.

Would disclosure of the requested information constitute a disclosure of personal data?

10. The DPA defines personal information as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual."

11. Following the Commissioner's intervention the Trust did disclose a redacted version of the requested information to the complainant. However the Trust was of the view that further disclosure would allow individuals to be identified:

"The residents and staff are very much the focus of this information therefore due to the sensitive personal nature of this information throughout, it would not be possible to redact this sufficiently to adequately preserve confidentiality of all those involved and also ensure that the information remains meaningful."

12. Having inspected the withheld information in detail the Commissioner notes that the report does not name every member of staff, and would stress that it does not name any resident. However, the Commissioner is mindful that individuals could be identified from the information contained in the report, along with other information held by the data controller (ie the Trust) and information known to other individuals such as friends, family or colleagues.

13. The Commissioner is thus satisfied that the information withheld under section 40(2) comprises personal data relating to various identifiable individuals. These include residents and staff at the home, and in the case of residents the information includes sensitive personal data as it relates to their physical and mental health and wellbeing. The withheld information also comprises information relating to individuals who provided information to the investigation team, and the source of the allegations that led to the investigation.

Would disclosure of the requested information breach any of the data protection principles?

14. The Trust argued that disclosure of the withheld information would breach the first data protection principle in that disclosure would be unfair to the individuals in question.

The first data protection principle

15. The first data protection principle has two main components. They are:
- the requirement to process all personal data fairly and lawfully; and
 - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
16. The Commissioner's general approach to the first data protection principle is to consider the fairness element first. If the Commissioner finds that disclosure would be fair he will then move on to consider the other elements of the first data protection principle.

Would disclosure of the information be fair?

17. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has then balanced these against the general principles of accountability, transparency and legitimate public interest in disclosure.

Expectations of the individuals concerned

18. The Trust advised the Commissioner that it had not sought consent from any of the individuals in question as it had assumed that this would not be forthcoming. The Commissioner considers that there is no statutory requirement to seek consent, and consent (or lack of it) may not be a decisive factor, depending on the circumstances of any given case.
19. In this case the residential home provides care for adults with learning disabilities who require assistance with all activities of daily living, and supervision to maintain a safe environment. As vulnerable adults these residents may not be able to give valid consent, in which case the Trust would have needed to consult with their personal representatives or next of kin. In any event the Commissioner considers that information relating to an individual's home life (and the residential home is the home of these individuals) will be more inherently private than information relating to an individual's public life or employment.
20. The Commissioner accepts that individuals providing information, whether as a whistleblower or as a witness during the investigation, would be likely to expect that information they provided to the Trust would be treated in confidence. In addition the staff members who were the subjects of allegations had not, at the time the request was made, yet had an opportunity to defend themselves in disciplinary hearings.

21. The Commissioner considers that individuals who raise concerns, or who are subject to disciplinary matters, are generally entitled to expect that their personal information would not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with disciplinary or grievance procedures, whether as the subject of an investigation or as a witness. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality. Owing to the serious nature of the matters under investigation this expectation of confidentiality could not be absolute. For example, information relating to alleged criminal matters may be passed to the Police Service of Northern Ireland (PSNI). However the Commissioner considers that it could reasonably be expected that information would not be placed into the public domain unless exceptional circumstances applied.
22. For the reasons set out above the Commissioner is satisfied that the individuals, including staff and residents, would all have a reasonable expectation that their personal information would not be disclosed into the public domain.

Consequences of disclosure to the individuals

23. The Commissioner is mindful that most of the requested information has been disclosed and is therefore available to the public. Although the Trust has redacted information that would identify individuals, the fact that the residential home is named will mean that anyone with knowledge of the home will be likely to know the identities of some of the residents or staff. Therefore it is unavoidable that there will be some interference with the privacy rights of individuals, and this in itself may cause a certain level of distress. However the Commissioner is of the view that this interference is to an extent unavoidable, since the residential home is run by the Trust, a public authority, in fulfilment of its statutory duties. The Commissioner has therefore considered the extent to which disclosure of the withheld information that could be linked directly to staff and residents, ie the information redacted from the published report, would cause further adverse consequences for the individuals concerned.
24. The Commissioner acknowledges that disclosure of sensitive personal information relating to residents would be likely to cause distress to those individuals and their families. It would undoubtedly intrude on their expectation of privacy in their home environment. The Commissioner considers this to be a significant argument, especially given that the residents are vulnerable adults.

25. The Commissioner also accepts that staff involved in disciplinary and grievance matters would be likely to feel uncomfortable if information relating to those matters was published into the public domain. It may be more difficult for staff in their everyday work if such information about them, or information they provided, was put into the public domain.

General principles of accountability, transparency and legitimate interest in disclosure

26. The Commissioner appreciates that there is a general legitimate interest in accountability and transparency, and the public is entitled to be informed as to how the Trust investigates serious allegations. There is a strong public interest in assuring the public that the Trust has robust procedures in place to protect vulnerable individuals from abuse and mistreatment. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the individuals whose information is being considered for disclosure into the public domain.
27. The Commissioner considers that there is a legitimate interest in protecting, rather than disclosing, sensitive personal information about residents. It is important that the public be assured that allegations of abuse are properly recorded and investigated, but the Commissioner does not believe that the public disclosure of information relating to vulnerable individuals is necessary to meet this aim in the particular circumstances of this case. As explained above, the Trust has disclosed a redacted version of the requested information, following the Commissioner's detailed recommendations. The Commissioner is satisfied that further disclosure would risk identification of the residents and would have a significant, unwarranted, adverse impact on their expectation of privacy in a home environment. Similarly the Commissioner finds that the disclosure of such information would also cause unjustified distress to the residents' families.
28. The Commissioner has also considered the information provided by staff, whether as witnesses or those accused. The Commissioner has had regard to his published guidance on section 40 and its application in relation to the personal information of public authority employees¹. This

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

guidance suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.

29. The Commissioner acknowledges that the information in question here relates to the individuals as Trust employees, rather than as private individuals. However the Commissioner recognises that information relating to the investigation of serious allegations must be protected from premature or unjustified disclosure into the public domain. The public is entitled to reassurance that an investigation is thorough and impartial, but in order to ensure that this is the case the Trust is required to protect the confidentiality of information provided by individuals such as witnesses and whistleblowers.
 30. In the Commissioner's opinion there is a strong legitimate interest in protecting the Trust's ability to obtain and consider this kind of information, away from public scrutiny. The legitimate interest in informing the public as to the outcome of the investigation can be met at an appropriate time. However, it would not be fair to disclose information before due process has been followed, for example, disciplinary and appeal hearings, etc. The Commissioner notes that, in this case, the request was made very soon after the report was completed. Therefore the Commissioner also finds that the timing of the request weakens the legitimate interest in disclosure.
 31. The Commissioner recognises that in some circumstances it will be fair to disclose information despite the above arguments. In such cases there would need to be an overriding legitimate interest in disclosure. However in this case the Commissioner is satisfied that any legitimate interest in disclosure is insufficient to override the fact that such disclosure would be likely to cause unwarranted distress to the individuals concerned. Therefore the Commissioner concludes that disclosure would be unfair, that section 40(2) is accordingly engaged, and that the Trust was entitled to withhold this portion of the requested information.
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Section 31(1)(g)

32. The Trust cited section 31(2) in its correspondence with the complainant. It did not specify which subsection of section 31(2) it sought to rely on, but stated that the withheld information “embraces the purposes set out in section 31(2) of the Act”.
33. The Trust subsequently clarified to the Commissioner its view that section 31(2) is engaged in conjunction with section 31(1)(g). This applies where disclosure of the information in question would, or would be likely to, prejudice one or more of the functions set out at section 31(2)(a)-(j). Each subsection of section 31(2) provides a separate exemption, therefore a public authority must provide arguments relating to each subsection separately. For the exemption to be engaged it must be at least likely that the prejudice identified would occur. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
34. The Trust subsequently clarified to the Commissioner that it considered subsections (a), (b), (c), (d), (i) and (j) of section 31(2) to be applicable in this case.

Section 31(2)(j)

35. As set out above the Commissioner has already found that the withheld information that comprises personal data of third parties is exempt under section 40(2) of the FOIA. Therefore his analysis below relates only to the withheld information which is not personal data of third parties.
36. Section 31(2)(j) of the FOIA states that:

*“(2) The purposes referred to in subsection (1)(g) to (i) are—

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work”.*
37. The Commissioner will therefore consider whether the Trust exercises a relevant function for the purposes specified in section 31(2)(j) of the FOIA, the likelihood of prejudice to that function if the requested information were to be disclosed and whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Trust's function for the purposes of Section 31(2)(j)

38. The Trust has explained that it is responsible for investigating issues regarding the quality of care arising out of the actions of Trust officers, and good governance has an impact on the quality of care.
39. For the exemption to be engaged, the Commissioner requires the function identified by the public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to that public authority to fulfil. Article 34 of the Health and Personal Social Services (Quality, Improvement and Regulation (Northern Ireland) Order 2003 states that trusts shall:

"...put and keep in place arrangements for the purpose of monitoring and improving the quality of—

(a) the health and personal social services which it provides to individuals; and

(b) the environment in which it provides them."

40. The Commissioner notes that this legislation is similarly worded to the Health and Social Care (Community Health and Standards) Act 2003, which the Commissioner has considered in a previous decision notice². In that case the Commissioner accepted that the legislation placed a duty on NHS bodies to protect the health and safety of patients against risks arising out of or in connection with the services it provides. The Commissioner accepts that the Trust in this case has a similar duty. The Commissioner further considers that as part of its statutory function of providing health and social care services to the public it is necessary to ensure that the services are provided in a manner which protects patients against risks to their health and safety which arise out of or in connection with the actions of the Trust's staff.
41. Therefore the Commissioner is satisfied that the Trust performs a relevant function in relation to section 31(1)(g) of the FOIA and the Trust exercises this function for the purposes of protecting persons other than persons at work (in this case residents of the care home) against health or safety risks arising out of or in connection with the actions of persons at work (Trust staff) as outlined in section 31(2)(j).

² Decision notice FS50518334, issued 14 May 2014

Likelihood of prejudice occurring

42. The Trust has argued that the disclosure of the requested information would prejudice its functions in relation to the protection of the health and safety of residents against risks arising out of or in connection with the actions of Trust staff.
43. The Trust is concerned about the impact of disclosure on future investigations conducted in relation to allegations of abuse. The Trust has argued that disclosure of the withheld information would adversely affect its ability to gather information and establish facts in a particular case. This is because, even though individuals may not be identified from the information withheld under section 31(2)(j), the information consists of frank assessments about Trust staff, practices and management. If staff thought this information would be put into the public domain, in the Trust's view they would be reluctant to provide detailed information, which would hamper any investigation.
44. In addition the Trust clarified to the Commissioner that the investigation in this case was conducted under the "Safeguarding Vulnerable Adults: Regional Adult Protection Policy & Procedural Guidance 2006" rather than the Trust's own human resources policy. This was because the allegations, although relating to the actions of individuals, focused on their impact on the residents identified. As the concerns raised were of a serious nature which may be classified as criminal, the investigation also engaged the "Protocol for Joint Investigation of Alleged and Suspected Cases of Abuse of Vulnerable Adults 2009".
45. In previous cases the Commissioner has accepted that disclosure of information of this nature would be likely to impact on the voluntary supply of information and that this would be likely to prejudice the Trust's function of ensuring the health and safety of patients against risk arising from the actions of Trust staff³. The Commissioner accepts in this case that disclosure of the information withheld under section 31(2)(j) would at least be likely to prejudice its function in respect of undertaking investigations with the aim of protecting vulnerable residents of a care home.
46. The Commissioner accepts that the higher threshold of "would" is met; since the allegations made were of a serious and sensitive nature,

³ ICO decision notices FS50407924 and FS50513359

disclosure of the withheld information in this case would make it more difficult for the Trust to investigate such concerns in future. Thus it would prejudice the Trust's ability to investigate and resolve issues which may impact on the health and safety of patients. The Commissioner accepts that this adverse impact would prejudice the Trust's function as a provider of healthcare services, therefore he finds that section 31(1)(g) with section 31(2)(j) of the FOIA is engaged.

Public interest arguments in favour of disclosing the information

47. The Trust acknowledged the general public interest in openness and transparency. The Trust recognised the particular public interest in understanding how the Trust investigates allegations of abuse in relation to vulnerable adults.
48. The Trust acknowledged that providing the public with information about the investigation would increase public confidence in the Trust's ability to fulfil its functions and provide safe, appropriate care.
49. The complainant argued that disclosure of the withheld information was necessary in order for professional bodies (such as the complainant itself) to represent their members' interests, especially where those members were party to ongoing investigations.
50. The complainant also argued that the Trust had already placed certain information into the public domain, and further disclosure was required in order to ensure that the public was fully informed. The complainant did not accept that disclosure of the withheld information would allow individuals to be identified, but that in any event this kind of information could be redacted.

Public interest arguments in favour of maintaining the exemption

51. The Trust argued that there was a strong public interest in maintaining the exemption with regard to the remaining withheld information. The Trust was of the view that it had met the public interest by disclosing so much of the withheld information.
52. The Trust also stressed to the Commissioner that its priority was establishing what had happened in the context of protecting vulnerable adults from abuse. The residents' wellbeing was the primary concern, and the Trust was anxious to ensure that it could seek and obtain information required in order to fulfil its functions in this regard.
53. The Trust argued that there was an inherent public interest in protecting its ability to investigate allegations of abuse. The serious nature of the allegations, and the impact on the residents, meant that the Trust

should be afforded protection from disclosure of the withheld information into the public domain.

54. The Trust also argued that disclosure of the withheld information would actually damage public confidence in the Trust's ability to conduct thorough investigations, which would not be in the public interest.

Balance of the public interest arguments

55. The Commissioner has stressed to the complainant that the FOIA is motive and applicant blind. The Commissioner cannot require the Trust to disclose information to the complainant that it need not disclose into the public domain. Therefore the complainant's argument in respect of its ability to represent members' interests is a private, rather than public interest argument. The Commissioner considers that in some cases a private interest may be of significance, but this will be informed by the circumstances of the case in question. In this particular case the Commissioner is of the view that the private interest in providing staff with relevant information in order to assist their own cases will be met via other means, for example a formal disciplinary process. Therefore the Commissioner does not consider this argument to carry significant weight in favour of disclosing the withheld information in this particular case.
56. Nevertheless the Commissioner does accept that there is a legitimate public interest in informing the public about investigations carried out. The Commissioner is acutely aware of the need to ensure that vulnerable adults are protected from abuse, and that when allegations are made, they are investigated fully and impartially. Vulnerable adults, their families and the wider public have a legitimate interest in accessing information that may assure them as to how the Trust fulfils its functions. However the Commissioner agrees that the Trust has met this legitimate interest in the disclosures it has made to date.
57. The Commissioner agrees with the Trust that there is a strong public interest in protecting its ability to obtain and assess information relating to allegations of abuse. As with previous cases the Commissioner is of the view that there is merit to the 'chilling effect' arguments presented by the Trust. He acknowledges the likelihood that disclosure of the withheld information would result in individuals being less likely to provide detailed and frank information; this would result in prejudice to the Trust's functions of improving services and protecting against a risk to the health and safety of individuals such as the residents.
58. The Commissioner has also taken into account the timing of the request, since the report had only just been published and decisions had yet to be taken as a result of its findings. The issues were therefore very much

'live', which in the Commissioner's opinion adds to the weight to be given to the arguments in favour of maintaining the exemption.

59. The Commissioner has considered the arguments presented and acknowledges the weight attached to the argument that disclosure would promote transparency and accountability in the delivery of health and social care services to vulnerable adults. Balanced against this, the Commissioner recognises the significant public interest in protecting the Trust's ability to investigate serious allegations. In doing so, the Commissioner attaches weight to the chilling effect argument and the consequences of disclosure. Finally, the Commissioner recognises that the Trust has disclosed all non-exempt information to the complainant.
60. For the reasons outlined above, the Commissioner considers that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure. Therefore, the Trust is not required to disclose the information withheld under section 31(1)(g) with 31(2)(j). The Commissioner has not gone on to consider the application of the other exemptions as he has found this exemption, and that at section 40(2), to have been correctly applied to the withheld information.

Right of appeal

61. 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 123 4504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
63. 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

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