

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2015

Public Authority: **Barnet, Enfield and Haringey Mental Health NHS Trust**

Address: **Trust Headquarters
St Ann's Hospital
St Ann's Road
London
N15 3TH**

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Barnet, Enfield and Haringey Mental Health NHS Trust ("the Trust") for information related to the investigation of an incident which he was involved with whilst visiting a patient at one of the Trust's premises. The Trust refused the request under the exemptions in section 40(2) (personal information) and section 36(2)(b)(ii) (free and frank exchange of views / provision of advice).
2. The Commissioner's decision is that both section 40(2) and section 36 are engaged and that for section 36 the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also found that one piece of information was exempt under the exemption in section 21 (information accessible by other means). In its handling of the request the Commissioner found that the Trust had identified all of the information it held falling within the scope of the requests but had breached section 10 by failing to respond to the request within 20 working days and section 11(a) by failing to give effect to the complainant's preferred method of communication. The Commissioner requires no steps to be taken.

Request and response

3. On 26 May 2014 the complainant made a series of requests to the Trust for information related to the investigation of an incident which he was involved with whilst visiting a patient at one of the Trust's premises and which he had complained about. The request was in fact made up of 14 different requests and read as follows:

"1. Documents relating to the "incident".

2. Documents recording the visits of (a) [a named individual] and [a named individual] and (b) [a named individual] to the Magnolia Unit on the evening of Saturday 25 May 2013 - including any relevant extracts from the signing in book and CCTV images.

3. Documents recording any interaction on 25 May 2013 between the nursing staff and (a) [a named individual] and [a named individual] and (b) [a named individual].

4. Documents recording any interaction between [a named individual] and us.

5. Documents recording any interaction between [a named individual] or [a named individual] and the person (believe to be the Unit Manager) who required the creation (on 28 May 2013) of the DATIX Report form referred to in the chief executive's letter of 27 June 2013. To include all drafts of the text of the DATIX form.

6. Documents relating to the appointment of [a named individual] to investigate the Complaint acknowledged by Ms [a named individual] on 28 May 2013. To include any seeking or giving of advice from or by the Complaints Handling staff of the Trust.

7. Documents relating to, or produced during or after, the investigation carried out by [a named individual], to include all meeting notes; drafts and amendments to any such documents; and any diary entries or such like evidencing the date, time or place of, or attendance at, meetings or other contacts between [a named individual], witnesses or officers including the chief executive or her staff. Also to include any communication with [a named individual].

- 8. Witness statements signed by witnesses as referred to in the letter of 27 June 2013; and all summaries or accounts of evidence given within the [a named individual] investigation process.*
 - 9. Drafts of, and amendments to, drafts of the chief executive's letters of 27 June 2013, 25 October 2013 and 7 February 2014.*
 - 10. Documents relating to the appointment of [a named individual] to investigate the Complaint after 29 July 2013. To include any seeking or giving of advice from or by the Complaints Handling staff of the Trust.*
 - 11. Documents relating to, or produced during or after, the investigation carried out by [a named individual], to include all meeting notes; drafts and amendments to any such documents; and any diary entries or suchlike evidencing the date, time or place of, or attendance at, meetings or other contacts between [a named individual], [a named individual], [a named individual] and [a named individual], witnesses or other officers including the chief executive or her staff. Also to include any communication with [a named individual].*
 - 12. Witness statements signed by witnesses; or in the absence of signed witness statements summaries or accounts of evidence given to the [a named individual] investigation process.*
 - 13. Documents recording any communications between the Trust and the PHSO (a) between 20 July 2013 and 29 July 2013; (b) from 30 July 2013 to 17 March 2014; and (c) after 17 March 2014. In particular documents recording the advice allegedly given by the Trust to the PHSO by 29 July 2013 that the Trust had not yet issued its final response.*
 - 14. Documents recording any contact with the ICO concerning my Request under the Act and the DATIX Incident Report."*
4. The Trust responded on 24 June 2014 asking for some clarification of the request. The complainant responded on 14 July and clarified the use of the term "incident" but did not provide any further clarification. The Trust therefore wrote to the complainant again on 31 July to explain the request was being processed on the basis of the Trust's understanding of what was requested.
 5. A response was sent on 27 August 2014 in which some information was provided but with redactions under section 40(2) and 36(2)(b)(ii) of the FOIA.

6. The complainant subsequently asked the Trust to carry out an internal review of its handling of the request and it presented its findings on 21 October 2014. However, this internal review response only addressed the procedural aspects of compliance with the request and did not appear to review the use of the exemptions to withhold information.

Scope of the case

7. The complainant initially contacted the Commissioner on 23 August 2014 to complain that the Trust had failed to respond to his request. Following the Trust's response, the complainant was advised to ask it to carry out an internal review.
8. Following the internal review, the complainant contacted the Commissioner again on 21 October 2014 to say that he remained dissatisfied with the Trust's handling of his request. The Commissioner subsequently agreed with the complainant that the scope of his investigation would be to consider whether the Trust correctly applied the section 40(2) and section 36(2)(b)(ii) exemptions to withhold some of the requested information. The Commissioner will also consider whether the Trust identified all of the information it held falling within the scope of the requests; the delay in complying with the request and whether the Trust had breached section 11 of the Act by failing to disclose to the complainant hard copies of the requested information, rather than providing the information electronically.
9. During the course of the Commissioner's investigation the Trust said that it had identified some further information falling within the scope of the first request which it was withholding under the section 41 exemption.

Reasons for decision

10. The requested information concerns an incident where the complainant was involved with an altercation with staff members at the Trust whilst visiting a patient at one of their sites. The complainant had made a complaint about this and it had been investigated by the Trust. The request covers information related to the incident and the subsequent investigation.
11. The Trust has withheld some information falling within the scope of requests 3, 5, 6, 7, 8, 10, 12, 13 and 14 although there is some overlap

between the different requests and some information falls within the scope of several requests. For the remaining requests information was either disclosed, has previously been provided to the complainant or else the Trust explained that no recorded information is held. For one request the Trust found that the information was the personal data of the complainant and the request was dealt with as a subject access request under the Data Protection Act 1998. The Trust has applied the section 40(2), section 36(2)(b)(ii) and, as explained above, the section 41 exemptions to the information it has withheld. Section 40(2) has been applied to the majority of withheld information and the Commissioner has considered the use of this exemption first.

Section 40(2) – Personal information

12. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure satisfies one of two conditions. In this case the first condition is relevant which is that disclosure would contravene one of the data protection principles.

13. The first thing to consider when applying the exemption is whether the information is personal data. Personal data is defined in the Data Protection Act 1998 as,

"personal data" means 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 other person in respect of the individual;

14. Section 40(2) has been applied to information falling within the scope of requests 3, 5, 6, 7, 8, 10, 12, 13 and 14. The Commissioner has reviewed the withheld information and has found that this includes the names and personal details of those members of staff who were the subject of the complaint as well as others who were involved in investigating the complaint. Information has also been withheld where it includes responses from members of staff to the investigation such as interviews with witnesses. References to the patient have also been redacted.

15. The Commissioner is satisfied that the information described above is personal data. The information clearly identifies the individuals concerned and records their involvement in the incident that led to the complaint and the subsequent investigation. As the Commissioner is satisfied that the information is personal data he has gone on to consider whether disclosure would contravene the first data protection principle. In assessing whether disclosure would be unfair, and thus contravene the first principle, the ICO takes into account a number of factors such as:
- What reasonable expectations does the individual have about what will happen to their personal data?
 - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
 - What are the consequences of disclosure?
16. In this case, the Trust explained that the members of staff and other individuals would have no expectation that their personal data would be disclosed in this way. The individuals are relatively junior members of staff and in the Commissioner's view would not expect that information given during the course of an investigation would be made public. Certainly, witnesses to the incident would not expect that statements they gave as part of an investigation would subsequently be disclosed. Given that the information concerns an incident involving a complaint from a member of the public it is also likely that disclosure would also be distressing to the people concerned.
17. However, the Commissioner's approach to cases like this is that, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
18. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest

in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.

19. In this case the Commissioner believes that disclosure of the information would not add very much to the information already disclosed. The Commissioner notes that the investigation into the incident found that there was no wrongdoing on the part of the members of staff concerned. In any event, the Commissioner is satisfied that the legitimate interests in protecting the rights and freedoms of the individuals concerned outweigh any other concerns in this particular case. Therefore the Commissioner is satisfied that disclosure of the information withheld under section 40(2) would contravene the first data protection principle and that this exemption is engaged.

Section 36(2)(b)(ii) – Free and frank exchange of views

20. Information in parts 6 and 12 of the request have been withheld under the exemption in section 36(2)(b)(ii). This information includes witness statements given by members of staff involved in the incident as well as some related emails.
21. Section 36(2)(b)(ii) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
22. In order to engage the exemption it is first necessary to establish that the Trust has obtained the opinion of its qualified person. The Commissioner has been provided with a copy of an opinion provided by the Trust's Executive Director of Nursing, Quality and Governance on behalf of the Chief Executive who was on leave at the time. The opinion was given on 27 August 2014 that section 36(2)(b)(ii) was engaged in respect of the withheld information.
23. For the witness statements the qualified person's opinion was that disclosure may inhibit similar investigations in future to the extent that such investigations may be less effective than they would otherwise be. As regards the related emails, the qualified person's opinion was that disclosure would prevent a similar exchange of views in future and this would be detrimental to the improvement of any such investigation.
24. Having satisfied himself that the Trust has obtained the opinion of the qualified person, in order to determine whether the exemption is engaged the Commissioner must then go on to decide whether this opinion is reasonable. This involves considering:

- whether the prejudice claimed relates to the specific 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.
25. The Commissioner has also issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' 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."
26. It is important to note that when considering whether the exemption is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold he must find that the exemption is engaged.
27. The Commissioner has reviewed the withheld information and considered the opinion of the qualified person. He notes that the qualified person was provided with copies of the withheld information, and had access to the Commissioner's guidance on the section 36 exemption and that this should have allowed them to reach a balanced opinion on whether the exemption could be applied. The Commissioner is also of the view that, given the sensitive nature of the subject matter, people would be reluctant to cooperate with similar investigations if they felt that information they provided in the form of witness statements would be made public or at the least, would express themselves in much in a much more guarded way. Similarly, the emails discussing the investigation are quite candid and again touch on many sensitive issues. In the Commissioner's view it is reasonable to conclude that people would be more inhibited in how they contribute to future investigations were the information disclosed.
28. For these reasons the Commissioner has decided that section 36(2)(b)(ii) is engaged and he has now gone on to consider the public interest test.

Public interest test

29. Section 36(2)(b)(ii) is a qualified exemption which means that even where the exemption is engaged the information can only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

30. In the Commissioner's view there is a public interest in disclosure to the extent that this would shed light on how the Trust investigates complaints it receives from members of the public.
31. For its part the Trust acknowledged that disclosure would promote openness and transparency.

Public interest arguments in favour of maintaining the exemption

32. In favour of maintaining the exemption the Trust said that there was a public interest in protecting the effectiveness of future investigations. It added:

"...it also considers there to be a strong public interest in Trust staff being able to openly and honestly provide their views to management without fear of public scrutiny. If the staff interviewed had known that their witness statements could become publicly available, then there is a very strong chance that they would not have been so open in providing their views. Consequently, disclosure of those statements is likely to discourage future participation in other investigations and could therefore significantly hamper the Trust's ability to undertake robust investigations and make suitable recommendations.

Balance of the public interest arguments

33. The Commissioner has first considered the public interest in disclosure and he accepts that this would promote transparency and accountability especially as this would provide an insight in to how the Trust carries out investigations of this kind. However, the Commissioner is also mindful that the Trust has already disclosed a significant amount of information regarding its investigation and so the public interest in transparency has already been satisfied to some extent. The Commissioner is also of the view that disclosure of the withheld information is also likely only to be of interest to the complainant as his request appears to be motivated by pursuing his complaint with the Trust regarding the incident. In that sense there is very little wider public interest in disclosure.

34. On the other hand the Commissioner considers that there is a strong public interest in allowing the Trust to carry out internal investigations of this kind as effectively as possible. It would not be in the public interest if members of staff felt they were unable to contribute freely to future investigations which would then affect the ability of the Trust to take the appropriate action. The Commissioner is also mindful that the withheld information was still very recent at the time of the request – around 9 months old or less. Therefore, the impact of disclosure was likely to have a more significant effect on the frankness with which staff contributes to investigations in future.
35. The Commissioner has considered the competing arguments and finds that in all the circumstances of the case, and having given due weight to the opinion of the qualified person, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 41 – information provided in confidence

Section 21 – information accessible by other means

36. During the course of the Commissioner's investigation the Trust found that it held some further information falling within the scope of request 1 which it had not identified when it originally responded to the request. It explained that this was a copy of a patient's nursing notes and which contained information related to the incident. It explained that the patient concerned was deceased and noted that for this reason it was unable to rely on the section 40(2) exemption. However, it said that the section 41 exemption could be relied on instead. Section 41 provides that information is exempt if it has been obtained from another person and disclosure would give rise to an actionable breach of confidence.
37. It is the Commissioner's long established view that medical records are subject to a duty of confidence and that this duty of confidence extends even after death. Therefore, in most cases the section 41 exemption will apply because action could be taken for a breach of confidence if the information was disclosed.
38. However, for the section 41 exemption to be engaged, the information must remain confidential. If the information has been previously disclosed it will no longer have the necessary quality of confidence. This is relevant because it became clear during the course of the Commissioner's investigation that the complainant already has a copy of this document which the Commissioner understands was provided to him by the Parliamentary and Health Service Ombudsman as part of a complaint he had made about the Trust to that organisation. Therefore,

section 41 cannot apply in this instance. The Commissioner also has some concerns that the relevant part of the nursing records which falls within the scope of the request does not focus on the patient but rather on the incident involving the complainant.

39. In any event, since it is clear that the complainant already possesses a copy of the nursing records, the Trust would have been entitled to rely on the section 21 exemption which provides that information is exempt if it is reasonably accessible to the applicant by other means. Section 21 confers an absolute exemption from the Act and therefore the Commissioner is satisfied that this information should be withheld, albeit for a different reason from that relied on by the Trust.
40. The complainant had also suggested that the existence of the nursing records indicated that the Trust had failed to identify all of the information it held and that it may in fact be withholding further information to which it had not applied an exemption. The Commissioner has considered this point below when deciding if the Trust holds any further information falling within the scope of the requests.

Section 1 – Information not held

41. The complainant had expressed some concern that the Trust had not identified all of the information falling within the scope of the requests, although he did not specify exactly which requests he felt had not been addressed properly. The Commissioner agreed that he would consider the thoroughness of the searches conducted by the Trust to identify any requested information.
42. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request). In order to reach a determination on this the Commissioner asked the Trust the following questions:
 - What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?
 - If searches included electronic data, please explain whether the search included information held locally on personal computers used

- by key officials (including laptop computers) and on networked resources and emails.
- If searches included electronic data, which search terms were used?
 - If the information were held would it be held as manual or electronic records?
 - Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
 - If recorded information was held but is no longer held, when did the Trust cease to retain this information?
 - Is there a business purpose for which any of the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon the Trust to retain any of the requested information?
43. In response to the Commissioner the Trust provided details of the searches it had undertaken for information falling within the scope of each request. From this it is apparent that all individuals involved in the incident and the subsequent complaint and investigation were asked to search for relevant information. Locations where information might reasonably be expected to be held were also searched. Both electronic information and paper information was searched.
44. It is likely that some information was once held in respect of request 2 for details of the signing-in book and CCTV images. However, the Trust explained that the information was no longer held at the time of the request. The signing-in book is only used for the purpose of accounting for those present in the event of a fire or evacuation and are not held for any length of time. Therefore, the information was no longer held when the complainant made his request, a year after the incident took place. Similarly, the Trust explained that there are no CCTV cameras in the building in which the incident took place and that cameras are only directed to the roads and paths outside the building. In any event, the Trust's policy is only to retain images for 7 days.
45. The Commissioner has considered the requests made by the complainant, the searches undertaken by the Trust to locate the information and the amount of information that was recovered. In his view there is nothing to suggest that information was withheld, indeed the Trust has recovered a significant amount of information related to the request. Moreover, the Trust appears to have taken all reasonable steps to search for the requested information and there is nothing obviously missing. Therefore, without any evidence to the contrary the Commissioner must conclude that the Trust holds no further information falling within the scope of the request beyond which it has already identified.

Section 10 – Time for compliance

46. Section 10 provides that a public authority must respond to a request promptly and in any event within 20 working days. In this case the complainant made his request on 26 May 2014 but the Trust did not provide a substantive response until 27 August 2014. Therefore, by failing to provide a response within 20 working days the Trust breached section 10(1) of FOIA.

Section 11 – Means by which communication to be made

47. In making his complaint the complainant had also said that the Trust had failed to provide the requested information in his required format which was paper copies. Instead the Trust had disclosed the information electronically.

48. Section 11(a) of FOIA provides that where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely-

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant.

The public authority shall so far as reasonably practicable give effect to that preference.

49. In making his request the complainant said "I wish to have hard copies where available and digitised copies if hard copies cannot be produced". In response the Trust provided the information which it found to be disclosable in electronic format. It did not provide any reason why it was unable to comply with the complainant's preference. Indeed, during the course of the Commissioner's investigation the Trust said that it was prepared to disclose information in hard copy if necessary. Therefore, it appears that it was reasonably practicable for the Trust to have provided paper copies of the requested information. By failing to do so the Trust has breached section 11(a) of FOIA.

50. During the course of the Commissioner's investigation the complainant said that he no longer required the Trust to provide him with hard copies of the information it had previously disclosed and that only if any new information were found it should be provided in hard copy. Therefore the Commissioner does not require the Trust to take any steps on this point. Nevertheless the complainant asked that the Commissioner still record the fact that the Trust failed to give effect to his preferred method of communication.

Right of appeal

51. 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

52. 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.
53. 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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