

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2017

Public Authority: Gloucestershire Hospitals NHS Foundation Trust
Address: Cheltenham General Hospital
Sandford Road
Cheltenham
GL53 7AN

Decision (including any steps ordered)

1. The complainant has requested a copy of a report into the financial issues at Gloucestershire Hospitals NHS Foundation Trust. The Trust refused the request on the basis of various subsections of the section 31 exemption.
2. The Commissioner's decision is that the Trust has demonstrated that section 31(1)(g) with 31(2)(d) is engaged and the public interest favours maintaining the exemption. She requires no steps to be taken.

Request and response

3. On 22 September 2016, the complainant wrote to Gloucestershire Hospitals NHS Foundation Trust ("the Trust") and requested information in the following terms:
"a copy of the Deloitte Touche report into the unreported overspend of the trust."
4. The Trust responded on 14 October 2016. It stated that it held the requested information but considered it exempt from disclosure by virtue of section 31 of the FOIA.
5. Following an internal review the Trust wrote to the complainant on 1 December 2016. It stated that it upheld its decision to withhold the report under section 31 due to an ongoing investigation by NHS Improvement.

Scope of the case

6. The complainant contacted the Commissioner on 5 December 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied the provisions of section 31 and if so to determine where the balance of the public interest lies.

Background

8. On 20 September 2016 the Trust made a public announcement about its financial position stating that it had recently discovered this was significantly worse than had previously been publicly reported, with an anticipated forecast deficit of £31 million compared with the previously reported planned surplus of £18.2 million.
9. This information was put into the public domain via a press release and a press conference held by the Trust's newly appointed Chief Executive. It was also revealed that the Trust's Director of Finance had recently resigned from her position. The information in the public domain referred to the report of August 2016 by Deloitte ("the report") and the Trust also confirmed it was commissioning a further report ("the second report" to establish the causes of the situation including the reasons why the financial position had not been identified earlier by the Trust Board.
10. The Trust has also explained to the Commissioner that at the time the request was received a pre-existing Police investigation into the alleged fraudulent actions of a Trust member of staff has been ongoing since 2015 and was reaching a significant point. At this time it was not clear if there was any connection between this and the Trust's financial issues but the Trust was mindful that disclosure of the report could impact on the Police investigation if there was found to be any link.

Reasons for decision

Section 31 – law enforcement

11. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this

is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.

12. The Trust has applied section 31(1)(g) together with sections 31(2)(a), (b), (c) and (d) to all parts of the Deloitte report.
13. The relevant parts of section 31 of the FOI provide that:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are –

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,”

14. The Commissioner will therefore consider whether the Trust exercises a relevant function for any of the purposes specified in these subsections, the likelihood of prejudice to any of the functions 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 functions for the purposes of Section 31(2)(b), (c), (d)

15. 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. The Commissioner is aware that healthcare authorities have specific statutory duties to protect the health and safety of patients against risks posed by the delivery of healthcare services as set out in

the NHS Act 2006 ("NHS Act") and the Health and Social Care Act 2012 ("HSCA").

16. The Commissioner considers that this function places 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. Part of this statutory function is providing NHS services to the public and 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 its staff.
17. More specifically, the Trust has an ongoing duty to ensure it uses its resources efficiently and effectively to fulfil its statutory function. The Trust needs to be able to demonstrate to NHS Improvement that it is able to provide goods and services for the purposes of the NHS and that it is financially sustainable. Where there is questions about this the Trust has a general duty to investigate the cause of the position under the NHS Act (sections 30-35) and the licensing regime in Part 3 of the HSCA.
18. The Commissioner is satisfied the Trust performs relevant functions in relation to section 31(1)(g) and, specifically, exercised these functions in this case for the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which they are authorised to carry on (31(2)(d)). The exemption provided by 31(2)(d) protects the activity of public authorities and the function is ascertaining a person's fitness or competence to manage companies or undertake a profession is often derived from statute. The Commissioner's guidance on this¹ describes "fitness" as referring to the character or suitability of the individual for the role and "competence" as whether the individual has the necessary skills, training and ability to perform that role.
19. The Trust has stated that it has a duty imposed on it under Regulation 5 of the Health and Social Care Act 2008 Regulated Activities Regulations 2014² to ensure that Directors of the Trust are "Fit and Proper Persons" to fill that role. The duty applies when Directors are first appointed and is also an ongoing duty requiring the Trust to take action if it identifies evidence indicating a director in a role was not, or had ceased to be, a

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

² <http://www.legislation.gov.uk/ukdsi/2014/9780111117613/regulation/5>

Fit and Proper Person. The Trust argues that in light of the report it was considered possible that it might need to take action against individuals who had been Directors on the Board during the period in which the financial difficulties developed. Section 6(a)(b) of the aforementioned Regulations requires that:

“Where an individual who holds an office or position ... no longer meets the requirements in paragraph (3), the service provider must –

a. take such action as necessary and proportionate to ensure that the office or position in question is held by an individual who meets such requirements and:

b. if the individual is a health care professional, social worker or other professional registered with a health care or social care regulator, inform the regulator in question”

20. Based on these submissions from the Trust the Commissioner is satisfied that the Trust performs a relevant function in relation to section 31(1)(g) and this function is exercised in ascertaining a person's fitness or competence to manage or carry out a profession.

Likelihood of prejudice occurring

21. The report was never intended to be made public and was for internal use. At the time of the request the Trust had not yet made any decision about any proceedings it might need to undertake and had made no decision about any action that might be taken against individuals.
22. The Trust considers the issue was still very much live at the time of the request and it was concerned that disclosing the report at this time would have impacted on it being able to achieve a fair outcome. This is because it could lead to bias or influence perceptions of the situation endangering the ability of individuals to provide an impartial and objective view of the situation and therefore make fair decisions.
23. The Commissioner has reviewed the withheld information and notes that the report was intended to review the circumstances that lead to the financial situation the Trust was in and to report to the Board on improving governance of the Trust's finances. The report was produced by relying on information provided to it by the Trust and representations from management. The report also contains caveats on the accuracy of information, making it clear that the information has not been independently verified or audited and highlighting the report was provided in confidence.
24. Given the financial situation which gave rise to the report and the detailed nature of the analysis of the Trust's financial position the

Commissioner accepts the report was not intended to be circulated more widely than at senior levels in the Trust. It is also clear that the report was an initial report intended to confirm the nature and immediate causes of the Trust's financial position. The second report was then to examine the root causes and responsibilities. Therefore, disclosing the first report could have impacted on the second report by opening up the investigations to public scrutiny and the possibility of a lack of impartiality.

25. Taking into account the subject matter, the content of the withheld information and the Trust's representations, the Commissioner accepts there is a real and significant risk that disclosure at the time of the request would have been likely to prejudice the Trust's ability to ascertain a person's fitness or competence to manage or carry out a profession. The subject matter was still live at the time of the request, the Trust had made no decisions on what action to take as a result of the findings of this report but there was still the possibility that individuals at the Trust may be investigated about their role in the financial issues with a view to decisions being made on their fitness and competence to carry out their profession.
26. As the issue was still live the Commissioner has to conclude that the likelihood of disclosure impacting on the Trust's ability to exercise its functions remained high at the time of the request. Therefore the Commissioner considers that section 31(1)(g) with section 31(2)(d) is engaged in relation to the withheld information.
27. The exemption under section 31(1)(g) with section 31(2)(d) is a qualified exemption which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

28. The Trust acknowledges there is a public interest in its financial position and understanding the causes and implications of that position. The Trust also recognises there is a public interest in the disclosure of information which shows accountability for the use of public money; particularly where there are doubts as to how effectively public finances have been managed. The Trust argues it met the public interest in this by openly and transparently committing to publish the findings of the second report.
29. The complainant argues that the fact that some information has been discussed publicly and the commitment by the Trust to publish the second report does not satisfy the public interest as it will not provide a complete picture of the financial issues at the Trust and what has been

done. The complainant considers there is a strong public interest in disclosure of all information relating to the financial situation at the Trust to give full context to the problems.

Public interest arguments in favour of maintaining the exemption

30. The Trust considers the key public interest argument in favour of maintaining the exemption is that disclosure would undermine the effectiveness of its investigation and the ability of the Trust to fully ascertain the financial position and determine responsibility for it.
31. The Trust also argued that there is a strong public interest in ensuring fairness to individuals and not exposing them to unjustified or prejudicial public comment. The Trust highlighted the fact that the report was not regarded as reflecting the definitive findings and no decision in terms of responsibilities for the financial position had been made as the investigation was at an early stage. However, the Trust was still in the process of gathering information and was considered that opening up the issue to external scrutiny at the time of the request would not have been in the public interest as it may have hindered the Trust's deliberations and decision making and made it more difficult to investigate the conduct of individuals without prejudice.

Balance of the public interest arguments

32. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information and the context in which it was received. The report was a first step in the investigative process and the process of determining responsibility for the financial problems at the Trust. The process of ascertaining if any individuals would be deemed to be no longer competent or fit to perform their role was therefore ongoing at the time of the request.
33. The Commissioner accepts there is a legitimate public interest in informing the public about investigations carried out, particularly in cases where the investigation relates to the potential misuse of public money. Whilst the Commissioner does not agree that this legitimate interest has been met by the statements made by the Trust she does acknowledge that the Trust has committed to publishing the findings of the second report which will contain more detailed findings on root causes and responsibilities for the financial issues. However, she still considers there is some public interest in the disclosure of any information on such a significant financial failure that was widely covered by the media.

34. Balanced against this is the need to allow the Trust a safe space to consider the findings of the first report and to await the outcome of the second report so that it can make impartial and fair decisions on action that might need to be taken against those found responsible. The Commissioner has already accepted that there is a real risk of prejudice to the Trust's ability to carry out its function of ascertaining if any member of staff is competent or fit to carry out their profession if the information is disclosed. If the Trust is inhibited in its ability to fully investigate and take action this could, in turn, impact on its ability to ensure effective financial governance going forwards which would not be in the public interest.
35. The timing of the request is of key importance in making a decision in this case, the early nature of the investigative process when considered alongside the subject matter and the argument that the process needs to be conducted in a safe space to allow the Trust to make decisions without prejudice also add enough weight to the public interest in favour of maintaining the exemption.
36. The Commissioner therefore finds that section 31(1)(g) with section 31(2)(d) is engaged in relation to the withheld information and the public interest favours maintaining the exemption.

Right of appeal

37. 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

38. 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.
39. 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

Jill Hulley
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