

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 August 2017

**Public Authority:** East of England Ambulance Service NHS Trust  
**Address:** Whiting Way  
Melbourn  
Cambridgeshire  
SG8 6EN

#### Decision (including any steps ordered)

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1. The complainant made three requests for information about meal breaks. The East of England Ambulance Service NHS Trust (the Trust) refused the request under section 36(2)(c) – prejudice to the effective conduct of public affairs.
2. The Commissioner is satisfied that section 36(2)(c) is engaged and, with the exception of one piece of information, the public interest favours maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the dates when the Gold Command removed the fixed meal breaks in October and November 2016.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 5 November 2016 (FOI 8416) the complainant requested the following information:

*'Q1. Please could you provide the number of staff that had a late break or a missed break by SLM area, for:*

- August 2016*
- September 2016*
- October 2016*

*And as separate dates:*

- 15th October 2016*
- 16th October 2016*
- 22nd October 2016*
- 23rd October 2016*
- 29th October 2016*
- 30th October 2016*

*If it's possible to also give the percentage of staff affected (i.e. on a DSA there would be x2 staff, rather than counting them as a single crew) who had a late or missed break, as a percentage of total staff working, again by month and by SLM area, that would be very helpful.*

*I have previously been given this information as a staff request - and have attached this for information. Please can the information be provided in the same format?*

*Q2. Please can you also provide me with any dates where gold command removed the fixed meal breaks during October 2016? Thanks.'*

6. On 23 November 2016 (FOI 8636) the complainant requested the following information:

*'Q1. Please could you provide the number of staff that had a late break or a missed break by SLM area, for the following dates - please provide late and missed breaks as separate figures:*

- 7th November 2016*
- 8th November 2016*
- 9th November 2016*
- 14th November 2016*
- 15th November 2016*
- 16th November 2016*
- 21st November 2016*
- 22nd November 2016*
- 23rd November 2016*

*If it's possible to also give the percentage of staff affected (i.e. on a DSA there would be x2 staff, rather than counting them as a single crew) who had a late or missed break, as a percentage of total staff working, again by month and by SLM area, that would be very helpful.*

*I have previously been given this information as a staff request - and have attached this for information. Please can the information be provided in the same format?*

*Q2. Please can you also provide me with any dates where gold command removed the fixed meal breaks, or the meal break window during October and November 2016 - please state the changes made, the length of time they were in force for and what monitoring was in place around meal breaks for staff. Thanks.'*

7. On 30 November 2016 (FOI 8722) the complainant requested the following information:

*'Q1. Please could you provide the number of staff that had a late break or a missed break by SLM area, for November 2016?*

*If it's possible to also give the percentage of staff affected (i.e. on a DSA there would be x2 staff, rather than counting them as a single crew) who had a late or missed break, as a percentage of total staff working, again by month and by SLM area, that would be very helpful.*

*I have previously been given this information as a staff request - and have attached this for information. Please can the information be provided in the same format?*

*Q2. Please can you also provide me with any dates where gold command removed the fixed meal breaks, or the meal break window during November 2016, or made any other changes - please state the changes made, the length of time they were in place for, the rationale and the monitoring in place around meal breaks for staff. Thanks.*

8. On 12 December 2016 the Trust responded to all 3 requests (FOI 8416, 8636, 8722) and provided a response to Q1 (meal break information by SLM area) in each request in the preferred format but withheld the requested information at Q2 (Gold notes and dates) for each request under section 36(2).

9. On 12 December 2016 the complainant requested an internal review on the withheld information:

*'I note the Trust has claimed an exemption for the following element of my request (referenced 8416)*

*"Please can you also provide me with any dates where gold command removed the fixed meal breaks during October 2016?"*

*This does not require access or copies of gold notes, but it does request that the dates of changes made by Gold are provided, i.e. the date the fixed meal breaks were removed. As these changes went out to staff via MDT I do not feel they should have been withheld under an exemption Section 36(2). It's not clear how providing those historical dates "would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs".'*

10. The Trust sent the outcome of its internal review to the complainant upholding its decision on section 36(2) to Q2 of all 3 requests.

### Scope of the case

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11. On 7 February 2017 the complainant wrote to the Commissioner to complain about the way her request for information had been handled. She argued that '*providing a rationale for the changes and the dates/times the change was made should be provided under FOIA*'
12. In its submissions to the Commissioner, the Trust confirmed that it was relying on both section 36(2)(b)(i) and section 36(2)(c).
13. The Commissioner therefore considers the focus of the investigation to be whether the Trust was entitled to rely upon the exemption at section 36 to withhold the remaining information at Q2 of the three requests.

### Reasons for decision

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#### Section 36 – prejudice to the conduct of public affairs

14. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
  - (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 purpose of deliberation, or
  - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
15. As section 36(2)(c) is worded specifically as "would otherwise prejudice", it is the Commissioner's opinion that if a public authority is

claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).

16. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. She considers that the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.
17. The Commissioner will first consider if section 36(2)(c) has been cited correctly by the Trust.
18. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
  - Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given, and
  - Consider whether the opinion was reasonable.
19. The Trust confirmed that its qualified person is its Chief Executive, Mr Robert Morton. The Trust has advised the Commissioner that the qualified person's opinion was sought from its Chief Executive on 9 December 2016. The Commissioner is therefore satisfied that the qualified person did provide his opinion that the information in question was exempt under section 36(2)(b)(i) and 36(2)(c).
20. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the Trust has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
21. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the

qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.

22. The Trust has explained that it

- has a SURGE PLAN in place, in line with ten other Ambulance Trusts, to safeguard patients who may need time critical care.
- The SURGE PLAN provides for a pre-authorized range of actions, which escalate in intensity and risk to match the level of pressure the service is under and the relative risk to patients. It also provides guidance and assurance to managers who are charged with making these decisions.
- The senior operational managers who make these decisions are a small group of well trained, highly experienced, senior members of staff known as Gold Commanders.
- The Gold Commanders make the decisions in pressurised situations where they are trying to balance both staff and patient welfare.
- There are a number of steps that the Gold Commanders take before resorting to removing fixed meal breaks. It should be noted that the removal of fixed meal breaks does not mean that crews do not get a break however, in times of extremis, meal breaks may be provided dynamically.

23. The Trust stated that it is the qualified person's opinion that disclosure of the withheld information in this case would be likely to prejudice the effective conduct of public affairs for a number of reasons:

- to disclose the decisions and the decision making process in Gold Command would inhibit the Trust's ability to operate an emergency ambulance service, as the Gold Commanders would not be able to openly discuss, exchange views for the purposes of deliberation and to fully understand operational issues in order to make future service development changes as required.
- Those involved in Gold Command need to be able to develop their views and provide advice and, whilst the information may not always be contentious, its publication could have a significant impact on the operation of the service and public confidence.

- The release of the information requested could make Gold Commanders reluctant to remove fixed meal breaks, which could negatively impact on patient safety.
  - It is impossible to recreate this type of live environment and the Gold Commander must make this important decision with the information available to them at that point in time. It is critical that Gold Commanders are free from undue influence, worry or concern so that effective decision-making can occur.
  - In forming this opinion, the qualified person had regard for the fact that this work is ongoing and live. Any disclosure could prejudice this important decision-making process and ultimately the ability of the Trust to provide an effective service as well as potentially increasing the risk to patient safety. This could have long term adverse effects on both the Trust and the public.
  - The qualified person is of the opinion that release of this information would be likely to inhibit the free and frank provision of advice by our Gold Commanders, which in turn would be likely to prejudice the effective conduct of public affairs.
24. The Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information.
25. The Trust has explained that these decisions to cancel fixed meal breaks are taken as part of the SURGE PLAN to safeguard patients who may need time critical care. Decisions are taken in live pressurised situations where the Gold Commanders try to balance both staff and patient welfare. The Trust has explained how disclosure would be likely to prejudice the effective conduct of public affairs. The Commissioner is satisfied that the qualified person's opinion (that disclosure would be likely to prejudice the effective conduct of public affairs) is a reasonable opinion to hold.
26. For these reasons, the Commissioner finds that the exemption provided by section 36(2)(c) is engaged in respect of all the information to which it has been applied. As the Commissioner considers that the exemption as set out in section 36(2)(c) is engaged in respect of all the withheld information, she has not considered the Trust's application of section 36(2)(b)(i).

### **Public interest test**

27. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case

the harm that disclosing the information would cause is greater than the public interest in its disclosure.

28. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)<sup>1</sup>. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
29. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

### **Public interest arguments in favour of disclosure**

30. The complainant has argued that
  - There is clearly a large public interest to provide the rationale over why changes to meal breaks were made and how these were monitored for safety.
  - It's clear that when Gold Commanders remove fixed meal breaks this causes more missed and late breaks - I believe the dates/times and justification should be shared.
  - the Trust was issued with two improvement notices by the Health and Safety Executive in November 2016, in relation to working hours of staff not being accurately recorded and concerns being raised over the working conditions/hours of staff.
  - The removal of the fixed meal break points results in a much higher percentage of frontline staff having a late or missed meal break - given these staff work over 12 hour shifts, this is a huge concern. Ensuring staff get their break in keeping with the working time directive should be a priority.
  - If there was to be an enquiry into a strategic decision the gold notes would be made available. All gold commanders are aware of that possibility and these notes are therefore not expected to be private.

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<sup>1</sup> EA/2006/0011; EA/2006/0013



- Gold Commanders are very senior managers in the Trust - usually Director level.
  - I believe sharing the times and dates over decisions to make changes to meal breaks should be disclosed under the freedom of information act. The rationale for the changes should also be disclosed, as I believe the public interest test would outweigh any right to non-disclosure.
31. In addition the complainant provided the Commissioner with a press release from UNISON on 15 December 2016 that stated that 125 frontline ambulance staff worked over 12 hours without a break on one shift.
32. The Trust stated that it is committed to providing a transparent and open approach which offers assurance that actions by senior managers are appropriate, fair and, effective, specifically in relation to patient and staff welfare. The Trust provides this assurance through different forums, such as the Oversight Group.
- The Oversight Group was developed to ensure partnership working and a collaborative approach to challenges arising from the Trial Stop clause, which provides a review and feedback system for UNISON and the project team in order to identify any learning opportunities. The requester is a member of this Oversight Group and is able to access information around this project and the risks associated with it via this Group.
33. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in understanding more clearly how senior managers make decisions around patient safety and crew welfare.

**Public interest arguments in favour of maintaining the exemption**

34. The Trust considered the following arguments in favour of maintaining the exemption
- It is important for the process of delivering effective and responsive emergency ambulance services to be allowed freedom to develop operational management views and to give free and frank advice and not be inhibited by the possibility of publication.
  - Disclosure of this information would therefore be likely to inhibit the free and frank exchange and reporting of views for the purposes of deliberation and decision-making.

- If those involved in Gold Command felt there was a risk of their findings and advice being published, it would be likely to lead them to being less frank in their reporting, drawing conclusions and providing advice in the future.
  - Those involved must be able to speak bluntly regarding operating procedures and processes.
  - If this information was made public this would result in challenges to protect reputations and substantially slow the manager's ability to deliver their operational objectives. The organisation is under increasing pressure to review the delivery and efficiency of all its functions and needs to be able to take decisions swiftly where public safety could be put at risk.
35. The Commissioner is satisfied that disclosure would be likely to compromise the integrity of the decision making process.

### **Balancing the public interest arguments**

36. The Trust has stated that the qualified person acknowledges the strong public interest in openness and transparency, particularly in ensuring fair and effective decision-making. However, the qualified person recognised that there is a strong public interest in senior managers and Executives having the ability to conduct free and frank discussions for the purposes of deliberation and decision making in order to deliver an effective and responsive emergency ambulance service.
37. The Commissioner has considered both the complainant's and the Trust's public interest arguments.
38. In the first request the complainant asked for information on the dates when meal breaks were cancelled by Gold Command:

*Q2. Please can you also provide me with any dates where gold command removed the fixed meal breaks during October 2016.'*

39. In the second and third request the complainant asked for additional information around the Gold Command decisions:

*Q2. Please can you also provide me with any dates where gold command removed the fixed meal breaks, or the meal break window during October and November 2016 - please state the changes made, the length of time they were in force for and what monitoring was in place around meal breaks for staff.'*

*Q2. Please can you also provide me with any dates where gold command removed the fixed meal breaks, or the meal break window*

*during November 2016, or made any other changes - please state the changes made, the length of time they were in place for, the rationale and the monitoring in place around meal breaks for staff.*

40. The Commissioner notes that considerable information has already been provided to the complainant on the numbers of staff with late or missed meal breaks by month and on particular dates within the months. (Q1 of each request)
41. The Commissioner has considered if the dates when Gold Command removed the fixed meal breaks could also be released. This is the information as described in the first request dated 5 November 2016 (FOI 8416 - Q2. *Please can you also provide me with any dates where gold command removed the fixed meal breaks during October 2016.*)
42. The Commissioner is sympathetic to the complainant's arguments from 12 December 2016 that providing a list of historical dates which went out to staff via MDT would be unlikely to prejudice the effective conduct of public affairs. The Commissioner also notes the two improvement notices issued by the Health and Safety Executive.
43. Therefore the Commissioner, although she accepts that the qualified person's opinion on this point is reasonable, is not satisfied that the severity or extent of the prejudice would be so significant on a list of historical dates when Gold Command removed the fixed meal breaks that it would outweigh the public interest in disclosure of these dates.
44. However, the Commissioner accepts that there is a significant public interest in the Gold Commanders at the Trust being free to discuss and decide when to remove the fixed meal breaks as part of a SURGE PLAN to safeguard patients who may need time critical care and to make decisions under the SURGE PLAN with a completely honest assessment.
45. In light of the above the Commissioner finds that although there is a significant and important public interest in the public understanding how the Trust decides to remove the fixed meal breaks as part of the SURGE PLAN, there is a greater public interest in allowing the Trust the ability to take decisions swiftly where public safety could be put at risk. The Commissioner finds that the Trust is entitled to withhold this part of the remaining information to which it applied section 36(2)(c).
46. In conclusion, the Commissioner considers that the remaining withheld information (Q2 of each request) should be considered as 2 parts:
  - The historical dates in October and November 2016 where Gold Command removed the fixed meal breaks should be disclosed as

the Commissioner considers that the public interest arguments in favour of maintaining the exemption are insufficient.

- However, the Commissioner accepts that there is an overriding public interest in maintaining the exemption for Gold Commanders to have the ability to conduct free and frank discussions for the purposes of deliberation and decision making when to remove the fixed meal breaks as part of a SURGE PLAN to safeguard patients who may need time critical care.

47. For the above reasons, the Commissioner is satisfied that section 36(2)(c) of the FOIA is engaged and that public interest in this case rests in maintaining this exemption for the part of the request that refers to decision-making by the Gold Commanders.

### **Procedural matters**

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48. Section 10(1) of the FOIA states that a public authority should respond to a request promptly and in any event no later than 20 working days of receipt. It is apparent in this case that the Trust failed to respond to the complainant's first request on 5 November 2016 within 20 working days and so breached section 10(1) of the FOIA.

## Right of appeal

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49. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**