



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0199

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50542355
Dated: 14 July 2014**

Appellant: JAMES LITTLE

1ST Respondent: INFORMATION COMMISSIONER

2ND Respondent: CORNWALL PARTNERSHIP NHS TRUST

On the papers at: CHELTENHAM MAGISTRATES' COURT

Date: 13 FEBRUARY 2015

Date of decision: 16 MARCH 2015

Date of Promulgation: 20 MARCH 2015

Before

ROBIN CALLENDER SMITH
Judge

and

SUZANNE COSGRAVE and JEAN NELSON
Tribunal Members

Written representations:

For the Appellant: Mr J Little

For the 1st Respondent: Ms C Nicholson, Solicitor for the Information Commissioner

For the 2nd Respondent: Ms V Slavin, Solicitor for the Cornwall Partnership NHS
Foundation

Qualified exemptions

- Inhibition of free and frank exchange of views for the purposes of deliberation s.36 (2) (b) (ii).

SUBSTITUTED DECISION NOTICE

Dated 16 MARCH 2015

Public authority: CORNWALL PARTNERSHIP NHS
FOUNDATION TRUST

Address of Public authority: FAIRVIEW HOUSE
CORPORATION ROAD
BODMIN
CORNWALL
PL31 1FB

Name of Complainant: MR JAMES LITTLE

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 14 July 2014.

Action Required Within 31 days of service of this Substituted Decision Notice on the 2nd Respondent it must provide the requested information detailed in the Confidential Annexe - which is separate to this Notice - to the Appellant although some material will still remained redacted.

Robin Callender Smith
Judge
16 March 2015

REASONS FOR DECISION

Background

1. Mr James Little (the Appellant) asked Cornwall Partnership NHS Foundation Trust (the Trust) for a copy of a report regarding Therapeutic Management of Aggression and Violence (TMAV). This report had been provided to the Trust in March 2012 by an external and independent company before the TMAV training had been disbanded by the Trust.
2. The Appellant's request, on 25 March 2014, was rejected by the Trust on 26 March 2014. It relied upon section 36 of FOIA and the opinion "of the qualified person" that disclosure of the information in question information would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views.
3. It also relied upon section 40 (2) FOIA.
4. It maintained its position on nondisclosure following an internal review in May 2014.
5. Section 36 relates to matters which could prejudice the effective conduct of public affairs. The relevant portion, relied on by the Trust, is set out below:

.... (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

The complaint to the Information Commissioner

6. The Information Commissioner upheld the use by the Trust of section 36 (2) (b) (ii). He considered the “qualified person’s” opinion as well as the reasoning which informed the opinion by using a four stage test to establish
 - whether an opinion was given;
 - who the qualified person was;
 - when the opinion was given; and
 - whether the opinion was reasonable.
7. He concluded that the “qualified person” was Mr Phil Confue, the chief executive of the Trust. The qualified opinion had been provided by him on 25 March 2014. In applying section 36 (2) (b) (ii) the Trust had informed the Commissioner that Mr Confue had access to all the relevant material including the withheld report and that a copy of his opinion was provided to the Commissioner.
8. The Commissioner summarised Mr Confue’s opinion as being that the compilation of the requested report depended on staff sharing their views openly and candidly with the organisation commissioned to undertake investigation and produce the report into TMAV. His opinion was that if the report was disclosed to the public it would be likely to hinder the frankness and candour of staff participation in similar investigations or reports in the future.
9. The Commissioner considered Mr Confue’s opinion was reasonable. On the basis that section 36 (2) (b) (ii) was engaged the Commissioner went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
10. He made it clear that he drew heavily on the Information Rights Tribunal’s decision in *Guardian Newspapers Ltd and Heather Brooke v Information*

Commissioner and BBC (EA/206/0011 and EA/2006/0013). The Tribunal's conclusion in that case had been that – having accepted the reasonableness of the Qualified Person's opinion that disclosure would, or would be likely, to have the stated detrimental effect - then weight must be given to that opinion as an important piece of evidence in the assessment the balance of the public interest.

11. He noted, too, that it was necessary – by virtue of section 2 (2) (b) FOIA – to form a view about the severity of, and the extent and frequency with which, any such detrimental effect might occur.

12. The public interest arguments that he had considered were that:

- There was a public interest in disclosure of information that would demonstrate that the Trust took patient safety seriously by holding reviews and assessments.
- Against this the Trust had stated that the public interest arguments in maintaining the exemption included the “chilling effect” and the timing of the request.

13. In terms of the “chilling effect” the views expressed by those interviewed were full and frank and staff would be unlikely to cooperate freely if such opinions were made available to the general public. The Trust said that the interviewees were told that the review would not reveal their identities and would be used to advise the Trust.

14. In terms of the timing of the request the Trust conceded that the report had been dated 30 January 2012 and that TMAV training had been updated, acknowledging that the matter was not as sensitive as it had been due to the passage of time. However issues related to training generally will always be live and sensitive in the context of restraint and detention issues. Patient safety was a serious matter and the fact that an external organisation had been able to observe practice on the Trust's

wards freely and get the views of staff so that the Trust could be advised objectively was imperative from an organisational point of view.

15. The Commissioner considered the public interest was finally balanced but concluded that there was a very strong public interest in not disclosing information which would be likely to inhibit the Trust's training review process by inhibiting the frankness and candour of staff engagement with this type of review. On that basis, the public interest in favour of disclosure was outweighed by the public interest in maintaining the exemption.

The appeal to the Tribunal

16. The Appellant's position in his notice of appeal related to the balancing of the public interest issues rather than the engagement of section 36 (2) (b) (ii).

17. Specifically he pointed out that there was no indication that any employee's identity had been disclosed in the report but – if that was the case – he was content for the report to be redacted to provide anonymity to anyone who was named.

18. Also, the report had been provided to the Trust in March 2012. More than two years had passed between that date and the date of the Appellant's request for the report and the "chilling effect" would have lessened considerably with the passage of time. The staff involved would be utilising the new training provided.

19. The Appellant had also stated in the notice of appeal:

If the Trust's reasons for withholding the information is true I agree that it should be withheld. However a third party needs to ascertain, by viewing the report, whether this is the case.

Representations and evidence from the Trust

20. The Tribunal considered the written witness statements of Ms Julie Dawson (the Chief Operating Officer of the Trust) and Ms Victoria Slavin (Solicitor to the Trust) dated 27 June 2014. These run from pages 68 – 78 in the Open Bundle. There was also a written response by the Trust dated 3 October 2014 running from pages 21 – 31 in the Open Bundle.
21. These documents fundamentally supported the position taken, earlier, by the Trust and by the Commissioner.

Closed material

22. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included an unredacted version of the report in question.
23. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
24. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
- i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

25. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

26. The closed bundle in this appeal contained the disputed information.

There was nothing additional in the closed bundle and it was necessary for the Tribunal to see the disputed information in order to reach its decision.

27. The Tribunal has considered carefully and rigorously the Appellant's and the Trust's points and concerns already expressed in the notice of appeal and in other representations and submissions.

Conclusion and remedy

28. Looking first at the documentation relating to Mr Confue's opinion – as a qualified person – that the Trust should not disclose the requested report there are a number of features which merit comment.
29. The first is that it looks as if the bulk of the handwritten manuscript entries on the document (at pages 60 – 61 in the Open Bundle) had been filled in by someone other than Mr Confue. There is a marked difference between the handwritten script used (particularly on page 60) and the signature of the qualified person which appears in Box 14 (at the end of page 61).
30. The second point is that the qualified person's opinion was sought and provided by the Trust on the same the day the information request was made by the Appellant (clarified in an email to the Commissioner at page 67 of the Open Bundle) but, at Box 7, there is no information inserted about the date the opinion was being sought.
31. Having presumably read the information that had been filled in for him to consider, Mr Confue signed off on the statement on (page 61) that: "Staff unwilling to fully disclose information/express themselves openly and honestly" in terms of section 36 (2) (b) (ii).
32. The only counter argument recorded, favouring disclosure, is: "duty of candour".
33. At no stage does the qualified person appear to have engaged his mind – or have had drawn to his attention – as to whether some of the information in the report could be revealed to the Appellant while other parts of it – the portions that might inhibit the ability of Trust staff and others to express themselves openly, honestly and completely - could be redacted and withheld.

34. He, and those advising, appear to have adopted an “all or nothing” approach in relation to the information requested i.e. the contents of the report.
35. This absolutist approach to the information it contains – particularly given the passage of time from the date of the report itself to the date of the information request amounting to two years – does not demonstrate any of the elements of proportionality in decision-making on this topic that one might have expected from someone of Mr Confue’s position within the Trust as Chief Executive.
36. The reality is, after all, that the report itself did lead to a change in the training regime.
37. In other words, the report looked at a situation in 2012 that was changed subsequent to the report over two years later.
38. The passage of time – and its role in the public interest balancing test – is a factor which this Tribunal gives significant weight to in coming to the conclusions it has in contradistinction to assessments made by the Trust and the Commissioner.
39. There is then a Review of the Appeal by the Chief Operating Officer, Ms Julie Dawson. She notes briefly (in the middle of page 62 in the Open Bundle) that the specifics of the appeal letter questioned whether the TMAV regime had been “..putting patients and the staff’s health and safety at risk,” to which she concluded: “No but improvements were suggested. No safety concerns but required updating.”
40. She also notes in her conclusions on the public interest test (at page 65 of the Open Bundle) that “Other than the identifiable trainers, the actual content of the report was not highly sensitive.”

....The report did not reach significant conclusions about the Trust's quality of training other than recommending updating training. The likely interest in the report by the general public is probably also not significant given the passage of time but at the same time the impact the report and the duty of candour reduces.

The purpose of the report was to provide a vehicle in which current problems and issues could be discussed. There had been incidences of seclusion and restraint [on redacted Wards] which had been investigated, but a view of the overall training provided needed to be considered on behalf of patients. The individuals who participated in the report did so in the understanding their identity would not be revealed and the report would be confidential (the report itself is marked confidential and has only been seen by very few members of the Trust). Seclusion and restraint are very sensitive issues for obvious reasons.... The purpose of an external organisation reviewing was to enable staff to talk openly honestly and frankly which would be unlikely if they knew prior to the review and assessments that the report may be disclosed in the public arena. It is important that we are able to gather information in this way, that under ordinary circumstances may not be so easily discussed and therefore the detriment to the Trust in disclosing this report is likely to affect the openness of staff in the future. If disclosed, this will impact on staff involved in this review and other staff that they speak to and it is extremely unlikely we would benefit from the use of this review as an assessment in the future which impact on our ability to check and assure ourselves that staff are undertaking the correct techniques and patients are receiving appropriate care....

41. The Tribunal is struck by - and agrees with – some but not all of the sentiments expressed by Ms Dawson in the first paragraph quoted above.
42. As the report did not reach significant conclusions about the Trust's quality of training other than recommending updating training it would seem that there is a specific benefit to the public in knowing this. Also, the likely interest in the report by the general public "is probably also not significant given the passage of time" and places on the Trust, we believe, a greater the duty of candour, given the passage of time of two years since it was presented to the Trust.
43. It is for these reasons that the Tribunal finds that even though section 36 (2) (b) (ii) is engaged, when the public interest balancing exercise is considered there are portions of the report where the public interest in

revealing the information outweighs the public interest in maintaining the exemption.

44. This is also an approach which addresses the issues of proportionality.

45. There is clearly material in the report that refers directly to conversations with the staff and which would engage the commitment of confidentiality given to the participants and which we have specifically identified – in a confidential annex to this Substituted Decision Notice – as material that should remain redacted.

46. On the other hand it is difficult to see – in the context of history and the passage of time that had passed since the report was prepared and submitted – that the name of the authors on the front cover of the report, the Acknowledgements and everything in the report from the cover up to page 11 and the cross-heading “**4. Visit to Trust for the Review and Collection of Data**” cannot lawfully, properly and safely be revealed to the public.

47. Thereafter, in the Tribunal’s view, the redaction exercise becomes somewhat more complex for the remainder of the Report.

48. That is why the entire detail of what should and should not be revealed to the public in relation to this Report is the subject of the attached confidential annex.

49. Our decision is unanimous.

50. There is no order as to costs.

Robin Callender Smith
Judge
16 March 2015