

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2013

Public Authority: Monitor

Address: 4 Matthew Parker Street
London
SW1H 9NP

Decision (including any steps ordered)

1. The complainant has requested information regarding Monitor's decision to amend the published minutes of a Board meeting which related to University Hospitals of Morecambe Bay NHS Trust. Monitor refused the request under section 36 (prejudice to the effective conduct of public affairs) and also applied section 40(2) (personal data) to some information.
2. The Commissioner's decision is that the withheld information is exempt under section 36, but the majority should be disclosed in the public interest. The name of a member of staff is exempt from disclosure under section 40(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information that it has withheld under section 36, except for the information identified at paragraph 41 of this notice and the name of a member of staff which is exempt from disclosure under section 40(2).
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

5. On 3 December 2012, the complainant wrote to Monitor and requested information in the following terms:

"This is a formal FoI request for all documents (to include internal letters, memos and emails; external letters, statements, policy documents and emails; reports and minutes of meetings) and correspondence in Monitor's possession which bear directly upon the decision to edit and substantially reduce the 'minutes in question'. The 'minutes in question' refers to that portion of the official record of the Monitor Board meeting of 27.5.09 relating to University Hospitals of Morecambe Bay NHS Trust. These were placed on the Monitor website sometime around June 2009, and altered by your own admission in January 2010."

6. Monitor initially responded on 4 January 2013. It stated that it appeared that section 36 was engaged but explained that the relevant qualified person, its Chief Executive, was on leave and that it would respond promptly on his return.
7. Monitor provided a full response on 17 January 2013. It withheld the requested information under section 36(2).
8. The complainant requested an internal review on 22 January 2013. Monitor wrote to the complainant on 14 February 2013. It upheld its original decision.

Scope of the case

9. The complainant contacted the Commissioner on 15 February 2013 to complain about the way his request for information had been handled, specifically whether Monitor had provided a response within the period required by the Act and whether it was entitled to rely on section 36 as a basis for refusing to provide the information that he requested.
10. The Commissioner considered whether Monitor provided a response to the complainant within the time period required by FOIA and whether it correctly applied section 36 to the information that he requested.

Reasons for decision

Section 36 – Prejudice the effective conduct of public affairs

11. Monitor applied section 36(2)(b)(i) and (ii) and (2)(c) to the withheld information.

12. Section 36(2)(b) and (c) provides that:

'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...'

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

13. In order to determine whether section 36 has been correctly applied the Commissioner has:

- (i) ascertained who the qualified person is for the public authority;
- (ii) established that an opinion was given;
- (iii) ascertained when the opinion was given; and
- (iv) considered whether the opinion given was reasonable.

The engagement of section 36

14. Monitor confirmed that its qualified person, under section 36(5)(o), is its Chief Executive.

15. In support of the application of section 36, Monitor informed the Commissioner that the qualified person's opinion was given by Dr David Bennett, its Chief Executive, at a meeting on 14 January 2013. It confirmed that no written submission was provided to the Chief Executive and no written copy of the opinion, or the discussion that took place, was taken at that time. However, it provided the Commissioner

with a written statement from the Chief Executive recording the opinion in the form recommended by the ICO.

16. Monitor confirmed that the withheld information had been shown to the Chief Executive. In his view section 36(2)(b)(i) and (ii) and 36(2)(c) were engaged.
17. In relation to the engagement of sections 36(2)(b)(i) and (ii), the Chief Executive's view was that disclosure of the requested internal correspondence would be likely to discourage or inhibit a full and frank exchange of views between Board members and officials. It would also be likely to discourage or inhibit the provision of full and frank advice to such members and officials, when discussing and agreeing draft minutes or a decision on whether and how to rectify an error made in published minutes. This would be likely to have an adverse effect on the quality of decisions about the content of draft minutes and hamper the proper and effective preparation of those documents, which are an important part of the proper governance of any public body.
18. The Chief Executive was also of the opinion that disclosure of the references in the correspondence to the Board's views on the actions of another regulator would be likely to discourage members from exchanging such views in deliberations at future Board meetings.
19. In relation to the application of section 36(2)(c), the Chief Executive's opinion was that the information included references to the Board's confidential discussions about another regulator in a way which, if that material was disclosed, may have a detrimental effect on the relationship with that body in such a way as to prejudice the effective conduct of the bodies' regulatory functions.
20. After reviewing the content of the withheld information, the Commissioner accepts that it was reasonable for the qualified person to conclude that that section 36(2)(b)(i) and (ii) and (2)(c) applied to all of the withheld information and that consequently the exemption is engaged. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information

Public interest test

21. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2)

the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.

22. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so “...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant.” Therefore, in the Commissioner’s opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of inhibition to the free and frank provision of advice or exchange of views or would be likely to otherwise prejudice the effective conduct of public affairs.
23. As the public interest arguments in relation to section 36(2)(b)(i) and (ii) and (2)(c) are very similar in nature, the Commissioner considered them together rather than considering them separately for each subsection.
24. Monitor confirmed to the Commissioner that the original minutes of its Board meeting of 27 May 2009 were placed on its website between 25 June and 29 July 2009 and the updated minutes were placed there on 8 January 2010. The Commissioner notes that the communications regarding the decision to amend the minutes took place in January 2010. The complainant made his request for this information on 3 December 2012.

Public interest arguments in favour of maintaining the exemption

25. The Commissioner initially notes that the reasonable opinion of the qualified person was that disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation and also likely to have a detrimental effect on Monitor’s relationship with another regulator. The consequence of the opinion is that it is accepted that there is a plausible causal link between the disclosure of the withheld information and the inhibitions and detrimental effect detailed by Monitor and that there is a real possibility that the circumstances giving rise to this inhibiting and detrimental effect could occur. The Commissioner has taken this into

account in assessing the public interest arguments in favour of maintaining the exemption.

26. Monitor argued that it is in the public interest for its officials to be able to exchange information freely, and to engage in frank discussions with, and to receive advice from its advisors without the need to disclose the same to a wider audience. If Monitor officials were not able to exchange views or receive advice without being able to ensure that such exchanges or advice would not enter the public domain, it is likely that this would severely inhibit the content and quality of such exchanges in future. Those public interest considerations extend to discussions and consideration of the drafting of minutes of Board meetings and decisions as to the information to be included within, or excluded from, the public version of such minutes.
27. Monitor contended that it is likely that disclosure of the information requested would hinder the frankness with which future discussions about the drafting of minutes are conducted, including consideration of different drafts, or whether information (particularly information relating to third parties) which was published in error should be removed or modified.
28. Monitor believed that if frank discussions and advice were inhibited, this would hamper the proper and effective production of the Board's published minutes, which is an essential part of Monitor's governance and its arrangements for public transparency, as with any other public body.
29. In relation to the material in the withheld information which refers to the Board's relationship with another regulator, Monitor believed that it is in the public interest for its Board to have a safe space in which to engage in frank and free discussions about its relationship with other regulatory bodies without fear of scrutiny from a wider audience or premature disclosure. It was of the view that there is a real risk that the disclosure of this information would hinder the frankness with which future discussions of the Board are conducted, which would not be conducive to the effective discharge of Monitor's regulatory functions.
30. In addition, Monitor considered that it had already provided a clear explanation of the reasons for the changes to the minutes in its previous communications with the complainant.

Public interest arguments in favour of disclosing the requested information

31. The Commissioner believes that there is a strong public interest in transparency and accountability and in increasing the understanding of how public authorities work. Disclosure of the withheld information would assist the public in gaining a better understanding of the considerations that informed the decision to amend the minutes of Monitor's Board in relation to University Hospitals of Morecambe Bay NHS Trust and would enhance accountability in relation to that decision.
32. The Commissioner believes that the public interest in disclosure is all the greater in this case because the minutes relate to the Board's discussions concerning a Trust in relation to which significant concerns had been raised about the care that it provided and about the circumstances surrounding its application for foundation trust status. These public concerns also extended to the important issue of the roles played by the health sector regulators, including Monitor, in the consideration of the application for foundation trust status and the checks that were undertaken by the relevant regulatory bodies before any approval could take place.
33. Any significant changes to the records of the Board's discussions on this topic, particularly when they are made a considerable time after the minutes were originally published, would understandably lead to questions from the public as to the reasons for those changes. Disclosure of the withheld information would help to provide transparency as to the reasons for the changes.

Balance of the public interest arguments

34. The Commissioner has accepted the qualified person's opinion concerning the harm that might arise from the disclosure of the withheld information and that there is a public interest in preventing that potential harm occurring. However, he notes that the complainant made his request for this information nearly three years after the communications in question had taken place. In light of the passage of time, the Commissioner believes that much of the sensitivity surrounding the information that would have existed at the time that the communications took place would have reduced by the time the request was made.
35. The Commissioner also notes that the request relates to an unusual set of circumstances in which a public authority has amended the published minutes of a Board meeting, on an issue of considerable public concern, quite some time after those minutes had originally been made available on its website. Given the nature of the topic to which the minutes relate,

the Commissioner believes that there is a significant public interest in ascertaining the reasons why the changes were made.

36. Understandably, in support of its decision to withhold the information, Monitor has pointed to the fact that it provided the complainant with a clear explanation for the changes to the minutes. In an email to the complainant dated 1 November 2012, it stated that an enquiry had highlighted *"... that the minutes of this discussion were very detailed, particularly with regard to a member of the public. It was felt that this level of detail, which had been included in the minutes as a result of an administrative error, was inappropriate."*
37. This appears to suggest that the level of detail included in the minutes that were originally published was due to an administrative error, particularly in relation to the details of a member of the public.
38. The Commissioner has reviewed the withheld information but clearly cannot provide details of what is contained within it. However, he is not convinced that the explanation provided to the complainant of the reasons for the amendment of the minutes is totally consistent with the reasons discussed in the emails that have been withheld. Consequently, the Commissioner believes that there is a significant public interest in disclosing the information to provide clarity regarding the reasons for the amendments that were made.
39. The Commissioner notes that the withheld information, in terms of the original minutes, does contain some limited information relating to the death of a child. However, he is aware that this information is publicly available, for example, on the BBC's website.
40. After weighing the public interest arguments, the Commissioner has determined that any limited harm that might arise from the disclosure of the information is not sufficient, given the particular circumstances of this case, to outweigh the public interest in transparency in relation to the reasons for the amendment of the Board's minutes. He has therefore decided that, subject to one exception mentioned below, the public interest in maintaining the section 36 exemption does not outweigh the public interest in disclosure.
41. The exception referred to in paragraph 40 above is the second paragraph of the email dated 6 January 2010 timed at 1711. The Commissioner considers that information to be speculative in nature and particularly free and frank in the exploration of individual views and recollections of past events. In his view, for that small amount of information only, the public interest in avoiding the inhibiting effect of the disclosure is greater than that in transparency.

42. As the Commissioner has found that the majority of the withheld information is not exempt from disclosure under section 36 on public interest grounds, he has gone on to consider Monitor's application of section 40(2) to some of that information.

Section 40(2) – Personal information

43. The withheld information contains the names of four of Monitor's staff. Monitor argued that, if section 36 did not apply to the withheld information, the name of one of the staff members was exempt from disclosure under section 40(2). It accepted that the names of the other three members of staff were not exempt as they held senior posts.
44. Under section 40(2), to the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority should not disclose the personal data if it would breach any of the data protection principles.

Does the withheld information constitute personal data?

45. In this case the withheld information is the name of member of staff who sent and received emails. The Commissioner considers that the withheld name is personal data from which the data subject would be identifiable. He therefore went on to consider whether disclosure would breach any of the data protection principles under the Data Protection Act ("DPA").

Would disclosure breach one of the data protection principles

46. The Commissioner considered whether the disclosure of the name of the member of staff would be a breach of the first principle of the DPA. The first data protection principle requires that any disclosure of information is fair and lawful and that at least one of the conditions in schedule 2 is met.
47. The Commissioner initially considered whether the disclosure of the withheld information would be fair. In doing this he took into account the following factors:
- (i) the individuals' reasonable expectations of what would happen to their information;
 - (ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and
 - (iii) whether the legitimate interests of the public were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

Reasonable expectations of the individuals concerned

48. Monitor informed the Commissioner that the member of staff, to whose name it had applied section 40(2), was not a senior member of staff. Her role in relation to the decision to amend the minutes was to alert others to concerns following a media enquiry about the relevant Trust. Unlike other employees whose names appear in the withheld information, she did not attend the Board meeting on 27 May 2009. Although her role was public facing in that she had direct contact with the media, her role did not generally include responsibility for the Board minutes. In light of this, Monitor believed that she would not have expected her name to be disclosed to the public in relation to the email exchange that took place.
49. The Commissioner accepts that where information relates to an employee of a public authority carrying out their professional duties, there is a greater expectation that such information will be disclosed than if it relates to their private life. The information that has been withheld in this case clearly relates to the professional duties of the member of staff concerned.
50. However, the Commissioner notes that the individual concerned was not responsible for making the decision to alter the minutes. In light of this, and the fact that she was not a senior member of staff at the time, the Commissioner believes that she would have had a reasonable expectations that her name would not be disclosed.

Consequences of disclosure

51. Given the nature of the information in this case, the Commissioner accepts that disclosure would be unlikely to cause significant distress or damage to the member of staff concerned. However, he does acknowledge that the disclosure of her name in connection with this issue could result in increased communications directed to her from members of the public. This may not be appropriate as it may result in her being diverted from carrying out her normal duties.

Balancing the rights and freedoms of the data subjects with legitimate interests of the public

52. The Commissioner accepts that the member of staff whose name has been withheld was not involved in a decision making role when undertaking the duties to which her name is linked. He does not therefore see any significant public interest in the disclosure of her name sufficient to override the reasonable expectations of the person concerned. He has consequently determined that it would not be fair to

disclose the member of staff's name and that the public authority correctly withheld her name under section 40(2).

Procedural issue

Section 10 – Time for compliance with the request

53. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have that information communicated to him. Section 10(1) of FOIA provides that this must be done within 20 working days of receiving a request.
54. The Commissioner notes that the complainant made his request on 3 December 2012 and that Monitor provided a response on 17 January 2013. It did not therefore responded to the complainant's request within the statutory time frame and so it breached section 10(1) of FOIA.

Other matters

55. The Commissioner wishes to emphasise that the decision to order disclosure of the withheld information in this case is very much confined to the particular facts surrounding this request. It should not be taken as setting any precedent in terms of the requests for similar information in the future.

Right of appeal

56. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF