

Our ref: FOI1327

Date: 19 August 2016

By e-mail

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Dear Mr Bell

FOI1327 – Internal Review Request

Thank you for your request for an internal review, dated 13 July 2016, in respect of your request for the Board Capability Review referred to in a press statement released on 30/06/2016.

Our initial response explained that the Trust did not yet hold a copy of the substantive response and therefore that the information was not held by the Trust. I have considered our initial response and concluded that our response was factually correct.

However, and by way of advice and assistance, since the date of our initial response, YSC, the external consultancy which has been undertaking the review, has now provided the Trust with the substantive report. I confirm, therefore, that the Trust now holds the information which is relevant to your request.

The report is exempt from disclosure under the Freedom of Information Act 2000 (“FOIA”). This is because disclosure under FOIA is ‘to the world’, and the Trust has concluded that:

- The disclosure of the report at this time would, in the view of the Trust’s qualified person, prejudice the free and frank exchange of views for the purposes of deliberation, and would prejudice the effective conduct of public affairs (and therefore is exempt under s. 36 FOIA);
- Aspects of the report comprise personal data of individual members of the board, which it would not be fair to disclose under FOIA – this engages the exemption under s. 40(2) FOIA;
- The report contains and constitutes information which has been provided to the Trust in confidence, and therefore is exempt under s. 41 FOIA.

I explain the application of these exemptions in greater detail below.

S. 36(2)(b)(ii) and s. 36(2)(c) FOIA – prejudice to the free and frank exchange of views for the purposes of deliberation; prejudice to the effective conduct of public affairs

The Trust’s qualified person has reasonably concluded that the disclosure of the YSC report under FOIA at this stage would prejudice the Trust’s ability to deliberate the report, and would prejudice the effective conduct of public affairs.

In short, this is because the report has only been very recently received by the Trust. The Trust needs a safe space to consider the conclusions of the report, and these may feed into possible changes to the Board in the future. The Trust’s ability to consider and implement any changes would be undermined by the premature disclosure of the report. The disruption caused by the release of the report would provide an unjustified distraction from, and be disruptive to, making the necessary changes. It is also important to note that the Trust

is required under the terms of its licence from NHS Improvement to have in place robust governance processes, which include the proper and due consideration of the report by the Trust itself. This would be undermined by the premature disclosure of the report 'to the world' under FOIA.

As s. 36 is a 'qualified exemption' the Trust has gone on to consider the public interests for and against disclosure. In all the circumstances, there is a very weighty public interest in maintaining the exemption so as to avert the prejudicial consequences outlined above. In particular, the Report is very recent at the time of your request. There is an ongoing need for a safe space in which to digest and implement the recommendations from the Report. The disclosure of such recent input would have a chilling effect on individuals' input into the processes and changes arising from the report. Therefore, despite the public interest in transparency as to the matters addressed in the Report, in light of the above and all other relevant considerations, the balance of the public interest favours maintaining the exemption.

S. 40(2) FOIA – personal data

Under section 40(2) FOIA, the personal data of someone other than you, the requester is absolutely exempt from disclosure if "the disclosure of the information to a member of the public otherwise than under this Act would contravene... any of the data protection principles".

Substantial sections of the Report undoubtedly constitute the personal data of identifiable individuals (members of the Board) who provided evidence and input into YSC's investigations, and are themselves the subject of the investigations (and who are thus the focus of the sections setting out and analysing their evidence). The report only considers a small group of people – i.e. the members of the Board.

Disclosure of the personal data in the report otherwise than under FOIA would breach the first data protection principle. It would be unfair: it would contravene the data subjects' reasonable expectations of confidentiality in participating in the YSC process; it would cause them distress and reputational damage (not only on account of their confidence being breached, but also given the nature of likely media coverage concerning the report); those prejudicial consequences for the data subjects are not outweighed by any sufficient public interest in the disclosure of this personal data.

Further, the first data protection principle would also be breached in that no condition from Schedule 2 DPA would be met. The only potentially applicable condition is condition 6(1), which provides that:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

That condition must be applied in accordance with the principles articulated by the Upper Tribunal in *Goldsmith International Business School v IC and Home Office (GIA/1643/2014)*. In the present case, although disclosure would arguably further legitimate interests (i.e. scrutiny of – and therefore improvement in – the Board's governance), it would not be reasonably necessary for those purposes, because the Trust's internal governance processes provide a more appropriate route to achieving this objective which interferes less with the privacy rights of the individuals concerned.

s. 41 FOIA

Section 41(1) FOIA is an absolute exemption which provides that:

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority),
and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The Report constitutes information provided by YSC to the Trust. It is the fruits of YSC's investigations and analysis. The Report was created under, and provided to the Trust subject to express expectations of confidentiality.

Disclosure of the Report to a member of the public or the media would breach the duty of confidence owed by the Trust to YSC and the individuals who provided input to the report. Therefore YSC (or the individuals involved) could take action to restrain or seek redress for such a breach in order, for example, to protect safeguard themselves against potential duties owed under the DPA and/or the law of confidence.

Although s. 41 is an 'absolute' exemption, it is considered to have an 'inbuilt' public interest test. For reasons similar to those given above, the public interests in disclosure are insufficiently weighty to found a successful defence to any such action for breach of confidence.

Your right to complain to the Information Commissioner

This concludes the internal review process. If you remain dissatisfied with the Trust's response, you have the right to complain to the Information Commissioner's Office. You can write to them via:

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

or contact them via their website – www.ico.org.uk .

Yours sincerely



Sarah Pearson
Head Of Legal and Insurance Services