

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2021

Public Authority: East of England Ambulance Service NHS Trust

Address: Whiting Way
Melbourn
Cambridgeshire
SG8 6EN

Decision (including any steps ordered)

1. The complainant has requested the results of a 2020 staff survey. East of England Ambulance Service NHS Trust ('the Trust') has withheld the information under FOIA section 41(1) (information provided in confidence), sections 36(2)(b) and 36(2)(c) (prejudice to effective conduct of public affairs), section 40(2)(personal data) and section 38(1) (health and safety).
2. The Commissioner's decision is as follows:
 - The Trust correctly applied section 41(1) to the requested information as it is information provided in confidence.
3. The Commissioner does not require the Trust to take any remedial steps.

Background

4. In its submission to the Commissioner the Trust has provided the following background and context.
5. In the summer of July 2020, the Trust was subject to an unannounced focused inspection by the Care Quality Commission ('CQC') as a result of whistle-blowers and increasing concerns. Following its inspection in September 2020, the CQC published its inspection report, which resulted

in 11 enforcement conditions under section 31 and section 29A of the Health and Social Care Act.

6. The CQC's full inspection report is published and can be viewed online. Its main findings were:
 - There is a poor culture within the Trust which is leading to a deep-rooted fear of speaking up – staff do not feel safe raising concerns.
 - There were significant issues with bullying and harassment.
 - There were cases of sexual harassment across the organisation.
 - As a result, the systems and processes in place within the organisation were insufficient to keep staff safe from harm.
7. Following on from the CQC's inspection, the Trust was placed in Special Measures and an enhanced regulatory oversight approach was implemented, whilst improvements were made.
8. The CQC's concerns were such that it referred the Trust to the Equality and Human Rights Commission ('EHRC'). As a result, the Trust has entered into a section 23 agreement under the Equality Act with the EHRC, focused on eradicating sexual harassment and ensuring staff have the ability to safely whistle-blow. Undertaking an annual harassment survey is a core component of the section 23 agreement with the EHRC; not only to assess the impact of the improvements being made, but to give a further method for staff to raise concerns confidentially. Failure to comply with the section 23 agreement could result in inspection, enforcement or prosecution for the Trust.
9. As part of the improvement plan implemented by the Trust, the staff harassment survey was created and implemented. The purpose of the survey is to:
 - Provide an opportunity for staff to raise concerns confidentially/'anonymously' (although will be discussed below, the nature of many of the concerns means that the staff members will be identifiable from the information).
 - Support identification of real time crisis incidents that were occurring and to take decisive action.
 - Identify most serious issues to enable rapid resolution.
 - Make clear to staff the Trust was serious about making the Trust a safe place for staff, and that it is a safe place to raise concerns.
10. The Trust has been open about the problems it faces with bullying and harassment. For instance, the most recent public board papers from September 2021 are available online and include many references to

action points arising from the above regulatory conditions and reports of the number of staff raising bullying and harassment concerns through the Trust's allied 'Freedom to Speak Up' processes.

Request and response

11. On 12 January 2021 the complainant wrote to the Trust and requested information in the following terms:

"I would like to request the full results of the staff harassment survey which was carried out between 22 October 2020 and 9 November 2020, including any free text entry or other comments from your staff."

12. The Trust responded on 9 February 2021. It withheld the requested information under section 41 of the FOIA.
13. Following an internal review the Trust wrote to the complainant on 11 March 2021. It upheld its response.
14. During the course of the Commissioner's investigation, the Trust confirmed that it was also relying on section 36(2)(b) and (c), section 40(2) and section 38 to withhold the information, with the public interest favouring withholding the information where relevant. On 27 September 2021 the Commissioner advised the Trust to communicate its reliance on the additional exemptions to the complainant.

Scope of the case

15. The complainant contacted the Commissioner on 17 March 2021 to complain about the way her request for information had been handled.
16. The Commissioner's investigation has first focussed on the Trust's reliance on section 41(1) to withhold the requested information. If necessary, she has been prepared to consider whether any of the remaining exemptions the Trust has applied – sections 36, 38 and 40 – are engaged, and the balance of the public interest where relevant.

Reasons for decision

Section 41 – information provided in confidence

17. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence

actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.

18. The complainant has requested what the Trust has categorised as the 'raw data' from the 2020 staff survey; that is the full results of the survey including any free text entries or other staff comments.
19. Given the raw data's content and its promise to staff to treat the survey results confidentially, the Trust was nervous about providing the Commissioner with a copy of the information. The Trust did, however, discuss the nature and sensitivity of the information in a telephone conversation with the Commissioner on 27 September 2021. It also discussed the survey in its submission to the Commissioner.
20. The Trust has explained that at the outset of the survey staff were informed that the information they provided would be kept entirely confidential. That was the basis on which staff felt confident to share highly sensitive concerns. The Trust considers that if the raw data was to be disclosed (including to the Commissioner) there is a high risk that this will undermine staff confidence that their information will be treated confidentially. As noted above, this survey is designed to be repeated annually. In the Trust's view disclosure would be likely to result in it being unable to comply with the Equality Act and its section 23 agreement. More importantly this would perpetuate the findings of the CQC, with staff remaining afraid to speak up, and losing further trust and confidence in the organisation's ability to keep them safe.
21. The Trust says that the content of the survey is effectively whistleblowing data and therefore requires a level of protection – specifically, the survey result themes included a fear of speaking up. The number of Employee Relation cases raised over the 12-month period prior to the survey made up 16% of the actual number of harassment issues that were raised through the survey. Following the survey, the number of formal Employee Relation cases has doubled. This leads the Trust to believe that staff have greater trust and confidence in the process. If the raw data is disclosed, the Trust believes that there is a real risk that the reported cases would decrease again. This would mean the Trust cannot deal with them effectively and is therefore non-compliant with the section 23 agreement and Equality Act.
22. Moreover, the Trust says, where staff have reported bullying or harassment (and are identifiable from the raw data) it is possible that first, those that are bullying/harassing them will behave vindictively against those who have raised concerns about them (as the data would be disclosed 'to the world'); and second, workforce resilience will be undermined. This is because there is a high correlation between people who feel victimised also having time off for stress/sickness or leaving an organisation altogether. Finally, due to the low numbers in relation to

aspects of the survey and the perpetrator/victim knowledge of events, there is a risk that, even with redaction, assumptions could be made by parties that may lead to further harm or detriment. The survey is for the most part correlated against protected characteristics as per the Equality Act and there is a risk of discrimination following any publication.

23. The Trust had in place, as part of the intensive support programme, additional expert resource in this field (a temporary Culture Director was hired). This expert resource designed and managed the survey process and output, including access to the raw data. The data is only accessible by the Culture Director, who joined the Trust following identification of areas of concern. This limited who had access to the data and ensured the Trust could keep its commitment to its staff that they were safe to raise concerns or to whistle-blow.
24. As a result, 50% of staff responded to the survey. In total, 76,368 data points have been provided by staff through completing the survey. Over 2,500 free text commentaries were provided which include a high number of circumstances of actual and real-time harm occurring, naming individuals, circumstances and locations. With this information the Culture Director could mobilise and act to ensure staff safety and to resolve issues, whilst maintaining the anonymity of those who responded.
25. The Trust has explained, for context, that some of the headline points from the survey included:
 - Details of sexual assaults/rape
 - Accounts of active sexual harassment
 - Accounts of active bullying and harassment
 - Accounts of discrimination due to protected characteristics
 - Accounts of personal crisis and the intent to take their own life
26. The Trust notes that this list is not exhaustive but seeks to outline the extent of the whistleblowing information outlined within the raw data.
27. Based upon the way in which the survey has been conducted, the information provided in it by the Trust's staff was provided in good faith that their anonymity would be maintained. The volume of information and the small numbers of certain groupings and localities within the survey means that it is not possible to confidently redact information and still maintain that anonymity. Similarly, the information within the survey is considered to be whistleblowing information and, as such, there are clear requirements to ensure the safety of these staff members and not, through the actions of the Trust, to cause detriment to those individuals.

28. The Trust has told the Commissioner that it knows that, through the results of the survey, it has been able to stop people taking their own lives as a result of the immediate interventions it carried out. So it is critical, the Trust says, that this raw data is safeguarded and not disclosed at all. Disclosure would undermine staff confidence in the Trust's processes and promises of confidentiality, staff would be less likely to continue speaking up, and it would be difficult for the Trust to continue with its efforts to improve the safety of its staff. The Trust considers that if staff were to find out that the raw data had been disclosed (even in a redacted form), it is highly unlikely they would continue to speak up as freely.
29. In light of the context, the Trust's very real concerns, its description of the information and because it is clear from its subject the type of experiences staff would discuss in the survey, the Commissioner did not consider it necessary to view the material on this occasion. However she advised the Trust that if she did consider it necessary to view the information, she would require the Trust to provide it to her, which the Trust acknowledged. The Commissioner has gone on to consider the two parts of section 41(1).

a) Was the information obtained from another person?

30. The Commissioner's published guidance on section 41 advises that while the exemption won't cover information an authority has generated itself, it may cover documents generated by the authority if these record information provided in confidence by another person.
31. In its submission to the Commissioner the Trust confirmed the information was provided to it by members of its staff, as individuals. The Trust has referred to the First-tier Tribunal (Information Rights) ('the FTT') decision in *DBERR v ICO And Friends of the Earth*. In that decision FTT accepted that meeting notes contained information obtained from another party, even though the material was created by DBERR.
32. In this case the Commissioner is satisfied that the Trust obtained the information it is withholding from other people, namely the individual members of staff who completed the survey. She finds that the condition under section 41(1)(a) has therefore been met and has gone on to consider the condition under section 41(1)(b).

b) Would disclosure constitute an actionable breach of confidence?

33. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
- whether the information has the necessary quality of confidence

- whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
34. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
35. The Trust has confirmed that the disputed information is not accessible elsewhere as staff members were assured that their responses would be kept confidential ie that they would not be published. The Commissioner is also satisfied that the information is more than trivial, concerning as it does staff members' personal experiences of harassment and bullying; some of those being traumatic experiences involving serious harassment or assault.
36. **Circumstances importing an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
37. Included with its submission, the Trust has provided the Commissioner with the messaging that accompanied the survey when it was circulated to staff. This advises that the survey is anonymous. In addition, the Trust says, the sensitive, personal and detailed nature of the questions asked in the survey clearly imply an obligation of confidence.
38. The Commissioner agrees with the Trust. Given the context and nature of the survey, she is satisfied that anyone responding to the survey would reasonably expect that the information they were providing would be treated confidentially.
39. **Detriment to the confider:** The Trust has noted that it does not have to demonstrate a tangible detriment. The FTT in *Bluck v ICO* and *Epsom and St Helier University Hospital Trust* refers to the fact that 'if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information', this exemption can apply. However, the Trust has also argued that disclosing to the world at large through the FOIA information provided through the staff survey would clearly be detrimental to the staff who responded. Detriment could be caused, for example, through possible repercussions for staff members (exacerbating already strained working

relationships) or through harm to staff members' physical health (for example through self-harm) and mental health.

40. The Commissioner accepts the Trust's reasoning and is satisfied that disclosure would cause detriment to the individuals who responded to the staff survey.

Is there a public interest defence for disclosure?

41. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).
42. In her complaint to the Commissioner, the complainant has said that this is a troubled Trust and that there is a strong public interest in knowing about its culture. This is because its culture ultimately impacts on its delivery of services to the public.
43. The Trust has acknowledged that there is a public interest argument around understanding how it operates and what the key issues are that it is facing. Specifically in this case, the nature and scale of the harassment problem and specific examples harassment affecting staff members. However, the Trust says, these matters have already been well documented in an appropriate, anonymised way and related information is in the public domain. The Trust has noted the published CQC report, and other reports that had been published at the time of the request – a CEO report in September 2020, CQC improvement plan reports and a Culture Plan report in January 2020. Other related reports have continued to be published from January 2021 to date.
44. In the Trust's view, the complainant and other members of the public can get an understanding of the issues (particularly around culture, bullying and harassment) in the published material. The Culture Plan report that was sent to the Trust Board in January 2021 includes an overview of the harassment survey results.
45. The Trust says it has been open and transparent about the harassment issue both internally and externally. It does not consider that the complainant needs the level of detail contained in the withheld information to understand the decisions made and to hold the Trust to account. In addition, there are statutory mechanisms by which the Trust is being held to account ie by regulators such as the CQC and EHRC.
46. The impact of disclosure on the staff respondents would be significant, the Trust says, and would be likely to cause emotional, and potentially

physical, harm to staff. Disclosure would completely undermine the work the Trust is currently undertaking to promote an open and safe culture within the organisation, and to work with staff who have been affected by this. The Trust considers that if it was to disclose the raw data then staff would feel that the promise of confidentiality was undermined. Staff would be less likely to come forward to share their experiences in the future, which could create a toxic environment within the workplace and affect the Trust's ability to function effectively.

47. The Commissioner acknowledges that there is a public interest in openness and accountability about the culture in the Trust and how the Trust operates. But the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
48. The Commissioner notes that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. As decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. While the disputed information does concern allegations of misconduct, it is not potential misconduct of which the Trust (and the public) is unaware, which has not already been independently investigated, and about which information is not already in the public domain.
49. The harassment issues brought to light at the Trust are grave and there is a strong public interest in those matters and how the Trust is going to address them. However, the Commissioner agrees with the Trust that putting the detail of individuals' experiences of harassment at the Trust into the public domain is not necessary to ensure that those issues are being addressed. Having considered the arguments on both sides, the Commissioner has decided that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant. The Trust is taking steps to improve its culture and had published CQC's report and updates on its progress at the time of the request. The Commissioner considers that was sufficient and that the Trust would therefore not have a public interest defence for breaching the duty of confidence it has with its staff.
50. The Commissioner has considered all the circumstances of this case and the nature of the information being withheld under section 41(1) of the FOIA. She has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner finds that the condition under section 41(1)(b) is also met and therefore, that the Trust correctly withheld the information under section 41(1).

51. As the Commissioner has found that the withheld information engages the exemption under section 41(1) of the FOIA, it has not been necessary to consider the Trust's application of sections 36, 38 or 40 of the FOIA to that information.

Right of appeal

52. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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

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