



**Review Application to the Information Commissioner under the
Freedom of Information Act 2014 (the FOI Act)**

Case Number: OIC-120078-D1P8V8

Applicant: Mr. John Hamill, [REDACTED]
[REDACTED]

Public Body: St. Vincent's University Hospital (SVUH)

Issue: Whether SVUH was justified in refusing access, under sections 30(1)(b) and 36(1) of the FOI Act, to the Religious Sisters of Charity Health Service Philosophy and Ethical Code

Review: Conducted in accordance with section 22(2) of the FOI Act by Stephen Rafferty Senior Investigator, who is authorised by the Information Commissioner to conduct this review

Decision: The Senior Investigator annulled the decision of SVUH and directed the release of the Code.

Right of Appeal: Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.

Background

In an FOI request dated 4 January 2022, the applicant sought access to a copy of the Religious Sisters of Charity Health Service Philosophy and Ethical Code (the Code). On 1 February 2022, SVUH refused his request under sections 30(1)(b) and 36(1) of the FOI Act. The applicant requested an internal review of this decision on 3 February 2022 further to which the Hospital affirmed its refusal of the request on 24 February 2022.

On 28 February 2022, the applicant applied to this Office for a review of SVUH's decision. In the course of the review, the Investigator consulted with the Religious Sisters of Charity, who also opposed the release of the Code.

I have now completed my review in accordance with section 22(2) of the FOI Act. In carrying out my review, I have had regard to the submissions made by SVUH and by the Religious Sisters of Charity, and to the applicant's comments in his application for review. I have also had regard to the contents of the record concerned. I have decided to conclude this review by way of a formal, binding decision.

Scope of Review

This review is concerned solely with whether SVUH was justified in refusing to release a copy of the Code under sections 30(1)(b) and 36(1) of the FOI Act.

Preliminary Matter

Section 22(12)(b) of the FOI Act provides that in a review by the Commissioner, a decision to refuse a request is presumed not to have been justified unless the public body shows to the satisfaction of the Commissioner that the decision was justified. Therefore in this case, the onus is on SVUH to satisfy this Office that its decision to refuse to grant access to the record at issue was justified.

Analysis and Findings

The record at issue

The Code is a 16-page booklet dated July 2011. By way of background, SVUH explained that the Code was developed by and relates to the Religious Sisters of Charity. It said that the Code has been superseded by the SVUH Ethical Framework and it is this latter document, rather than the Code, that is relevant to any ongoing operations of SVUH.

Section 30: Functions and negotiations of FOI bodies

Section 30(1)(b) of the Act provides for the refusal of a request where the FOI body considers that access to the record concerned could reasonably be expected to have a significant, adverse effect on the performance by an FOI body of any of its functions relating to management (including industrial relations and management of its staff). Where an FOI

body relies on section 30(1)(b), it should identify the function relating to management concerned and it should identify the significant adverse effect on the performance of that function which is envisaged. The FOI body must then make an assessment of the degree of significance attaching to the adverse effects claimed. Establishing “significant adverse effect” requires stronger evidence of damage than the “prejudice” standard in section 30(1)(a) and other sections of the Act. Having identified the significant adverse effect envisaged, the FOI body should then explain how release of the particular information in the records could cause the harm and consider the reasonableness of its expectation that the harm will occur.

A claim for exemption under section 30(1)(b) must be made on its merits and in light of the contents of the particular record concerned and the relevant facts and circumstances of the case. The exemption is also subject to a ‘public interest override’ i.e. even where the requirements of section 30(1)(b) have been met, section 30(2) provides that the exemption does not apply where the public interest would, on balance, be better served by granting access than by refusing to grant the request.

The submissions

In its submissions to this Office, SVUH argued that “the release of a copy of the ... Code, and any suggestion that this Code is still relevant to or guides the operations, objectives and initiatives of SVUH or the new National Maternity Hospital would be thoroughly misleading and damaging”. It said the wording of the applicant’s original request in which he described the Code as being “an important part of the 2017 negotiation and agreement with respect to the new National Maternity Hospital” was entirely wrong. It said that, taken out of context, release of the record could result in the public at large incorrectly believing that SVUH and the new National Maternity Hospital would operate on the basis of this old and superseded ethical code.

SVUH said that in conducting its activities, and in particular in carrying out its medical, surgical and nursing services and the provision of hospital accommodation, it is reliant on the sourcing and retention of skilled staff and the maintenance of staff morale. It argued that any incorrect belief about the Code would potentially impact on the performance of SVUH’s functions relating to management, including the appropriate administration of the employment relationship, maintaining staff morale and ensuring that the best staff are hired and retained for both SVUH and the new National Maternity Hospital. It argued that misleading sentiments could adversely affect current and prospective staff by suggesting that by working with SVUH or the new National Maternity Hospital, they themselves would be operating on the basis of an outdated and superseded ethical code which may or may not be in conflict with their own convictions and beliefs. It said that unfair criticism of SVUH, and by extension, the staff who work there, could potentially affect staff morale. It said that SVUH has already encountered these issues via the adverse and unfair publicity which it suffered based on misleading and incorrect media and other commentary. It said that this could, in turn, result in an undue administrative management burden being imposed on SVUH in dealing with this negative impact.

The Religious Sisters of Charity, in its submissions, objected to the release of the Code and made similar arguments to SVUH in relation to section 30(1)(b). It noted the vital public

services provided by SVUH and to be provided by the new National Maternity Hospital and that disclosure of the outdated Code could have a damaging and misleading effect on these services and those providing the services.

Analysis

The essential thrust of the argument made by SVUH is that the release of the Code would be misleading and that this, in turn would cause the harms identified in section 30(1)(b). As we have said many times before in our published decisions, this Office does not generally accept that the possibility that information once released will be misinterpreted by the public is a valid reason for refusing access to the information, nor is there any provision in the Act to exempt the release of information on the grounds that it is factually inaccurate. We hold this view as, apart from anything else, such an argument appears to be based on an assumption that public bodies are incapable of explaining their records to the public and are unable to present information to the public in a way which will allow any objective observer to draw accurate and balanced conclusions.

This point was put to SVUH by the Investigator. SVUH said it accepts that the FOI Act does not include any exemption which provides for a request for a record to be refused solely on the basis that the record would be misinterpreted or is inaccurate. It said it was not seeking to withhold the record solely on the grounds of likely misinterpretations or inaccuracies. It said that, instead, it was seeking to withhold the record because of the detrimental impact which it believes will arise on foot of the release of the record and which is at least, in part, likely to be caused by inaccuracies and misinterpretation of such record.

While I accept that SVUH is seeking to withhold the record because of the detrimental impact which it believes will arise on foot of its release, it seems to me that its ground for believing that such harms will arise is based entirely on its concern that release of the record will be misleading. In my view, this is not a sustainable argument.

SVUH has clearly explained in its submissions to this Office that the Code was developed by and relates to the Religious Sisters of Charity, that it has been superseded by the SVUH Ethical Framework, and that it is this latter document, rather than the Code, that is relevant to any ongoing operations of SVUH. There is nothing preventing SVUH from issuing a similar statement when releasing the record. Similarly, I find it difficult to accept that the release of the record could lead staff (or potential future staff) to mistakenly think that they were operating under the Code and that this could affect morale and/or SVUH's ability to recruit or retain staff. Again, it seems to me that this is something that could be dealt with quite easily by appropriate communication to current staff and/or candidates for future roles.

I should say, for the avoidance of doubt, that I accept that it may be possible for anyone who comes into possession of the record to misinterpret and/or misrepresent the record as being relevant to the operations, objectives and initiatives of SVUH or the new National Maternity Hospital. Nevertheless, if that were to happen, it seems to me that the situation could be readily rectified by SVUH clarifying the matter. Moreover, while the need to do so might prove inconvenient, it seems to me such concerns fall well short of the requirement in section 30(1)(b) that release could reasonably be expected to have a significant, adverse effect on the performance by an FOI body of any of its functions relating to management.

Having regard to the provisions of section 22(12)(b) as set out above, I find that SVUH has not justified its refusal of the request under section 30(1)(b) of the Act.

Section 36: Commercially sensitive information

Section 36(1) provides a mandatory exemption for commercially sensitive information. Section 36(3) provides that section 36(1) does not apply if the public interest would, on balance, be better served by granting rather than by refusing the request. SVUH argued that sections 36(1)(b) and 36(1)(c) applied to the Code.

Section 36(1)(b) provides for the refusal of a request where the record sought contains financial, commercial, scientific, technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation. Section 36(1)(c) provides for the refusal of a request where the disclosure of information contained in the record sought could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

While SVUH and, indeed, the Religious Sisters of Charity, have identified certain harms as captured by sections 36(1)(b) and 36(1)(c), their arguments as to how such harms might arise are based entirely on concerns that the release of the record would be misleading. For the same reasons as I have outlined above in respect of the applicability of section 30(1)(b), I find that SVUH has not justified its refusal of the request under section 36(1) or 36(1)(c) of the Act.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby annul the decision of SVUH. I find that SVUH was not justified in refusing access, under sections 30(1)(b), 36(1)(b), or 36(1)(c) of the Act, to the Code and I direct its release in full.

Right of Appeal

Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.



Stephen Rafferty
Senior Investigator
23 August 2022