

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2019

Public Authority: Northumbria Healthcare NHS Foundation Trust
Address: Northumbria House
7-8 Silver Fox Way
Cobalt Business Park
North Shields
Tyne and Wear
NE27 0QJ

Decision (including any steps ordered)

1. The complainant has requested any information relating to the business case for the Northumbria Healthcare NHS Foundation Trust's (the Trust) buy out of the Hexham General Hospital's private finance initiative (PFI). The Trust withheld the information, citing the exemption under section 43(2) (commercial interests) of the FOIA as its basis for doing so.
2. The complainant is concerned about the Trust's reliance on section 43(2) of the FOIA to withhold the requested information. The complainant is also concerned that the Trust has not complied with its obligations under section 16(1) (advice and assistance) of the FOIA.
3. During the Commissioner's investigation, the Trust disclosed some of the requested information to the complainant. It also revised its position in relation to one element of the withheld information, stating that it may be additionally exempt under section 42(1) (legal professional privilege) of the FOIA. However, it maintained its reliance on section 43(2) of the FOIA as a basis for refusing to provide the remaining withheld information.

4. The Commissioner's decision is that:
 - The Trust has complied with the requirements of section 16(1) of the FOIA, in that no meaningful advice could have been provided as to how to refine the information requested.
 - The Trust has breached section 10(1) of the FOIA by failing to provide information to which the complainant was entitled within the statutory time of 20 working days.
 - The Trust has not demonstrated that section 43(2) of the FOIA applies to the remaining withheld information.
 - Section 42(1) of the FOIA applies to one element of the withheld information.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information other than that caught by section 42 to the complainant.
6. 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

7. On 18 September 2017, the complainant wrote to the Trust and requested information in the following terms:

"Can you please provide copies of any information relating to the business case for the Hexham PFI buy out, in particular any information about how the reported savings of £3.5m pa were calculated, the assumptions made and any independent evaluation of the calculations."
8. The Trust responded on 19 October 2017 and refused to provide the requested information citing section 43(2) of the FOIA as its basis for doing so.
9. Following an internal review the Trust wrote to the complainant on 15 November 2017, maintaining its original position.

Scope of the case

10. The complainant contacted the Commissioner on 16 November 2017 to complain about the way his request for information had been handled. In particular, the complainant is concerned about whether the Trust is entitled to rely on section 43(2) of the FOIA to withhold the requested information.
11. The complainant has also raised a concern about the Trust appearing to be unaware of its duty to assist those that make requests.
12. During the course of the Commissioner's investigation, the Trust has released some of the withheld information with redactions. The Trust also claimed a late reliance on section 42(1) of the FOIA for one element of the withheld information.
13. The Commissioner considers the scope of this case is to determine whether the Trust has complied with its obligations under section 1(1), section 10(1) and section 16(1) of the FOIA.
14. The Commissioner will also determine whether the Trust is entitled to rely on section 42(1) and 43(2) of the FOIA as a basis for refusing to provide the remaining withheld information.

Reasons for decision

Section 1 – general right of access

15. Section 1(1) of the FOIA states that any person making a request is entitled to be told whether the information they have asked for is held and, if so, to have that information communicated to them, subject to the application of any exemptions that are appropriate.

Section 10 – time for compliance

16. Section 10(1) states that a public authority shall respond to information requests promptly and in any event no later than 20 working days from receipt.
17. As it is clear that the Trust did not respond within 20 working days she finds that the Trust breached section 10(1) of the FOIA.

Section 16 – advice and assistance

18. Section 16(1) of the FOIA says that a public authority has a duty to provide advice and assistance to an applicant, so far as it would be reasonable to expect the authority to do so.
19. The complainant is concerned that the Trust did not provide him with advice and assistance as to how he could refine his request.
20. In its submission to the Commissioner, the Trust has stated that it is unable to provide any further assistance to the complainant in relation to his request for information. The Trust has explained that to refine the request would still infringe the exemption engaged. The Trust has also stated that it is unable to make the information any broader than what is already in the public domain. The Trust has explained that due to the nature of the request, it is unable to provide any redacted responses as the redacted information would be the information that is being requested.
21. Given the scope of the complainant's request, the Commissioner is of the view that no meaningful advice could have been offered as to ways to refine the request, as any refinement would have still resulted in the Trust applying the exemption.

Section 43 – prejudice to commercial interests

22. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
23. There are a number of circumstances in which a public authority might hold information with the potential to prejudice commercial interests. One such activity is a PFI. Public authorities often work with private sector partners, who may help to finance projects and deliver identified services. In such circumstances, the public authority is likely to hold a significant amount of information about the funding of the partnership, as well as more general information relating to the partner's private business.
24. In this case, the Trust provided services from three facilities that were funded via a PFI. The Trust ended a previous PFI contract for one of those facilities, Hexham General Hospital, via external funding from a loan provided by Northumberland County Council.
25. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests;
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely to occur.
26. In its initial submission to the Commissioner, the Trust has explained that *"PFI providers are private organisations and their PFI financial modelling bespoke to their organisation."* The Trust went on to explain that *"the terms of all PFI's are locally negotiated and will be different per organisation."* The Trust has stated that releasing the PFI financial modelling for the Hexham PFI buyout will release commercial information that could be share price sensitive.
27. The Trust has stated that *"it commissioned support from external specialist accountants and lawyers incurring costs with a view that the knowledge and knowhow will be utilised to support other NHS organisations considering PFI buy back as an option. The release of this information would also prejudice the commercial interests of the external specialists [the] Trust consulted, as their advice on the process and how savings are made would prevent them from marketing that information in the future."*
28. The Trust went on to explain that *"as a result, and in line with the powers Foundation NHS Trusts have, a 'product' has been created to support other organisations the opportunity of buying-back their PFI or refinance options. This 'product' does not exist anywhere else in the market place, would be cheaper than recreating a new model to do this and also, again, share price sensitive for those financial organisations providing financial options"*.
29. The Trust is of the view that disclosing the detailed modelling as requested by the complainant regarding the calculations of the PFI buyout would provide potential competitors with commercial knowledge and knowhow about buying out of a PFI agreement.
30. The Trust is therefore of the opinion that to release the withheld information would prejudice or harm the commercial interests of the Trust and would prejudice the commercial interests of other organisations operating within that marketplace who provide these services for a fee.

31. Having considered the above, and in light of the fact the Trust had not provided the Commissioner with a copy of the withheld information, she wrote back to the Trust and requested the withheld information and further arguments to support its position to withhold the requested information under section 43(2) of the FOIA.
32. In the Trust's second submission to the Commissioner, it explained that the disclosure of the requested information would make available to the public the method and proposal of how the Trust was able to finance and carry out ending a PFI agreement. The Trust stated that it is the first NHS Trust in the country that has been able to buy out of a PFI agreement, and it therefore considers that it is in unique position to provide a consultancy service to other organisations that plan to undertake a similar process. The Trust has stated that the money generated by it in carrying out this work can then be reinvested back into patient care.
33. In the Trust's initial submission to the Commissioner, it appeared to say that releasing the requested information would be likely to prejudice a third party's commercial interests too. However, the Trust did not provide any detailed arguments in its initial submission to support this position.
34. When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.
35. The Commissioner therefore asked the Trust to provide further information to support its position that releasing the withheld information would be likely to prejudice a third party's commercial interests.
36. The Trust stated in its second submission to the Commissioner that it consulted a number of private organisations in relation to the PFI buyout, who provided the Trust with reports and expert advice in relation to the matter. The Trust has stated that the release of this information would prejudice the private organisations commercial interests because it would impact on their fundamental business operations as their expert advice would be available in the public domain and therefore free of charge.
37. The Trust has confirmed that the third parties are a Solicitors firm, Financial Advisors, commercial banks, a Council and the PFI provider.

38. With regard to the Solicitors, the Trust stated that it had paid for expert legal advice. The Trust stated that if this information was made public, it would prevent the Solicitors from providing similar services to other organisations, which is a key part of their business operations.
39. The Trust has stated that the Financial Advisors provided significant advice via the withheld information that it says it paid for. It went on to explain that the Financial Advisors provided specific reports relating to the cost and benefits of terminating the PFI agreement which consisted of specialist financial advice and assurance. The Trust has stated that the release of this information would make available expert advice, which it says the Financial Advisors provide as the fundamental purpose of their business operations. The Trust has provided the Commissioner with a letter it received from the Financial Advisors which specifically states that within the letter of engagement, this precludes the Trust from disclosing any report to any third party without prior written consent.
40. With regards to the commercial banks, the Trust has stated that the withheld information contains information about discussions that the Trust held with these parties which includes details of the interest rates quoted. The Trust has stated that the release of this information may discourage other organisations and individuals from obtaining quotes or approaching these organisations.
41. With regards to the Council, the Trust has stated that disclosing the withheld information specifically relating to the loan provided by the Council, including arrangement fees, interest charges and other costs, would be making it public. The Trust has stated that this may impact any future loan that the Council may offer to other organisations with a competitive rate.
42. With regards to the PFI provider, the Trust has provided the Commissioner with a letter containing a section on confidentiality and states the content is confidential to both parties and is legally binding.
43. When she asked the Trust to explain clearly why disclosure of the withheld information would be likely to prejudice the commercial interests of third parties, the Commissioner stated that the Trust would need to prove that any arguments in relation to this question originated from that third party itself (i.e. the Trust has contacted the third party and obtained these views).
44. In this case, the Trust has not explained in sufficient detail why disclosure of the withheld information would be likely to prejudice the third parties' own commercial interests, despite the Commissioner encouraging the Trust to include such an explanation in its second

submission. Furthermore, the Trust has not provided the Commissioner with any information or evidence to suggest that it has contacted the third parties in question and obtained their views on this matter.

45. The Commissioner acknowledges the confidentiality clause referred to in paragraphs 45 and 48 above which demonstrates that the parties involved appear to have some concerns over the commercial sensitivity of the information. However, these clauses do not appear to provide any further explanation as to why disclosure of the withheld information would be likely to prejudice the Financial Advisors and PFI provider's commercial interests and the clause itself alone is not sufficient to demonstrate that section 43 of the FOIA applies.
46. In line with Tribunal decisions, the Commissioner will not consider claims that a third party's commercial interests would be harmed without some evidence that these reflect genuine concerns expressed by the third party involved. As the Trust has not provided the Commissioner with such evidence she will not consider this aspect any further.
47. The Trust has also stated that a significant number of other organisations are also referred to within the withheld information. However, the Trust has not explained in any of its submissions to the Commissioner who these other organisations are or why disclosure of the withheld information would be likely to prejudice those organisations' commercial interests. The Commissioner will therefore not consider this aspect any further.
48. Upon beginning the task of reviewing the withheld information, it quickly became apparent to the Commissioner that there was information which could be disclosed. She therefore wrote to the Trust stating this and giving the example that minutes of the meetings could be released. Although the minutes refer to the buyout, they do not appear to contain any information that would be prejudicial to any commercial interests.
49. In view of this, it became apparent to the Commissioner that the Trust appeared to have applied a blanket approach to non-disclosure of the requested information. The Commissioner explained to the Trust that this was not appropriate and that public authorities should separately consider each piece of information held when deciding whether an exemption applies, rather than apply an exemption to all information held on a blanket basis (for example, by applying an exemption to an entire file instead of separately considering the pieces of information within the file). The Commissioner also explained that it was the Trust's responsibility to do this, not the Commissioner's on the public authority's behalf.

50. In addition, the Commissioner explained to the Trust that the arguments the Trust had presented so far did not explain in sufficient detail why the disclosure of the requested information would be likely to prejudice the commercial interests of the Trust. The Commissioner confirmed to the Trust that the onus was on the Trust to go through the withheld information and present the necessary arguments to the Commissioner for her to consider.
51. In view of this, the Commissioner gave the Trust one final opportunity to review the withheld information for itself, decide what information could be disclosed, and present detailed arguments to support the application of section 43 of the FOIA to any remaining withheld information.
52. The Commissioner informed the Trust that failure to take this action would result in an adverse decision notice against the Trust ordering the disclosure of the requested information
53. Following a review of the withheld information, the Trust confirmed to the Commissioner that redacted copies of the minutes of meetings and two other documents could be released to the complainant. The Trust confirmed to the Commissioner that it released this information to the complainant on 7 December 2018.
54. The Trust stated in its third submission to the Commissioner that the remaining withheld information, mainly consisting of reports provided by external financial consultancies and auditors, remained commercially sensitive and exempt under section 43(2) of the FOIA because the disclosure of this information would fundamentally impact on their core business operations and would prevent them from providing similar services to other organisations. The Trust confirmed its belief that the previous arguments provided for this remained.
55. The Commissioner is not persuaded that the exemption at section 43(2) is engaged. The Trust has not demonstrated that the disclosure of the requested information would be likely to prejudice the commercial interests of the Trust and/or any third party. In addition, there is no evidence that the Trust has consulted with the other parties to consider what information could be disclosed. Furthermore, the Trust appears to have still applied a blanket approach to non-disclosure of the remaining withheld information. In the circumstances the Commissioner has no alternative but to issue an adverse decision ordering disclosure of the remaining withheld information.
56. As the Commissioner is not satisfied that the exemption is engaged she has not gone on to consider the public interest test.

Section 42 - legal professional privilege

57. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
58. There are two categories of legal professional privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
59. The Commissioner noted from the Trust's second submission to her, dated 15 October 2018, that it considered some of the requested information, specifically the notes of a conference call with the Solicitors, may be additionally exempt under section 42(1) of the FOIA as it considered the information to be subject to advice privilege.
60. The Trust stated that it considered the importance of transparency and openness in all communications between the Trust and its legal advisers, as well as its ability to ensure access to full and frank legal advice.
61. The Trust has argued that to disclose the withheld information would severely hinder its ability to obtain legal advice, which would prevent it from engaging in a number of wider activities which may impact on patient care.
62. The Trust has stated that the arguments for disclosure of the information would be openness and transparency to the public in the affairs that the Trust is discussing.
63. The Commissioner advised the Trust that if it intended to apply section 42(1) exemption to this specific piece of information (or to any other pieces of the requested information), then it should have informed the complainant why this new exemption applies and provide us with its full and final arguments as to why it thinks the exemption applies.
64. It does not appear that the Trust has informed the complainant that it is withholding these notes under section 42(1) of the FOIA. Furthermore, the Trust has not provided the Commissioner with any further arguments to support its application of this exemption, despite being asked to provide them.

65. Despite the Trust's flaws in its consideration of section 42 as highlighted above the Commissioner is nevertheless satisfied that the information it has identified is clearly covered by legal professional privilege. She has therefore proactively decided to reach her own decision on this issue to avoid any further delays and is satisfied that doing so will not cause detriment of either party.
66. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
67. The Commissioner has considered the limited public interest arguments provided by the Trust. In order to outweigh the inherent public interest in maintaining the exemption under section 42, the Commissioner considers that there must be a compelling argument for disclosure. In this case the Commissioner has not identified any such arguments. She has therefore concluded that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption and that this information should not be disclosed.

Other matters

68. The Commissioner has concerns about the way in which the Trust responded to her enquiries. The initial response was inadequate and it did not provide a copy of the withheld information. The Commissioner gave the Trust a further two opportunities to provide detailed arguments to support its application of section 43(2) of the FOIA. However, the Trust's further submissions were also inadequate. The responses were not of the standard expected. It did not provide clear and separate arguments relating to the prejudice envisaged, the likelihood of that prejudice or any evidence of any consultation with the other parties.
69. Furthermore, the Trust failed to respond to the Commissioner's enquiries within any of the deadlines set by the Commissioner. She is also concerned by the Trust's late consideration of section 42 which entailed the Commissioner taking the action above to address this.
70. The Commissioner therefore recommends that the Trust review its handling of this request and complaint to ensure lessons are learned and improvements made.

Right of appeal

71. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

72. 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.
73. 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

Pamela Clements
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