

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 September 2014

**Public Authority:** Wye Valley NHS Trust  
**Address:** Trust Headquarters  
County Hospital  
Union Walk  
Hereford  
HR1 2ER

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to an adjudication process. Wye Valley NHS Trust (the Trust) provided the complainant with some information, it withheld some information under section 32 and section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the Trust incorrectly applied section 32 FOIA to the withheld information but correctly applied section 43(2) FOIA to documents 28, 40 and 51.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information other than documents 28, 40 and 51.
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**

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5. On 17 July 2013 the complainant made the following request for information under the FOIA for:

"I am requesting information on the dispute resolution process between [named company] and Wye Valley Trust, relating to the issue of improper fire safety features. Could you provide me with copies documents relating to the first stage of the dispute resolution:

1. The original 'Dispute Notice' or 'Referral to Adjudication Procedure Notice' sent by the Trust to [named company]. I would expect this to include a summary of the dispute and the relief the Trust is seeking, along with copies of the relevant documents attached to the notice.
2. Any further 'written representations' submitted to the adjudicator, but not included in the original notice. I would expect this to include the Trust's representations and copies that Mercia Healthcare has provided them with.
3. The 'Preliminary Decision' written by the adjudicator
4. I would also like a copy of the 'Expert Determination Decision'. This would be the notice handed out at the end of the second stage of the dispute resolution process.
6. I imagine these documents would have been created electronically, and would prefer them in that format. However I would be more than happy to visit in person to inspect the records if this request is prohibitively expensive."
7. On 8 August 2013 the Trust responded. It refused to provide the requested information under section 32 FOIA.
8. The complainant requested an internal review on 23 August 2013. The Trust sent the outcome of its internal review on 23 September 2013. It upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 4 November 2013 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation, the Trust also applied section 43(2) FOIA to documents 28, 40 and 51 of the withheld information.
11. The Commissioner has considered whether the Trust was correct to apply section 32 and section 43(2) FOIA to the withheld information.

## Reasons for decision

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### Section 32 FOIA

12. Section 32(1) states that:

"Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
  - i. a court, or
  - ii. a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."

13. Section 32(2) FOIA states that the following is exempt from disclosure:

- (2) any document placed in the custody of a person conducting an inquiry or arbitration,
  - (a) for the purposes of the inquiry or arbitration, or
  - (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.'

14. Section 32(4) FOIA provides the definitions relating to this section:

'(4) In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the [1996 c. 23.] Arbitration Act 1996 applies.'

15. The Commissioner asked the Trust to explain on what statutory basis the adjudication in question was conducted. The Trust explained that:

“There is no provision for arbitration in the Trust's contract with Mercia and therefore the Arbitration Act has no relevance to the issues that formed the subject matter of the FOI request.

If the query should instead have asked whether the adjudication process undertaken by the parties last year was statutory (i.e. governed by the Housing Grants, Construction and Regeneration Act 1996 (as amended)), it was not. The provisions governing the adjudication are contractual and not governed by statute.

The dispute resolution provisions in the Project Agreement provide for negotiation between the parties, mediation and adjudication followed by Expert Determination and/or litigation.”

16. The Commissioner does not consider that the dispute resolution process described by the Trust would fall into the definition set out at section 32(1) FOIA. It is clear in this case that the dispute process is not a ‘court’ nor ‘proceedings’ as defined under sub-sections 32(4)(a) and (b) respectively.
17. For the dispute resolution process described by the public authority to be able to be caught by the exemption found in sub-section 32(2), it would need to be a process that falls under one of the categories described in section 32(4)(c) or (d).
18. The Trust has however confirmed that the process is not covered either by the Arbitration Act 1996 or any other enactment. It can therefore not be considered an ‘inquiry’ as defined under sub-section 32(4)(c) or as an ‘arbitration’ process under section 32(4)(d). The Trust has explained that it is a contractual remedy process. The Commissioner does not therefore consider that the withheld information can be classified as a court record under section 32 FOIA.
19. This exemption was therefore incorrectly applied by the Trust.

### **Section 43 – commercial interests**

20. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

21. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."<sup>1</sup>*

22. Upon viewing the withheld information the Commissioner considers that it relates to a contractual dispute covering the provision of services between the Trust and its Private Finance Initiative (PFI) Partners and does therefore fall within the scope of the exemption.
23. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.

*Whose commercial interests and the likelihood of prejudice*

24. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
25. The Trust has stated that disclosure of the information would prejudice its own commercial interests.

*The nature of the prejudice*

26. The Trust argued that disclosure would jeopardise the negotiation of contracts for the provision of services with any commissioner of such services and also the renegotiation of any contracts with the PFI partners in this case.
27. It argued that it is a small health economy which serves the Herefordshire populations as well as patients from Powys, Shropshire,

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<sup>1</sup> See here:  
[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

Worcestershire and Gloucestershire and it relies on income from contracts held with the respective commissioners in these areas.

28. It said that the Trust has partnership agreements within these areas and should the withheld information be disclosed before the dispute is finalised, these relationships could be jeopardised and the Trust considered an unsafe partner.
29. The Trust said that patients have a choice of where to obtain their treatment but if the information were disclosed patients may choose to go to Wye Valley NHS Trust. It went on to explain that the Department of Health consider the Trust to be a small, financially challenged acute Trust. It said that the County Hospital is the only acute hospital in the area. It said that income would be taken out of the local health economy if patients went elsewhere.
30. Finally it said that the business relationship with the PFI Partners needs rebuilding following this dispute and disclosure of the withheld information at this stage would inevitably lead to a worsening of the situation between the two organisations as well as undermining any renegotiation of contractual agreements and charges made to the Trust.
31. The information withheld under section 43(2) is documents containing the notice of withheld contract fees and is part of the on-going dispute. The Commissioner considers that disclosure of information relating to fees being withheld as part of the dispute process would cause further deterioration of the working relationship between the Trust and its PFI Partners which would have a negative impact upon any renegotiation as part of that process. The Commissioner is satisfied that the prejudice would occur as there already appears to be an ongoing dispute between the parties and disclosure of financial information into the public domain at this time would as the Trust has argued 'deepen the rift' which would prejudice the commercial interests of the Trust.
32. In relation to future tendering with its PFI partners or other commissioners, disclosure would reveal details of the fees the Trust is prepared to pay for contracted services. He therefore accepts that the prejudice claimed is real, actual and of substance and there is a causal link between disclosure and the prejudice occurring. Whilst the Commissioner considers that the prejudice claimed would be likely to occur, he does not consider, in relation to this specific argument, that the Trust has sufficiently demonstrated that the prejudice would occur.
33. The Commissioner does not however consider that the Trust has provided sufficient evidence to demonstrate that disclosure would or would be likely to lead to patients opting to receive health care elsewhere.

34. As the Commissioner does consider that section 43(2) FOIA was correctly engaged and this is a qualified exemption, he has gone on to consider the balance of the public interest in this case.

### **Public interest test**

#### *Public interest arguments in favour of disclosure*

35. The Commissioner considers that there is a public interest in transparency in public affairs including how public monies are spent.
36. The Commissioner is aware PFI has been widely criticised as poor value for money and has led to the closure of one hospital (Lewisham Hospital);
37. The lack of transparency over PFI contracts has been highlighted by the Public Accounts Committee as a factor in poor value for money;

#### *Public interest arguments in favour of maintaining the exemption*

38. The Trust considers that there is a strong public interest in not jeopardising the dispute process at this stage of proceedings whilst it is still ongoing as it would prejudice its commercial interests in relation to ongoing negotiations with its PFI Partners.

#### *Balance of the public interest arguments*

39. The Commissioner considers that there is a very strong public interest in disclosure of information relating to PFI contracts due to the wide criticism surrounding these contracts and particularly in this case where a dispute has occurred.
40. However the Commissioner is mindful that the dispute process is ongoing and disclosure of financial information, relating to the withholding of fees due, at this time would lead to a further deterioration of the working relationship between the Trust and its PFI Partners and would thereby prejudice the ongoing negotiation. It is in the public interest that the Trust's commercial position is not prejudiced in this way. Furthermore it is not in the public interest to disclose information which would impede the Trust in seeking the best value for money and a positive outcome within this dispute process.
41. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly engaged in relation to documents 28 and 40.

## Right of appeal

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42. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**