

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2019

Public Authority: Tees, Esk and Wear Valleys NHS Foundation Trust

Address: West Park Hospital
Edward Pease Way
Darlington
DL2 2TS

Decision (including any steps ordered)

1. The complainant has requested information relating to building defects at Roseberry Park Hospital in Middlesbrough.
2. The Commissioner's decision is that Tees, Esk and Wear Valleys NHS Foundation Trust (the Trust) has correctly applied section 36(2)(c) to the withheld information. She has further determined that the public interest lies in favour of maintaining the exemption.
3. The Commissioner does not require the Trust to take any steps.

Request and response

4. On 25 April 2018, the complainant wrote to the Trust and requested information in the following terms:

"Under the Freedom of Information Act, please send me details of all documentation and reports considered by the TEWV board of directors at its meetings held in private in the last six months concerning the building defects at Roseberry Park Hospital.

In addition, please send me documentation held by the trust concerning assessments of the cost of rectification work, put at around £41m in its official accounts."

5. The Trust responded on 22 June 2018. It refused to provide the information at part 1 of the request citing section 43(2), section 42(1), section 36 and section 38(1) as its basis for doing so.

6. With regard to part 2 of the request, again the Trust refused to provide the information citing sections 41 and 42(1) as its basis for doing so.
7. Following an internal review the Trust wrote to the complainant on 20 July 2018. It maintained its position and with regard to part 1 of the request and its reliance on sections 38(1); 42(1); 36 and 43(2). With regard to part 2 of the request it now cited sections 36, 38 and 43(2) as its basis for withholding the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 3 August 2018 to complain about the way his request for information had been handled.
9. During the course of the investigation the Trust determined that, due to the passage of time, some of the requested information could now be disclosed.
10. The Commissioner further contacted the Trust as it had not been clear in identifying the exemptions applied to specific withheld information, rather it had stated it was either out of scope or exempt by virtue of multiple exemptions.
11. A final response was received in which the Trust again did not identify specific exemptions for some of the withheld information. However, due to the delays incurred in this case the Commissioner has considered whether the arguments provided support any of the exemptions claimed.
12. The Trust provided the Commissioner with a significant amount of information consisting of minutes of Meetings of the Board of Directors, Continuity Plans, correspondence relating to Lenders and template letters. Much of this was out of scope of the request as it was not relevant to the building defects at Roseberry Park Hospital or assessments of the cost of rectification work. The Trust explained it had been provided in the interests of transparency.
13. When making her determination the Commissioner has considered all the information provided to her, including that deemed to be out of scope by the Trust.

Reasons for decision

Part 1: details of all documentation and reports considered by the TEWW board of directors at its meetings held in private in the last six months concerning the building defects at Roseberry Park Hospital.

14. Following the internal review the Trust maintained its reliance on sections 38(1); 42(1); 36(1) and 43(2).

Part 2: *In addition, please send me documentation held by the trust concerning assessments of the cost of rectification work, put at around £41m in its official accounts*

15. With regard to part 2 of the request the Trust has cited sections 36, 38 and 43(2) as its basis for withholding the requested information.
16. Upon receipt of the Trust's final submission to the Commissioner it became clear that it considered section 36(2)(c) applied to all the withheld information.
17. The Commissioner has therefore first considered the 'common' exemption of section 36(2)(c) applied to both parts of the information jointly. In the event that she finds this exemption does not apply she will go on to consider the appropriateness of any other exemptions cited.

Section 36 – prejudice to the effective conduct of public affairs

18. Section 36(2)(c) states:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

19. As section 36(2)(c) is worded specifically as "would otherwise prejudice", it is the Commissioner's opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
20. The exemption provided by section 36(2)(c) is engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.
21. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.

22. To engage this exemption, the public authority's "qualified person" is required to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.
23. The Commissioner adopts the plain meaning of the word "reasonable" as defined by the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
24. To engage section 36, the qualified person's opinion needs only to be reasonable: It needs to be an opinion reasonably held by a reasonable person.
25. This is not a high hurdle. It is not necessary for the Commissioner to agree with the opinion given; she needs only to recognise that a reasonable person could hold the opinion given.
26. In keeping with the requirement of the exemption, the Commissioner has considered whether the qualified person's opinion was reasonable. To do this, the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the section 36(2)(c) claimed by the Trust. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue.
 - The qualified person's knowledge of, or involvement in, the issue.
27. The Trust sought the view of its Chief Executive on 17 July 2018. The Commissioner is satisfied the Chief Executive is a qualified person as defined in section 36(5) of the FOIA. The Commissioner notes that the opinion was not sought until the internal review stage. The Trust should note that the exemption cannot be engaged until the qualified person's opinion has been obtained¹. However, as the opinion was based upon the circumstances at the time of the request the Commissioner is prepared to accept it.
28. The qualified person has stated that his opinion is that the prejudice 'would be likely' to occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

29. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
30. The Commissioner has seen the submission produced by Trust staff upon which the opinion of the qualified person was based. This included a summary of the information to be withheld, an explanation of the section 36 exemption and a brief analysis of the public interest arguments.
31. In this case, the qualified person was of the opinion that the release of the information to the public regarding matters and processes around process and resolution related to the defects and rectification works at the hospital in isolation and/or prematurely could inhibit or adversely interfere with the Trust's ability to protect its interests and those of the public.
32. In addition, the investigations into the nature and extent of the defects at Roseberry Park Hospital are ongoing and the Trust's advisors continue to assess the likely costs. These will also be dependent on the outcome of court proceedings and future negotiations. Given the range of outcomes from the termination process (see annex) it would be premature to release the information at the current time to the public.
33. The Commissioner is satisfied that the qualified person's opinion is a reasonable one, and relates to the prejudice relevant to section 36(2)(c) and the qualified person had an adequate level of knowledge of the issue. The Commissioner is therefore satisfied that a reasonable opinion has been given and she is satisfied that the exemption provided by section 36(2)(c) is engaged.
34. This exemption is a qualified exemption which means that even if the disclosure of the information would or would be likely to inhibit the free and frank provision of advice or exchange of views or otherwise prejudice the effective conduct of public affairs, disclosure is still subject to a public interest test.

The public interest test

35. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Tribunal provided some general principles concerning the application of the public interest test in section 36 cases:

- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
- While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), she is able to consider the severity, frequency or extent of any likely prejudice.
- Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
- In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs.
- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption.
- Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.

Arguments in favour of maintaining the exemption

36. The Trust argued that disclosure of the information requested would be likely to prejudice the effective conduct of public affairs for a number of reasons:

- It could impair its ability to reach solutions in ongoing legal processes, proceedings and negotiations, and ultimately, its safe, cost effective, operation of Roseberry Park Hospital;
- It would reveal its "hand" to other parties in any future litigation/legal claims which may be brought against it which result from the various issues at Roseberry Park Hospital, to the detriment of the Trust and potentially the public purse. The other parties are not subject to the FOIA and therefore disclosure would create an uneven playing field and interfere with the integrity of legal processes.

- Whilst there are no current legal claims, the Trust expects a claim to be made by the project company's administrators, and potentially the PFI scheme's funders, in due course;
- It could result in "trial by media", where for example arguments about liability enter the public domain, which would be unfair to those who should be able to reply in the normal course of any legal proceedings or in 'without prejudice' and confidential settings; and
- It could add stress to relationships between the Trust and other parties. The Roseberry Park Hospital and PFI project agreement has a number of different, complex elements to it, which involve different parties with competing interests. There are other challenging matters including the insolvency of companies involved in the provision of services at Roseberry Park Hospital.

Arguments in favour of disclosing the information

37. The complainant has presented the following arguments in favour of disclosing the information:

- There are significant and overwhelming reasons for the information to be made public concerning the need to carry out wholesale reconstruction work on buildings only a few years old constructed for the treatment of a highly vulnerable group of patients. In addition to the huge cost involved of the work running into tens of millions of pounds, the problems are causing major disruption to this hospital, others in the area and potentially to the treatment of many hundreds of patients.
- There are further arguments concerning the transparency and accountability of public spending, the right of patients, their families, staff and the public to know about building defects, the wider public interest in current and future PFI developments and their value for money, concerns over similar defects in other buildings paid for by public money and to examine the rigour to which this specific development was originally approved by the Trust, its regulators and the Treasury. Transparency may also help future contracting arrangements, safeguarding the public from unsafe or dubious practices.
- A great deal of information will simply be matters of fact or irrelevant to the details of any legal proceedings. Release of the information will therefore not affect them. The Trust is attempting to put a blanket restriction on the release of any information when it cannot apply to all that requested.
- The Trust makes some speculative arguments about "trial by media", which it does not explain. An alternative view is that to make the

information public would enable the public to scrutinise the problems and hold officials and others to account.

- The Trust also says that disclosure "could" be in breach of undertakings given in litigation not to use information obtained in legal proceedings for another purpose or in breach of contractual or common law obligations of confidence, which the complainant would suggest do not apply, or even if they did, do not fall under section 36 and could only apply to very small amounts of information.
- The complainant argues that given that legal proceedings are already underway relationships between the trust and other parties have irretrievably broken down and public disclosure will not further damage them.
- In this case, the scale of rectification works and costs appear to be so large as to demand public scrutiny and accountability by the trust and the wider NHS. In summary, the complainant argues that the Trust's argument that it should not release any of the information requested is wholly unsustainable.

Balance of the public interest

38. It is the Commissioner's view that the extensive media coverage of PFI contracts and value for money has placed greater scrutiny on public authorities.
39. In addition, the Commissioner further considers that disclosure of the information at this time could prejudice any potential litigation that may arise. The Trust has provided a number of updates to the public and the Commissioner is satisfied that this goes some way to satisfy the public interest.
40. The Commissioner notes that PFI contracts are of a high profile nature given the recent collapse of Carillion, however, this in itself can also serve to maintain the exemption so that the Trust can resolve any outstanding claims relating to remedial works required.
41. Having reviewed all of the withheld information, it is the Commissioner's view that much of it is inextricably linked with information that falls out of the scope of the request making it impossible to provide.
42. It is therefore the Commissioner's view that the balance of the public interest in disclosure is outweighed by the public interest in maintaining the section 36(2)(c) FOIA exemption.
43. As the Commissioner considers that section 36(2)(c) FOIA was correctly applied to all the withheld information, she has not gone on to consider the application of any of the other exemptions any further.

Right of appeal

- (a) 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

- (b) 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.
- (c) 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

Annex

PFI Termination Process

From a contractual perspective, many of the older PFI projects do not contain provisions allowing a public authority to terminate on a voluntary basis.

For those projects, termination only applies as a result of specified default events on the part of the contracting parties. Unless the contractor is in default, the public authority cannot terminate. Even if the contractor is in default, there is often a process by which it can attempt to rectify the default before the project is terminated.

The consequences of termination depend on the terms of the relevant contract. However, PFI contracts are generally in similar forms that follow relevant Treasury guidance. This provides that for a voluntary termination, the PFI contractor should receive a termination payment which leaves it in the position in which it would have been had the contract run its full course.

This termination payment will generally include:

The "base senior debt termination amount" – generally defined as including all amounts outstanding to the funders (including accrued interest) and all other costs of pre-payment of the PFI contractor's loan, such as the costs of terminating interest rate hedging arrangements

Redundancy payments for employees of the PFI contractor reasonably incurred as a direct result of the termination

Subcontractor breakage costs – compensation payable to relevant contractors as a result of the termination of their contract

Compensation for equity holders in the PFI contractor. How this is calculated will depend on the terms of the relevant PFI contract but will generally be based on: (i) a sum that, when added to sums previously paid to the equity holders, equals their projected rate of return in the financial model, or (ii) the open-market value of the equity, or (iii) all the sums due to be paid to the equity holders under the financial model from the termination date.

The costs of such a termination are likely to be substantial. Consideration would also have to be given to who would deliver the services being provided by the PFI contractor after termination and at what price.

In this case the contractor was in default and the Trust is still in the process of terminating the contract, having to take into account all the above and the possible outcomes.