

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

### **Decision notice**

**Date:** 5 November 2012

**Public Authority:** Derby Hospitals NHS Foundation Trust

**Address:** Royal Derby Hospital  
Uttoxeter Road  
Derby  
DE22 3NE

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

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1. The complainant has requested a copy of the Deloitte review of Derby Hospitals NHS Foundation Trust's ("the Trust") finances. The Trust initially refused to provide this information on the basis of the section 43 (commercial interests exemption). However, the Trust later sought to withhold the requested information on the basis of section 36(2).
2. The Commissioner's decision is that section 36 is engaged and, after considering the public interest arguments, the Trust has correctly withheld the information.

#### **Request and response**

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3. On 23 January 2012, the complainant wrote to the Trust and requested information in the following terms:

*"I would like to see a copy of the recent Deloitte review of the trust's finances please."*

4. The Trust responded on 10 February 2012. It stated that it did hold the requested information but considered it exempt from disclosure on the basis of the commercial interests exemption (section 43 of the FOIA). The Trust indicated it had considered the public interest arguments associated with this exemption and had concluded that the information should be withheld.

5. Following an internal review the Trust wrote to the complainant on 14 March 2012. It stated that although it had considered the complainant's arguments that the whole of the Deloitte Report would not be likely to be commercially sensitive, the Trust still considered section 43 to apply to the whole report. At this stage the Trust clarified that the Report contained the following categories of information:
- Information provided to the Trust and Deloitte, on a confidential basis, by the PCTs
  - Comments on the Trust's relationship with the PCTs
  - Draft and unaudited/unpublished historical and forecast financial information
  - Detailed commentary of forecast assumptions
  - Commercially sensitive information in respect of specific CIP programmes
  - Quantification of risks
  - Commentary on the Trust's internal governance processes

### **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular the complainant did not consider that the commercial interests exemption covered all of the information within the report.
7. During the course of the Commissioner's investigation the Trust sought to rely on section 36 (2), 40(2) and 41 in addition to section 43 to withhold the report. The Commissioner accepted the late application of these exemptions and the complainant was provided with the opportunity to provide any relevant arguments in relation to the application of these exemptions.
8. The Commissioner therefore considers the scope of his investigation to be to determine if the exemptions cited by the Trust provide a valid basis for refusing to disclose the Deloitte Report.

## Background

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9. The report in question was commissioned by Monitor in November 2011. Monitor is the independent regulator of NHS Foundation Trusts, providing advice and supporting development and ensuring they are financially robust. The report was then produced by Deloitte in late November and had the stated purpose of being to assist in discussions between the Trust and Monitor in relation to the Trust's financial performance, position and reporting procedures.
10. The report was produced following interviews with senior officials within, for example, the Trust and the PCT Cluster. Contractual documents were also provided and the report was provided to Monitor and the Trust on a confidential basis. At the time of the request the report had not been shared with any party except the Trust, Monitor and the Trust's legal advisers.

## Reasons for decision

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11. Section 36(2) of the FOIA states that

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –*

*(b) would, or would be likely to, inhibit –*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

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

12. The exemptions listed in section 36(2) are qualified exemptions so are subject to public interest tests. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
13. For any of the exemptions listed in section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the Trust is the Chief Executive. The Trust has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The

Commissioner has next gone on to consider whether the opinion of the Chief Executive was a reasonable one.

14. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: "*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*"<sup>1</sup>
15. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
  - whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge of or involvement in the issue.
16. The Trust explained that the report dealt with three main issues – robustness of financial forecasts, cash management and programme management office (PMO) review, and financial governance and Board effectiveness. As well as this the report has eight appendices including a list of all individuals interviewed by Deloitte and risk assessments in relation to Cost Improvement Programmes (CIPs).
17. The Trust has argued that the commissioning of this report was a vital part of ensuring the financial performance of the Trust was monitored and preventative action could be taken at any time. This is a process which is of importance to both the Trust and Monitor. The report relied on the full and frank opinions of issues and difficulties within the Trust from various sources, including staff, with the intention of assessing the financial viability of the Trust.
18. The report was not commissioned with the intention of it being publicly disclosed and was intended only for the consumption of the Trust, its lawyers, Deloitte and Monitor. It was considered that to disclose the

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<sup>1</sup> Information Commissioner's section 36 FOIA guidance, [http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx), November 2011, page 6.

report any more widely would be likely to inhibit the free and frank exchange of views as staff would be less willing to engage in the future and it would have a detrimental impact on the future of the Trust.

19. The Trust expanded on this point by explaining that disclosure of the report would be likely to impact on staff's willingness to provide full and frank opinions and contributions to reports in the future. Interviewees were given assurances that their responses would remain confidential and were they aware that the report may be disclosed in the future, the Trust argues that the opinions provided would have been more measured and the report would not have been sufficiently honest to allow for proper evaluation of the Trust's financial position and for preventative steps to be identified. As such, the Trust considers disclosure of the report now would be likely to impact on the free and frank provision of advice and the free and frank exchange of views in the future.
20. The timing of the request has also been considered by the Trust and in particular the fact that the report was finalised in December 2011 and the request made in January 2012. At this stage the Trust and Monitor were still in the process of formally considering the report and the implications of the report. During this time discussions were ongoing between the Trust and Monitor, often requiring the free and frank exchange of views, airing of grievances and the need to honestly discuss worst case scenarios. This required a safe space for the parties involved to challenge the report and its conclusions and to consider future steps. The Trust considers that to disclose the report at the time of the request would have been likely to inhibit this process and the free and frank exchange of views.
21. The Commissioner is aware that the financial situation at the Trust is an issue which has generated some media attention and his view is that disclosure of the report and the potential surrounding media interest would be likely to impact on the free and frank exchange of views and the provision of advice. The Commissioner considers this to be the case both in regard to future reports but also, given the timing of the request, he also considers disclosure in January whilst the report was still being considered would also have been likely to have had an inhibitory effect on discussions and deliberations in respect of this report and the Trust's potential future actions.
22. As a result the Commissioner recognises that if staff do not feel they can provide open and frank views to the Trust to inform these types of reports and staff cannot debate the issues and challenge conclusions, this will be likely to decrease the effectiveness of these reports and inhibit any potential improvements within the Trust.

23. The Trust has provided sufficient evidence to illustrate that the Chief Executive was provided with an email explaining that she was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information withheld by the Trust in this case. It is clear having reviewed this information the Chief Executive formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
24. For the reasons outlined above the Commissioner is satisfied that the opinion of the Chief Executive is a reasonable one. Therefore, he considers that sections 36(2)(b)(i) and (ii) are engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosure*

25. The Commissioner recognises the general public interest argument that disclosure of information increases accountability within public authorities. He also considers it promotes transparency in the use of public funds to provide the best standards of care. The information in question may enable the public to better scrutinise the management of the Trust.
26. The Commissioner also accepts the general public interest argument that disclosure of information increases transparency and this is particularly relevant in NHS bodies and Trusts where disclosure can help to promote public confidence in the NHS and those who work within it.
27. With more specific reference to the withheld information, the Trust did recognise that there is a legitimate public interest in the way Monitor performs its functions as a regulator and its effectiveness. The Trust considered that disclosure of the report would provide the public with an insight into the information that is available to Monitor and therefore enabling the public debate on Monitor's effectiveness.

*Public interest arguments in favour of maintaining the exemption*

28. When making a judgement about the weight of the public authority's arguments, the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
29. The Trust argues that the content of the report and the circumstances under which information was compiled to produce the report are such that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views.

30. The requested report was compiled using views and opinions of staff and other sources and it was never intended, by the Trust or contributing staff or Monitor, that the report would be in the public domain. The Commissioner recognises that disclosure of the report could undermine the confidence of staff and inhibit future quality, open and frank discussion, exchange of ideas and provision of advice for fear of public disclosure. Inhibition of this process would be likely to be detrimental to the process of assessing and improving the financial position of the Trust.
31. The Trust considers that whilst there is a general public interest in the effectiveness of Monitor and this may be a factor in favour of disclosure, the effectiveness of Monitor is dependent on its ability to obtain detailed and honest advice which it can consider to ensure appropriate remedial steps are taken without the diversion of public scrutiny. This process relies on the free and frank provision of advice which the Trust argues would be likely to be inhibited by disclosure of the report.

*Balance of the public interest arguments*

32. The Commissioner has considered the public interest in maintaining the exemption. Having taken into account the content of the report, he considers that the inhibition to the free and frank provision of advice and exchange of views, which in the reasonable person's opinion is likely to result from disclosure of the requested information, is real.
33. The Commissioner has taken into account the level of information about the financial situation at the Trust which is routinely placed in the public domain. The Trust has quarterly public Board meetings at which financial reports are considered and placed on the Trust's website. The reports include information about the Trust's income and expenditure and its financial risk rating.
34. In addition to this, the Commissioner considers the timing of the request to be significant in this case, coming at a time when the report had only recently been finalised and was still being deliberated. The Trust has stated it needed the time and space to be able to seek out hard-hitting opinions and advice on the conclusions drawn from the report and this would have been likely to have been inhibited by disclosure at the time of the request. The Commissioner accepts that this is an important factor and affords significant weight to it.
35. The Commissioner recognises that should this report be disclosed, this would be likely to erode some of the trust that staff may have that information they provide will not be made publicly available. As such the Commissioner considers this to be a relevant argument weighing in favour of maintaining the exemption.

36. The Commissioner, having accepted that sections 36(2)(b)(i) and (ii) are engaged, recognises that the prejudice that would be likely to occur adds weight to the public interest in favour of maintaining the exemption. He does not consider it would be in the public interest for the Trust and Monitor to be unable to frankly assess and deliberate on the financial position of the Trust and preventative steps that can be taken. Without the production of reports and the full participation of staff, the Commissioner accepts there may be an impact on service delivery and management of the Trust to the detriment of the public.
37. Having taken into account the public interest factors outlined above, the Commissioner considers that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Trust is therefore not obliged to disclose the report withheld on the basis of section 36.
38. In light of his decision in relation to section 36 the Commissioner has not considered the application of sections 40(2), 41 or 43.



## Right of appeal

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39. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

40. 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.
41. 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, Complaints Resolution**  
**Information Commissioner's Office**  
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