

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2013

Public Authority: South London Healthcare NHS Trust
Address: Frognal Avenue
Sidcup
Kent
DA14 6LT

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the South London Healthcare NHS Trust ("the Trust") for information related to the building of the Princess Royal University Hospital and the Queen Elizabeth Hospital. The Trust refused the request by relying on the exemptions in section 36(2)(c) (Public affairs), section 41 (Information provided in confidence) and section 43 (Commercial interests). The Commissioner has found that none of the exemptions are engaged and the information should be disclosed.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Trust must disclose to the complainant the information it holds falling within the scope of the request of 12 July 2012.
3. 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.

Background

4. The complainant's request concerns the Princess Royal University Hospital and Queen Elizabeth Hospital, both part of the South London Healthcare NHS Trust ("the Trust"). Both hospitals were built using

funds from a Private Finance Initiative (PFI). On 16 July 2012 the Secretary of State for Health placed the Trust into the Regime for Unsustainable Providers (UPR) in light of ongoing financial difficulties. A Trust Special Administrator (TSA) was also appointed to take control of the Trust and prepare a report making recommendations for its future. Following this report the Secretary of State took the decision that the Trust would be dissolved and its hospitals taken over by neighbouring NHS trusts.

Request and response

5. On 12 July 2012 the complainant made a request to the Trust for information on the PFI contracts and business cases related to the Princess Royal University Hospital and the Queen Elizabeth Hospital. The request read as follows:

"The request I would like to make is for complete copies of the:

- 1a. The PFI contract, commissioned by Bromley Hospitals NHS Trust for the Princess Royal University Hospital PFI project.*
1b. the PFI contract, commissioned by Queen Elizabeth Hospital NHS Trust / Greenwich Healthcare NHS Trust for the Queen Elizabeth Hospital PFI project.

In both cases I would like copies of all appendices and supporting documents that form part of these PFI contracts, including all financial appendixes, schedules, annexes and so forth.

2. The full and final business case for both PFI projects."

6. The Trust provided an initial response to the request on 18 July 2012 by enclosing a copy of a response it had sent to a previous similar request for information. That request had been refused under the exemptions in sections 21, 41 and 43 of FOIA. This led the complainant to submit another request for information which effectively was a refinement of the earlier request. It read as follows:

"As you know, the Freedom of Information request I am making is for the full and final contracts for the Queen Elizabeth and Princess Royal Hospital PFI projects, including all financial appendices and supporting documents [therefore including the financial models]. In light of the information you have sent I am now writing to:

I. Request the release of:

a. all the information you are able to disclose as soon as possible: please do not exempt whole documents where some of the information can be made available.

b. copies of any letters or emails etc. the Trust received from the private partners in response to the Freedom of Information request last year."

7. The Trust responded on 25 October 2012 when it confirmed that it held information falling within the scope of the request. However it said that the contract information including the financial models was being withheld under the section 43 exemption (commercial interests). The request for correspondence received from private partners in response to the earlier FOI request was refused under the section 41 exemption (information provided in confidence).
8. Following further correspondence with the complainant the Trust committed to carrying out an internal review and presented its findings on 12 November 2012. The review confirmed that the request should be refused under section 43(2). However, having taken external legal advice, the Trust also suggested that the information would be exempt under the section 36 exemption (prejudice to effective conduct of public affairs). It explained that the Trust's Special Administrator, considered to be the qualified person for the purposes of the FOIA, had confirmed his agreement with the application of the exemption.

Scope of the case

9. On 16 January 2013 the complainant contacted the Commissioner to complain about the Trust's decision to refuse the request.

Reasons for decision

10. The withheld information in this case is a copy of the contracts for both hospitals as well as a number of separate documents that set out the financial agreement between the parties and which were referred to by the complainant as 'the financial model'. This information has been withheld under the section 43 and section 36 exemptions. The information in part b of the request, correspondence between the Trust and its PFI partners in response to a previous FOI request has been withheld under section 41. The Commissioner has first considered the

application of the section 43 exemption to the contracts and financial models.

Section 43 – Commercial interests

11. Section 43(2) provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person including the person holding it.
12. In this case the public authority has argued that disclosure would be likely to prejudice the commercial interests of the Trust, the Department of Health and the Trust Special Administrator or National Trust Development Authority. It said that the information was sensitive and could not be disclosed whilst the Trust was 'in the throes of being dissolved'. It went on to explain that disclosure would prejudice possible future negotiations concerning the future of healthcare provided by the Trust. According to the Trust disclosure would prejudice negotiations to split up the Trust and would compromise commercial negotiations to place the hospitals it runs with other healthcare providers.
13. First of all the Commissioner would say that for the most part the contracts contain information which one would expect to be included in a large commercial contract of this nature. Much of the information is generic such as standard legal clauses which are not specific to these contracts. In the Commissioner's view this information is not sensitive and in no way could be said to prejudice any person's commercial interests if disclosed. The Commissioner would highlight the fact that the contracts are very large documents running to several hundred pages and it is apparent that the Trust has taken a blanket approach in applying exemptions rather than attempting to direct the Commissioner to the information which it considers to be genuinely sensitive.
14. In any event the Trust has failed to provide a satisfactory explanation of why the information is considered to be commercially sensitive. Some of the information, most obviously the financial models which include information such as balance sheets and profit and loss accounts, are specific to the particular PFI deals for these hospitals. However, the Trust has failed to say how disclosure of this information would prejudice any future negotiations. Instead it has relied on vague references to the sensitivity of the information and the fact that the Trust is being dissolved as conclusive proof that the information would prejudice its commercial interests if disclosed. In this sense the Trust has failed to satisfy the prejudice test set out in *Hogan v Information Commissioner*

whereby a public authority applying a prejudice based exemption must be able to identify the nature of the prejudice it is claiming would be caused by disclosure.¹ This requires that the public authority demonstrate that the prejudice it has envisaged is "real, actual or of substance" and that there is a "causal link" between disclosure and the prejudice. That is to say the authority must be able to explain how disclosure of the specific requested information would or would be likely to lead to the prejudice.

15. The Commissioner has found that the Trust has failed to adequately explain why the section 43(2) exemption applies and therefore he has decided that the exemption is not engaged.

Section 36 – Effective conduct of public affairs

16. At the internal review stage the Trust suggested that the section 36(2)(c) exemption would also apply to the contracts and financial models although it was unclear if the exemption was being formally cited at this time. During the course of the Commissioner's investigation the Trust confirmed that it intended to rely on this exemption to withhold the information.
17. Section 36(2)(c) of FOIA provides that information is exempt if in the reasonable opinion of the qualified person disclosure would or would be likely to prejudice the effective conduct of public affairs.
18. When deciding if the exemption is engaged the Commissioner has to first establish that an opinion was given on the application of the exemption by a proper qualified person. In this case the Trust has explained that the Trust Special Administrator (TSA), Michael Kershaw, gave his opinion on the application of the exemption at or around 12 November 2012. The Commissioner understands that the TSA acted as Chief Executive for the Trust on his appointment by the Secretary of State and therefore the Commissioner is satisfied that at the time of the request the TSA was the proper qualified person for the purposes of section 36.
19. In order to determine whether the exemption is engaged the Commissioner must then go on to consider:

¹ Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030, 17 October 2006)

- 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.
20. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' 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."*²
21. The Trust has explained that in the opinion of the qualified person section 36(2)(c) is engaged because disclosure would be likely to prejudice the effective conduct of the consultations and negotiations that are on-going as part of the Unsustainable Provider Regime. In a letter to the Commissioner the qualified person said that in his view it was "essential that the financial arrangements remain confidential whilst the TSA process, dissolution and realigning of NHS services takes place".
22. However, as with section 43 the Trust and the qualified person have again failed to explain how disclosure of the information might prejudice the future negotiations it refers to. Instead the Trust appears to have made a blanket ruling to withhold any information related to the PFI deals for the two hospitals whilst it is in the process of being dissolved without properly considering how disclosure would prejudice this process.

"It must be remembered that this is the first time the legislation for trust special administration has been used and so, understandable caution is being exercised so that disclosures are not made, whilst the dissolution has not been concluded, which would prejudice either the current process or any new process that needs to be undertaken."

²http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

23. As the Commissioner makes clear in his guidance, section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. The Trust has not done this and so the Commissioner is not satisfied that the opinion given by the qualified person was reasonable in the circumstances.
24. Section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion and be clear what information is being withheld. As the Commissioner has explained above, much of the contractual information is generic information which would not cause any prejudice if disclosed. The Commissioner considers that an opinion that finds that information is exempt without properly considering what information is being withheld and what the effects of disclosure would be is unlikely to be reasonable.
25. In this case the qualified person was provided with a copy of the request, the refusal notice and a submission from a solicitor advising that section 36(2)(c) could be relied upon as disclosure could prejudice future negotiations. Having reviewed this information the Commissioner is not satisfied that the qualified person's opinion is supported by evidence or a submissions showing that relevant factors have been taken into account. Without a proper analysis or explanation of how prejudice may occur, the opinion is just an assertion.
26. In the circumstances of this case the Commissioner finds that the opinion of the qualified person was not reasonable and that therefore section 36(2)(c) is not engaged.

Section 41 – Information provided in confidence

27. The Trust has applied the section 41 exemption to the information covered by part b) of the request, the correspondence with the PFI partners regarding the previous FOIA request. Section 41 provides that information is exempt if it was obtained from another person and disclosure to the public would give rise to a breach of confidence actionable by that or any other person.
28. In this case it is evident from the request that the complainant is seeking information which the Trust received from another person (the PFI partners) and therefore this part of the test is met. However, for the exemption to be engaged disclosure of the withheld information must also constitute an actionable breach of confidence. In the Commissioner's view a breach will be actionable if:

- i. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
 - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.
29. The information falling within this part of the request amounts to two letters from the Trust's PFI partners providing their view on the previous FOI request. The Trust has not explicitly said why it considers the information to have the necessary quality of confidence. However, it did say that:

"the vast majority of information submitted by other organisations for the purposes of the PFI is commercially confidential information and has been treated as such by the Trust. This is apparent from the nature of the PFI agreements and the fact that they contain sensitive information about private and NHS organisations. Releasing such information would breach this confidentiality."
30. The Commissioner is not satisfied that the information provided by the PFI partners is commercially sensitive. The letters from the PFI partners set out their view on information being disclosed in response to the previous request. They were not submitted for the purposes of the PFI nor do they contain sensitive information on the terms of the PFI. Clearly the content of the letters are not in themselves commercially sensitive. Indeed the substance of the letters' content is likely to be apparent from the Trust's response to the previous request which was provided to the complainant. Therefore, without any further arguments from the Trust as to why this information is considered to have the quality of confidence the Commissioner must conclude that disclosure of the information would not give rise to an actionable breach of confidence.
31. As the Commissioner has determined that the information does not have the necessary quality of confidence it is not necessary to consider the further elements of the test. However, for the sake of completeness, the Commissioner would also say that whilst it does appear that in at least one case the information was provided to the Trust in the expectation

that it would not be disclosed the Commissioner has not seen anything to suggest that there would be any detriment to the confider if disclosed.

32. The Commissioner has decided on the strength of the arguments put forward by the Trust that disclosure of the information falling within the scope of part b) of the request would not give rise to an actionable breach of confidence. Consequently the Commissioner finds that section 41 is not engaged.

Right of appeal

33. 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
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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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