Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2015

Public Authority: Dorset County Hospital NHS Foundation Trust
Address: Williams Avenue
Dorchester
Dorset
DT1 2JY

Decision (including any steps ordered)

1. The complainant made a request to the Dorset County Hospital NHS Foundation Trust ("the Trust") for information related to a tender concerning the Trust's Pathology Service. The Trust disclosed some of the requested information but other information was withheld under the section 42 (legal professional privilege), section 43(2) (commercial interests) and section 36(2)(b)(i) and (ii) (free and frank exchange of views/provision of advice) exemptions.

2. The Commissioner's decision is that the section 36(2)(b)(i) and (ii), and section 42 exemptions were correctly applied and the public interest in maintaining the exemption outweighed the public interest in disclosure. However the Commissioner also found that for a small amount of redacted information and where section 43(2) was the only exemption that was applied, the exemption was not engaged.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - The Trust shall provide the complainant with copies of the minutes and agendas falling within the scope of part 6 of the request with the information previously redacted under section 43(2) disclosed.

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

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 October 2014 the complainant made a freedom of information request to the Trust for information regarding a tender concerning the Trust's Pathology Service. The request asked for the following information:

1) The Options Appraisal – referred to in various papers as having gone to a private session of the Trust Board in August/September 2013.
2) The Business Case for the Pathology "project".
3) The Procurement Plan for the Pathology procurement.
4) The Tender Evaluation Report.
5) The report on the benchmarking/best value appraisal of the in-house service compared to the preferred bidder (Board Paper for 8 October).
6) The information supplied to the Council Task and Finish Group (I assume redaction will no longer be applied).
7) Copies of the legal advice obtained in relation to the tender process – the Board Chair told visitors to the Board meeting that such advice had been obtained.

6. The Trust responded to the request on 31 October 2014. For parts 2 and 3 of the request it explained that the information was not held. For parts 1, 4 and 5 of the request it said that the information was considered to be exempt under section 36(2)(b)(i) and (ii) exemption. For part 6 of the request the section 43(2) exemption was applied and for part 7 the section 42 exemption applied. In each case the Trust found that the public interest favoured maintaining the exemption.

7. The complainant subsequently asked the Trust to carry out an internal review of its handling of the request and it presented its findings on 2 December 2014. The review upheld the decision to refuse to disclose the information but also said that for parts 1, 4 and 5 the information was considered to be additionally exempt under section 43(2).

Scope of the case

8. On 12 December 2014 the complainant contacted the Commissioner to complain about the way his request was handled. In particular he complained about the Trust's decision to refuse to disclose some of the requested information under the section 36, section 42 and section 43

exemptions, and challenged its position that the information in parts 2 and 3 of the request was not held.

9. During the course of the Commissioner's investigation the Trust said that for part 3 of the request, whilst it had previously said that no information was held, it had now discovered that it did in fact hold information falling within the scope of that request and that it would disclose this to the complainant. It also explained that for part 2 of the request it had found that relevant information was in fact held. However, this information was the same as the information which was being withheld for part 1 of the request under the section 36 exemption. Nevertheless, it acknowledged that it was not correct to say that it did not hold any information for part 2 of the request.

10. For part 6 of the request the Trust held a significant amount of information which it said was provided to the Council Task and Finishing Group. The Trust disclosed this to the complainant during the course of the investigation with the exception of the Agendas and minutes of the Pathology Project Board from which it redacted staff names and the names of companies involved in the project.

11. The remaining areas of the request which are in dispute are parts 1, 4 and 5 of the request which are being withheld under section 36(2)(b)(i) and (ii), and part 7 of the request which is withheld under the section 42 exemption. Part 6 of the request is in dispute only in so far as the Trust has withheld the names of companies involved in the project under the section 43(2) exemption.

Reasons for decision

Section 36(2)(b) – Free and frank provision of advice and exchange of views

12. The Commissioner has first considered the application of the section 36 exemption as this has been applied to the majority of the withheld information.

13. Section 36(2)(b) provides that information is exempt if in the reasonable opinion of a qualified person disclosure:

(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

14. The qualified person for the Trust is its Chief Executive Patricia Miller and the Trust has provided the Commissioner with a submission to show that the qualified person gave her opinion on the application of the exemption on 24 October 2014. Therefore, having satisfied himself that the Trust has obtained the opinion of the qualified person, in order to determine whether the exemption is engaged the Commissioner must then go on to decide whether this opinion is reasonable. This involves considering:

- 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.

15. The Commissioner has also 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."

16. The withheld information in this case comprises 3 reports discussing the tender for running pathology services at the Trust and the various options considered by the Trust, including details of the different bids. The qualified person has said that disclosure would be likely to inhibit the free and frank exchange of views and provision of advice because it would reduce the ability of the Trust to effectively conduct deliberations regarding pathology services in future. This is because the result of the tendering exercise was that the Trust decided not to award a contract and to continue with the current arrangements. However, it explained that whilst this particular tendering exercise has concluded, it was continuing to look at future developments relating to the pathology service, not precluding a similar exercise being conducted again in the future. Therefore the issues discussed in the withheld papers would continue to be relevant.

17. The Trust elaborated on this point with the following comments:

- *A long-term solution for pathology services at the Trust is yet to be agreed by the Board, and as such the process for examining the best service options has not yet ended*

- *The Trust is currently looking at the possibility of partnership working with other Trusts regarding pathology services*

- *The Trust has not ruled out the possibility of putting part or all of the pathology service out to tender again in the future*

18. It is important to note that when considering whether the exemption is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold he must find that the exemption is engaged.

19. The Commissioner has reviewed the withheld information and considered the opinion of the qualified person. He notes that the qualified person was provided with copies of the withheld information, as well as counter arguments to applying the exemption and that this material should have allowed her to reach a balanced decision. The Commissioner would also accept that it was at least reasonable to conclude that disclosure of the withheld information would inhibit the way in which the Trust and its staff contribute to future discussions regarding reforms to the way it runs its pathology services. The proposed changes were high profile, sensitive and controversial. Disclosure of the options discussed, including details of options which were not pursued but which may be considered again in future, so soon after the final decision had been made, would be likely to inhibit future discussions. The Commissioner is also aware that at the time of the request whilst a final decision not to award a contract had been made, the bidders involved had yet to be fully debriefed and as such the Trust considers that the tender process was still "in phase". In the Commissioner's view, disclosure at this point would increase the likelihood of inhibiting future discussions about pathology services.

20. For these reasons the Commissioner has decided that section 36(2)(b)(i) and (ii) are engaged.

Public interest test

21. Section 36 is a qualified exemption and therefore the Commissioner has undertaken a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of disclosure

22. In favour of disclosure the complainant argued that there was a strong public interest in how public money is spent. The public, he said, has a genuine right to know how a public authority had behaved and to hold it to account of the money it spent as a result.

23. The complainant also suggested that the Trust may have badly mishandled the tendering exercise which he said "lasted many months, caused much uncertainty, led to protests and cost significant sums of public money, only to result in no change".

24. For its part, the Trust said that factors around transparency accountability and participation favoured disclosure. It also said that accountability in the spending of public money also weighed in favour of disclosure and that wherever possible it sought to release information to demonstrate that public money is being spent appropriately.

Public interest arguments in favour of maintaining the exemption

25. The Trust gave the following factors as reasons why the public interest favoured maintaining the exemption:

- *Specific circumstances of the case and the timing of the request. Although the outcome of the tendering process had been decided at the time of the original request, conversations were still ongoing with the companies who were involved in the bidding process. As bidders were yet to be fully debriefed, the Trust considered that the tender process was still "in phase". The Trust's tenders are subject to OJEU regulations, which permit the Trust to withhold documents relating to a tender whilst that part of the tender process is "in phase".*

- *Likelihood and severity of harm or prejudice. The Trust believes that the potential damage to the Trust's commercial reputation (as outlined above) outweighs the public interest in disclosing the requested information.*

- *Significance or sensitivity of the information. Given the potential for reputational and commercial damage, the Trust considers this information to be highly commercially sensitive.*

Balance of public interest arguments

26. The Commissioner has considered the competing arguments and finds that disclosure would serve the public interest insofar as it would help the public to better understand the reasons why the Trust had decided not to award a contract.

27. However, on the other hand, the Commissioner would also accept that there is a strong public interest in not prejudicing the ability of the Trust to carry out future changes to pathology services by releasing the findings and evaluations it carried out as a result of this project. Disclosure of the information withheld under this exemption would be likely to inhibit the ability of the Trust's staff to express themselves in a free and frank way or to explore extreme options. The result of this is to impair the quality of decision making with regard to pathology services and this would not be in the public interest.

28. In determining the amount of weight to give this factor the timing of the request is key. The tendering project had only just concluded at the time of the request and, as the Trust explained, was still 'in phase'. Moreover the Trust has said that it was continuing to look at future developments relating to pathology services with the possibility of a similar tendering exercise being conducted in future. In the Commissioner's view this does weigh in favour of maintaining the exemption at the time of the request. However, the Commissioner would also caution that public authorities cannot expect to withhold information indefinitely with only a vague suggestion that a future tender may take place – there must be a realistic prospect that the issues discussed in the withheld information will be revisited in the near future. In the present circumstances, having reviewed the withheld information and on the basis of what he has been told by the Trust, the Commissioner is satisfied that this is indeed the case.

29. Given the timing of the request and the likelihood that the Trust will look at reforming pathology services again, the Commissioner has decided, having given due weight to the opinion of the qualified person, that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 43(2) – commercial interests

30. 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 public authority holding it. The Trust has applied this exemption to the three reports discussed above. However, since the

Commissioner has established that this information should be withheld on the basis of section 36, he does not intend to make a decision on whether section 43 might also apply. However, the Commissioner has considered the application of section 43(2) to redacted information falling within the scope of part 6 of the request as this was the only exemption that was applied. This information consists of the names of companies that bid for the contract which have been redacted from the minutes and agendas falling within the scope of part 6 of the request.

31. Section 43(2) is a prejudice based exemption which means that in order for the information to be withheld the Trust must be able to identify and explain the nature of the prejudice it envisages would be caused by disclosure. Following the test adopted by the Information Tribunal in *Hogan and Oxford City Council v the Information Commissioner*, this means that the public authority must be able to show that the prejudice claimed is *"real, actual or of substance"* and that there is some *"causal link"* between disclosure of the information and the prejudice claimed.

32. The Trust explained that it was seeking to withhold this information because disclosure would be likely to damage the Trust's reputation and commercial interests. This is because, it argues, disclosure could bring into question the integrity of the Trust and the reliability of the Trust to maintain confidentiality. This in turn may discourage suppliers from engaging in future tendering exercises with the Trust and damage relationships with companies who already provide services to the Trust.

33. The Commissioner has considered the Trust's arguments but is not satisfied that the exemption is engaged when applied to the redacted information. It is important to stress that the only information which has been redacted under this exemption are the names of companies. The information does not include details of their bid, their strengths and weaknesses or any financial details. There is no evidence to suggest that companies would react in the way the Trust suggests to the disclosure of such a limited amount of information. Moreover, in the Commissioner's view, companies are unlikely to be easily discouraged from doing business with the public sector because a particular public authority has disclosed information in response to a request under FOIA. It does not seem credible that companies would pass up potentially lucrative contracts because the Trust had previously disclosed the names of companies who bid for a tender in which the Trust had ultimately decided not to award a contract.

34. The Commissioner's view is that the Trust has failed to demonstrate a causal link between disclosure of the information and the prejudice it envisages. Therefore the Commissioner has decided that section 43(2) is not engaged.

Section 42 – legal professional privilege

35. The Trust has withheld the information in part 7 of the request under section 42(1) of FOIA which provides for an exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

36. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* as:

    "a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation."

37. There are two types of legal professional privilege: advice privilege and litigation privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the Trust are relying on legal advice privilege and the exemption has been applied to a small number of emails between a member of the Trust's staff and an external legal adviser concerning an issue related to the bidding process. The Commissioner has reviewed the withheld information and found that it is communications between the Trust and its lawyers seeking or giving legal advice in a professional capacity. The Commissioner is also satisfied that the information has been kept confidential and has not been made public. Therefore he finds that legal professional privilege can be maintained and that the section 42(1) exemption applies. The Commissioner will now go on to consider the public interest test.

Public interest test

Public interest arguments in favour of disclosure

38. The arguments for disclosure are the same as discussed in relation to section 36 above.

Public interest arguments in favour of maintaining the exemption

39. The Trust did not advance any specific arguments for section 42 but instead relies on the general arguments listed in relation to section 36. However, it did note at the internal review stage that in its view any public interest in disclosure was outweighed by the public interest in the principle behind legal professional privilege.

Balance of the public interest arguments

40. In balancing the public interest the Commissioner has given an initial weighting to maintaining the exemption. This is because the Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case *of Bellamy v Information Commissioner & Secretary of State for Trade and Industry* in which it states:

    "…there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest…it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case…"

41. The Commissioner's approach is that the arguments for protecting legal professional privilege will also have added weight where the legal advice is recent. This is based on the principle that where legal advice is recent it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure. In this case the withheld emails were only around 3 months old at the time of the request and so still very recent. The advice can also be said to still be 'live' given that the Trust had yet to decide on a long term solution for Pathology Services and may consider re-tendering for services in future. The Commissioner considers that in the circumstances these factors weigh strongly in favour of maintaining the exemption.

42. Given the strong public interest in protecting legal professional privilege there will need to be equally weighty arguments for disclosure. However, he finds that having reviewed the information the case for disclosure carries only limited weight. Whilst he accepts that disclosure would promote transparency and accountability this is only in the most

general sense that disclosure of any public information promotes transparency. The legal advice relates to a very narrow issue that arose during the course of the bidding process. In the Commissioner's view there is very little wider public interest in disclosure and nothing in the information which strikes him as particularly compelling, for instance there is no suggestion of any kind of wrongdoing or that the Trust has misrepresented the advice it has received.

43. The Commissioner has decided that given the importance of the principle of legal professional privilege, and in the particular circumstances of the case, the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure.

Right of appeal

44. 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

45. 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.

46. 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 .....

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