

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2016

Public Authority: NHS Improvement
Address: Southside
105 Victoria Street
London
SW1E 6QT

Decision (including any steps ordered)

1. The complainant has requested information about the categories NHS Improvement has segmented trusts into based on their likely trajectory towards a sustainable organisational form. NHS Improvement refused to provide the requested information under section 33(1)(b) and 43(2) FOIA.
2. The Commissioner's decision is that NHS Improvement has incorrectly applied section 33(1)(b) and 43(2) FOIA to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
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

5. On 7 April 2015 the complainant requested information of the following description:

I'd like to know what categories the TDA has segmented trusts into

based on their likely trajectory towards a sustainable organisational form ([as mentioned in previous TDA board papers](#)).

6. On 8 April 2015 NHS Improvement responded. It refused to provide the requested information under section 22 FOIA.
7. As the information was not subsequently published, on 17 August 2015 the complainant resubmitted his request for information:

Could you please provide me with information on what categories the TDA has segmented trusts into based on their likely trajectory towards a sustainable organisational form (as mentioned in previous TDA board papers)?

I requested this information under FOI on 7 April 2015 (see email, attached). However the TDA exempted the information from disclosure under the exemption set out in Section 22 of the Act (information intended for future publication).

In its March 2015 board papers the TDA said the trust segmentation would be "set out publicly in summer 2015". We are approaching the end of the summer and the TDA has still not released this information, so I would like to re-submit this FOI request.

8. On 11 December 2015 NHS Improvement responded. It refused to provide the requested information under section 43(2) and 33(1)(b) FOIA.
9. The complainant requested an internal review on 14 December 2015. NHS Improvement sent the outcome of its internal review on 2 February 2016. It upheld its position.

Background

10. NHS Improvement is the operational name for the organisation that brings together Monitor, NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change team and the Intensive Support Teams.
11. In this case, whilst the request was made to the NHS Trust Development Authority, this DN will refer to NHS Improvement throughout.

Scope of the case

12. The complainant contacted the Commissioner on 3 February 2016 to complain about the way his request for information had been handled.
13. The Commissioner has considered whether NHS Improvement was correct to apply section 33(1)(b) and 43(2) FOIA to the withheld information.

Reasons for decision

Section 43 – commercial interests

14. 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.
15. 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."*¹
16. The withheld information relates to the categories NHS Improvement has segmented trusts into based on their likely trajectory towards a sustainable organisational form. The Commissioner considers that information relating to the sustainability of a Trust relates to that Trust's ability to provide services as opposed to other public sector or private sector bodies operating within their area. The withheld information does therefore fall within the scope of the exemption.
17. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice

¹ 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)

which disclosure would or would be likely to cause and the relevant party or parties which would be affected.

The nature of the prejudice

18. NHS Improvement explained that, segmentation data will identify three broad categories of Trust - those with a sustainable future and a credible future plan for obtaining Foundation Trust status; those that are unlikely to have a sustainable future and are therefore candidates for acquisition or merger; and those where it is not yet known whether they have a sustainable future or not. It argued that a Trust identified as not having a long term future will be likely to have ever increasing difficulties in retaining permanent staff with a corresponding increase in the use of locums/agency workers. It explained that these are more expensive than permanent staff, and will thus cause the financial position in the Trusts so identified to worsen.
19. It went on that while these issues will be inevitable when the final segmentation data is published by NHS Improvement (as it has indicated it will do) the particular sensitivity here is that the allocations of Trusts to categories is not yet fixed - there are still a number of variables, such as the level of tariff payments and other negotiations with commissioners which may mean that a Trust provisionally in one category may in fact be in another when the segmentation data is made final. There is thus a risk that a Trust that has provisionally been identified as non sustainable may in fact later be determined to be a viable Trust with a viable future plan. Early publication of the data could thus run the risk of generating significant problems for the Trusts concerned that would otherwise have been avoided, and these problems are likely to include additional financial costs for the Trusts.
20. It said that given that the loss of permanent staff makes the affected Trust less efficient due to the higher staffing costs involved (and thus exacerbating problems within the Trusts affected). This is sufficient to demonstrate likely commercial prejudice.
21. As far as the Commissioner is aware, NHS Improvement has not contacted any of the Trusts in this case, but has made its representations based upon its own understanding and experience in this area.

Likelihood of prejudice

22. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

- “there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”
23. In this case NHS Improvement has argued that disclosure would be likely to prejudice the commercial interests of the Trusts.
 24. NHS Improvement must therefore demonstrate that there is a real and significant risk of prejudice occurring. The withheld information contains the current segmentation, which NHS Improvement has confirmed may be subject to change. However it has also confirmed that once finalised this information will be published.
 25. The Commissioner considers that NHS Improvement’s argument that disclosure will be likely to lead to higher turnover staff is very speculative. It has not provided evidence as to why it considers this would be likely to occur. It has not therefore demonstrated a causal link between disclosure of the withheld information and the claimed prejudice occurring.
 26. Furthermore NHS Improvement has already acknowledged that it does plan to release the information once the segmentation has been finalised, which suggests that any potential prejudice caused by disclosure is unlikely to be considered significant. The fact that the categories have not been finalised as yet can be explained alongside disclosure at this stage.
 27. The Commissioner does not therefore consider that section 43(2) was correctly engaged in this case.

Section 33(1)(b)

28. Section 33(1) provides that – “This section applies to any public authority which has functions in relation to- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”
29. NHS Improvement has explained that it has statutory responsibilities under section 4 of the NHS Trust Development Authority Regulations 2013 to support NHS trusts by assessing matters including their clinical quality, governance and management of risk and to oversee, develop and support NHS trusts to become sustainable organisations. Publication of the information requested would be likely to make this work undertaken by the NHS TDA much more complex, and would

accordingly prejudice the NHS TDA's functions in examining the economy, efficiency and effectiveness with which Trusts use their resources in discharging their functions.

30. NHS Improvement has not explained to the Commissioner how disclosure of the withheld information would be likely to make the work it undertakes in this area much more complex, and therefore why it would be likely to prejudice its functions in examining the economy, efficiency and effectiveness with which Trusts use their resources in discharging their functions.
31. Again NHS Improvement has not established a causal link between disclosure of the withheld information in this case and the prejudice claimed, therefore the Commissioner is unable to uphold the application of section 33(1)(b) FOIA.

Right of appeal

32. 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

33. 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.
34. 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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF