

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 August 2017

**Public Authority:** South Warwickshire NHS Foundation Trust  
**Address:** Warwick Hospital  
Lakin Road  
CV34 5BW

#### Decision (including any steps ordered)

---

1. The complainant requested emails and other information relating to the Sustainability and Transformation Planning (STP) process.
2. The public authority refused to provide the complainant with the requested emails, citing section 12 of the FOIA (Cost) as its basis for doing so. In relation to other STP related information the public authority refused the request citing sections 43(2) (commercial interests), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) as its reason for refusal.
3. The Commissioner's decision is that the public authority has correctly applied section 12 of the FOIA to the request for emails. In respect of other STP related information the Commissioner finds that sections 36(2)(b)(i) and (ii) of the FOIA are engaged and that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.
4. The Commissioner requires no steps to be taken.

#### Background

---

5. By way of background and in terms of context, in December 2015 NHS England published a document "Delivering the Forward View: NHS Planning Guidance 2016/17 – 2020/21" which sets out what a STP is intended to do. Effectively, health bodies and social care partners within an STP footprint were asked to come together to jointly plan services for the period October 2016 to March 2021, in order to meet the triple

challenge set out in the 5 Year Forward View, which is a public document.

6. The triple challenge is as follows:
  - How will we close the health and well-being gap?
  - How will we drive transformation to close the care and quality gap?
  - How will we close the finance and efficiency gap?
7. It was recognised from the outset that in order to meet the triple challenge, there would need to be changes to the way that healthcare is delivered across the Coventry and Warwickshire STP and as a forerunner, it would be necessary for partners to share information in the way that would not ordinarily be in, or reasonably expected to be in the public domain and to this end members of the STP signed an agreement for mutual exchange of confidential information for use regarding the development of the STP.
8. The STP was very high level and embryonic and had no status in terms of this not being effectively 'signed off' by the regulator. Prior to any plans being enacted, each constituent body would need to follow internal governance processes and take a decision through their respective Board or Governing Body as the STP is a meeting of partners; it is not entity in its own right and has no legal status.
9. There was always an intention to publish the STP once it had been through due process with NHS England as the regulator for the sector and the STP plan was published by each member organisation on 6 December 2016:

<http://www.uhcv.nhs.uk/about-us/stp>

## Request and response

---

10. On 2 December 2016, the complainant, on behalf of the Trinity Mirror publishing group, wrote to South Warwickshire NHS Foundation Trust (SWFT) and requested information in the following terms:

*Please could you provide copies of the following for the past 24 months (Jan 1, 2015 to Dec 2, 2016):*

*Any emails sent and received by [Chief Executive] in relation to the STP  
Any emails sent and received by [name redacted] in relation to the STP  
Any emails sent and received by [name redacted] relation to the STP  
Any emails sent and received by [name redacted] in relation to the STP*

*Any emails sent and received by [name redacted] in relation to the STP or in relation to press enquiries about the STP*

*Any emails sent and received by any other member of the press team in relation to the STP or in relation to press enquiries about the STP*

*Any minutes / notes taken during meetings in relation to the STP planning process*

*Specifically: Any minutes / notes taken during meetings in relation to A&E in Coventry and Warwickshire and the STP **AND** Any minutes / notes taken during in relation to forward planning for maternity services / paediatrics in the region.*

*Please also provide any documents (presentations, powerpoint slideshows, graphics, charts etc) produced as part of the STP process relating specifically to A&E, maternity or paediatrics care in Coventry / Warwickshire.*

11. SWFT responded on 4 January 2017. It refused to provide the complainant with the requested emails, citing section 12 of the FOIA (cost) as its basis for doing so. In relation to STP paperwork, SWFT refused the complainant's request citing sections 43(2) (commercial interests), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) as the reason for its refusal.
12. On 5 January 2017 the complainant wrote to SWFT requesting an internal review of its decision to refuse his request.
13. In its internal review outcome dated 2 February 2017 SWFT upheld its decision to refuse to provide the requested emails on the basis of section 12 of the FOIA. In relation to STP paperwork SWFT upheld its decision to refuse the request on the basis of sections 43(2), 41 and 36 of the FOIA.

## **Scope of the case**

---

14. The complainant contacted the Commissioner on 20 February 2017 to complain about the way his request for information had been handled and asked the Commissioner to encourage SWFT to provide him with the requested information.
15. The Commissioner considers that the scope of the case is whether section 12 has been appropriately applied to the requested emails, and whether SWFT was correct to rely upon the exemptions contained in sections 43(2), 41 and 36 of the FOIA in refusing the request for other SPT related information.

## Reasons for decision

---

### Emails

#### Section 12 (cost)

16. Section 12(1) provides that:

*"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."*

17. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
18. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
- Determining whether it holds the information;
  - Locating the information, or a document which may contain the information;
  - Retrieving the information, or a document which may contain the information;
  - Extracting the information from a document containing it.
19. In its response to the complainant SWFT highlighted that he had requested emails for a 24 month period from 5 individuals plus one team comprising 4 individuals, who collectively receive on average 200 emails per day. SWFT advised the complainant that in order to respond to his request SWFT would be required to extract any STP related information which would very quickly exceed the cost limit set out in section 12 of the FOIA.
20. In line with its duty to assist the complainant, SWFT informed him that the requirements for STPs to be developed was not announced until December 2015 and so it was possible to pare back his request to the period December 2015 to the date of his request, representing 12 months emails at the rate of arrival detailed previously. However SWFT still considered that a refined request on these terms would exceed the appropriate cost limit.

21. In his request for an internal review, the complainant considered that email searches for keywords would eliminate the need to inspect each email individually and rejected the notion that this would be an overly time-consuming process.
22. In considering the complainant's point, SWFT's internal review acknowledged that the first issue would be to try and select the right and most appropriate 'key' word(s); a search on key word(s) will result in a message stating "Try searching again in All Mail items" and once this has been selected, it is highly likely that that a message stating "Your search returned a large number of results. Narrow your search..." if the right key word(s) has not been selected.
23. In this instance SWFT advised the complainant that each of the emails would have to be individually examined to determine if they fell within the scope of the complainant's request. It informed him that even based on the refined time period it is estimated that the cost of compliance in this circumstance would exceed the appropriate limit and would therefore engage section 12 of the FOIA.
24. During the course of her enquiries the Commissioner asked a number of questions to enable her to consider whether SWFT has correctly applied section 12 of the FOIA, to which it responded on 19 July 2017.
25. In estimating the time for compliance, SWFT informed the Commissioner that one particular individual included in the request identified that they held 1,200 emails, and another 1,030 emails that have 'STP' in the title. In addition to this there will be many more emails which do not specifically refer to STP but will contain STP related information. In order to determine relevance and to extract the information within the scope of the request each of the emails would need to be reviewed.
26. SWFT's position is that a conservative time estimate for locating, retrieving and extracting the relevant information in those 2,230 emails identified is as follows:  
  
$$2 \text{ mins per email} \times 2,230 = 4,460 \text{ minutes (or 74 hours)}$$
$$74 \text{ hours} \times \text{£}25.00/\text{hr} = \text{£}1,850 \text{ (for two individuals)}$$
$$9 \text{ individuals (5 named plus 4 in press team)} = \text{£}8,325$$
27. The Commissioner queried SWFT's calculations as per paragraphs 25 and 26, on the basis that she considered it unlikely that if a number of emails had been located with 'STP' in the title, they would then have to be further reviewed, as presumably these would already fall within the scope of the complainants request.

28. SWFT clarified that the emails referred to in paragraphs 25 and 26 only form a proportion of those which will fall to be considered under this request. In fact there are a great many emails which relate to specific work streams which do not have STP in the title and so those emails will need to be reviewed individually, together with any attachments, in order to establish if they fall within the scope of this request.
29. The Commissioner was informed that in relation to the two email accounts already reviewed, they held between them, approximately 10,500 emails. Reducing this amount by the number which contained 'STP' in the title (2,230), this leaves 8,270 which would need to be individually reviewed.
- 2 mins per email x 8,270 = 16,540 minutes (or 275 hours)
- 275 hours x £25/hr = £6,875 (for two named individuals)
30. SWFT therefore maintains that the cost of compliance with this part of the request would significantly exceed the appropriate cost limit of £450.
31. The Commissioner accepts SWFT's submission that all emails (save for those with 'STP' in the title) in each individuals account would need to be examined as the search term 'STP' or its full unabbreviated form would not necessarily reveal all emails falling within the scope of the complainant's request. On the basis of the sampling exercise conducted by SWFT she accepts that the estimated time for compliance with this part of the request would far exceed the appropriate limit. Accordingly she is satisfied that SWFT has appropriately applied section 12 to this part of the request.

### **SPT related information**

#### **Section 36 (prejudice to effective conduct of public affairs)**

32. The Commissioner has been informed by SWFT that it has applied section 36 to the entirety of the withheld information. In particular, the withheld information falls to be considered under sections 36(2)(b)(i) and (ii) of the FOIA.
33. Sections 36(2)(b)(i) and (ii) of FOIA state that:
- 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 –*
- (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.*

34. Sections 36(2)(b)(i) and (ii) can only be engaged if, in the reasonable opinion of the qualified person, disclosure would, or would be likely to result in any of the effects set out.
35. In the present case, SWFT's Chief Executive, Mr Glen Burley provided the opinion. The Commissioner is satisfied that he is the qualified person for the purposes of section 36. The Commissioner was informed that the qualified person is a member of the STP Board and is fully aware of the content of the emails, minutes and papers requested by the complainant. SWFT has provided the Commissioner with a copy of the qualified person's opinion.

### **Is section 36 engaged?**

36. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. When making her determination, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd – that is, if it is an opinion that a reasonable person could hold – then it is reasonable.
37. However, this is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion will not be deemed unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Therefore, the qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
38. The Commissioner has considered the relevant factors including:
- Whether the prejudice relates to the specific subsections of section 36(2) that are being claimed. If the prejudice or inhibition is not related to the specific subsections, 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 on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.



39. The qualified person advised that at the end of 2015 health and social care organisations (within the local health economy) were tasked with developing a place-based blueprint of service provision, as part of a 5-year plan covering the period 2016 – 2021. This is a centrally driven directive requiring health and social care partners to meet the triple challenge of this 5-year STP. In order to meet this brief, partners will exchange confidential and commercially sensitive information. Such exchange is hitherto unprecedented.
40. He considered that disclosure in this instance would inhibit the ability of SWFT senior officers and others in expressing views, providing advice (based on their own organisation's specific data) and deliberating live issues which would, in turn, impair the quality of decision making. There is therefore a need for a safe space in which SWFT senior staff are able to have free and frank exchanges with STP partners in order to reach decisions, free from external interference and distraction and to ensure the effective operation of the arrangements that need to be put in place.
41. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank provision of advice and the exchange of views either 'would' occur or would only be 'likely' to occur. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
42. In the qualified person's opinion, he stated that disclosure 'would' inhibit the matters set out in section 36(2)(b)(i) on the basis that disclosure would inhibit the free and frank exchange of advice. The Chief Executive, as a senior officer of SWFT and acting as the senior representative of the Trust would have been asked to provide confidential advice and sensitive/confidential information (based on SWFT's data and services). There is a need to discuss and present a number of options at the various planning stages and this would have been hindered if the information was disclosed to the public. It was determined that it would have prejudiced the ability of the senior representative to provide that advice and information freely and without fear of external interference, distraction and misinterpretation. He is convinced that exposing details of the advice passed between itself and its STP partners would make officials less likely to be candid in such discussions in the future, thus prejudicing this critical facet of public affairs.
43. He stated that disclosure 'would be likely to' inhibit the matters set out in section 36(2)(b)(ii) on the basis that the STP partners have a collective responsibility to maintain the confidentiality of information at



the early planning stages so that trust and collaboration can be effective in looking at a variety of options, including those that may not come to fruition (not endorsed) or are taken forward in the long term. He felt that to disclose information at the early discussion/exploratory stages could undermine the process of planning effective health care for the future on the basis that freely-given advice and discussion could be inhibited if the information was released into the public domain.

44. The qualified person was minded that section 36 recognises the critical importance in the effective role undertaken by public authorities in their ability to have free and frank discussions and exchanges. In this instance that relates to SWFT's future workings with its STP colleagues, where it is vital to be able to have full and frank exchanges about the detail of reports and any subsequent discussion/analysis ahead of the Plan's publication.
45. The complainant pointed out that the minuted conversations have led to the production of a publicly available document dealing with the expenditure of millions of pounds of public funds and healthcare provision for millions of people. With the document already released he felt there was little justification for continuing to keep those conversations private.
46. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would be likely to inhibit the processes of providing advice or exchanging views.
47. Having reviewed the information withheld under this section of the FOIA, which comprise a series of meeting minutes, the Commissioner considers it was reasonable for the qualified person to conclude that sections 36(2)(b)(i) and (ii) applied.
48. This is because she considers that SWFT needed to provide advice and deliberate sensitive and high profile issues in a 'safe space' and away from the public domain. She agrees that if each and every step of these processes is put into the public domain then senior officials and others are likely to be inhibited from providing open and honest advice and exchanging free and frank views for the purposes of deliberation in the future. This in turn would affect the ability of SWFT to make effective and fully informed decisions in the future in relation to its core function of providing value for public money and high quality public healthcare.
49. Whilst the Commissioner is of the view that senior officials should be sufficiently robust to make decisions without being deterred by concerns about advice and deliberations being publicly available, this view does

not outweigh the need to deliberate and provide advice in a 'safe space' in relation to important and large scale issues, as was involved in the particular circumstances of this case.

50. In forming her view the Commissioner took into account that at the time of the request, the STP process was live and ongoing; the STP document had not been published at that stage. Furthermore, she understands that the STP is expected to be further developed over time from high level planning to more solid proposals and eventual implementation, and so the publication of the STP was only the culmination of the initial stage of the longer term project. In any event the Commissioner notes that whilst publication of the STP took place four days after the request, when arguably any deliberations relating to that stage of the Plan had been completed, the complainant asked for information spanning the whole planning process from the date the requirement for STPs was announced, and so included in its scope very early discussions and 'blue sky' thinking.

### **Public interest test**

51. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition would (in respect of the matters set out in section 36(2)(b)(i)) and would be likely (in respect of the matters set out in section 36(2)(b)(ii)) to result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.
52. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable, she will consider the weight of that opinion in applying the public interest test.

### **Public interest arguments in favour of disclosure of the information**

53. The complainant considered that transparency of decisions on how public funds are spent will generate confidence in the integrity of the procedures involved. He felt there was a clear public interest in the scrutiny of how decision on public spending and healthcare provision are made.
54. SWFT acknowledges that there is no doubt there is a public interest in health services and their development. Disclosure of information is in itself of value and in the public interest because it promotes understanding, transparency and accountability in relation to the activities of public authorities.

55. It also acknowledges there is a public interest in furthering the public's understanding and participation in debates on the issues of the day and, in this regard, the expenditure of money by the NHS and how its limited resources might be more effectively utilised is clearly a very important matter of great concern.

### **Public interest arguments in favour of maintaining the exemption**

56. SWFT's view is that the public interest in releasing the documents is outweighed by the public interest in maintaining the exemption.
57. In terms of the public interest test, SWFT's position is that the public interest in the ability of public authorities to make sound and fully informed decisions regarding public money and services without hindrance is paramount. The STP's intention was always to publish its Plan and to engage and consult fully with the public once it had been through an appropriate due process with NHS England; indeed the STP Plan was published by each STP member organisation on 6 December 2016 (which sets out the plans for A&E, Maternity and Paediatric services to which the complainant's request relates).

### **Balance of the public interest arguments**

58. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
59. When attributing weight to the 'chilling effect' arguments ie. that disclosure of information would inhibit free and frank provision of advice and discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making, the Commissioner recognises that the members are expected to be robust and impartial when providing advice and deliberating.
60. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure. However, she also considers that chilling effect arguments cannot be dismissed out of hand. In this case, she accepts that SWFT should be able to hold free and frank discussions which include the provision of advice and the exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made.

61. With regard to SWFT's 'thinking space' argument, the Commissioner considers that there is a need for any public authority to have a safe space in which to develop ideas or make decisions.
62. The Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability, however she considers that the publication of the STP document is sufficient to achieve these ends. The Commissioner does not consider that the wider public interest would be better served by disclosure of the withheld information.
63. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and exchange of views for the purposes of deliberation, against the public interest in openness and transparency. In particular, in accepting the qualified person's opinion that disclosure 'would' inhibit the matters set out in section 36(2)(b)(i), and 'would be likely' to inhibit the matters set out in section 36(2)(b)(ii), she has had due regard to the inherent weight of that opinion when applying the public interest test. In her deliberations she has also considered SWFT's and the complainant's arguments regarding disclosure and has paid particular attention to the timing of the request which occurred at a time when the issue was very much live and formed only a part of an ongoing longer term planning process.
64. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in SWFT's ability to conduct its affairs effectively and in a 'safe space'. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Conclusion**

65. Taking all of the above into account, the Commissioner is satisfied that sections 36(2)(i) and (ii) have been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
66. As the Commissioner has concluded that section 36 has been correctly applied to all of the withheld information she has not gone on to consider SWFT's application of sections 41 and 43(2).

## **Other matters**

---

67. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to someone making an information request, including helping an applicant refine a request so that it can be

answered within the appropriate costs limit. In this case the Commissioner notes that in line with this duty SWFT considered reducing the period of the request to include only the time post December 2015 when the requirement for STPs was announced, however this would not take the request within the appropriate limit.

68. The Commissioner has considered whether SWFT could reasonably offer any other advice and assistance to the complainant, however given that the estimated cost of providing emails from two out of nine accounts she feels there is limited scope for doing so, as any refined search would be unlikely to provide the complainant with a sufficiently meaningful response. SWFT explained to the Commissioner that whilst the complainant had requested emails from specified individuals, he did not highlight any one in particular as being of greater importance and so it did not feel that it was possible to further offer to refine his request to give a meaningful response to the complainant. The Commissioner therefore considers that SWFT has complied with its duty under section 16.

## Right of appeal

---

69. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

70. 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.
71. 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**