

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2017

Public Authority: Coventry and Warwickshire Partnership

NHS Trust

Address: Wayside House

Wilsons Lane

Coventry

CV6 6NY

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 section 36(2)(b)(i) & (ii) of the FOIA (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 to the requested emails. In respect of all other STP related information the Commissioner finds that the public authority has correctly applied sections 36(2)(b)(i) and (ii) to the withheld information and accordingly requires no steps to be taken.

Background

4. 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.

5. 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?
6. 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.
7. 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.
8. 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

9. On 2 December 2016, the complainant, on behalf of the Trinity Mirror newspaper, wrote to Coventry and Warwickshire Partnership NHS Trust ('CWPT') 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):

1. *Any emails sent and received by [Medical Director] in relation to the STP*

2. *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*
 3. *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.
 4. *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.*
10. CWPT responded on 5 January 2017 by confirming that it holds some of the requested information (parts 1 & 2 of the request), however refused to provide the complainant with the requested emails, citing section 12 of the FOIA (cost) as its basis for doing so. In any event it also considered that section 36 (prejudice to effective conduct of public affairs) would apply to the emails albeit no arguments were advanced in this regard as section 12 was applied in the first instance. In relation to minutes and papers of STP meetings (parts 3 & 4 of the request) it denied holding this information on the basis that CWPT does not provide A&E, maternity or paediatric services, nor did it lead specific discussions in relation to these fields.
 11. On 9 January 2017 the complainant wrote to CWPT requesting an internal review of its decision to refuse his request.
 12. In its internal review outcome dated 6 February 2017 CWPT upheld its decision to refuse the complainant's request.

Scope of the case

13. The complainant contacted the Commissioner on 20 April 2017 to complain about the way his request for information had been handled. In particular he was concerned about the refusal of his request for emails on the basis of section 12 of the FOIA and asked the Commissioner to encourage CWPT to provide him with the requested information. Subsequently, on 21 June 2017, the complainant confirmed that he also wished the Commissioner to consider the assertion by CWPT that it did not hold information within parts 3 & 4 of the request.

14. During the course of the Commissioner's investigation of this case CWPT amended its position in relation to parts 3 & 4 of the request (other SPT information) and confirmed that further searches conducted as a result of the Commissioner's enquiries had revealed that information falling within the scope of these parts of the request was held. However CWPT sought to apply the exemption under section 36(2)(b)(i) & (ii) to this 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 CWPT was correct to rely upon the exemption contained in section 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 CWPT informed him that in relation to part 1 of his request it had looked at the likely volume of emails to and

from the Medical Director of the Trust and on a review of the numbers the request would exceed the appropriate limit, as all emails incoming and outgoing would need to be reviewed to extract the relevant information in relation to the STP.

20. In relation to part 2 of the request CWPT advised the complainant that this part of the request involved searching 5 individual email accounts and also a generic Communications email box (the volume of e-mails are at the rate of 150-200 emails per day per individual email box). Again CWPT estimated the cost of compliance to exceed the appropriate limit.
21. CWPT considered whether reducing the timeframe would enable it to provide information for a shorter period, on the basis that the STP was not announced by the Government until December 2015 and therefore information would not be held prior to that date, however a reduction in the period to 12 months would still take the request above the appropriate limit.
22. 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.
23. CWPT's internal review based its outcome on the number of emails and the suggestion of searching using keywords to identify context. It considered that using keywords is a simple and unrealistic approach in this context. As a large and complex, technical organisation, the NHS uses a large number of abbreviations and to rely on these would be unreliable in this instance. It advised that each email would need to be carefully scrutinised to locate relevant information and the cost of this would exceed the appropriate limit. A shorter timeframe would not bring the cost below the appropriate limit.
24. During the course of her enquiries the Commissioner asked a number of questions to enable her to consider whether CWPT has correctly applied section 12 of the FOIA, to which it responded on 19 July 2017.
25. CWPT confirmed that in one day alone there were some 70 emails and attachments relating to STP. In a number of cases the main subject matter of emails or their attachments is not about the STP per se and/or not about the STP relating to Coventry and Warwickshire. To then further extract information relating specifically to the A&E, Maternity and Paediatrics elements in accordance with the complainant's request would take further time.
26. The Commissioner notes that the complainant's request specifically asked for 'any emailsin relation to the STP' and did not restrict parts

1 & 2 to specific work streams. She therefore considers that it would not be necessary for CWPT to further extract information relating to A&E, maternity & paediatrics.

27. CWPT conducted a sampling exercise in which it looked at three main email accounts which fell within the scope of the request. It clarified that in order to comply with the request it would need to search the Communications Team (6 email accounts) and the Trust Medical Director's account. In relation to each of the three accounts it looked at emails over three different time periods (1 month, 3 months & 24 months). In respect of each period searches were conducted using the following search terms:

- 'STP'; and
- 'STP', 'Sustainability' & 'Transformation'.

28. Based upon the third sample (3 email accounts over 1 month's data) the calculation is as follows:

Location of data: 1 hour x 3 accounts = **3 hours**

Retrieval of data: Average print out time per email (plus attachments) =
between 30 seconds & 2 mins
584 emails x 30 seconds = 4.8 hours
584 emails x 2 mins = 19.4 hours
Estimated time = **between 4.8 & 19.4 hours**

Extraction of data: Average extraction time per email = between 30
Seconds & 2 mins
584 emails x 30 seconds = 4.8 hours
584 emails x 2 mins = 19.4 hours
Estimated time = **between 4.8 & 19.4 hours**

Total time for all activities = **12.6 – 41.8 hours** (for 3 email accounts over 1 month).

29. The Commissioner is satisfied with the explanation provided by CWPT that using the search terms 'SPT' and other related terms would not necessarily reveal STP related information and so she accepts that CWPT would need to review each and every email in order to establish whether it contained STP related information falling within the scope of the complainant's request.

30. She has considered the sampling exercise conducted by CWPT and accepts that in relation to three email accounts covering a one month period, the time to locate, retrieve and extract information would take,

as a minimum, 12.6 hours. CWPT has not made it clear in its arguments why it would take time to extract STP information, however the Commissioner is minded to accept that some emails may contain information which falls outside the scope of the complainant's request. Also, as she does not agree that once STP related information had been located, further extraction of A&E, maternity and paediatrics related information would be required, she has accepted the minimum time of 30 seconds per email for 'extraction'.

31. The Commissioner calculates that CWPT would need to search seven email accounts in total over a minimum period of 12 months in order to comply with the complainant's request (assuming a shorter period commencing December 2015 to the date of the request). Using an average minimum 4.2 hours per account for one month, seven accounts over one month would total 29.4 hours. This exceeds the appropriate limit and would significantly exceed the limit when searching the requested period of time (even assuming a reduced period of 12 months) which the Commissioner calculates on the above basis would take 352.8 hours at a cost of £8,820. In light of her concerns about the time taken for extraction of information, the Commissioner notes that to ignore this element of the calculation totally would still take the time/cost well over the appropriate limit.
32. The Commissioner is therefore satisfied that the cost of complying with the complainant's request for emails would significantly exceed the appropriate limit and accordingly she finds that section 12 of the FOIA has been correctly applied in this case.

Other SPT related information

Section 36 (prejudice to effective conduct of public affairs)

33. The Commissioner has been informed by CWPT that it has applied section 36 to the entirety of the withheld information, comprising a series of meeting minutes. In particular, the withheld information falls to be considered under sections 36(2)(b)(i) and (ii) of the FOIA.
34. 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.

35. 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.
36. In the present case CWPT's Chief Executive, Mr Simon Gilby, provided the opinion. The Commissioner is satisfied that he is the qualified person for the purposes of section 36. CWPT has provided the Commissioner with a copy of the qualified person's opinion dated 5 January 2017, together with an updated opinion of 19 July 2017, which was provided following the amendment of CWPT's response in relation to parts 3 and 4 of the request. The qualified person was a member of the STP Board and therefore had in depth knowledge of the STP process and the withheld information.

Is section 36 engaged?

37. 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.
38. 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.
39. 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.

40. The qualified person stated that at the point of the request the initial development of ideas and views prior to public involvement was 'in train' with a view to imminent publication of the public facing and mutually agreed Coventry and Warwickshire Plan. For this process to be effective would require senior officers of the Trust to be able to engage in the provision of advice based on Trust specific data relating to the Trust's performance and initial strategic thinking, and also the free and frank exchange of views for the purpose of deliberation
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 be likely' to inhibit the matters set out in section 36(2)(b)(i) and (ii) on the basis that the Medical Director, as a senior officer of the Trust would have been asked to provide advice and information relating to the Trust's services and other planning approaches to services. The ability to discuss and present a number of options at each planning stage would have been hindered if this information was disclosed to the public. Thus he considered that it would have been likely to prejudice the ability of the senior representative to provide that advice and information freely and without fear of misrepresentation.
43. Furthermore he confirmed that the Trust is working on the development of the STP in conjunction with other local Trust's and organisations within the local health economy. It is important to maintain trust and collaboration for the process of effectively looking at a variety of options that may not be endorsed or taken forward in the long run. Thus to disclose information at the earliest discussion stages could undermine the process of planning effective health care for the future on the basis that advice and free discussion would be inhibited if minutes or other exploratory discussions were released into the public domain.
44. 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.

45. 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.
46. Having reviewed the information withheld under this section of the FOIA, which comprise a series of meeting minutes, the Commissioner is satisfied that it was reasonable for the qualified person to conclude that sections 36(2)(b)(i) and (ii) applied.
47. This is because she considers that CWPT needed to provide advice and deliberate sensitive and high profile issues in a 'safe space' and away from the glare of publicity. She agrees that if each and every step of these processes is put into the public domain then members 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 CWPT 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.
48. 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.

In forming her view the Commissioner took into account the timing of the request. The STP was live and ongoing and the STP document had not been published at that time. In any event, the development of the STP was in effect only the initial planning stage in a longer term project, which will require further discussion and deliberation in relation to the ongoing and future planning and implementation of the STP. Whilst the STP was published four days after the request, when arguably the discussions and deliberations in relation to that stage of the Plan had concluded, the scope of the request included information covering the whole period since announcement of the requirement for STPs, which would include the earliest stages of the discussions and 'blue sky' thinking.

Public interest test

49. 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 be likely 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.

50. 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

51. The complainant considers 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.

CWPT accepts that disclosure would contribute to the wider public understanding of the STP planning, and would demonstrate openness and transparency of processes when making decisions, particularly in regard to the STP. Disclosure would also demonstrate accountability for, and scrutiny of, decisions made by CWPT.

Public interest arguments in favour of maintaining the exemption

52. CWPT's view is that the public interest in releasing the documents is outweighed by the public interest in maintaining the exemption.
53. This is because disclosure would damage the internal 'thinking space' to discuss with other partners within the local health economy the potential to review services for ongoing sustainability. At the point of the request the information being discussed was in connection with services still under discussion. Therefore these discussions needed to be free ranging and for advice and participation by CWPT to be freely and frankly given without fear of such 'blue sky' thinking being widely disclosed. Premature disclosure of information being shared locally in connection with the very early stages of discussions could have undermined the confidence of each organisation in the collective responsibility to develop plans to a sufficiently robust stage to present to the public. Early disclosure of possible options which may or may not have been supported would be likely to lead to misinterpretation and undermine confidence in CWPT's approaches, causing potential unrest and uncertainty. For example disclosure could have prevented officers, advisors and members giving and taking frank and full advice. This could only be done if there was confidence in the knowledge that 'ideas' will not be disclosed now or in the future.
54. CWPT concluded that disclosure of the information would be likely to inhibit its full and free engagement in the STP planning process in

regard to the local health authority plans. This would be likely to prejudice the viability of the financial planning of the NHS locally and the CWPT's engagement in this process and so it considered that disclosure of the information would not best serve the public interest.

Balance of the public interest arguments

55. 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.
56. 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.
57. 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 CWPT 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.
58. With regard to CWPT'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.
59. 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.
60. 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 be likely' to inhibit the matters set out in section 36(2)(b)(i) and (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 CWPT'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 was at a very early or 'embryonic' stage of a longer term project.

61. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in CWPT'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

62. Taking all of the above into account, the Commissioner is satisfied that sections 36(2)(b)(i) and (ii) have been engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
63. On the basis that she is satisfied that section 36 has been appropriately applied by CWPT she has not gone on to consider its arguments in relation to section 41 and 43(2) of the FOIA.

Other matters

64. 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 CWPT 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. The Commissioner has considered whether CWPT could reasonably offer any other advice and assistance to the complainant, however given the estimated cost of providing emails from three accounts for one month 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. The Commissioner therefore considers that CWPT has complied with its duty under section 16.
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Right of appeal

65. 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

66. 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.
67. 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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