

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 August 2022

**Public Authority:** Newcastle upon Tyne Hospitals NHS Foundation Trust

**Address:** Freeman Hospital  
Freeman Road  
High Heaton  
Newcastle upon Tyne  
NE7 7DN

#### **Decision (including any steps ordered)**

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1. The complainant has requested contract information associated with particular administration costs. Newcastle upon Tyne Hospitals NHS Foundation Trust ('the Trust') has disclosed information within scope of three parts of the request and withheld the information requested in the fourth part under section 43(2) of FOIA, which concerns prejudice to commercial interests.
2. The Commissioner's decision is as follows:
  - The Trust is entitled to withhold the information under section 43(2) of FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require the Trust to take any corrective steps.

#### **Request and response**

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4. On 18 October 2021 the complainant requested information of the following description:

"I understand from the Trust's website that you deliver a large number of outpatient appointments each year. I would thus be grateful if you could provide the following information for FY 2020-21:

1. The number of outpatient appointment letters issued by the Trust.
2. A breakdown of the activity costs per letter, namely
  - Paper
  - Envelope
  - Ink
  - Staff fulfilment costs for stuffing the envelopes
  - Postage
3. The departmental overhead cost for the year comprising the cross-charge for the use of the space, heating/lighting/air conditioning, printer and other equipment depreciation cost, departmental management overhead charge etc.
4. The organisational overhead charge allocated to the outpatient appointment department, i.e. the [sic] cost of the allocated executives, HR, IT etc."
5. On 9 November 2021 the Trust responded. It released information relevant to Q1, withheld information relevant to Q2 under section 43 (but did not appear to have carried out a public interest test), and addressed Q3 and Q4.
6. The Trust provided an internal review on 22 December 2021. It maintained its reliance on section 43 with regard to Q2 but again, did not carry out a public interest test.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 24 November 2021 to complain about the way their request for information had been handled.
8. The Commissioner's investigation has focussed on whether the Trust is entitled to withhold the information requested in part 2 of the request under section 43(2) of FOIA, and the balance of the public interest. The Commissioner has discussed the public interest test under 'Other Matters'.

## Reasons for decision

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### Section 43 – commercial interests

9. Section 43(2) of FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
10. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information were disclosed has to relate to the applicable interests within the relevant exemption.
11. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
12. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not. Section 43(2) is subject to the public interest test.
13. In their correspondence to the Commissioner the complainant raised the following points:
  - "1. ... we are now in a new financial year compared to when I first made my FOIA request to the Trust. It is normal and usual practice for contracts to have a Review Clause in the Ts&Cs at the end of each financial year allowing the price to be increased or decreased depending upon the economic situation at the time. If this was the case with the Trust and the subcontractor they use for the fulfilment of their ~1.2 million letters per year, then the FY 2021-22 price will have change and no longer be confidential so the Trust should have no reason not to disclose the price per letter or price per 1,000 letters.
  2. In terms of new information, inflation is 9% and forecast to rise to 12 or more during this financial year and next. All prices

negotiated back in 2021 will no longer be financially viable when Trust renegotiates its contract with its existing or new fulfilment agency. In short, historic prices have been overtaken by dramatic events and are no longer confidential so there are now no longer any issues preventing the Trust from disclosing the price.

3. Give the dire financial challenges facing all organisations, Tesco, JCB and other large businesses are desperately trying to reduce their prices as much as possible. Accordingly, they are making available to all potential suppliers what they are currently paying to see if they can obtain a better price. Given the very large number of outpatients appointment notification letters issued by the Trust, one would expect they too are publicising the prices they pay so as to drive down non-clinical costs so there should now be no issue for the Trust preventing them from disclosing the cost per letter.”
14. In its submission to the Commissioner the Trust first addressed the points the complainant has raised. It confirmed that the current contract runs until October 2022. It will be due for review and renegotiation shortly but at present the contract costs remain valid. The Trust provided the Commissioner with a copy of the contract extension document. Since the contract is current, the Trust said, the costs are valid until October 2022. Finally, the Trust said it had noted the complainant’s opinion in their third point and detailed below its reason for not releasing the data in question.
15. With its submission to the Commissioner the Trust included an email from its supplier’s contracts manager in which they detail the supplier’s concerns about releasing the data. The Trust also provided a copy of the contract in question. The Trust says that it is clear from the contract that the contract is current and in place until October [2022] and noted that the contract also includes clauses relating to FOIA.
16. The Trust says that when it was considering whether it was appropriate to apply the section 43 exemption, it took into account the information the supplier provided and also the fact that at the time of the initial request on 18 October 2021 the contract extension was still to be agreed – it was finally signed on 21 October 2021. The Trust says that it would benefit from releasing that data and has explained why that it is. However the Trust says it has had to consider its relationship with the supplier and the possible impact of disclosure on the supplier and also any impact for the Trust regarding future negotiations. The Trust confirmed that, on balance and because of the supplier’s concerns, it considers the section 43 exemption was appropriate.
17. In their correspondence to the Trust dated 5 November 2021, the supplier’s contract manager confirmed that it considered information

about its detailed pricing processes and methods of operation to be commercially sensitive (and to include trade secrets).

18. The supplier considered that releasing the information “would” prejudice its commercial operations and put at risk its employees’ livelihoods and continued employment. The supplier also drew attention to section 41 of FOIA (which concerns information provided in confidence) and advised that any contractual arrangements between it and the Trust that the Trust holds under an actionable obligation of confidentiality, is exempt from disclosure. (The Commissioner notes that that does not necessarily guarantee that, under section 43(2), such information will not be disclosed.)

### **The Commissioner’s conclusion**

19. The Commissioner notes that the supplier has referred to “trade secrets” in its correspondence to the Trust. Trade secrets are exempt from disclosure under section 43(1). Because neither the Trust nor the supplier have made a case that the information being withheld can be categorised as a trade secret, the Commissioner has not considered that matter. He has focussed on the application of section 43(2).
20. Noting the three criteria at paragraphs 9-12, the Commissioner is first satisfied that the actual harm that the Trust alleges would, or would be likely, to occur if the withheld information were disclosed relates to the interests applicable within section 43 as it relates to the Trust’s supplier’s commercial interests.
21. Regarding the second of the criteria, the Commissioner does not consider that the Trust has drawn together its own concerns and those of the supplier into a clear case that some causal relationship exists between potentially disclosing the information being withheld and the prejudice which section 43 is designed to protect. For example the Commissioner considers that it is quite a leap to say that disclosing the information would risk the supplier’s employees’ employment and livelihoods. However, from the information the Trust has provided, the Commissioner has been able, on this occasion, to identify that such a causal relationship exists.
22. The Commissioner accepts that disclosing the financial detail of a contract that was live at the time of the request and which remains live would or would be likely to prejudice the supplier’s commercial interests. This is because it would provide the supplier’s competitors with information about its pricing and processes to which those competitors would not otherwise be privy. Disclosure would or would be likely, therefore, to undermine the supplier’s future negotiating position, with the Trust in this case or with other organisations, and it would put

competitors in a stronger position. The Commissioner is also satisfied that such commercial prejudice is not trivial and would be of substance.

23. Finally, the Trust's position, via its supplier, is that the envisioned prejudice **would** happen. However, the Commissioner does not consider that a compelling argument has been made that the envisioned prejudice is more likely to occur than not. He considers the prejudice being **likely** to happen is more credible but that still means that the chance of prejudice occurring is more than a hypothetical possibility and that there is a real and significant risk.
24. Since the three criteria have been met, the Commissioner's decision is that the disputed information engages the exemption under section 43(2) of the FOIA. He has gone on to consider the associated public interest test.

## **Public interest test**

### **Public interest in disclosing the information**

25. In his correspondence to the Trust the Commissioner invited it to detail its public interest arguments, but the Trust did not do so in its submission.
26. The Commissioner has noted the complainant's arguments for disclosure, above. And he considers that there is a general public interest in public authorities being transparent about their financial arrangements to reassure the public that it is achieving the best value for money.

### **Public interest in maintaining the exemption**

27. As noted, the Trust has not presented a clear public interest argument for maintaining the section 43(2) exemption. However, the Commissioner has noted the correspondence from the Trust's supplier and accepts that there is a public interest in the supplier maintaining its competitiveness. This benefits both the supplier and the Trust.

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

28. The information being withheld is the cost to the Trust of its letters being posted. The applicant may well have their own personal interest in that specific information but the Commissioner does not consider they have made a convincing case for there being wider public interest in it.

29. The Commissioner has considered the circumstances of this case and taken into account that the Trust provided information within scope of three parts of the request. He is satisfied that there is greater public interest in the Trust's supplier not being disadvantaged through disclosure of the information at the time of the request. Disclosure could result in the supplier being less willing or less able to engage in future contracts with the Trust, or other bodies. This would be to the detriment of the supplier. Disclosure could also disadvantage the Trust – with a diminished pool of potential suppliers with which the Trust can contract, it may be more difficult to achieve value for money. The Commissioner therefore finds that the public interest favours maintaining the section 43(2) exemption with regard to Q2 of the request.

### **Other matters**

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30. The Commissioner has published guidance on the public interest test<sup>1</sup>. He reminds the Trust that section 43 of FOIA is one of FOIA's 'qualified' exemptions and, as such, is subject to this test. A section 43 refusal notice should therefore clearly detail the public interest balancing exercise that the public authority carried out, once it had satisfied itself that this exemption was engaged.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/>

## Right of appeal

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31. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

32. 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.
33. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**