

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

### **Decision notice**

**Date:** 20 January 2023

**Public Authority:** Calderdale and Huddersfield NHS Foundation Trust

**Address:** Trust Headquarters  
Acre Mills Outpatients  
Huddersfield  
HD3 3EB

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

---

1. The complainant has requested details of a proposed business case. The above public authority ("the public authority") relied on section 22 (due to be published) and 43 (commercial interests) of FOIA in order to withhold the requested information.
2. The Commissioner's decision is that the public authority has correctly engaged section 22 of FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

#### **Request and response**

---

4. On 13 September 2022, the complainant wrote to the public authority and requested information in the following terms:  
  
"[1] Under FOI regulations, I would like to request a copy of both the November 2021 Full Business Case for the Huddersfield Royal Infirmary New Accident and Emergency Department; and the November 2021 Draft Outline Business Case for Reconfiguration of CHFT Services and Estate Developments - plus the final version of this Outline Business Case, which I believe must now exist..."

"[2] ...So, also under FOI regulations, I would like to ask why CHFT's Director of Transformation and Partnerships, Anna Basford, told the 16th November 2021 meeting of Calderdale and Kirklees Joint Health Scrutiny Committee that CHFT was not publishing the November 2021 Business Cases (that are based on the revised 2019 Strategic Outline Case), on the grounds that they were not 'public documents'.

"[3] Specifically, if a Business Case was a public document in 2014, why is it not also a public document today?"

5. The public authority responded on 10 October 2022. It relied on section 22 of FOIA to withhold the business cases that it held.
6. The complainant sought an internal review. She challenged the application of section 22 and also noted that the public authority had failed to deal explicitly with elements [2] and [3]. The public authority upheld its position on section 22 after an internal review – although it additionally noted that section 43(2) of FOIA would also be engaged. It did not deal with elements [2] and [3] as it did not consider them to be valid requests for information.

## **Reasons for decision**

---

### **Elements [2] and [3]**

7. The Commissioner agrees that these elements do not constitute valid requests for information. FOIA gives individuals the right to seek information that a public authority holds in recorded form. It does not give individuals the right to demand explanations or justifications from a public authority or the right to have questions answered.

### **Element [1]**

8. Section 22 of FOIA allows a public authority to withhold information that it is already intending to publish if it is reasonable in the circumstances to wait until the anticipated publication date.
9. In order to engage the exemption, the public authority does not need to have set a specific publication date, but it must have already had a settled intent to publish the information before the request was made and it must be intending to publish all the withheld information – not just parts of it.
10. The public authority explained to the Commissioner that it was intending to publish all the business cases in full, but not yet. It explained that,

before any works could proceed, the business cases needed to be signed off by HM Treasury. Whilst a visit from Treasury officials had taken place in mid-2022, the public authority had not received sign-off and had received no indication as to when this might happen.

11. Following sign-off, the public authority stated that it would need a further 12 months in which to execute its procurement strategy. Once this had taken place, it was willing to publish the information and it is noted that previous similar documents had been published.
12. The public authority argued that it was reasonable in the circumstances for it to withhold the information until the business cases had received sign-off and until it had had the opportunity to execute its procurement strategy. Earlier disclosure, the public authority argued, would disclose a document which had yet to be approved and was potentially subject to change. Furthermore, an earlier disclosure would reveal costings and budgetary arrangements which would harm its ability to negotiate with suppliers to achieve value for money.
13. In the Commissioner's view, the public authority did have a settled intention to publish the information and this pre-dated the request being made.
14. When considering whether it is reasonable for a public authority to withhold information until its anticipated publication date, the Commissioner will take into account the likely delay between the date the request was responded to and the anticipated publication date. The further in the future publication is anticipated to be, the stronger the reason for delaying publication needs to be.
15. In this particular case, the public authority does not know when it will be in a position to publish the information, but it has stated that it will need approximately 12 months from the date on which Treasury approval is granted. Therefore even if approval were to be forthcoming today (and there is no indication that approval is imminent) publication would still be 12 months away – which is some considerable time.
16. That being said, in the Commissioner's view, it is still reasonable to withhold the information until Treasury approval has been granted. A previous iteration of this document was rejected by the Secretary of State for Health, therefore there is no guarantee that approval will ultimately be granted. The Commissioner considers that the public value of the documents will only be significant once it has been confirmed that those documents form the basis on which action will be taken.
17. Once approval has been granted, the Commissioner is much less persuaded that it will be reasonable to withhold all of the documents, in

their entirety, until the public authority's preferred publication date. Whilst the documents may contain some financial information, it seems unlikely that the entire document will remain commercially sensitive and there will be a stronger public interest in disclosure of plans which have been signed off and are now being put into action.

18. However, the Commissioner notes that the implication of the ruling in *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC) is that he is required to assess the situation as it stood at the time the request was responded to. That situation was (and remains) that Treasury approval had yet to be granted and therefore it was not reasonable to expect the public authority to publish the information prior to approval being granted. Section 22 of FOIA is thus engaged.

### **Public interest test**

19. Though the Commissioner considers it was reasonable to delay disclosure of the information, he must still consider the balance of the public interest.
20. The Commissioner recognises that matters pertaining to the way in which health services are provided are of substantial public interest. The information about the business cases that is already in the public domain indicates that the public authority is proposing significant changes to the way health services are delivered in the local area and therefore there will be a strong public interest in informing local debate. The fact that previous versions of this plan have been rejected by the Secretary of State increases the public interest in transparency.
21. There also appears to be some dispute between the parties about the extent to which information about the business case has been provided to the local joint health scrutiny committee. The available evidence suggests that, at least historically, information has been provided – though the withheld information itself may not have been.
22. However, the Commissioner also recognises that the main principles of the plan (particularly the re-allocation of treatment across two existing hospitals) are already in the public domain and can therefore be debated on their merits.
23. Furthermore the Commissioner considers that the public interest in disclosing documents is much lower when those documents have yet to receive official approval. There is little public interest in debating plans which may not ultimately proceed. Disclosing earlier versions can also cause unnecessary confusion if what is approved differs significantly from the original submission.

24. Once again, the Commissioner considers that the public interest in disclosure is likely to be much higher once approval has been granted. But, again, per the Montague decision, he is required to consider matters as they stood at the time the request was responded to.
25. The Commissioner is therefore satisfied that section 22 of FOIA is engaged and that the balance of the public interest favours maintaining the exemption.

### **Other matters**

---

26. Notwithstanding his decision above, the Commissioner wishes to place two further points on record.
27. Firstly, whilst the Commissioner has indicated that there will be a much stronger public interest in disclosure once approval has been granted, should a fresh request be made at that time, he would judge any associated complaint on its own merits. He would also note that, even if section 22 did not apply, there is a likelihood that at least some of the information would still engage section 43 of FOIA.
28. Second, nothing in the Commissioner's decision prevents the public authority from sharing the withheld information, on a limited basis, with the local joint health scrutiny committee or other similar bodies.

## Right of appeal

---

29. 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)

30. 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.
31. 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 .....**

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