

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2014

Public Authority: University Hospitals Coventry and Warwickshire
NHS Trust

Address: University Hospital
Clifford Bridge Road
Coventry
CV2 2DX

Decision (including any steps ordered)

1. The complainant has requested the full PFI contract for Coventry Hospital between University Hospitals Coventry and Warwickshire NHS Trust ("the Trust") and the Coventry and Rugby Hospital Plc. The Trust provided all of the contract with the exception of four paragraphs in one of the Schedules which it considered exempt as they were commercially sensitive (section 43). The Commissioner accepts the section 43(2) exemption is engaged but considers the balance of the public interest favours disclosure in this case.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the remaining information – paragraphs 4.3.5, 7.22, 7.2.3, 7.3.2, 7.3.3, 7.4.2 and 7.4.3 in Schedule 18.
3. 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

4. On 12 December 2013, the complainant wrote to the Trust and requested information in the following terms:

"Could I please be provided with:

- 1) The full PFI contract for Coventry Hospital between University Hospitals Coventry & Warwickshire NHS Trust and The Coventry and Rugby Hospital Plc.*
 - 2) And all associated documents. I would expect this to include, but not be limited to, any schedules, annexes, appendices or other documents attached."*
5. The Trust responded on 31 January 2014. It stated that as the document was so large the Trust had already exceeded the 18 hour threshold set out by section 12 of the FOIA. However it enclosed the schedules that had been reviewed to date which it considered could be disclosed but that the remaining schedules were continuing to be reviewed.
 6. The complainant asked for an internal review on 3 February 2014. In this request the complainant acknowledged that the Trust was still in the process of reviewing the remaining schedules but considered a request for an internal review was appropriate as it was likely there would be information withheld.
 7. Following an internal review the Trust wrote to the complainant on 20 March 2014. It stated that it had now disclosed the majority of the Project Agreements and Schedules but continued to withhold some limited information on the basis of section 43(2) and 40(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 4 April 2014 to complain about the way his request for information had been handled. In the complainant's submissions to the Commissioner he indicated he accepted the limited redactions made by the Trust in relation to personal data.
9. The Commissioner therefore considers the scope of his investigation to be to determine if the Trust has correctly applied section 43(2) of the FOIA to the remaining withheld information and, if so, where the balance of the public interest lies.

Reasons for decision

10. Section 43(2) of the FOIA provided 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.

11. In this case the Trust has applied the section 43(2) exemption to information redacted from Schedule 18 of the PFI contract. Having viewed the redactions made from this Schedule the Commissioner notes that it extends to 7 paragraphs of Part 3 of this Schedule.
12. These paragraphs contain:
 - information on the maximum annual deduction that may be made in respect of the Medical Equipment Maintenance Service (MEMS) each year; and
 - rates for the catering, laundry and waste volume adjuster fees which determine the limit and amount of increase or reduction in fees payable to the PFI provider that may arise in any month from a change in volume of the relevant service.
13. The Trust has argued that disclosure would be likely to prejudice both its own commercial interests and those of its PFI partner. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43¹. 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."
14. The Commissioner accepts that details of how a company or organisation will deliver a service relates to its ability to participate competitively in a commercial activity and the requested information would therefore appear to fall within the remit of section 43(2) of the FOIA.
15. In this case, the Trust considers that the prejudice 'would be likely' to occur and the Commissioner has gone on to consider how any prejudice to the commercial interests of the Trust or its PFI partner would be likely to be caused by the disclosure of the withheld information.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

16. In relation to the Trust's own commercial interests, it explained that the four services covered by the withheld information and the fees payable by the Trust in relation to them, form a core part of the support services of the Trust's hospitals. These services are a significant part of the Trust's revenue expenditure on contract services and of the revenue income of the PFI provider. Variations in expenditure on these services therefore represent a cost/income variable in the commercial operations of the Trust and PFI provider. The figures are index-linked in each case and thus directly referable to current trading conditions.
17. The Trust has therefore argued that disclosure of this information would enable competitors to gain access to and calculate significant variable elements of the contract price. This would be an unfair advantage to one side in negotiations. The Trust argues that some competitors may submit bids above what they may otherwise had done in the knowledge that the Trust has been willing to pay a certain amount. This would be to the detriment of the Trust in seeking tenders and obtaining value for money services.
18. In relation to the PFI partner's interests, the Trust said that the information is commercially sensitive and disclosure would weaken the PFI partner's competitive position. This is because the information relates to pricing data and financial models which are valuable to competitors. If this information were to be disclosed it would provide competitors with an unfair commercial advantage as they would be able to understand the pricing strategy underpinning the PFI partners unitary charge. This would enable competitors to bid more effectively on other contracts.
19. When claiming that disclosure would be likely to prejudice the commercial interests of a third party, the Commissioner usually expects a public authority to consult the third party for its view. In this case, the Trust discussed the issues with its PFI partner who expressed the following view:

"the value shown in the PA, Schedule 18, is subject to an annual RPI uplift, thus these values can be easily translated into today's prices. If for example this information were available while the services were subject to market-testing, it would provide unfair commercial advantage to competitors of the existing service providers. To be clear, this would enable a competitor to tender a rates only marginally different from these values, rather than a genuinely competitive bid that might reduce the overall cost of the service. Thus we contend that ... might not receive the most competitive prices, resulting in a higher price being charged to the Trust."

20. In relation to the Trust's own commercial interests, the Commissioner considers that disclosure of the remaining withheld information could impact on future tendering as it would reveal details of the fees the Trust is prepared to pay for contracted services. He accepts that the prejudice claimed is real, actual and of substance and there is a causal link between disclosure and the prejudice occurring.
21. With regard to the PFI partner's commercial interests, the Commissioner notes the argument that disclosure would impact on its ability to remain competitive as it would reveal information about its pricing strategy which could be used by competitors to undermine its bids. The Commissioner agrees that access to these financial models would be likely to result in the prejudice occurring to the third party as there is a real risk that competitors knowing how pricing is set by the PFI partner will put them at a competitive disadvantage in any future tendering for services, particularly given that the figures are index-linked and relatable to current trading conditions.
22. As the Commissioner considers that the prejudice in relation to both the Trust's and its PFI partner's commercial interests would be likely to occur from disclosure of the withheld information, he accepts that section 43(2) of the FOIA has been correctly engaged. As section 43(2) is a qualified exemption he has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosure

23. The Trust has acknowledged the public interest in transparency in public affairs including how public monies are spent but has not provided any more substantial arguments in favour of disclosure of the information.
24. The complainant has set out a number of arguments he considers relevant to the public interest in disclosure:
 - PFI has been widely criticised as poor value for money and has led to the closure of one hospital (Lewisham Hospital);
 - The lack of transparency over PFI contracts has been highlighted by the Public Accounts Committee as a factor in poor value for money;
 - There is a strong public interest in knowing how public money is spent, particularly when Treasury figures indicated payments in 2014-15 to the Trust's PFI partner will be £82 million (16% of its income);
 - Value for money in a contract cannot be assessed without the full breakdown of services provided and performance targets; and

- Financial models will allow the public to track planned expenditure against actual income into the PFI company, allowing members of the public to determine whether the PFI contract is providing value for money services.

Public interest arguments in favour of maintaining the exemption

25. The Trust considers that any potential public interest in disclosure must be weighed against the harm that could occur to its and its PFI partners, commercial interests. The Trust has argued that disclosure would impact on the PFI company's ability to provide comparable services now and in the future and in a profitable way. This in turn could affect the quality of the service offered which would not be in the public interest.
26. The Trust has also argued that there is a strong public interest in public authorities and the Trust being able to achieve the best price possible for services. The Trust does accept that there may be some benefit in encouraging lower prices to be bid but in this particular case the effect of disclosing the specific information about the current earning value and cost of these services would be counter-productive as lower bids may lead to less value for money which would not be in the public interest.

Balance of the public interest arguments

27. The Commissioner has considered the arguments made in favour of disclosure and maintaining the exemption and has also taking into account the more general public interest arguments relevant to issues regarding PFI contracts.
28. He notes that PFI projects have been largely criticised for over spending and under delivering.² The operation and spending of NHS hospitals is always likely to be of high public interest due to the huge numbers of individuals reliant on NHS services. Those hospitals and Trusts who have PFI contracts for delivering services should be as open and transparent as possible in order to demonstrate they are receiving the best services at the best cost.

² <http://www.theguardian.com/commentisfree/2012/jun/29/pfi-crippling-nhs>

<http://www.bbc.co.uk/news/health-18584968>

<http://www.telegraph.co.uk/health/healthnews/9357679/PFI-hospital-crisis-20-more-NHS-trusts-at-risk.html>

29. The Commissioner accepts that the public interest in transparency and accountability for public spending could be seen to have been met by the disclosure of almost the entirety of the PFI contract. It is only minimal information which is seen to be the most commercially sensitive that has been withheld. Disclosure of this commercially sensitive information may impact on the Trust's ability to achieve value for money services which would not be in the public interest as it may impact on the delivery of services by NHS hospitals.
30. That being said, the Commissioner recognises there is a strong argument for full disclosure of the full contract to show the mutual obligations on each partner. Full disclosure will show the exact services being bought and the specifications which have to be met, demonstrating how the Trust and PFI partner work together. The Commissioner does accept that disclosure of financial models would disclose commercially sensitive information but in doing so it would allow the public to form an opinion on whether the services being provided are adequate and flexible enough to prevent the Trust from being subject to very high charges if services need to be changed.
31. The Commissioner therefore accepts there is a public interest in openness and transparency and in accountability in relation to the Trust's ability to demonstrate that its PFI partner is providing adequate services, value for money and not creating a situation where the Trust may end up in financial difficulties due to charges.
32. However, he also considers there is a strong public interest in not disclosing information which would commercially disadvantage private companies or in disclosing information which would be likely to prejudice the Trust's ability to achieve quality and value for money in respect of services.
33. In making a decision about the balance of the public interest arguments the Commissioner considers it important to note that there are strong arguments on both sides and he does not take decisions about potentially disclosing commercially sensitive information lightly. However, in this case he has had to take into account the huge impact that PFI contracts have on NHS Trusts and hospitals and the negative attention they have generated over the last few years.
34. In light of this, the Commissioner is of the view that full disclosure of the PFI contract in this case would be in the public interest to allow for full transparency and scrutiny. He has reached this decision by taking into

account the specific circumstances at this Trust. In particular, the suggestion that the Trust had to borrow money to meet its first payment owed to the PFI contractor³. Regardless of this, the Trust has frequently been cited as a Trust at risk due to its PFI partnership and full transparency will increase accountability and provide the public with the opportunity to scrutinise the full contract to ascertain whether it did achieve value for money services.

35. As the provision of NHS services affects almost every person in the UK there is a strong overall public interest in disclosure of any information which provides further insights into PFI contracts. Where the information relates to a specific Trust as in this case, full disclosure will affect a significant number of people in the local area as it will show the contract and the amounts paid for services. If value for money services have not been commissioned this could have an impact on other areas within the Trust and lead to the closing of departments and job losses. If the services are value for money then disclosure will enhance the public's trust in its ability to provide for members of the local area.
36. On balance, the Commissioner therefore considers that in this case the public interest arguments in favour of disclosing the information outweigh the public interest arguments in favour of maintaining the exemption.

³ http://news.bbc.co.uk/1/hi/programmes/file_on_4/6740895.stm

Right of appeal

37. 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

38. 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.

39. 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
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