

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2015

Public Authority: Derby Hospitals NHS Trust
Address: Royal Derby Hospital
Uttoxeter Road
Derby
DE22 3NE

Decision (including any steps ordered)

1. The complainant has requested the full PFI contract and associated documentation between Derby Hospitals NHS Trust and Derby Healthcare Plc. Derby Hospitals NHS Trust provided the complainant with some information but withheld some information under section 40(2), section 41(1) and section 42(1) of the Freedom of Information Act (FOIA).
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) and section 42(1) FOIA. The Trust incorrectly applied section 41(1) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 41(1) FOIA.
4. 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

5. On 12 December 2013 the complainant made the following request for information under the FOIA for:
 1. The full PFI contract for Derby Hospital between Derby Hospitals NHS Trust and Derby Healthcare 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.
6. On 8 January 2014 the Trust responded. It refused to provide the information requested under section 41(1) and section 43(2) FOIA.
7. The complainant requested an internal review on 30 January 2014. The Trust sent the outcome of its internal review on 27 February 2014. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner 4 April 2014 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the Trust withdrew its application of section 43(2) FOIA. It did however apply section 40(2) FOIA to some information.
10. The Commissioner has considered whether the Trust correctly applied section 40(2), section 41(1) and section 42(1) FOIA to the withheld information.

Reasons for decision

Section 41 – information provided in confidence

11. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.
12. The Trust identified a number of documents that it said were exempt under section 41. The Trust explained that the information withheld in reliance on section 41 FOIA comprised agreements relating to

loans/funding arrangements entered into in connection with the PFI project, powers of attorney, the terms of financial bonds, letters of credit, guarantees and indemnities provided in support of that project, shareholders agreements and associated deeds and agreements and various documents relating to the constitution of Derby Hospitals Company PLC, Derby Hospital Company (Holdings) Ltd and Derby Healthcare (Holdings) Ltd.

Was the information obtained from another person?

13. The Trust explained that the documents withheld under section 41(1) FOIA contain detailed financial and corporate information relating to private parties, including the minutes of meetings held in private session and/or of the Boards of wholly private entities. It said that some documents relate to advice provided by technical and insurance advisors that was provided on terms that such appointment/advice remain confidential.
14. In Derry City Council EA/2006/0014 the Tribunal confirmed that a written agreement between two parties does not constitute information provided by one of them to the other, and therefore a concluded contract between a public authority and a third party does not fall within the definition at section 41(1)(a) FOIA.
15. The Commissioner's awareness guidance (no. 2) states that this exemption will not apply to information that the public authority has generated itself. This reflects the fact that the exemption is not just concerned with the sensitivity of the information but that it also requires the information be obtained from another party.
16. Upon considering the information withheld under section 41(1), the Commissioner considers the parties relevant to the withheld documents are third parties to the Trust and the withheld information was provided to the Trust by one or more of those third parties.
17. The contract documentation to which the Trust is a direct party to has been disclosed to the complainant and the withheld information constitutes sub-contracts, agreements, other legal documents, financial and corporate information, meeting minutes and advice generated by third party private companies either involved in the PFI contract or in an advisory capacity.

Would disclosure constitute an actionable breach of confidence?

18. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will usually consider the following:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.
- whether there is a public interest defence to the disclosure

Does the information have the necessary quality of confidence?

19. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
20. The Trust said that the withheld information has the necessary quality of confidence, being corporate/financial/technical information provided by and relating to private parties in connection with confidential contract negotiations. It concluded that the information was communicated in circumstances importing an obligation of confidence.
21. The Trust has explained that some documents contain advice provided by technical and insurance advisors and that it was provided on terms that such appointment/advice remains confidential. It said that Information of the nature described has the necessary quality of confidence, being technical information provided by private parties in connection with confidential contract negotiations.
22. Having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The Trust has also argued that the information cannot be said to be trivial as it constitutes corporate, financial or technical information connected with confidential contract negotiations.
23. Based on the above the Commissioner accepts that the information is not trivial as it contains quite detailed corporate, financial or technical information relating to the contract negotiations. The Commissioner is

therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

24. The Trust explained that the information was communicated in circumstances importing an obligation of confidence. The circumstances in which the information referred to was provided was in the context of the negotiation of a significant and detailed PFI contract involving a number of private parties and complex legal and financial arrangements. It said that those circumstances have given rise to an obligation of confidence and the Trust in any event gave an express undertaking as to confidentiality.
25. The Commissioner accepts that there is both an implied and explicit obligation of confidence on the part of the Trust that it will not share information provided as part of this process.

Would disclosure be of detriment to the confider?

26. The Trust explained that in the case of *Higher Education Funding Council for England v Information Commissioner and Guardian News and Media Limited* [2011] 1 Info LR 1034, the Tribunal identified a number of possible categories of detriment, including an adverse impact on competitive position and reputational damage. It said that the documents identified by the Trust as giving rise to an actionable breach of confidence contained information provided to it by third parties as part of a process of contractual negotiation, including internal corporate arrangements and the terms on which finance was to be provided and structured to enable the PFI project to proceed. It said release of that information could cause detriment to the Trust, in terms of a loss of confidence on the part of its present and future contracting partners that sensitive commercial and financial information provided as part of a negotiation process would be subject to public disclosure and to the third parties concerned. It said that a loss of confidence could deter participation with the Trust and as such inhibit the Trust's ability to enter into contractual arrangements in future and/or obtain all the information it needs to make informed decisions in relation to such arrangements. It said given the nature of the information the third parties could suffer detriment in relation to, for example, their ability to secure long term finance and loss of confidence on the part of their shareholders and commercial and financial partners as to the privacy of their commercial affairs.

27. The Commissioner accepts that a commercial detriment is a relevant consideration under section 41(1) FOIA. The Trust has stated that the third party confiders of the information could suffer detriment in relation to their ability to secure long term finance but it has failed to explain how this would arise. It also said that the third party confiders of the information could suffer detriment because of a loss of confidence of their shareholders and commercial and financial partners. Again it failed to explain exactly how and why this would arise, and what the detrimental outcome to the third parties from such a loss of confidence would be. It is not evident to the Commissioner how disclosing a contract of this age would lead to the adverse impact to the confiders that the Trust has argued.
28. The Trust's arguments about adverse impact to its own interests, although relevant when considering if there is a public interest defence to disclosure, are not relevant when considering whether disclosure would be of detriment to the confider of the information. Therefore, in the absence of any arguments from the Trust explaining exactly how disclosure of this information would cause detriment to the the confiders of the information, the Commissioner considers that the Trust has not demonstrated that section 41(1) is engaged.
29. As section 41(1) cannot be engaged without showing detriment to the confider, the Commissioner has not gone on to consider whether there would be a public interest defence to the disclosure.

Section 42(1)

30. Section 42(1) FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
31. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
32. The Trust has confirmed that in this case that it is relying upon advice privilege. The withheld information includes instructions to Counsel and legal opinions provided by Counsel.
33. Advice privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The

determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.

34. The Trust confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
- a. confidential;
 - b. made between a client and professional legal adviser acting in their professional capacity; and
 - c. made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
35. Upon considering the information withheld under section 42(1) FOIA and the submissions provided by the Trust, the Commissioner considers that the section 42(1) exemption was correctly engaged.
36. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.
37. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:
- "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*
- "The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*
38. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest must be *"clear, compelling and specific"*.

Public interest arguments in favour of disclosing the requested information

39. The Trust has not put forward any public interest arguments in favour of disclosure.
40. The Commissioner considers that there is a strong public interest in Trust's operating openly and transparently when entering into PFI contracts due to the large volume of the population they affect. There is also a public interest in the Trust demonstrating that it is achieving value for money through its PFI contract.

Public interest arguments in favour of maintaining the exemption

41. The Trust argued that there is a strong weight built in favour of maintaining the exemption (*Bellamy v ICO (No 1)* [EA/2005/0023]), and this would require a significant public interest in the disclosure of the information in order to override that privilege. It said that there must be some clear, compelling and specific public interest justification for disclosure which must outweigh the strong public interest in protecting communications which are intended to be confidential. It said that it does not consider that there is any specific public interest justification for disclosure.
42. Finally it reiterated that the complainant has been provided with a significant amount of information relevant to the scope of the request, which goes some way to meeting any public interest in disclosure.

Balance of the public interest

43. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in relation to PFI contracts particularly within the NHS.
44. The Commissioner also considers that there is a very strong public interest in the Trust being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the willingness of the Trust to seek legal advice in the future. This in turn may have a negative impact upon the quality of decisions made by the Trust which would not be in the public interest.
45. Upon viewing the withheld legal advice the Commissioner considers that in the context of a PFI arrangement to build a new hospital and transfer existing staff onto new contracts the advice is likely to remain live. The Commissioner has not been presented with evidence that would suggest

that the withheld advice has been misapplied or misrepresented in any way.

46. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 42(1) was therefore correctly applied in this case.

Section 40(2)

47. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.

48. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

“data which relate to a living individual who can be identified –

(i) from those data, or

(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

49. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

50. The Trust has explained that it redacted information from two documents provided to the complainant under section 40(2) FOIA. It confirmed that the information redacted was details about individual employees including their names. It said that these documents contain confidential salary and employment information for a significant number of staff working in roles that include catering, housekeeping, car parking, portering, security, switchboard, facilities management and estates. The Commissioner considers the redacted information is information from which the data subjects would be identifiable.

51. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has

considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

52. The Trust explained that the individuals have not given their consent to the release of the withheld data into the public domain and would not therefore expect that this information would be disclosed into the public domain. The Trust does not consider that the employees were of sufficient enough seniority to release their personal data without their consent.

The legitimate public interest

53. The Commissioner considers that there is a legitimate public interest in knowing how public money has been spent and how decisions are arrived at, particularly in relation to PFI contracts.
54. The Commissioner does however consider that as the substance of the information contained within these two documents has been disclosed to the complainant and only names and personal details have been redacted, this goes some way to meeting the legitimate public interest.
55. The Commissioner considers that whilst there is a legitimate public interest in the disclosure of the withheld information, for the reasons set out above, the Commissioner does not consider that the legitimate public interest would outweigh the interests of the data subjects in this case. He considers that the data subjects would have a reasonable expectation that this information would not be disclosed and it would not be fair to them to put this information into the public domain
56. The Commissioner therefore considers section 40(2) FOIA was correctly applied to the redacted information in this case.

Right of appeal

57. 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

58. 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.
59. 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

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF