

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2017

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 made a freedom of information request to University Hospitals Coventry and Warwickshire NHS Trust for a copy of its draft Sustainability and Transformation plan which it sent to NHS England. The Trust refused the request under the exemptions in section 22 (information intended for future publication), section 41 (information provided in confidence) and section 43 (commercial interests).
2. The Commissioner's decision is that the Trust correctly applied the section 22 exemption and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 25 September 2016 the complainant made a freedom of information request to the Trust which asked for information on its NHS Sustainability and Transformation Plan (STP). The complaint only concerns disclosure of one particular piece of information, a submission that was sent to NHS England in June 2016 which the Commissioner understands is a draft of its plan. The full request is included as an appendix to this notice.
4. The Trust responded to the request on 24 October 2016. The request had asked a number of different questions and the Trust now disclosed

some information, confirmed that some information was not held and explained that some information was considered to be exempt from disclosure. In particular it said that it held a draft of the plan that was sent to NHS England in June 2016 but that this was being withheld under the exemptions in sections 22 (information intended for future publication), 41 (information provided in confidence) and 43 (commercial interests). In explaining its position to the complainant it also confirmed that a final version of the plan was not due for submission until 21 October 2016. However, since this version of the plan was not held at the time the request was received only the June draft fell within the scope of the request.

5. The complainant subsequently asked the Trust to carry out an internal review and it presented its findings on 5 December 2016. The review upheld the Trust's initial response.

Scope of the case

6. On 5 December 2016 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner agreed with the complainant that the scope of her investigation would be to consider whether the June draft of the Sustainability and Transformation Plan (STP) document is exempt from disclosure under any of the exemptions in section 22, section 41 or section 43.
8. Following receipt of the complaint the Trust did in fact disclose the final version of its STP plan. In light of this the complainant was asked whether he would be willing to withdraw his complaint. However, the complainant confirmed that he wished to pursue his complaint.

Reasons for decision

Section 22 – information intended for future publication

9. Section 22 of FOIA provides that information is exempt if-
 - (a) *the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
 - (b) *the information was already held with a view to such publication at the time when the request for information was made, and*

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

10. In this case the withheld information is a document comprising a draft of the Trust's STP. STPs were announced in NHS planning guidance published in December 2015. NHS organisations and local authorities in different parts of England were asked to come together to jointly develop 'place-based plans' for the future of health and care services in their area for the period 2016 - 2021. Draft plans were produced by June 2016 and 'final' plans were submitted in October. The Commissioner understands that the June STP document is an earlier draft of the October version which was published in December 2016. The Commissioner accepts that documents can go through many drafts before they are finalised. The Commissioner's approach is that if the intention or expectation, in producing any one of those drafts, is to publish the information in it, the section 22 exemption can be considered.
11. The Trust has confirmed to the Commissioner that at the time the request was received it had a settled intention to publish the information. It referred to the NHS planning guidance mentioned above which sets out the timeline for the STP submission.¹ Page 4 of the guidance confirms that the expectation was that the STP document would be submitted to NHS England in June 2016 for formal assessment in July 2016. It explained that the June submission was a checkpoint and the document that was submitted was a working draft that was developed in order to demonstrate to NHS England that progress had been made. The timetable on page 16 indicates the submission date and the intent of NHS England, as regulator, to assess and review the STPs during July and the Trust explained that it had intended to publish the plans once this had taken place.
12. The Trust also referred to NHS England's Guidance for areas developing STP plans from September 2016 which makes it clear that the intention was to publish STP plans and that it would expect that most areas would publish their plans between October 2016 and the end of that year.² Having considered the evidence referred to by the Trust the Commissioner is satisfied that at the time of the request there was a settled intention to publish the plan, of which the June version was a draft, at some point towards the end of 2016 even though the date had not been finalised at this point. The Commissioner has now gone on to

¹ <https://www.england.nhs.uk/wp-content/uploads/2015/12/planning-guid-16-17-20-21.pdf>

² <https://www.england.nhs.uk/wp-content/uploads/2017/06/engaging-local-people-stps.pdf>

consider whether it was reasonable to withhold the information until its planned publication.

13. The Trust has said that at the point that the complainant requested it the plan was still a work in progress and therefore releasing it at that stage, before it had been through any kind of assessment process, ran the risk of giving inaccurate and misleading information as NHS England might, as the regulator, have requested that the plan be revised or re-drafted. It is also said that the Trust's Board had not had sight of the STP document at the point that the request was made.
14. The Trust also explained that the STP had not received formal support from the Boards/Governing bodies of member organisations at the time that the request was received and argued that it would have been unfair and inappropriate to release the details until such time that internal governance processes had been followed. The Trust added that the STP document had developed iteratively and had built upon the June version of the document. The June version had been written at a point in time and the Trust confirmed that a great deal of work had been undertaken since then.
15. In deciding whether it was reasonable to withhold the information the Commissioner has been guided by her awareness guidance on the section 22 exemption which includes a number of factors public authorities should consider before applying the exemption.³ In particular, it suggests that a public authority should first consider whether or not to withhold the information until publication is:
 - *sensible;*
 - *in line with accepted practices; and*
 - *fair to all concerned.*
16. Given that the plans were still under development and had yet to be signed off the Commissioner accepts that it was sensible to withhold the information until its planned publication when it would give a fuller picture of the plans for the area. The Commissioner also notes that the decision to withhold publication until after it had been approved by NHS England was in line with the timetable agreed by NHS England and adopted by the other STP areas, and therefore in line with accepted practices. The Commissioner is also mindful that, as the Trust explained,

³ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

at the time of the request the plan had not been agreed by the governing bodies of the various NHS organisations and local authorities that were part of the STP board. These organisations would have been likely to find publication of the STP document unfair if this was done before they had had a chance to agree it and provide their comments.

17. The Commissioner's guidance also suggests that a public authority may wish to give thought to whether:

- *it is the right decision to manage the availability of the information by planning and controlling its publication;*
- *the timetable properly requires internal or limited consideration of the information prior to its public release;*

18. In this case the Commissioner notes that there was an agreed procedure in place to present a draft of the STP to NHS England before it would be ready for publication. The Commissioner is satisfied that it was appropriate to allow this assessment process to take place and to control publication until such time as NHS England and the member organisations had had chance to comment and agree on the final STP. For these reasons the Commissioner has decided that it was reasonable in all the circumstances that the information should have been withheld until its planned publication and that therefore section 22 is engaged.

19. The Commissioner has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosure

20. The complainant has argued that the public interest favoured disclosure at the time he made his request because it would allow the public to see and contribute to the STP plans before final decisions had been made.

21. For its part, the Trust acknowledged that there was a proper public interest in information about the NHS especially given that the aim of developing STP plans is to create sustainable healthcare services for the future.

Public interest arguments in favour of maintaining the exemption

22. The Trust argued that disclosure could impede the free exchange of information between STP members.

23. It reiterated that the STP document at the time of the request had not been approved by the member organisations or NHS England. It said that “premature release of plans that have not been through due process, have not yet received support and that ultimately, may not come to fruition would also be contrary to the public interest insofar as they may cause unnecessary distress to the public, patients and staff and undermine confidence in the NHS as a whole”.
24. The Trust also suggested that the information contained within the STP document could be misconstrued or misinterpreted which would cause confidence to be undermined further.

Balance of the public interest arguments

25. The Commissioner has considered the competing arguments and accepts that there is a public interest in disclosure insofar as this would promote transparency about the plans for health and care services within the Coventry and Warwickshire area. However the Commissioner also takes the view that this public interest is significantly reduced by the fact that the STP group always planned to publish the final version of its plan once it had been approved. The complainant had argued that it was necessary for the public to be able to contribute to the plans whilst they were being developed rather than simply be presented with the plans once they had been finalised. The Trust has said that this is not the case as no final decisions have been made. The published October version of the STP document makes it clear that the plans are just that and that full public engagement is fundamental, followed by any necessary consultation, before any plans are put into action.
26. As regards the arguments for maintaining the exemption there is some overlap between the factors to consider when deciding what is reasonable, and those which are relevant to the application of the public interest test. As the Commissioner has already mentioned, at the time of the request the STP document was still a work in progress and had not yet been finalised. The Trust had suggested that disclosing this version would be confusing to the public or could be misinterpreted. The Commissioner does not accept this argument as it would be open for the Trust to disclose the information with an accompanying explanation to put the information in context. However, the Commissioner does accept that the public interest favoured withholding information until its planned publication because otherwise it would be harder for the group to complete further drafts due to the distraction caused by unwanted attention and disruption to the planned timetable for publishing the plans. The Commissioner also accepts that it is important to allow the STP group to properly review the STP document and have it approved

by the appropriate regulator, NHS England which ensures the integrity of the process.

27. The timing of the request is also crucial. The complainant made his request on 25 September 2016. Whilst the exact publication date of the STP document had not been finalised it is clear that the Trust expected it to be published sometime between October and the end of the year. In fact the October version of the STP document was published on 6 December 2016. In the Commissioner's view this was sufficiently close to the date of the request that there was a stronger public interest in withholding the information.
28. The Commissioner is also mindful that the STP document had developed iteratively and built upon the June version of the document. Therefore, the final version which the Trust subsequently published was a more complete version and so gave a fuller picture of the plans for the area which would be more informative for the public.
29. In the absence of any compelling case for disclosure the Commissioner finds that the public interest in maintaining the section 22 exemption outweighs the public interest in disclosure.

Other exemptions

30. The Commissioner is satisfied that the information was correctly withheld under the section 22 exemption and therefore she has not gone on to consider whether the section 41 or section 43 exemptions might also apply.

Right of appeal

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: 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

Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix – The request

I am attaching a request under the Freedom of Information (FOI) Act 2000 in relation to the NHS Sustainability and Transformation Plan for which you are the named lead person. I look forward to receiving your response within the statutory 20-day period. I would be happy to receive this information in digital form to save trees and photocopying costs.

FOI request

This request relates to each of categories A-D below. Please give a separate answer to each question in relation to each of these categories:

A. the version of the 5-year NHS Sustainability and Transformation Plan that has been submitted to NHS England,

B. any subsequent amendments that have been requested or required by NHS England and

C. any subsequent amendments that have been approved via relevant bodies or CCG Boards and have been submitted to NHS England and

D. any further amendments that have been approved by relevant bodies or CCG Boards but that have not as yet been submitted to NHS England.

In setting out your responses, please detail:

- i. the overall figures for the full STP footprint*
- ii. a full breakdown of the total in i) by individual constituent CCGs and individual NHS Trusts and other bodies.*
- iii. The word 'proposed' in this FOI request should be taken to refer to 'options under consideration', and these options should be specified separately. The wording 'proposed' is intended as shorthand alternative to the more detailed request for 'please list all options currently under consideration'.*
- iv. Please adopt a reasonable, common sense and plain English approach to this FOI request. I am a member of the public seeking full information about proposals that are likely to have a major impact on our health services, and I have a right to this information.*

FOI QUESTIONS

General questions

- 1. On what date was the STP 5-year plan submitted to NHS England?*
- 2. Please attach a full and complete copy of the STP Plan in the form submitted to NHS England, including all Appendices*
- 3. Please include all options appraisals and risk analyses conducted in relation to the STP footprint or component parts.*
- 4. Please attach copies of all correspondence, including emails and letters, between authorized representatives of the STP and NHS England in relation to the detail of this plan, including any formal responses received from NHS England in relation to the STP plan.*
- 5. Please give details of all formal consultation with relevant local authorities (including those which may be affected by decisions about NHS services not based in their area). Please give specific details of any formal local authority approval for the STP plan or any component parts.*

Questions about specific proposals in the STP. Please give details of:

- 6. the actual and projected financial position of the STP as a whole and component CCGs, Trusts and bodies (as requested in i) and ii) above), for each of the financial years from 2016-17 to 2020-21 inclusive. Please give separate best and worst case projections and explain assumptions made about funding.*
- 7. projected population and demographic changes over the same 5-year period, including projected changes in age profiles.*
- 8. Impact of the combination of funding changes and demographic changes on NHS funding per 1,000 population (or similar measure) over the 5-year period*
- 9. Projected, planned or proposed reduction in number of bed-days (or nights)*
- 10. Planned or proposed reduction in NHS hospital bed numbers*
- 11. Impact of changes in bed numbers and demographic changes on bed availability per 1,000 population over 5-year period (by age group if possible).*

12. *Details of planned or proposed new services replacing in-patient beds*
13. *Planned or proposed reductions in GP numbers*
14. *Impact of changes in GP numbers coupled with demographic projections on GP availability over the 5-year period.*
15. *Planned or proposed reductions in A&E facilities including any proposals to downgrade services from A&E to Urgent Care (or anything other than a full A&E service).*
16. *Planned or proposed changes to specific locations where NHS services will be delivered*
17. *Planned or proposed changes to procedures that will be carried out at specific sites, including details of any plans or proposals to relocate services elsewhere.*
18. *Projected changes in staffing structure, including changes in numbers of staff at different grades and projected change to the bottom-line costs.*
19. *Please give details of anticipated timing of your implementation plan.*
20. *Details of services that you expect to procure through competitive tenders over the 5-year period (draft outline of main services, approximate numbers of treatment and approximate total and annual cost).*

Consultation

21. *What consultation has been conducted undertaken in relation to the overall STP plan and component parts of this plan. Please give separate information for each of the following: local authorities; local authority scrutiny committees, Healthwatch, NHS staff, population in the STP area.*
22. *Please explain what consultation you intend to carry out in future, including timescale for such consultation.*