

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2023

Public Authority: Sussex Partnership NHS Foundation Trust
Address: Swandean
Arundel Road
Worthing
West Sussex BN13 3EP

Decision (including any steps ordered)

1. The complainant has requested information about leases. Having first withheld the information because it was either not complete or was commercial and confidential, Sussex Partnership NHS Foundation Trust ('the Trust') subsequently confirmed that it is withholding the information under section 22, which concerns information intended for future publication. Based on the Trust's submission to him, the Commissioner's decision is that section 22(1) of FOIA is not engaged. In addition, the Trust's refusal of the request did not meet the requirements of section 17 of FOIA.
2. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
 - Disclose to the complainant the "head" and "sub" lease for the Medical Centre and the "Agreement for Leases" that they requested, with any personal data redacted as appropriate.
3. The Trust must take this step 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. The complainant made the following information request to the Trust on 13 June 2022:
 - “1. Could you provide a copy of the head lease for St Peters medical centre and a copy of the sub lease between the trust and St Peters medical centre.
 2. From the information you provided can the trust provide a copy of “an Agreement for Leases between the parties””
5. In its response the Trust indicated that the information it held that was relevant to part 1 had not been completed and that the information it held that was relevant to part 2 was “commercial and confidential”. The Trust did not cite any FOIA exemptions.
6. The complainant requested an internal review on 21 July 2022. The Trust did not provide one and still did not provide one despite having been instructed to by the Commissioner in correspondence dated 14 December 2022. In the circumstances the Commissioner accepted the complaint as eligible without an internal review having been carried out.
7. As a result of the complaint to the Commissioner the Trust reconsidered its response and confirmed it is relying on section 22 of FOIA to withhold the information.

Reasons for decision

8. This reasoning covers the Trust’s reliance on section 22 of FOIA to withhold the requested information. It also considers the Trust’s original refusal of the request.
9. Under section 22(1) of FOIA, information is exempt information if, at the time of the request, the public authority held the information with a view to publishing it at some future date and it is reasonable in all the circumstances to withhold the information until that date. Section 22 is subject to the public interest test.
10. The Trust’s submission is as follows:
 - “Our procedure notes are currently in the process of being revised and will be published in the public domain over the coming months. For this reason we consider this response to be exempt in accordance with Section 22 of the Freedom of Information Act 2000 which provides an exemption for information that is intended to be published in the future.

The Trust believes that the two agreements cannot be issued to [redacted] at its present time due to the fact that there are going to be changes to the Head Lease as well as to the Agreement for Leases between the parties. At the present moment the originally St Peters Medical Centre has now been demolished and that a new Medical Centre will be ready by the end of the year. Once this has been completed then the Trust will be in a position to provide [redacted] with an update Head Lease and Sub lease between the parties.

I understand that [redacted] is very unhappy with regards to his request, but the Trust believes that these documents should be kept confidential for the time being until the completion of the new Medical Centre.”

11. First, the Commissioner notes that the submission refers to “procedural notes” that are being revised with the intention of publishing them. However the Trust has not made it clear why it considers “procedural notes” are within scope of the request for information about leases.
12. Moving on to the features of section 22, in order to rely on this exemption the public authority must have had a settled intention to publish all the specific information requested, prior to the request being received. The Trust should therefore have provided the Commissioner with evidence which demonstrated that the requested information was going to be published at the time of the initial request. This might be, for example, the minutes of a meeting where this was discussed or the fact that the Trust routinely publishes such information. The Trust did not provide such evidence.
13. A public authority relying on section 22 should also advise whether the publication date was determined when the request was actually received. The Commissioner notes that in its submission the Trust has advised that the information will be published when the new Medical Centre is completed.
14. Finally however, this exemption requires that its application is ‘reasonable in all the circumstances’ of the request. The Commissioner does not consider that the Trust has satisfactorily explained why, in this case, the Trust concluded that withholding the information until the Medical Centre is completed is reasonable in all the circumstances. It might well be reasonable to withhold it but, if so, the Trust has not explained why that is the case. Nor does the Trust appear to have carried out the public interest test or put forward any public interest arguments for withholding the information.
15. The Commissioner does not consider that the Trust has put forward a persuasive case that section 22 is engaged and it is not the Commissioner’s role to build such a case for the Trust. Given the

shortcomings of its submission, the Commissioner finds that the Trust is not entitled to rely on section 22(1) of FOIA to withhold the requested information.

Procedural matters

16. Under section 17(1) of FOIA a public authority that is relying on an exemption to withhold information should provide the applicant with a refusal notice within 20 working days of the request. The refusal notice should state that the authority is withholding the information, cite the exemption it is relying on and explain why it considers the exemption is engaged.
17. Section 17(3) requires the refusal notice to include the public authority's consideration of the public interest test.
18. In its response to the complainant, the Trust said only that it was withholding the information because it was not complete and because it was commercial and confidential. The Trust did not cite any exemptions, satisfactorily explain why these were engaged or include consideration of the public interest test. The Commissioner therefore finds that the Trust's refusal notice did not meet the requirements of section 17 of FOIA.

Other matters

19. The Commissioner wrote to the Trust to advise it that he had accepted the complaint on 10 January 2023. In that correspondence the Trust was given 20 working days to provide the Commissioner with a submission that explained its final position.
20. The Commissioner wrote to the Trust again on 18 January 2023 to note that its submission was due by 7 February 2023. The Trust acknowledged receipt of this email on 19 January 2023.
21. The Commissioner did not receive a submission and wrote to the Trust again on 14 February 2023. He instructed the Trust to provide its submission by close of 17 February 2023 so as to avoid any formal enforcement action. The Commissioner still did not receive a submission from the Trust.
22. It was therefore necessary for the Commissioner to serve the Trust with an information notice under section 51(1) of FOIA, which he did on 21 February 2023. This formally instructed the Trust to provide him with a submission within 30 calendar days of the date of the information notice.

23. The Trust did not provide a submission by the required deadline and did not respond to the Commissioner's follow up correspondence. It therefore then became necessary for the Commissioner to advise the Trust that he intended to pass the Trust's non-compliance with the information notice to his legal team if he did not hear from the Trust within seven days.
24. Again, the Commissioner did not receive a response and only received a communication from the Trust on 30 March 2023, following a voicemail message he had left the Trust.
25. The Trust indicated that a shortage of staff had left it under pressure. The Commissioner advised that he can be flexible in certain circumstances but in order to be flexible he does need the public authority to communicate with him - a quick email or phone call to explain the situation. When he does not receive any response at all to his communications, he has no choice but to follow his and FOIA's formal procedures.
26. When it arrived, the Commissioner found the Trust's section 22 submission to be inadequate. However, he made an exception in the circumstances of this case and gave the Trust a further five working days to strengthen its submission. He asked the Trust the key questions about section 22 that he would expect its submission to address (at paragraphs 12 – 14) and reminded the Trust to address the associated public interest test. The Commissioner advised the Trust that he would make a decision based on the information he had if he did not receive a response from the Trust by this final deadline – Thursday 13 April 2023.
27. The Commissioner did not receive any further communications from the Trust; hence this decision.
28. The Trust's engagement with the request, the complaint and with the Commissioner has been poor and he has recorded this for monitoring purposes. There may be valid reasons why engaging with the Commissioner and the complaint was difficult for the Trust. But, as above, while the Commissioner can be flexible when necessary, he needs some communication from a public authority – even simply a quick email to update him on the situation. When an authority does not engage with him adequately or at all, he will follow his formal procedures.

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
Website: 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

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