

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2023

Public Authority: Liverpool University Hospitals NHS Foundation Trust

Address: Prescot Street
Liverpool
Merseyside
L7 8XP

Decision (including any steps ordered)

1. The complainant requested from Liverpool University Hospitals NHS Foundation Trust ("the Trust") the minutes from various committee meetings. The Trust disclosed the requested committee meeting minutes but withheld some information contained within the minutes citing section 40(2) (personal information) and section 43(2) (commercial interests) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that the Trust is not entitled to rely on section 40(2) to withhold any information. He finds that the Trust is entitled to rely on section 43(2) to withhold some information contained within the requested meeting minutes. However, some of the withheld information does not engage section 43(2).
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - The Trust must disclose the information withheld under section 40(2) of the FOIA. It must also disclose the information withheld under section 43(2) detailed in the annex below.

4. The Trust 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following information request to the Trust on 16 December 2022:

“I request the minutes for the meetings of the following committees that were held between June and September 2022.

- People & Organisational Development Group
 - Quality & Safety Group
 - Clinical Effectiveness Group
 - Finance and Digital Group
 - Operational Performance Group
 - Research & Innovation Group”
6. The Trust provided the complainant with the requested meeting minutes. However, it redacted some information contained within the minutes citing section 40(2) (personal information) and section 43(2) (commercial interests) of the FOIA as its basis for doing so.

Reasons for decision

7. This reasoning covers whether the Trust is entitled to rely on section 40(2) and section 43(2) of the FOIA to withhold some information contained within the requested committee meeting minutes.

Section 40(2) – personal information

8. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
9. Section 3(2) of the Data Protection Act 2018 defines personal data as:

"any information relating to an identified or identifiable living individual."

10. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
11. In this case, the Trust has relied on section 40(2) to withhold the number of live suspension cases, the number of live disciplinary cases that relate to an individual from an ethnic minority, the number of disciplinary cases that are currently being defended by the Trust at the employment tribunal and the number of incidents of harm that have taken place.
12. The Trust has also withheld under section 40(2) of the FOIA the number of clinical claims made against the Emergency Medicine and General Surgery division and the name of the division that has had less than 5 clinical claims made against it.
13. The Commissioner will now go on to consider whether the individuals who are the subject of the suspension and disciplinary cases and the incident of harm can be identified from the withheld information. He will also consider whether the withheld information would identify the individuals who have made clinical claims against the Emergency Medicine and General Surgery Division and the division which has had less than 5 clinical claims made against it.
14. In its internal review response and submissions to the Commissioner, the Trust stated that there is a minimal number of live suspension cases, live disciplinary cases that relate to individuals from an ethnic minority, disciplinary cases that are currently being defended at the employment tribunal and incidents of harm. It therefore considers that the individuals who are the subject of the suspension and disciplinary cases and the incident of harm could be identified from the withheld information if the information was combined with other details available within the public domain.
15. Similarly, as there has been a minimal number of clinical claims made against the Emergency Medicine and General Surgery division and the division that has had less than 5 clinical claims made against it, the Trust considers that the individuals who have made the relevant clinical claims could be identified from the withheld information if the information was combined with other information available within the public domain.
16. The Commissioner acknowledges that a small number can constitute personal data if the information both relates to and would identify an individual. However, in such cases the Commissioner expects a public

authority to be able to explain how the data subject would be identified from the information. The Commissioner considers that in this case, the Trust has not explained how the individuals who are the subject of the suspension and disciplinary cases and the incident of harm could be identified from the withheld information.

17. The Commissioner has considered whether there are obvious means of identifying the individuals who are the subject of the suspension and disciplinary cases and the incident of harm from the withheld information. He has also considered whether the individuals who have made clinical claims against the Emergency Medicine and General Surgery Division and the division who has had less than 5 claims made against it could be identified from the withheld information. However, there does not appear to be any obvious means of identification.
18. The Commissioner considers that the withheld information does not constitute personal data as defined in section 3(2) of the DPA as the individuals who are the subject of the suspension and disciplinary case and the incident of harm would not be identified from the information. Furthermore, the individuals who have made clinical claims against the Emergency Medicine and General Surgery Division and the division who has had less than 5 claims made against would not be identified from the withheld information.
19. Therefore, the Commissioner's decision is that the Trust is not entitled to rely on section 40(2) of the FOIA to withhold information contained within the requested committee meeting minutes. He requires the Trust to disclose this information.
20. The Commissioner will now go on to consider whether the Trust is entitled to rely on section 43(2) to withhold some information contained within the meeting minutes.

Section 43(2) – commercial interests

21. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
22. The Trust has relied on section 43(2) of the FOIA to withhold information relating to the Care Record Liverpool Outline Business Case, the reconfiguration of the Trust's estates and facilities, and the contracting of both retail services and restaurant services for the Royal Hospital. It has also withheld the name of a contractor and a healthcare facility as well as some financial information. The Trust considers the withheld information to be commercial in nature as the information relates to plans, budgets, suppliers and estimated costs for specific

projects. The Commissioner has viewed the withheld information and is satisfied that constitutes commercial information.

23. The Trust considers that disclosure of the withheld information would be detrimental to the Trust's negotiations on contracts and procurement as it would inform third parties how much it is willing to pay for a specific item or service prejudicing the Trust's ability to obtain best value for money. It therefore considers that disclosure of the withheld information would prejudice the Trust's commercial interests.
24. The Trust also stated that disclosure of the withheld information would prejudice third parties commercial interests as it would disclose third parties' pricing for supplying services. The Trust considers that this would likely unfairly place third parties at a disadvantage by affecting their ability to compete for future public sector and private sector contracts.
25. In cases where a public authority considers that disclosure of information would, or would be likely to, prejudice the commercial interest of a third party, the Commissioner expects the public authority to have consulted the relevant third party and to have evidence that reflects the third party's concerns and views. It is not sufficient for a public authority to simply speculate about prejudice that may be caused to a third party.
26. In this case, whilst the Trust has stated that disclosure of the withheld information would prejudice the commercial interests of third parties, the Trust has not specified the third party whose commercial interests would be prejudiced by disclosure of the withheld information. Furthermore, based on the Trusts submissions, it appears to the Commissioner that the Trust has not consulted any third parties about the disclosure of the withheld information. He therefore does not accept that disclosure of the withheld information would prejudice the commercial interest of third parties.
27. Furthermore, the Commissioner is not satisfied that disclosure of the withheld 'would' prejudice the Trust's commercial interests. However, he accepts that disclosure of some of the withheld information 'would likely' prejudice the Trust's commercial interests.
28. The Commissioner accepts that disclosure of the withheld information relating to the contracting of restaurant services for the Royal Hospital may affect the Trust's ability to obtain value for money by informing current and future contractors how much the Trust is willing to pay for restaurant services allowing contractors to increase their costs to reflect the Trust's budget. He is therefore satisfied that disclosure of this information would likely prejudice the Trust's commercial interests.

29. The Commissioner also considers that disclosure of the withheld information relating to the reconfiguration of the Trust's estates and facilities would likely prejudice the Trust's commercial interests by informing current and potential future contractors of the future arrangements being considered for hotel services including the costs associated with such arrangements. The Commissioner considers that this may affect the Trust's ability to obtain best value for money.
30. The Commissioner also accepts that disclosure of the withheld information relating to the Care Record Liverpool Outline Business Case would likely prejudice the Trust's commercial interests as the withheld information discusses the costs associated with the creation of a bespoke electronic patient record system (EPR) and the various options available to the Trust with regards to the EPR. The Commissioner considers that disclosure of such information may inform potential suppliers how much the Trust is willing to spend on an EPR system, again, potentially affecting the Trust's ability to obtain best value for money.
31. The Commissioner notes that the Trust has withheld specific pieces of financial information. Whilst the Trust has stated that disclosure of such information would prejudice its commercial interests by affecting its ability to obtain best value for money, the Trust has not explained how this would occur. Furthermore, it is not obvious to the Commissioner how disclosure of the withheld financial information would affect the Trust's ability to obtain best value for money. Therefore, he does not consider that disclosure of such information would likely prejudice the Trust's commercial interests.
32. Similarly, the Commissioner considers that the Trust has failed to explain how disclosure of the name of a contractor, healthcare facility and the names of companies who have bid for retail services at the Royal Hospital would affect the Trust's ability to obtain best value for money. Therefore, he does not accept that disclosure of such information would likely prejudice the Trust's commercial interests.
33. The Commissioner does not consider the withheld financial information, the name of a contractor and healthcare facility, and names of companies who have bid for retail services at the Royal Hospital to engage section 43(2) of the FOIA. He therefore requires the Trust to disclose this information. The Commissioner has outlined the withheld information to be disclosed in the annex below.
34. The Commissioner considers the withheld information relating to the contracting of restaurant services for the Royal Hospital, the reconfiguration of the Trust's estates and facilities, and Care Record Liverpool Outline Business Case, to engage section 43(2) of the FOIA.

He will now go on to consider the public interest test in relation to this information.

The public interest test

35. With regards to the public interest test, in its initial response to the request, the Trust acknowledged that there is a public interest in the openness and transparency of the Trust, its decisions, and the spending of public money. However, as the Trust already proactively publishes information relating to its spending and updates from its executive assurance groups, the Trust considers that the public interest in the disclosure of the withheld information has already been met.
36. The Trust considers that disclosure of the withheld information would prevent the Trust from obtaining best value for money by informing third parties how much the Trust is willing to pay for services. The Trust does not consider this to be within the public interest.
37. The Commissioner recognises that there is a general public interest in the transparency and accountability of the Trust, its decisions, and the spending of public money. However, he also accepts that disclosure of the withheld information relating to the contracting of restaurant services for the Royal Hospital, the reconfiguration of the Trust's estates and facilities, and Care Record Liverpool Outline Business Case may affect the Trust's ability to obtain best value for money. He does not consider this to be in the public interest.
38. For this reason, the Commissioner's decision is that the public interest in maintaining section 43(2) in respect of the withheld information relating to the contracting of restaurant services for the Royal Hospital, the reconfiguration of the Trust's estates and facilities, and Care Record Liverpool Outline Business Case, outweighs the public interest in disclosure of the information.
39. The Commissioner does not require the Trust to disclose the withheld information relating to the contracting of restaurant services for the Royal Hospital, the reconfiguration of the Trust's estates and facilities, and Care Record Liverpool Outline Business Case.

Right of appeal

40. 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

41. 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.
42. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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Annex

43. The Commissioner's decision is that the withheld information detailed below does not engage section 43(2) of the FOIA. The Trust is required to disclose this information.

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5.1 Meeting of the Executive Research & Innovation Group held on 16 June 2022	6
5.3 Meeting of the Executive Quality & Safety Group held on 29 June 2022	8
5.6 Meeting of the Executive Clinical Effectiveness Group held on 13 July 2022	2
5.8 Meeting of the Executive Quality & Safety Group held on 27 July 2022	4
5.9 Meeting of the Executive Finance & Digital Group held on 28 July 2022	3, 6
5. 13 Minutes of the Meeting of the Executive Research and Innovation Group Held on 11 August 2022	6, 7
5.15 Meeting of the Executive Finance & Digital Group held on 25 August 2022	5, 7