

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 August 2024

Public Authority: Guy's and St Thomas' NHS Foundation Trust
Address: St Thomas' Hospital
Westminster Bridge Road
London
SE1 7EH

Decision (including any steps ordered)

1. The complainant has requested the Outline Business Case for the extension to the Evelina London Children's Hospital. Guy's and St Thomas' NHS Foundation Trust ('the Trust') withheld this information under sections 36(2)(b), 36(2)(c) and 43(2) of FOIA, which concern prejudice to the effective conduct of public affairs and commercial interests, respectively. The Commissioner's decision is that the Trust was entitled to withhold the information under sections 36(2)(b) and 36(2)(c) of FOIA.
2. It's not necessary for the Trust to take any corrective steps.

Request and response

3. The complainant made the following information request to the Trust on 7 December 2023:

"Can you please supply the initial business case for the building of the extension building to the Evelina Children's Hospital. This proposed extension was known at the time as Evelina Phase 2.

I am trying to ascertain which children's services were destined to be hosted by the Evelina when the new extension building was completed."

4. The Trust provided a refusal notice on 13 February 2024. It advised that the relevant information it holds – an Outline Business Case (OBC) - was exempt from disclosure under sections 36(2)(b), 36(2)(c) and 43(2) of FOIA.
5. On 18 February 2024, the complainant requested an internal review. They said they appreciated that the OBC was likely to contain commercially sensitive information but that:

“Frankly this information is not at all of interest to me at all. I am just interested in the list of children’s services listed in the business case that the proposed extension would have enabled the Evelina to offer. I am sure this is just one page of a very lengthy document.”
6. The Trust provided an internal review on 9 April 2024. It explained what services it expected to be provided at the Evelina when the new extension building was completed.
7. The complainant submitted a complaint to the Commissioner on 21 April 2024. They’re dissatisfied that the Trust hasn’t provided them with the list of children’s services that they consider the OBC contains. They also consider that the Trust’s internal review response was “incorrect.”

Reasons for decision

8. The Commissioner has reviewed the OBC that the Trust is withholding, which is a 212 page document. Services are discussed broadly in the OBC, as one would expect, but the OBC doesn’t appear to contain any discrete “list” of the children’s services that will be hosted by the Evelina when the extension is completed. Nor can the Commissioner consider the accuracy or otherwise of information the Trust provided to the complainant in its internal review – his focus is solely on the Trust’s compliance with FOIA.
9. As such, this reasoning covers the Trust’s application of sections 36(2)(b) or section 36(2)(c) or 43(2) of FOIA - or all of these - to the OBC.
10. Under section 36(2)(b)(i) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank provision of advice.
11. Under section 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views.

12. Under section 36(2)(c) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
13. These three exemptions can only be engaged on the basis of the reasonable opinion of a qualified person.
14. The qualified person (QP) in this case was Professor Ian Abbs, the Trust's Chief Executive Officer. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
15. The Trust has provided the Commissioner with a copy of its submission to the QP about the request. From the submission the Commissioner accepts that the QP gave their opinion that the exemptions were engaged.
16. The QP was provided a description of the request, a copy of the exemptions under section 36(2) of FOIA, some public interest arguments and explanations for why the Trust considered the three exemptions were engaged.
17. Regarding section 36(2)(b)(i) and 36(2)(b)(ii) and the provision of advice and exchange of views, the QP was advised of:
 - inhibition of most senior and other Trust staff to express themselves openly, honestly and completely in order to explore novel or radical options when providing advice and decisions as part of the deliberation process to improve services for patients
 - the likely chilling effect on future debate and discussions; and
 - the impairment of quality decision-making by the Trust for patient benefit.
18. Regarding section 36(2)(c) and other prejudice, the QP was advised that:
 - there was a need for a safe space to develop and vigorously discuss ideas including as to funding possibilities
 - it was necessary to debate live issues and reach ideas and conclusions away from external interference and distraction, including premature public or media involvement, or both; and
 - as the Evelina expansion remains very much a live programme, the ongoing need for this safe space was very important.

19. The QP's signed opinion confirms that they considered that disclosing the information "would be likely to" cause the prejudice envisioned under the three exemptions, rather than "would" cause this prejudice. The Commissioner will accept that the lower level is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
20. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
21. The Commissioner considers that the QP had sufficient background knowledge and was provided with sufficient information to enable them to make a decision on the matter. There's some overlap with the advice given to the QP about section 36(2)(b) and section 36(2)(c). However, the Commissioner finds that the QP's opinions about withholding the information under sections 36(2)(b) and 36(2)(c) of FOIA were nonetheless reasonable ones. He accepts that, in the circumstances of this case, disclosing the information at the time of the request, when the extension programme was 'live,' would have been likely to inhibit the provision of advice and the exchange of views and would have been likely to have a disruptive effect.
22. The Trust was therefore entitled to apply the exemptions under section 36(2)(b) and 36(2)(c) to the request. The Commissioner has gone on to consider the public interest tests associated with these exemptions.

Public interest test

23. In its submission to the QP the Trust acknowledged the need for it to be as open and transparent as possible. However, it cautioned that the Evelina expansion programme remained very much live, and so the sensitivity and confidentiality of proposals at that formative stage remained a real issue.
24. In its correspondence to the complainant the Trust said it appreciated and accepted the need for as much transparency as possible in matters concerning public authorities such as the Trust. However, it said, it needed to preserve a 'safe space' to develop options and to share advice and views freely and frankly, for the benefit of patients. The Trust said it therefore considered that, in the circumstances of the Evelina expansion being a live issue, the public interest was better served by protecting the confidentiality of the information in question.

25. The focus of the complainant's interest is children's services that are expected to be hosted in the Evelina once the extension is finished. They consider the OBC would include a list of these services. First, in its internal review the Trust addressed that query and, second, as the Commissioner has noted, the OBC doesn't contain such a list because its focus being on the strategic, economic, commercial, financial and management cases for the extension.
26. As with all public authorities in receipt of public money, there's a public interest in the Trust being transparent. However, the Evelina programme was live at the time of the request and remains live to date. While the programme is live, the Commissioner considers there's greater public interest in the Trust being able to open and honest discussions about the extension programme without concern that these might be put in the public domain. Similarly, while proposals are being developed and considered, there's greater public interest in the programme progressing away from any distraction from the public or media that might arise through the disclosing the OBC. The Commissioner notes that the Trust publishes information about the Evelina extension programme on its website and considers this adequately addresses the public interest in transparency¹.
27. To summarise, the Commissioner's decision is that the Trust correctly applied the section 36(2) exemptions to the OBC and that the public interest favours maintaining the exemptions. It's therefore not necessary to consider the Trust's application of section 43(2) to the information.

¹ <https://www.evelinalondon.nhs.uk/about-us/our-plans-to-grow/our-hospital-expansion.aspx>

Right of appeal

28. 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

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
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