

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 August 2024

Public Authority: Airedale NHS Foundation Trust
Address: Airedale General Hospital
Skipton Road
Steeton
Keighley
West Yorkshire BD20 6TD

Decision (including any steps ordered)

1. The Commissioner's decision is that, at the time of the request, Airedale NHS Foundation Trust ('the Trust') was entitled to withhold the information in parts 1, 3 and 4 of the applicant's request for information about the Phoenix Partnership under section 43(2) of FOIA. This exemption concerns commercial interests. But the Commissioner has also decided that aspects of the Trust's refusal of the request didn't comply with section 17(1) of FOIA.
2. It's not necessary for the Trust to take any corrective steps.

Request and response

3. On behalf of a newspaper, the applicant made the following information request to the Trust on 18 December 2023:

"[1] A letter from The Phoenix Partnership (TPP) to the trust sent on 25 July 2023 that was mentioned in September's board papers, regarding its contract with the trust and consequences for the trust if the price they quoted was not agreed.

[2] Any legal advice, set out in letters or emails, about how the trust should respond to TPP demand to increase renewal costs from £550,000 to £1.35m.

[3] All correspondence in the form of emails, letters, or notes of telephone conversations sent to NHS Digital this year regarding TPP.

[4] All replies in the form of emails, letters or notes of telephone conversations sent to the trust by NHS Digital this year regarding TPP.”

4. The Trust provided a refusal notice on 5 April 2024. It withheld the requested information under a combination of sections 41 (information provided in confidence), 42 (legal professional privilege) and 43 of FOIA.
5. The applicant requested an internal review on 10 April 2024. Their concerns were focussed on parts 1, 3 and 4 of the request. With regard to part 2, the applicant said, “I do not wish to challenge this.”
6. The Trust provided an internal review on 5 June 2024. It maintained its reliance on sections 41, 42 and 43 of FOIA to withhold information the applicant requested.
7. The complainant submitted a complaint to the Commissioner on the applicant’s behalf.

Reasons for decision

8. On the basis of the applicant’s request for an internal review, this reasoning is focussed on parts 1, 3 and 4 of the request. The Commissioner will also consider the timeliness of the Trust’s refusal.
9. The Commissioner has considered the information the Trust is withholding and the exemption(s) the Trust has applied to it. In the first instance, this reasoning covers the Trust’s application of section 43(2) of FOIA because it has applied this exemption to all three parts of the request. The Commissioner will consider the Trust’s reliance on section 41 or section 42, or both, if and as necessary.
10. The requested information is [1] a specific letter from TPP to the Trust dated 25 July 2023, [3] communications from the Trust to NHS England about TPP and [4] communications from NHS England to the Trust about TPP (NHS Digital merged into NHS England in 2023).
11. In its submission to the Commissioner, the Trust says it has given the letter within scope of part 1 of the request the reference ‘A’ and the information within scope of parts 3 and 4 of the request the reference ‘B’.

12. Amongst the material referenced 'B' is information that doesn't clearly fall within scope of parts 3 and 4 (or part 1). However, the material does include correspondence between the Trust and NHS England.
13. The Trust says it has provided the additional information labelled 'B' - and also other material labelled 'C' - for context. This additional information includes Board minutes, Board papers, a Committee Chair report and correspondence between the Trust and TPP.
14. Under section 43(2), information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
15. When he's considering whether section 43(2) is engaged, the Commissioner considers whether the envisioned harm concerns commercial interests and whose interests would be harmed; how disclosing the information would cause that harm and the level of likelihood of the harm occurring.
16. Regarding the specific letter requested in part 1 of the request, the Trust's refusal notice of 5 April 2024 appears to focus more on public interest arguments, and on section 42.
17. It advised that, "the letter is designated 'without prejudice', without prejudice privilege being a form of legal professional privilege, and as such is confidential." The refusal then goes on to discuss public interest arguments.
18. In its internal review the Trust maintained its reliance on section 43 but didn't elaborate on this exemption.
19. In its submission to the Commissioner, the Trust referred him to a draft internal review document that it hadn't in the end sent to the applicant. As noted, the Trust has also referred him to "additional documents" which it says were relevant to the request and which it was providing for context and to "evidence a clear link between disclosure of the information requested and any prejudice to commercial interests and supporting the basis established that disclosure of a third party's interests may occur."
20. The draft internal review discusses the public interest but, again, doesn't discuss why the Trust considered section 43 was engaged.
21. However, the Commissioner has also reviewed the additional documents and taken account of the content of the letter being withheld. On the basis of these, and its correspondence to the complainant generally, the Commissioner will accept that the harm the Trust envisions from disclosing the letter within scope of part 1 concerns commercial interests

and so is relevant to section 43. Second, he accepts those whose commercial interests would be prejudiced are the Trust and TPP.

22. The Commissioner has gone on to consider parts 3 and 4 of the request.
23. In its correspondence to the applicant, the Trust advised that disclosing this information had the potential to cause significant prejudice to its commercial interests and could potentially cause significant prejudice to TPP's commercial interests. It said that that there was a continuing relationship between it and TPP and a continuing need for TPP to provide Electronic Patient Records (EPR) services to the Trust, "pending transition to the supply of such services by Cerner." The Trust said that disclosing "legal advice" [ie the information in scope of these parts] had "inherent scope to prejudice the authority's position and commercial interests in the context of that continuing relationship."
24. Again, the Trust's correspondence to the applicant and the submissions it has provided to the Commissioner don't clearly explain why the Trust considers parts 3 and 4 engage section 43. However, on the basis of that material and the information in scope of these two parts of the request, the Commissioner can accept, first, that, regarding these two parts, the harm the Trust envisions concerns commercial interests and so is relevant to section 43. And again, he accepts that those whose commercial interests would be prejudiced are the Trust and TPP.
25. The Commissioner has next considered how disclosing the information requested in the parts 1, 3 and 4 of the request would or could prejudice the commercial interests of the Trust or TPP, or both. He doesn't consider that the Trust has made a clear connection here. However, disclosure could damage the relationship between both parties, making the ongoing negotiations more protracted or antagonistic, or both, which wouldn't be in the commercial interests of either party. Disclosing the information could also cause some reputational damage for either or both parties which could have a negative effect on their commercial interests. Finally, disclosing information associated with these ongoing negotiations could deter suppliers from participating in and competing for future opportunities. This is because they could be concerned that they'd potentially face external scrutiny on issues which both parties would normally expect to be treated as part of a confidential contract management process. This would therefore negatively impact on the quality and quantity of the Trust's supplier base, potentially leading to [even] higher prices for an essential service or the lack of availability of suitable services.

26. Lastly, the Commissioner has considered the level of likelihood of the envisioned prejudice occurring. The Trust's communications aren't clear on this point. Due to the lack of clarity, the Commissioner will accept the lower level of likelihood only; that the envisioned prejudice would be likely to happen, rather than would happen.
27. Because the criteria at paragraph 15 have broadly been met, the Commissioner will accept that, at the time of the request, the Trust correctly applied section 43(2) of FOIA to the three parts of the applicant's request. He's gone on to consider the associated public interest test.

Public interest test

28. In their request for an internal review, which wasn't until April 2024 because of the lateness of the Trust's refusal, the applicant noted that the Guardian newspaper had published a number of stories raising significant questions about TPP and its director and sole shareholder, Frank Hester¹. This had led to criticism from the [former] Prime Minister and the chief executive of NHS England. The matter had also been the subject of Parliamentary debate. The applicant said that this is directly relevant to the Trust as TPP receives hundreds of millions of pounds of public money via healthcare contracts.
29. The applicant presented the following public interest arguments for disclosure:
 - Accountability for the spending of public money. The complainant said that there were clearly concerns in the authority (based on other information that the Trust had disclosed) of overbilling that are of inherent public interest.
 - Promoting competition in procurement via transparency. Disclosure would allow the public to have more information about how a company seeks renewal of contract in a marketplace with highly limited competitive options that could be perceived as a duopoly. Healthcare is of "intense" public interest, especially when it concerns TPP.

¹ <https://www.theguardian.com/politics/2024/mar/16/sunak-under-pressure-to-say-how-many-times-he-has-met-tory-donor-frank-hester>

30. In their complaint to the Commissioner, the complainant has argued that the information being withheld is of significant and ongoing public interest. This is because it concerns a company that has been the subject of considerable public debate, both in the media and in Parliament.
31. The Trust acknowledged that TPP had imposed on it a very substantial increase in price in return for continuity of supply of EPR services. It accepted that there was a public interest in transparency and in informing the public debate until such time as the Trust transitions to its new EPR service.
32. The arguments the Trust presented for withholding the information, that are most relevant to section 43, are the following:
 - Part 1 of the request – In the context of negotiations on securing the continued provision of EPR services by TPP, to ensure continuity of supply pending transition to the alternative EPR service and supplier, there was a clear and compelling argument in favour of withholding the information.
 - Discussions are better facilitated if parties can speak freely, secure in the knowledge that what they have said and, in particular, any admissions made to try to settle the matter, may not be used against them should the settlement discussions fail. Underlying this principle is the idea that parties are more likely to settle if they are free to put all their cards on the table.
 - There is a significant risk that disclosure may give rise to a significant risk of liability on the part of the authority. It may also damage the relationship between the parties and prejudice any current or future negotiations between the parties in circumstances where the “without prejudice rule” is not respected and adhered to.
 - Parts 4 and 4 of the request – There’s a public interest in public authorities not being disadvantaged by their FOIA obligations in circumstances when in commercial negotiations with a private sector provider. The Trust remained in dialogue with TPP around continuity of service provision.
33. The Commissioner appreciates that the applicant and the complainant have an interest in the information that’s been requested. The Commissioner has considered the situation as it was at the time of the request and up to the point when the Trust should have responded to the request (ie the end of January 2024), and he considers the information also has a degree of wider public interest. In September

2023 and November 2023 TPP's CEO, Frank Hester, had made very substantial donations to the Conservative party (and had given the former Prime Minister Rishi Sunak use of his private helicopter in November 2023).

34. However, other matters associated with Frank Hester – for example, remarks he'd previously made about Diane Abbott MP, and others, and the concerns that followed - weren't reported until 2024, shortly before the Trust provided its refusal and the applicant requested an internal review. The Commissioner therefore cannot take account of those matters and, in any case, their link to the contract renewal being negotiated in this case isn't obvious.
35. As the Commissioner has noted in his published guidance about section 43, there's a general public interest in public authorities being open and transparent. In relation to section 43 specifically, there's also a public interest in public authorities being accountable for the public money that they're spending. That is certainly a factor here where TPP's price for renewing the EPR service increased substantially.
36. But against disclosure, and most relevant in this case, the Commissioner advises that matters of competition may be a public interest argument for withholding information. He notes that, although in many cases disclosure promotes competition, there is undoubtedly a public interest in allowing public authorities to withhold information which, if disclosed, would negatively affect their ability to negotiate or to compete in a commercial environment.
37. The Trust indicates that it has applied section 43 because, at the point of the request and currently, it has a continuing relationship with TPP. TPP was and is providing the Trust's EPR service, until, the Commissioner understands, the provision of that service moves to Cerner, possibly later this year. It's clear from correspondence from the Trust to TPP dated 12 July 2024, which the Trust has provided to the Commissioner, that the Trust is still negotiating the EPR contract renewal with TPP.
38. In the circumstances at the time of the request, the Commissioner is satisfied that there was a greater public interest in withholding the information. This is so that the Trust can settle its negotiations with TPP without its ability to do so being negatively affected through it having to disclose the requested communications associated with those negotiations. Withholding the information minimises the risk of there being any break in the continuity of the Trust's EPR service, which would cause a detriment to the users of that service.

39. The Commissioner's decision is therefore that, at the time of the request, the Trust was entitled to rely on section 43(2) of FOIA to withhold the information requested in parts 1, 3 and 4 of the request. Because he has found section 43(2) was engaged, it hasn't been necessary for the Commissioner to consider the Trust's application of sections 41 and 42 to the same information.
40. This decision is in line with the section 43(2) decision the Commissioner made in August 2024 about a somewhat similar case involving a request to the Department of Health and Social Care about TPP².

Procedural matters

41. In respect of any exempt information, under section 17(1), a public authority must issue an applicant with a refusal notice that states why the authority considers that the exemption it's relying on is engaged. The refusal notice must also be provided promptly and within 20 working days following the date of receipt of the request.
42. The Commissioner considers that the Trust's refusal notice and internal review response didn't first adequately explain why it considered section 43(2) was engaged, before discussing public interest factors.
43. The applicant also submitted their request on 23 December 2023 and the Trust didn't provide a refusal notice until 5 April 2024.
44. In view of these matters, the Trust's refusal didn't therefore comply with section 17(1) of FOIA.

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4030582/ic-287477-v0v6.pdf>

Right of appeal

45. 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

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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Water Lane
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