

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2024

Public Authority: The Royal Marsden NHS Foundation Trust
Address: Fulham Road
London, SW3 6JJ

Decision (including any steps ordered)

1. The complainant has requested The Royal Marsden NHS Foundation Trust (the Trust) to disclose information relating to a £9m donation to Royal Marsden Cancer Charity (RMCC) in 2022/23. The Trust disclosed some information but withheld the remainder under section 36(2)(c) of FOIA.
2. The Commissioner's decision is that the Trust is entitled to refuse to disclose the withheld information in accordance with section 36(2)(c) of FOIA. He has however found a breach of section 1, 10 and 17 of FOIA.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 6 February 2024, the complainant wrote to the trust and requested information in the following terms:

"Under the Freedom of Information Act, please let me have the following information regarding the trusts transaction in 2022-23 of £9m to the Royal Marsden Cancer Charity as stated by the trust in its annual report and by auditors.

 - Please set out the outcome held by the trust of retrospective approval from NHS England, DHSC or HM Treasury ie was approval

- given and why, or was it withheld and why, and also when it was received.
- What was the trusts source of funds to make the £9m transaction?
 - Please provide documents considered by the trust board ahead of a decision to make the transaction.”
5. The trust responded on 8 March 2024. It answered bullet points one and two and confirmed that the information is not available for bullet point three.
 6. The complainant requested an internal review on 8 March 2024. They asked whether any recorded information is held falling within the scope of bullet point three.
 7. The trust carried out an internal review and notified the complainant of its findings on 8 April 2024. It confirmed that it holds a legal opinion and a paper tabled by the Trust's Chief Financial Officer but considers this information is exempt from disclosure under sections 22, 36(2)(c) and 42 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 9 April 2024 to complain about the way their request for information had been handled. They dispute the exemptions apply and believe there is an overwhelming public interest in the disclosure of this information. They stated that the payment was made without prior approval of NHS England or HM Treasury and that its auditor, Deloitte, stated in June 2023 that it showed “significant weakness” in governance at the Trust. The complainant also advised that HM Treasury later refused to give retrospective approval of the transaction in December 2023.
9. The complainant confirmed that they only wish to pursue the disclosure of the paper tabled by the Trust's Chief Finance Officer; they have no interest in the legal opinion.
10. The Commissioner's investigation has therefore been limited to this information. He will first consider section 36(2)(c), as this has been applied to the information in its entirety. He will only go on to consider section 22 if he finds section 36(2)(c) does not apply.

Reasons for decision

Section 36 – the effective conduct of public affairs

11. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. The Trust confirmed that it obtained the opinion of the qualified person – its Chief Executive – on 8 April 2024. In the qualified person’s opinion disclosure would be likely to otherwise prejudice the effective conduct of public affairs (so, for reasons other than those covered by section 36(2)(b)(i) and (ii)). The qualified person had sight of the withheld information and submissions detailing the request itself and concerns over its disclosure.
13. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the ‘most’ reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
14. The Trust stated that before it outlines what the qualified person’s opinion is, it is important to consider the timing of the request on the one hand, and the statutory and parliamentary requirements and procedures for the preparation, laying and publication of the Trust’s annual reports on the other. This is because the withheld information directly relates to the decision making within the Trust surrounding the donation. This matter and the Trust’s subsequent internal review will be included in that annual report.
15. It stated that it is an NHS Foundation Trust, a public benefit corporation constituted under Chapter 5 and Schedule 7, and audited in accordance

with Schedule 10, of the National Health Service Act 2006¹. Under this legislation:

- “1. The Trust must prepare annual accounts and annual reports in accordance with requirements specified by NHS England and approved by the Secretary of State for Health and Social Care (Schedule 7, Paragraphs 25 & 26).
 2. In auditing the annual accounts, the Trust’s auditor must satisfy themselves that the Trust has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources (Schedule 10, Paragraph 1(d)).
 3. The Trust must send the annual accounts, any auditor’s report on the annual accounts, and annual report to NHS England (Schedule 7, Paragraphs 25 & 26).
 4. The Trust must hold an annual meeting of its members, and a general meeting of its council of governors, at which the annual accounts, any auditor’s report on the annual accounts, and annual report, are presented (Schedule 7, Paragraphs 27A and 28).
 5. The Trust must lay a copy of the annual accounts, and any auditor’s report on the annual accounts, before Parliament (Schedule 7, Paragraph 25).
 6. The Trust must make a copy of the latest annual accounts, any auditor’s report on the annual accounts, and annual report, available for inspection by the public (Schedule 7, Paragraph 22).
 7. NHS England must maintain a public register of NHS foundation trusts, which includes a copy of the latest annual accounts, any auditor’s report on the annual accounts, and annual report for each NHS foundation trust (section 39).”
16. The Trust advised that the requirements specified by NHS England and approved by the Secretary of State referred to above are summarised within NHS England's NHS Foundation Trust Annual Reporting Manual 2023/24² (the NHS FT ARM). The NHS FT ARM links to further, more detailed guidance, in particular the Code of Governance for NHS Provider Trusts³ (the Code), the Department of Health and Social Care Group

¹ [National Health Service Act 2006 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

² [NHS foundation trust annual reporting manual 2023/24 \(england.nhs.uk\)](https://www.england.nhs.uk)

³ [NHS England » Code of governance for NHS provider trusts](https://www.nhs.uk)

Accounting Manual 2023/24⁴ (the DHSC GAM), and the Department of Health and Social Care Guidance on Laying Accounts in Parliament⁵ (the DHSC Laying Guidance).

17. The trust said the key points are:

“1. It is an explicit requirement of this statutory and parliamentary procedure that the Trust’s Annual Report and Accounts 2023/24 include a statement as to the Trust’s arrangements for securing economy, efficiency and effectiveness in its use of resources, which would include any significant weaknesses identified by the Trust’s auditor.

2. It is an explicit requirement of this statutory and parliamentary procedure that the Annual Report and Accounts 2023/24 are not published for the wider public until they have been laid before Parliament.

3. As of the date of the Request, 7 February 2024, the Annual Report and Accounts 2023/24 had not been finalised (yet to be approved by the Trust’s Audit and Finance Committee or the Trust’s Board) and had not begun the statutory and parliamentary procedure outlined above. The procedure remains ongoing at this time.”

18. Turning now to section 36(2)(c), the Trust explained that it is the qualified person’s opinion that, at the date the request was responded to, it was in the process of finalising its annual report and accounts, which it expects to publish in September 2024. At the time of the request both the process of finalising the content of the Annual Report and Accounts 2023/24 and the process of laying and publishing them remained a live process.

19. The Trust stated that it is an explicit requirement of the statutory and parliamentary procedure that the report and accounts includes a statement about the Trust’s arrangements for securing economy, efficiency and effectiveness in its use of resources, which will include any significant weaknesses identified by the Trust’s auditor. They will therefore include further details around the payment to RMCC following the decision on the application for retrospective approval, including the purpose of the transaction and the steps that were taken to provide assurance of its regularity.

⁴ [DHSC guidance on laying accounts in Parliament - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/dhsc-guidance-on-laying-accounts-in-parliament)

⁵ [DHSC guidance on laying accounts in Parliament - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/dhsc-guidance-on-laying-accounts-in-parliament)

20. It is also an explicit requirement that reports and accounts (inclusive of this information on the payment) are not published for the wider public until they have been laid before Parliament (at the time of the request, this was scheduled for 22 July 2024). The Trust confirmed that its members and governors, and the wider public, are yet to receive the Annual Report and Accounts for 2023/24.
21. It is the qualified person's opinion that disclosure of the withheld information would publish information that directly relates to a required disclosure within the Annual Report and Accounts it is preparing, prior to that required disclosure being laid before Parliament and shared with the Trust's members and governors. It would be prior to and outside the full, proper and official context of the official disclosure within the Annual Report and Accounts for 2023/24 and outside of the explicit statutory and parliamentary procedure it has outlined above.
22. The qualified person considered disclosure at the time of the request would present a partial and misleading picture of events, before the Trust's own members and governors, and Parliament, have a full picture of its annual Report and Accounts.
23. The withheld information itself contains advice, options and recommendations to the Board, which led to the decision to make the donation to the charity, which is the subject of this request and the required disclosure with the Annual Report and Accounts 2023/24. Disclosure at the time of the request and currently would be likely to prejudice the effective conduct of the statutory and parliamentary procedure for laying and publication of annual reports and accounts and its own internal review process of its finances and governance.
24. The Commissioner has obtained an extract of the current draft of the Annual Report and Accounts 2023/24 in which the donation and internal and external scrutiny of that donation are referenced and discussed. He is satisfied that the withheld information directly relates to and feeds into what the Trust intends to publish this September.
25. The Commissioner is therefore satisfied that it is a reasonable opinion to hold that disclosure of the withheld information, outside of the explicit statutory and parliamentary procedures for the presentation and publication of annual reports and accounts for such Trusts, would be likely to prejudice the effective conduct of public affairs. It is reasonable opinion to hold that disclosure at the time of the request would have been likely to prejudice the Trust's ability to carry on its own internal review process and produce its report and accounts efficiently and in accordance with required procedure and legislation.

Public interest test

26. The Trust confirmed that it acknowledged the public interest in openness, transparency and accountability. It also recognised the public interest in the subject matter and in members of the public having access to the information the Trust had prior to taking the relevant decisions. It argued that the annual reporting and accounting processes should also not unduly delay the publication of important decisions and matters which concern the Trust's management of public money.
27. However, in this case, considering the time of the request, the statutory and parliamentary procedures in place and the fact that the Trust was still in the process of reviewing matters internally and putting together the report and accounts, the Trust considers the public interest rests in maintaining the exemption.
28. It stated that it did not consider it is in the public interest to disclose information before the conclusion of its own internal reporting, as to do so would be likely to be misleading, misinterpreted and misunderstood by the general public. It also felt disclosure at the time of the request would have been likely to interfere with its internal processes and prejudice its ability to conduct its public affairs.
29. The Trust said that it addressed bullet points one and two of the request, confirming the retrospective approval request, reasons, the relevant dates and the source of funds. It considers this goes a considerable way to meeting the public interest that exists in favour of disclosure, prior to the official publication of its report and accounts for 2023/24. It confirmed how the withheld information feeds into the report and accounts it was putting together at the time of the request and how the public interest is best served publishing further information about the donation in accordance with the statutory and parliamentary procedures in place.
30. The Commissioner will consider the extent, frequency and severity of the prejudice claimed during the public interest test.
31. The Commissioner considers there are significant public interest arguments in favour of disclosure in this case. The trust donated a large sum of surplus public funds to a charity. Prior to the request the Trust had been criticised by its own auditor for doing so and had received notification from the relevant body that it would not be granted retrospective approval for the transaction. The Commissioner is of the view that there is a clear and significant public interest in understanding why this transaction took place, why the Trust considered it was an

appropriate use of surplus funds and why it did not seek approval from HM Treasury before making the donation.

32. The Commissioner believes the public has a right to know how public money is managed and spent and public authorities should be held accountable for the decisions it makes.
33. However, in this case, the Commissioner considers the public interest rests in maintaining the exemption due to the circumstances at the time of the request and the explicit statutory and parliamentary procedures that are in place that govern the production and publication of the Trust's accounts. In this case, he notes that the withheld information does feed into those accounts and the Trust will be including a section on the transaction that took place and its governance of that transaction. At the time of the request the Trust was still in the process of internally reviewing the situation and given this, the Commissioner accepts that disclosure would have been likely to distract the Trust away from doing so.
34. He also notes that the withheld information is a paper that the Trust considered prior to making the decision to donate. It outlines the Trust's options and contains candid advice and deliberations on those options.
35. The Commissioner considers the prior publication of that paper ahead of the official procedures in place for the publication of the Trust's report and accounts for 2023/24 (considering that there is a section which discusses this donation) would be likely to mislead the public and lead to misinterpretation.
36. The Commissioner will however point out that he considers the public interest in this case to be finely balanced, as there are compelling arguments on both sides. He feels that once the Trust has published its report and accounts for 2023/24 in September the public interest may tip in favour of disclosure. This is because of size of the donation, the external scrutiny it has received and the public interest in understanding more closely why the Trust felt it was appropriate and good governance to give this donation. The Trust's arguments also relate to protecting the process of publishing accounts. Once publication has happened, these will fall away.

Procedural matters

37. The Commissioner has found the Trust in breach of section 1, 10 and 17 of FOIA. This is because the Trust failed to confirm that it held recorded information falling within the scope of bullet point three of the complainant's request and, issue a refusal notice for that information, within 20 working days of the receipt of the request.

38. It took the complainant having to request an internal review to establish the recorded information the Trust holds for this element of the request and to know what the Trust's position was on its disclosure under FOIA.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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