

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2024

Public Authority: Hertfordshire and West Essex Integrated Care Board (ICB)

Address: The Forum
Marlowes
Hemel Hempstead
HP1 1DN

Decision (including any steps ordered)

1. The complainant has requested communications, correspondence and other information relating to the construction of a new Health Centre. The ICB disclosed information but did redact and withhold some information under section 43(2). The complainant raised queries as to whether further information might be held.
2. The Commissioner's decision is that the ICB has correctly applied section 43(2) to withhold information in respect of parts 2) and 6) of the request. The ICB has located a Project Initiation Document (PID) that the Commissioner considers is in scope of the request and should now be disclosed. The ICB did not therefore comply with its duties under section 1 FOIA as this information was not provided at the time of the request but as the ICB has conducted appropriate searches and found no further information the Commissioner does not require any further steps in this regard.
3. The Commissioner requires the ICB to take the following steps to ensure compliance with the legislation.
 - Disclose the PID document with appropriate redactions under section 40(2) for personal data and 43(2) where the information is of the same nature as the other information withheld under this exemption.

4. The ICB must take these steps within 30 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

5. On 9 April 2024 the complainant made an information request to the ICB, received by them on 11 April 2024, in the following terms:
 - 1) "All internal and external communications (not summaries) by any means between officials of the former WECCG and the current ICB and any and all reports and notes of discussions pertaining to the construction of a new Felsted Health Centre, including any request by [name redacted] which resulted in the report by District Valuer, [name redacted] MRICS dated 8th October 2019. In particular any communications between [name redacted], [name redacted] and [name redacted].
 - 2) All internal and external communications by any means between officials and any and all reports and notes of discussions pertaining to the construction of a new Felsted Health Centre, including any report or letter which resulted in the report by the District Valuer, relied on by [name redacted] in 2024
 - 3) The name and contact details of the District Valuer authoring the report relied on by [name redacted] in 2024.
 - 4) Any and all internal and external communications by any means in April 2024 between [name redacted] and the National Team regarding the disclosure of information in relation to the new Felsted Health Centre.
 - 5) All communications between the ICB and the John Tasker House Practice relating to the ownership and leasing arrangements of the proposed new Felsted Health Centre.
 - 6) The current annual rent amount paid by the WECCG/ICB for the surgery premises in Felsted between 2019 and 2024. The terms of the lease agreement, including the duration of the lease and any clauses related to rent review or renewal options.
 - 7) Any additional costs or charges associated with the lease agreement, such as service charges or maintenance fees."

6. The ICB responded on 22 April 2024 refusing the request under section 43 FOIA – commercial interests.
7. The complainant requested an internal review in a letter dated 26 April 2024 sent recorded delivery but at the time the Commissioner accepted the complaint no response had been received and he used his discretion to accept the case for investigation.
8. Following intervention by the Commissioner an internal review was completed and the outcome communicated to the complainant on 26 July 2024.
9. The internal review addressed each of the numbered parts of the request and provided information with some minor redactions under section 40(2) for personal data and section 43 for commercial information.

Scope of the case

10. The complainant contacted the Commissioner on 7 August 2024 following the internal review response to raise concerns about the continued use of section 43 and to question whether all information held had been located and disclosed.
11. The complainant did not challenge the redactions made under section 40(2). As such the Commissioner considers the scope of his investigation is to determine if the ICB has correctly relied on section 43(2) to redact information and to determine if the ICB has complied with its duties under section 1 of FOIA or if further information is held. .

Reasons for decision

Section 43 – prejudice to commercial interests

12. The ICB is withholding specific property information relating to lease terms, property specifications and rent evaluations and the current amount of rent paid by the ICB for the surgery premises in Felsted.
13. Section 43(2) of the FOIA says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The exemption is subject to the public interest test.
14. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. Firstly, the actual harm that the public

authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.

15. In responding to part 2) of the request the ICB which asked for communications relating to the construction of a new Felsted Health Centre, including the report by the District Valuer, the ICB identified an email and letter. This information was disclosed but a section of the letter contained an extract from the District Valuer's report with technical details of the property and its valuation in potential rent per annum. It is this information along with the information requested at part 6) – the current rent and any clauses related to rent review – that has been withheld under section 43(2).
16. The ICB explained GP practices are independent contractors that deliver NHS services, in most cases through a General Medical Services (GMS) contract. In line with their contract, they receive payments for the delivery of GMS services as well as reimbursements of their premises costs. The terms of those reimbursements are agreed for each GP practice and negotiated on a case by case basis. The terms are often based on the valuation report produced by the District Valuer.
17. The ICB therefore argues disclosing the specific valuation and rent for any practice would likely prejudice the ICB's ability to achieve best value in negotiations and would also impact on other related parties commercial interests.
18. The Commissioner has considered this issue before in a case involving NHS England relating to the rent, lease and ownership information about properties housing GP practices¹. In that case a further argument was advanced that the Commissioner considers is a relevant consideration here. In short, it was argued that businesses exist that offer services to GP practices that wish to challenge the NHS through the District Valuer on the rental valuation for a property with the aim of increasing the amount the GP practice receives in rent from the NHS.
19. It was argued that disclosing information about what each GP practice is paid for rent, when the rent review is due and clauses in the agreement would allow the District Valuer to be challenged more easily, jeopardising the NHS' ability to negotiate rents in the future.

¹ [Freedom of Information Act 2000 \(Section 50\) \(ico.org.uk\)](https://ico.org.uk)

20. It was further explained that, in accordance with the Premises Cost Directions² a form is issued to practices by the NHS/ICB to begin the rent review process. The form is reviewed and passed to the District Valuer for a current market rent valuation. The District Valuer will then visit the premises to confirm what the Practice has put on the form and value the premises to determine a current market rent figure.
21. For leased premises the process is similar to that of GP owned premises but the District Valuer also reviews the lease provided by the landlord. As stated in the Cost Directions, with leased premises the lower of the two figures is reimbursed. For example, if the District Valuer values premises at £100,000 per annum, but the lease gives a figure of £120,000 per annum, the actual amount paid is £100,000. It is the relevant ICB that reimburses for both leased and GP owned buildings.
22. The Commissioner accepted that this kind of information relates to the interests applicable to section 43(2) as it is a commercial harm to the NHS and the ICB.
23. The ICB though must demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. On this point the Commissioner agrees with the reasoning in his earlier decision – making this information available to the public could allow for any interest parties to contact practices at the time their rent review is due and encourage them to challenge the rent review and aim for higher valuations based on what other practices are receiving. More challenges is more cost for the NHS. Providing details of property valuations, rent agreements and lease agreements would be likely to impact the ability to negotiate rent reviews for premises fairly and competitively.
24. The Commissioner is again satisfied that a causal relationship exists between disclosing the disputed information and prejudice to the ICB's commercial interests resulting from the disclosure. Disclosing current rent figures, rents payable and technical property details combined with when rent reviews are due, would facilitate parties with their own commercial interest in these matters to approach a GP practice at the point of its rent review – or indeed, at any other time - with a view to encouraging that practice to challenge the District Valuer and to request higher rent payments from the NHS.

² [The National Health Service \(General Medical Services - Premises Costs\) Directions 2024 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

25. The Commissioner accepts that this alleged prejudice is of substance and he therefore finds that section 43(2) is appropriately engaged.

Public interest test

26. The ICB accepts that there is a public interest in transparency of information within public authorities. However, the ICB considers that the public interest is best served by withholding the information to protect the ICB's ability to obtain best value from its contractors and suppliers, thus ensuring the most appropriate use of public funds.
27. The Commissioner considers that neither party has put forward particularly strong cases for the release or withholding of the information in question.
28. In the Commissioner's view the public interest in the ICB being able to use its resources efficiently and to achieve the best value that it can has greater public interest than, on this occasion, the ICB being seen to be transparent by disclosing the rental/lease information and technical property details.
29. As such the Commissioner finds that the ICB has correctly withheld this information under section 43(2) FOIA.

Section 1 – information held

30. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
31. FOIA provides a right of access to recorded information which is held by a public authority at the time when it receives the request; this does not extend to the right to ask questions, or for explanations, clarification of information or to debate the contents of information, unless the answer to those questions, requests for explanation or clarification is already held by the public authority in recorded form.
32. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

33. The complainant had raised general concerns about whether further information might be held and also specific concerns that the Commissioner asked the ICB to address.
34. The ICB explained that it searched inboxes of key staff who had been currently and historically involved with the property. It also searched shared drives. The ICB clarified these are main stores of information used by the ICB for this work. The searches conducted used keywords which would return any information held relating to the premises.
35. The ICB further clarified some of the names mentioned in the request are not known to the ICB or no longer work for the ICB. This has been ongoing for several years and there were three Clinical Commissioning Groups (CCGs) in the area at the time. During the transition from CCGs to the ICB staff left, inboxes were deleted and searches are therefore limited to information currently held by the ICB.
36. With regard to the more specific queries raised; the complainant had been advised that the issue of the Felsted Health Centre had been the subject of consideration by the 'PID' which they understood stood for 'Project Initiation' but did not know the full title. If this was the case the complainant queried whether submissions to the PID or minutes of meetings would exist.
37. The ICB explained that there appears to be an incorrect assumption that PID refers to a committee or working group but PID is the 'Project Initiation Document' that was presented to the Primary Care Commissioning Committees of the previous CCGs. This document was found following additional searches. The Commissioner has viewed this document and considers it is in scope of the request. There is information in the document that discusses rental income and reimbursements and the Commissioner accepts this can be redacted from the document for the same reasons as outlined in his analysis of section 43(2) earlier in this notice. There is also personal data of staff that can be redacted under section 40(2) in line with the information redacted from the already disclosed documents.
38. The complainant had raised a further concern regarding the response to part 4) of the request. An email disclosed showed that NHS England had been asked two questions but no response email or correspondence had been provided. The ICB confirmed to the Commissioner that no response from NHS England had been received, either at the time of the request or since.
39. In conclusion, the Commissioner accepts that keyword searches of appropriate electronic storage would be sufficient to locate relevant information and were proportionate. The Commissioner notes the

structural changes from three CCGs to one ICB have created some difficulties and it is possible some information in inboxes has been lost. But the ICB has taken appropriate steps to search for the information it does hold. The PID now located is in scope of the request and can be provided with appropriate redactions and the ICB has sufficiently answered the additional queries raised.

40. The Commissioner therefore concludes that, on the balance of probabilities, the ICB does not hold any further recorded information within the scope of the request.

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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