

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2016

Public Authority: Wye Valley NHS Trust

Address: Trust Headquarters
County Hospital
Union Walk
Hereford
HR1 2ER

Decision (including any steps ordered)

1. The complainant has requested private board minutes in which the Trust's PFI contract was discussed as well as legal advice received by the Trust from Bevan Brittan discussing the PFI contract.
2. The Trust considered section 36(2)(c) provided a basis for withholding the minutes and section 42(1) applied to the legal advice, contained within a series of emails.
3. The Commissioner's decision is that section 36(2)(c) is not engaged in relation to information in the minutes and, for the legal advice, section 42(1) is engaged but the public interest favours disclosure.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in the private board minutes which refers to the PFI contract, as identified by the Trust; and
 - Disclose the emails containing legal advice within the scope of the request with redactions for personal data where appropriate.
5. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

6. On 20 May 2015, the complainant wrote to Wye Valley NHS Trust ("the Trust") and requested information in the following terms:

"1) Copies of documents from 'Part B – In Private' board meetings, for the period September 2012 to present, to include:

A. All minutes, and

B. All attached papers which relate to the performance and operation of the Trust's PFI

Although I am aware that prior to the 25th July 2013 Board meeting the Trust did not explicitly refer to an 'In Private' board meeting, I expect an equivalent meeting would have taken place and similar records would be held.

2) Copies of all legal advice provided to the Trust relating to the PFI contract during the period September 2012 to present. Please limit your search solely to records provided by:

A. Bevan Brittan

B. Leviathan Consulting

C. Hoare Lea

D. The Water Hygiene Centre"

7. The Trust responded on 24 June 2015. With regard to private board minutes it stated matters discussed in private board meetings may concern a number of topics which would be exempt on the basis of sections 22, 24, 30, 31, 38, 40, 41, 42 or 43 of the FOIA depending on the subject matter. The Trust further stated that it considered all private board meeting minutes to be exempt on the basis of section 36 of the FOIA and that the public interest had already been considered when determining that the matters should be discussed in a private meeting.
8. For the legal advice relating to the PFI contract the Trust cited section 42 of the FOIA as a basis for withholding any information it might hold.
9. Following an internal review, the Trust wrote to the complainant on 30 June 2015. For the private board minutes the Trust explained that narrowing the request to just the parts of the minutes which relate to the PFI contract would mean that many of the exemptions cited would not apply but to extract the relevant information would exceed the cost limit of £450 and therefore section 12 of the FOIA was engaged.

10. In any event, the Trust considered section 36(2)(c) to be relevant to all of the minutes and again stated that any public interest had already been conducted when determining these matters should be discussed in private. The Trust also stated that minutes relating to the PFI contract with Mercia Healthcare would be exempt on the basis of section 41, 43 or both and cited a previous decision notice¹ where the Commissioner had upheld the use of the section 41 exemption by the Trust.
11. The Trust reiterated its position on the legal advice that had been requested, maintaining it engaged the section 42 exemption and was therefore exempt from disclosure.

Scope of the case

12. The complainant contacted the Commissioner on 23 July 2015 to complain about the way his request for information had been handled.
13. The Commissioner corresponded with the Trust and the complainant on these issues to clarify what information was within the scope of the request and what information was within the scope of the complainant's complaint.
14. During the Commissioner's investigation with the Trust, the Trust confirmed it held 39 private board meetings from 27 September 2012 to the date of the request. The Trust stated that these minutes did not explicitly refer to the PFI contract but did refer to aspects of the contract, specifically disputes, adjudications and a settlement agreement. The Trust confirmed that section 36 was the exemption it wished to rely on to withhold the information in the scope of this part of the request.
15. The Commissioner notes that the Trust, at various times in its responses, also listed a number of exemptions it considered would be applicable to different types of information that *may* be discussed at private board meetings. The list of matters that *could* be discussed and the exemptions that would be used was as follows:
 - Information intended for future publication (section 22);
 - National security, as regards civil contingency planning (section 24);

¹ ICO decision notice FS50519100

- Criminal investigations (section 30);
 - Fraud prevention and risk management (section 31);
 - Security of patients and staff (section 38);
 - Personal information (section 40);
 - Information provided in confidence (section 41);
 - Legally privileged information (section 42); and
 - Commercial interests (section 43)
16. The Commissioner notes that these exemptions were speculatively applied and were listed as possible exemptions that could be relied on for the various types of information. The Trust has not made any attempt to identify information which matches these descriptions within the actual minutes in question and the Commissioner has therefore not considered these exemptions individually. Similarly, section 12 was referred to in the internal review but has not been raised by the Trust after this and the Trust has since been able to identify the minutes which hold information within the scope of the request.
17. The Trust has identified the minutes which contain information on the PFI contract but has not extracted this from the minutes. Although the Trust has specifically referred to sections 41 and 43 of the FOIA as being relevant to the information on the PFI within the minutes it has not made any attempt to link the exemptions to the specific information in the minutes.
18. The Commissioner has therefore focused his investigation on the Trust's use of the section 36(2)(c) exemption to withhold information on the PFI contract from the minutes. The request was worded to ask for minutes and attached papers relating to *the performance and operation of the Trust's PFI*. The Trust has, at times, referred to information which explicitly refers to the PFI contract but the Commissioner is of the view this is a very narrow interpretation of the request. The Commissioner considers information on the performance and operation of the Trust's PFI will include, but not necessarily be limited to, information on the PFI contract, PFI services, disputes with PFI contractors, settlement of disputes and issues with Mercia as the PFI contractor. The Commissioner considers this to be a reasonable interpretation of the complainant's request following correspondence with the complainant and the Trust.
19. With regard to the legal advice; the Trust stated it only held emails from Bevan Brittan which constituted legal advice and this amounted to over 700 emails. The Trust explained it did not hold legal advice from Hoare

Lea, Leviathan or The Water Hygiene Centre as they are not legal advisers and are independent consultants/experts who did not provide legal advice to the Trust. The complainant has accepted this and is content for the decision to focus on the legal advice from Bevan Brittan.

20. The scope of the Commissioner's investigation is therefore to determine if the Trust has correctly withheld the emails containing legal advice from Bevan Brittan on the basis of section 42 of the FOIA and to establish if the board minutes which refer to the PFI contract have been correctly withheld on the basis of section 36(2)(c).

Background

21. The complainant had previously informed the Commissioner that Wye Valley NHS Trust had identified a number of issues with health and safety protocols within Hereford County Hospital, owned and maintained by the Private Finance Initiative (PFI) consortium, Mercia Healthcare Ltd. For example, in 2013 the Telegraph² revealed that the PFI contractors had not been maintaining ventilation units in surgical theatres to the correct standard.
22. Following the Commissioner's intervention, in February 2014 the Trust had released information to the complainant in response to a separate FOIA request concerning the Trust and Mercia Healthcare Ltd. This request was for information about schedules containing details of the relationship between the two organisations. The Trust had previously refused to comply with this request under section 12 (cost exceeds the appropriate limit) and 41 (information provided in confidence) of the FOIA. Following the Commissioner's intervention, the Trust released the project agreement schedules and output schedules to the complainant and that case was closed informally, without a decision notice.
23. The complainant had also requested information from the Trust about any dispute resolution process between the Trust and Mercia and the subsequent complaint resulted in decision notice FS50519100. This decision notice led to the Trust disclosing the settlement agreement to the complainant.

² <http://www.telegraph.co.uk/news/health/news/10486246/Fault-sees-bugs-pumped-into-hospital-ventilation-system.html>

24. Another request was made to the Trust for information on the legal and contractual basis for the agreements reached with Mercia, including signed agreements, amended sections of the PFI Project Agreement and information on any changes to the working relationships with Mercia. This was the subject of ICO decision notice FS50572001.

Reasons for decision

Private Board meeting minutes

Section 36(2)(c) – prejudice to the effective conduct of public affairs

25. Section 36 of the FOIA states that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

26. The Trust has applied section 36(2)(c) to the information contained within the minutes on the PFI contract.
27. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the qualified person for the public authority. The qualified person's opinion must also be a “reasonable” opinion and the Commissioner may decide that the exemption has not been properly applied if he finds that the opinion given isn't reasonable.
28. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
29. The Trust has not indicated who the qualified person is in this case but the Commissioner is aware from previous decisions that it is the Chief Executive, Richard Beeken.

30. The Trust has stated that the qualified person was asked for their opinion about the general issue of the disclosure of private board meeting minutes at the time the request was made. The Trust explained that the qualified person did not have access to any documents when the issue was discussed. The qualified person's advice to the Trust was that by their very nature the meetings are confidential and a forum where members can feel comfortable discussing items that are commercial, individual and relating to staff.
31. It was the view of the Trust board that disclosure of the matters discussed in private board meetings would have an adverse effect on the Trust's ability to operate effectively and all minutes should therefore be exempt on the basis of section 36(2)(c).
32. The qualified person upheld the view submitted to him that disclosing any private board meeting minutes would be likely to prejudice the effective conduct of public affairs. Although the opinion of the qualified person was not recorded, the Commissioner has to accept that it was obtained by the Trust. However, in order to determine whether the exemption is engaged the Commissioner must go on to consider whether the opinion is reasonable. This involves considering:
- whether the prejudice claimed relates to the specific subsection of section 36(2) on which the Trust is relying;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
33. The Commissioner has also issued guidance on section 36³. With regard to what can be considered a 'reasonable opinion' it states the following:
- "The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short if it is an opinion that a reasonable person could hold – then it is reasonable."*
34. It is important to note that when considering whether the exemption is engaged, the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was

³ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

reasonable for him or her to reach that opinion. The Commissioner's guidance on section 36 states that the qualified person:

"must consider the circumstances of the particular case before forming an opinion. We recognise that public authorities will tend to develop a general approach to, or policy on, releasing certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion."

35. Based on this guidance the Commissioner considers that for an opinion to be reasonable it must be based on consideration of the specific information that is being requested. The information provided by the Trust indicates that the qualified person provided their opinion on disclosure of the minutes in general but not with specific reference to the information within the minutes which was the actual subject of the request.
36. The Commissioner acknowledges that the qualified person would know the issues being discussed and would have attended a number of the meetings whose minutes contain relevant information but the request was for information within the minutes on the PFI contract, not for all information in the minutes which appears to be the basis on which the opinion was formed. In fact, having analysed the minutes which the Trust has identified as containing relevant information, the Commissioner notes this amounts to only 19 of the 39 meetings which took place in the specified time frame.
37. Having looked over these minutes the Commissioner notes that they discuss a wide range of issues but references to the PFI contract or disputes make up a small portion of the minutes. That being said there are several sets of minutes which also contain attached papers on PFI issues.
38. The Commissioner does not consider that the opinion that was given related to the specific information that had been requested and, in fact the responses from the Trust indicate that at the time the opinion was requested the Trust had not identified the information within the scope of the request as it later cited section 12 as a basis for refusing the request. Therefore, despite accepting the qualified person would have an awareness of the types of information likely to be included in the minutes the Commissioner cannot accept the opinion was reasonable as it was not based on knowledge of the actual information which was

being withheld and, by the Trust's own admission, the qualified person did not have sight of any of the documents when asked for his opinion.

39. The Commissioner therefore does not consider that section 36(2)(c) has been applied correctly in this case.

Other exemptions – sections 41 and 43

40. The Trust had cited a number of exemptions that could be applied to various types of information within the minutes. However, the information in question is that which relates to the PFI contract and the Trust specifically highlighted sections 41 and 43 of the FOIA as being the exemptions most likely to apply to this information.
41. As with the section 36(2)(c) exemption, the Commissioner has been provided with no evidence to suggest the Trust has considered the use of these exemptions in relation to the specific information in the minutes that it would attract.
42. For section 41 it is not clear who provided the information which the Trust has alluded to having been provided in confidence or how any of the information would be commercially sensitive. As well as this, it has not been made clear what information each exemption would apply to and from viewing the information the Commissioner does not consider that some of the information, even from an initial review, would be either commercial in nature or information attracting a duty of confidence.
43. The Commissioner has therefore not gone on to consider these exemptions in any further detail. As he has not been persuaded that any of the exemptions cited by the Trust provide a basis for withholding the relevant information in the board minutes he now requires this information to be disclosed.

Legal advice

Section 42 – legal professional privilege

44. The Trust provided the Commissioner with over 700 emails which it state held legal advice from Bevan Brittan. The request specifically asked for legal advice provided *to* the Trust relating to the PFI contract *from* Bevan Brittan.
45. The Trust initially stated it held "hundreds of emails on legal advice" but did not make it clear if these emails contained information within the scope of the request i.e. legal advice on the PFI contract. The Trust argued it would take a significant amount of time to search all of the emails to identify the relevant information. Following further

correspondence with the Trust, it was agreed that these emails would be reviewed and scanned for pertinent legal advice and provided to the Commissioner.

46. Once these emails had been provided to the Commissioner, he reviewed the information in the emails and noted that the information in many of the emails was not within the scope of the request either because it was emails to Bevan Brittan from the Trust or it was on issues other than the PFI contract. Following further correspondence the Trust looked again at these emails and identified the specific emails and attached papers which were within the scope of the request.
47. The Trust has stated it considered section 42 to be engaged in relation to this specific information as it protects information shared between clients and their legal advisers for the purposes of obtaining legal advice or for ongoing legal action. The Trust stated that this ensured it could be confident in being frank and candid with its legal advisers without fear of disclosure.
48. The information has therefore been withheld on the basis of section 42(1) which provides that information is exempt from disclosure if it is protected by legal professional privilege.
49. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
50. The category of privilege the Trust is relying on to withhold the information is advice privilege.
51. In this case, the advice was provided directly to the Trust by its solicitors for the sole purpose of providing legal advice on details of the PFI contract. The Commissioner accepts the information, both in the emails and attachments, can be considered to be legal advice provided by solicitors to their clients (the Trust) and there is no suggestion that the privilege attached to this information has been lost by any previous disclosures; he therefore accepts that section 42 is engaged.
52. As section 42 is a qualified exemption the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of disclosure

53. The Trust acknowledges there is a public interest in ensuring openness and transparency and sharing information on mechanisms and machinations behind the provision of services.
54. The complainant has argued that there is a strong public interest in any information around PFI contracts due to the large amounts of money involved. The complainant has pointed out that issues at Hereford County Hospital related to the PFI contract were publicly known and the public interest in disclosure of information which sheds some light on these known issues is strong.

Public interest arguments in favour of maintaining the exemption

55. The Trust has explained that the information that is being withheld is, in the main, related to the unavailability of areas and units of the hospital and clinical decisions taken at the time of the advice. During this period of time the Trust had to make decisions to keep services and care to patients flowing whilst also looking to vacate parts of the hospital to allow Mercia to undertake work.
56. The Trust argues that disclosure of the information may cause distress and misunderstanding. It argues that at the time of "unavailability" it issued press notices to keep the public up to date and the Trust does not consider that disclosure of this legal advice would be appropriate as it would mislead the public into thinking that the situation was not safe at a time when the Trust and Mercia had reached an understanding on how to resolve issues.

Balance of the public interest

57. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption". (Para 41)

58. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the

information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- How recent the advice is; and
 - Whether it is still live.
59. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
- The number of people affected by the decision to which the advice relates;
 - The amount of money involved; and
 - The transparency of the public authority's actions.
60. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
61. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
62. In this case the Commissioner notes the advice contained in the emails dates back to 2012 and 2013 and relates to a specific situation at the hospital at that time. For this reason the Commissioner has to conclude that at the time of the request the advice was not still live as it was no longer relevant to decisions being made by the Trust as the situation has been resolved. In light of this the Commissioner considers there is weight to add to the public interest arguments in favour of disclosure.
63. The Commissioner acknowledges that decisions by Trusts on how to efficiently operate in times of flux and upheaval are likely to affect individuals using the services of a hospital. It is therefore important that a Trust can seek legal advice on how to continue to provide services and

to assist in making clinical decisions. That being said it would appear that the issues being advised upon had been concluded at the time of the request.

64. In terms of transparency; the Trust has issued press statements on various issues related to the PFI and has stated it issued updates at the time of the advice when the issues were ongoing. At the time releasing details of the legal advice would have prejudiced the decision making process but the same cannot be said at the time of the request. The Commissioner therefore considers this adds further weight to the argument that disclosure of the information would be in the public interest as it would demonstrate that decisions, both clinical and operational, made by the Trust were taken on the basis of sound legal advice and consideration of all of the potential factors.
65. The Commissioner also acknowledges there is a general public interest in increased transparency and he understands that the PFI programme has been under scrutiny. The Commissioner is aware that it has become publicly known that there were issues with the fire safety procedures at the Trust and other aspects of the PFI contract. The legal advice which relates to this issue and the decisions made by the Trust to remain functional in a time when work was needed would increase transparency around what happened to deal with the problems.
66. The Commissioner recognises the argument that a client should be able to seek legal advice to help make decisions and should be entitled to do so away from scrutiny so that all options can be considered and frank advice obtained. In this case, as this issue had been resolved by the time of the request the Commissioner considers the public interest in protection the principle of legal professional privilege was weak.
67. Therefore, in light of the strong public interest in transparency both in general and in relation to the decisions made in relation to issues with the PFI, the Commissioner has concluded that in this case it is sufficient to outweigh the inherent public interest in maintaining legal professional privilege which has been greatly diminished over time. The Commissioner now requires the Trust to disclose the legal advice with appropriate redactions to remove the names of any individuals.

Right of appeal

68. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

69. 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.
70. 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

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