

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2018

Public Authority: Newcastle Upon Tyne Hospitals NHS Foundation Trust

Address: The Freeman Hospital
Newcastle upon Tyne
NE7 7DN.

Decision (including any steps ordered)

1. The complainant has requested information relating to fire safety on the private finance initiative state used by Newcastle Upon Tyne Hospitals NHS Foundation Trust (the trust).
2. The Commissioner's decision is that the trust has incorrectly applied section 43(2) (commercial interests) to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information
4. 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.
5. The Commissioner further finds that the trust breached section 10(1) of the FOIA by failing to provide its response within the designated timescale.

Request and response

6. On 27 June 2017, the complainant wrote to the trust and requested information in the following terms:

"Under the Freedom of Information Act, please send me details of documents received by the trust board since 2014 into problems

concerning fire safety on the private finance initiative (PFI) estate used by the trust in Newcastle.

Please also send me all reports received by the trust from consultants Arup concerning fire safety.

Please also provide details of temporary measures taken to ameliorate fire risks in the estate and provide details of remedial programmes of work to take fire safety issues that have been identified."

7. The trust responded on 1 November 2017 and refused to provide the requested information citing section 31 of the FOIA as its basis for doing so.
8. Following an internal review the trust wrote to the complainant on 21 November 2017 and maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 7 December 2017 to complain about the way his request for information had been handled and stated:

"My request mainly relates to information dating back several years which came to light well before the Grenfell Tower fire and is therefore unrelated to it. The trust has already reached a settlement over the problems in the estate related to this and any legal process concerning this has ended.

In my view, the exemption does not apply. Even it did apply, it could not apply to all the information in the documents concerned, and there are significant public interest arguments to justify the publication of the information for any details that remain.

To be clear, the documents requested are historic, detailing failings in fire safety. A programme of work to put them right was underway before the Grenfell Tower fire.

I note the trust has not considered any public interest arguments in favour of publication.

I would argue that the prejudicial effect of publication is not real, actual or of substance.

The trust has not set out any potential harm from publication and therefore no causal link between disclosure and harm of publication of historic information.

It has not considered the likelihood of any harm occurring.

Publication is also justified in that problems with fire safety in PFI estate have occurred elsewhere, raising questions about other existing buildings and future programmes of work in the sector both in Newcastle and nationally.

In this case, it has involved considerable inconvenience for staff and patients, wasted public money and staff time, and potentially damaged patient safety and delayed valuable research.

Publication will also further inform the national debate around fire safety in public buildings and in this case offer public assurance that the required work is being carried out to make the buildings safe."

10. Following further correspondence with the Commissioner, the trust withdrew its reliance on section 31 and instead cited section 43(2) and subsequently advised the complainant of its position.
11. The complainant advised that he wished to continue with his complaint on the basis of the trust's amended position. The Commissioner therefore considers the scope of this case to be to determine if the trust has correctly applied section 43(2) to the withheld information.

Reasons for decision

Section 43 – prejudice to commercial interests

12. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
13. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which 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;
 - Secondly, the public authority must be able to 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. Furthermore, the resultant prejudice which is alleged must be real, actual, or of substance, and;

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge. The anticipated prejudice must be more likely than not.
14. The Commissioner has looked at each criterion in turn. With regard to the first criterion, while the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. Moreover, the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life.
 15. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
 16. The trust explained that it only commissioned one report and the subsequent reports were raised by ARUP (the independent assessor) and passed direct to the PFI provider and contractor to commission specific work. The only involvement for the trust is to ensure that the contractor has access to the specific areas. ARUP then review the work and sign off on completion.
 17. The withheld information relates to contractual obligations and the Commissioner is satisfied that this falls within commercial interests.
 18. From the wording of the exemption it is clear that the exemption can be applied on the basis that the prejudice either 'would' occur, or the lower threshold, that the prejudice would be 'likely' to occur. The trust has said that it believes disclosing the withheld information 'would' prejudice commercial interests. The term 'would' is interpreted as meaning that the likelihood of the prejudice occurring is more probable than not, ie greater than 50%.

The prejudice

19. The trust argued that release of this data to the press would severely prejudice the Trust, the PFI provider and contractor.

20. The trust provided the Commissioner with its arguments with regard to the envisaged prejudice, however, it is not appropriate to repeat them in full in this decision notice. With regard to the prejudice to its own commercial interests the trust stated that disclosing the information would prejudice:
- a) It's ongoing relationship with the PFI provider and contractor, bearing in mind that the residual work is still not complete.
 - b) The PFI provider and contractor would consider the trust in breach of the confidential settlement agreement. This is likely to have financial implications for the trust in terms of legal cost.
21. Release of the data would prejudice both the PFI provider and contractor in:
- a) Their work with other NHS organisations in relation to PFI. That could have serious financial implications for both parties and it should be noted that there is currently a substantial cost for the contractor to complete the residual work.
 - b) Their relationship with the trust would be put under strain. Both parties have indicated that they would require legal review of the confidential agreement before any release.
 - c) Release of redacted copies would prejudice against the contractor.
22. In summary, the trust consider that to release the data into the public domain would have a potential impact on patient care and erode public confidence. It would cost the trust financially as legal costs would be incurred, which is not a good use of public funds when the NHS is already at stretching point.
23. It would have a negative impact both financially and in reputation for the PFI organisation and the contractors in any further work being undertaken nationally for the NHS.
24. The Commissioner acknowledges the confidentiality clause and this demonstrates that the parties involved had some concerns over the commercial sensitivity of the information. However, this clause appears to be both vague, and all encompassing. Therefore, despite this clause the trust has not provided any further explanation based on an understanding of the PFI provider and contractors concerns, as to what information is sensitive and why.
25. In line with Tribunal decisions, the Commissioner will not consider claims that a third party's commercial interests would be harmed without some evidence that these reflect genuine concerns expressed by the third party involved. As the trust has not provided the Commissioner such evidence the Commissioner will not consider this aspect any further.

26. Returning to the trust's argument that disclosing the withheld information would harm its own commercial interests the trust argued that release of this data to the press would severely prejudice the trust. It explained that the areas highlighted in the report that were considered major were dealt with immediately. It further stated that if it agreed to redact each line and release the document it was more likely to be misconstrued.
27. The Commissioner is not persuaded that this is the case as the trust could provide the appropriate context if disclosing any redacted information.
28. The trust further stated that as the actions plans are actually documents raised by the other parties and specifically covered in the confidentiality agreement it would not be possible to release those without the explicit consent of the two parties. It also noted that fire is a relatively small part of the overall remedial work and that the total works covered by the settlement agreement still has 18 months for completion.
29. It considered that there is no public interest in any article that is likely to prejudice the public and patients against one of the largest and most successful English Trusts. Any article that erodes public confidence is not in anyone's interest and although there has never been any risk to patients or staff an article is still likely to cause concern.
30. The trust informed the Commissioner that it has already made a statement regarding the fire cladding that was classed as C1 (similar to Grenfell) where it confirmed that there were 4 small areas where C1 cladding was in place and that the cladding was upgraded within 7 days of being found. Indeed that statement has been released under FOI to other press organisations.
31. The trust has applied Section 43 to all the withheld information and Commissioner has reviewed it with that in mind.

The Commissioner has considered the arguments presented to her by both parties. As noted in paragraph 26, the Commissioner has not afforded the trust's argument relating to the redacted information being misconstrued any significant weight as the trust could provide appropriate context when providing any information in response to a FOI request.

32. Neither does she consider that disclosure would have an impact on patient care, and it could be argued that contrary to eroding public confidence, it could actually increase with the knowledge that action was taken.

33. However, she does acknowledge that the relationships between the parties could be placed under strain should the information be disclosed and has afforded this some weight.

Commissioner's decision

34. The Commissioner notes that this information was as a result of legal proceedings and was subject to a confidential settlement agreement. Following this an inspection was undertaken and remedial works agreed. She further notes that residual work is still ongoing.

35. The agreement states:

*"The terms of this Agreement (to include all schedules/annexes) AND any discussions, negotiations and/or communications that have led up to and otherwise relate to this Agreement, contain information that is commercially sensitive to each of the Parties in which has been exchanged between them in confidence (the "**Confidential Information**").*

Each Party shall, and shall procure that its officers, employees, advisers and agents shall, keep confidential all the Confidential Information and shall not disclose the Confidential Information to any person whatsoever, whether by failure to exercise due care or otherwise by any act or omission, unless the prior written consent of each of the other Parties has first been obtained."

36. However, the Commissioner's own guidance¹ states:

"The third party may ask the public authority to accept a confidentiality clause in a procurement contract in order to prevent the future disclosure of information. Such clauses may identify the information considered by the two parties to be confidential and therefore not to be made public. They can be useful in identifying prejudice to a third party's commercial interests and also in providing a framework for redress in the event of an unauthorised disclosure.

However a confidentiality clause should not be used as a substitute for consultation (as long as this is possible) following any information request and does not necessarily mean that section 43 will apply.

Public authorities should also be wary of circumstances where an organisation attempts to impose a blanket confidentiality clause on all

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

the information contained in a contract. In the event of a complaint to the Commissioner, the whole contract would be reviewed and, where information was not considered to be commercially sensitive, a confidentiality clause would not prevent its disclosure. Public authorities must realise they cannot contract out of their FOIA statutory obligations."

37. Whilst the Commissioner acknowledges that the confidentiality clause does not form part of the original procurement contract, the Commissioner's approach can reasonably be extended to the settlement agreement.
38. The Commissioner is not persuaded that the exemption at section 43(2) is engaged. The trust has not demonstrated that the actual harm which it alleges would occur if the withheld information was disclosed and therefore fails the first criterion. Furthermore, there is no evidence that the trust has consulted with the other parties to consider what information could be disclosed and has applied a blanket exemption to all the information.
39. As the Commissioner is not satisfied that the exemption is engaged she has not gone on to consider the public interest test.

Section 10 – time for compliance

40. Where a public authority receives a request for information it is obliged under section 1(1) to confirm whether it holds that information, and if so, subject to the application of any exemptions, to communicate that information.
41. Section 10 of FOIA states that a public authority must comply with its obligations under section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
42. The request was made on 27 June 2017 and the trust did not respond until 1 November 2017. Although the Commissioner notes the trust apologised for the delay, this is clearly a breach of section 10. As the trust did issue a response the Commissioner does not require any further action in this regard.

Other matters

43. The Commissioner has concerns about the way in which the trust responded to her enquiries. The initial response was entirely inadequate and it took several weeks, with guidance from the Commissioner, for a reasonable response to be provided.

44. That response in itself, was not of the standard expected. It did not provide confirmation as to who were the holders of all the information requested, and in one part appeared incomplete.
45. The trust did not provide clear and separate arguments relating to the prejudice envisaged, the likelihood of that prejudice or the public interest, or any evidence of consultation with the other parties.
46. The Commissioner therefore recommends that the trust review its handling of this request and complaint to ensure lessons are learned and improvements made.

Right of appeal

47. 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

48. 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.
49. 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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