

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2022

Public Authority: East Sussex Healthcare NHS Trust
Address: St Annes House
729 The Ridge
St Leonards-on-Sea
East Sussex
TN37 7PT

Decision (including any steps ordered)

1. The complainant has requested from the East Sussex Healthcare NHS Trust (the Trust) the Building for our Future (BFF) Strategic Outline Case (SOC). The Trust withheld the information citing section 36 FOIA – prejudice to the effective conduct of public affairs. Later, the Trust also cited section 21 (information accessible to the applicant by other means) for part of the information. During the Commissioner's investigation the Trust confirmed that it no longer wished to withhold certain appendices under section 36 as they were now in the public domain and provided them to the complainant.
2. The Commissioner's decision is that the Trust has correctly cited section 21 and that parts of the information are reasonably accessible to the complainant by other means. He has also decided that section 36 applies to the remaining requested information and that the public interest, at this time, lies in maintaining the exemption.

3. The Commissioner does not require the public authority to take any further steps.

Background

4. By way of background, the following information was provided to the Commissioner by the Trust:

'The "Building for our Future" ('BFF') project is the Trust's name for its bid for the Government's New Hospital Programme (part of the Government's Health Infrastructure Plan) under which national funding has been announced for building 40 new hospitals by 2030...

Details of the processes by which funding is being awarded is set out in the Government's guidance document on the Health Infrastructure Plan [Health Infrastructure Plan \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614441/Health-Infrastructure-Plan-2019.pdf). The precise funding which will be available for each individual project has not yet been determined by the Treasury and Department of Health and Social Care, and therefore the Trust's proposals have been worked up on a 'best case' basis, but it is possible that what (if anything) is approved by the Government in the near future will be different to what has been submitted by the Trust in its Strategic Outline Case."

5. The Trust explained that it is in the first stage of what is normally a three key stage process to gain funding approval. The SOC establishes the need for investment, appraises the main options for service delivery and provides management with a recommended or preferred way forward for further analysis and external approvals from the DHSC and NHSE/I as the national coordinating bodies for Health Improvement Programme approval and capital investment for the NHS. The New Hospital Programme (NHP) is currently going through the process of submitting its business case to the Treasury for approval. This will provide the direction of travel for the hospitals in the NHP. After that further internal discussion will be required which will include refinements to the proposals before moving to a final business case, prior to funds being awarded.

Request and response

6. On 19 April 2021 the complainant wrote to the Trust and requested information in the following terms:

"Please could we have a copy of the BFF Strategic Outline Case (SOC) which have been referred to in public Board documents."

7. The Trust responded on 21 April 2021 and refused to provide the requested information citing section 36 FOIA.
8. On 22 May 2021 the complainant requested an internal review.
9. The Trust provided an internal review on 9 June 2021 in which it maintained its original position.

Scope of the case

10. The complainant contacted the Commissioner on 13 July 2021 to complain about the way their request for information had been handled, arguing that the information should be provided as the public are supposed to be involved in the plans.
11. The Trust confirmed in its response to the Commissioner of 16 February 2022 that it was also relying on section 21 FOIA for parts of the requested document that were already in the public domain.
12. Later on in the investigation it transpired that there were further appendices that had been placed in the public domain subsequent to the internal review. The Trust subsequently provided the information in the form of links to the complainant on 9 March 2022.
13. The Commissioner considers that the scope of this case is the Trust's citing of section 21 and section 36 FOIA to the remaining withheld information.

Reasons for decision

Section 21 – Information reasonably accessible by other means

14. Section 21 of the FOIA states:

"(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

15. The Trust has cited section 21 concerning parts of the requested information that are included in the full SOC which is the requested information.

16. The purpose of section 21 is to protect the resources of public authorities. Public authorities do not have to respond to requests for information where the requester could have found the requested information elsewhere. Section 21 also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes.
17. For information to be "reasonably accessible" it does not need to all be found in a single location. Information is regarded as being in the public domain if it is reasonably accessible to the general public at the time of the request. So long as all the information requested can be accessed, it will usually be "reasonably accessible" to the applicant. Whether the section 21 exemption can be successfully applied is also dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it.
18. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
19. The Trust explained to the Commissioner that aspects of the SOC are now in the public domain through other channels. Appendices C, D and E of the full SOC are in the public domain. There is duplication of elements of the information within the exempt full SOC and the published summary¹ versions. Examples of this are set out below:

Information in full SOC	Information in summary version on Trust website	Information in summary version presented to the local authority²
Critical infrastructure risk figures (£49m/2), p. 8		Equivalent information on slide 2.

¹ [2021-12-23 EHST-Summary-16pp-A4 V08.indd \(esht.nhs.uk\)](#)

² [Appendix 1 - ESHT BFF Summary Draft SOC.pdf \(eastsussex.gov.uk\)](#)

Rationale and case for change narrative and diagram p. 5 and supporting information, p. 41. Housing growth on p. 42		Slides 2-3 include an equivalent version of the narrative and diagram and statistics
Description of services provided at each site, p. 24 (pdf p. 30)	Description of services provided by the Trust, p. 6	
Fixed strategic points diagram, p. 35 (pdf p. 41)	Trust's strategic commitments diagram, p. 7.	
Figure 25 on p. 87		A version of this appears as the options diagram slide 5
Descriptions of benefits, table 10 (p.63)	Benefits realisation, p. 14	

Programme management description, p. 187		Slide 8, programme management summary.
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20. Firstly, the Trust has published summary versions of the SOC on its website. The Trust explained that it had engaged with the public and other stakeholders throughout the development of the proposals that led to the SOC. This includes a summary presentation about the BFF project that was presented on 2 March 2021 at a meeting of the East Sussex Health and Wellbeing Board. The Trust also made a summary version available to the local authority East Sussex Council (responsible for health overview and scrutiny) that has been published (see paragraph 19).
21. The Trust explained that other parts of the SOC are published in other locations – for instance, the Trust's CQC ratings are on the Trust's and CQC website, see paragraph 22 below. There are aspects of the SOC that duplicate information published by other parts of the NHS, e.g. pages 36-38 repeat information published from the ICS website – [Sussex-2025-Our-vision-for-the-future.pdf \(sussexhealthandcare.uk\)](#).
22. Three of the appendices (C D and E) are in the public domain. These are the links:

Appendix C - [Provider section - RXC East Sussex Healthcare NHS Trust \(05/11/2019\) INS2-5806147281 \(cqc.org.uk\)](#);

Appendix D - [Microsoft Word - ESHT SDMP Update Jan18](#);

Appendix E - This document was published in June 2018 but is no longer on the Trust's website as it is out of date. It has been replaced with the one available on this link - [Outstanding-by-2020-Highlights-from-our-Annual-Report-and-Quality-Account-2017-18.pdf \(esht.nhs.uk\)](#).
23. In answer to the Commissioner's question, the Trust explained how the requested information could be accessed by an individual and why it considered the information to be reasonably accessible. The Trust

stated that it had a page³ on its website dedicated to BFF with information about the SOC on it, which is available to all members of the public. The Trust points out that the complainant had made their request via email and has referenced the Trust's public board papers in their request, which indicate they would be able to find all of the above information online. The Trust acknowledges that the URLs do not include dates but that it is evident from the front page of [Appendix 1 - ESHT BFF Summary Draft SOC.pdf \(eastsussex.gov.uk\)](#) that the document was presented in March 2021, and there has been a page on the Trust website Building for our Future – [Building for our Future – East Sussex Healthcare NHS Trust \(esht.nhs.uk\)](#) since October 2020.

24. This exemption uses the words 'reasonably accessible to the applicant'. As the applicant/complainant has a particular interest and knowledge of the BFF and issues surrounding it, the Commissioner has decided that the information listed in the table is accessible to them. Therefore, the exemption is engaged.
25. However, the Commissioner notes that the Trust did not cite section 21 until it responded to the Commissioner, it was not mentioned in the refusal notice or the internal review. The Trust confirmed to the complainant during the Commissioner's investigation that, appendices C, D and E had been accessible at the time of the internal review and therefore provided the links to the complainant on 8 March 2022.

Section 36 – Prejudice to the effective conduct of public affairs

26. Section 36 FOIA provides 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)(b) would, or would be likely to, inhibit -

i. the free and frank provision of advice, or

ii. the free and frank exchange of views for the purposes of deliberation, or

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

³ [Building for our Future – East Sussex Healthcare NHS Trust \(esht.nhs.uk\)](#)

27. The Trust has cited section 36 to the parts of the withheld information that do not fall under section 21. The Commissioner has been provided with this information. He is unable to describe the withheld information in any detail for obvious reasons.
28. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. 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 exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect of the Trust is Joanna Chadwick-Bell, Chief Executive Officer. The Commissioner is satisfied that Joanna Chadwick-Bell was the appropriate qualified person to give an opinion. The agreement of the qualified person was originally sought in order to sanction the refusal notice and the internal review to the complainant. The QP sanctioned the response on 21 April 2021 by email. The date the QP's opinion was first formally set out was not until 9 June 2021 at the internal review stage, when the information was recorded as shown to the QP and the exemption highlighted was section 36(2)(c). The prejudice was identified at the higher level. QP opinion was again sought on 15 February 2022. At this point sections 36(b)(i) and (ii) were also cited alongside section 36(2)(c) but at the lower level of prejudice.
30. The Trust acknowledges that the views of the QP were not captured at the time the FOI response was given using the ICO's template record for the qualified person's opinion. However, it provided an email chain that demonstrated that the QP had considered sections 36(2)(b)(i), (ii) and (c) applied at the time the request was received and the response was being processed. The QP had access to the SOC at the time the opinion was provided. In fact, the Trust explains that the QP was the accountable officer and that the SOC had previously been considered and approved by the Trust's Board. The QP had also presented the SOC to external stakeholders and was very familiar with its contents and the potential prejudices that disclosure would cause.

31. The Commissioner next needs to establish whether the qualified person's opinion was reasonable.

Is the qualified person's opinion reasonable?

32. In the QP form there were arguments both in favour of withholding and in favour of disclosing the information.

Sections 36(2)(b)(i), (ii) and 36(2)(c)

33. The QP in relation to the exemption at section 36(2)(b)(i) and (ii) must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The approach of the Commissioner to section 36(2)(c) is that it should only be cited in relation to a prejudice that would not be relevant to any of the other exemptions in Part II FOIA.⁴

34. The Commissioner's guidance regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...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."⁵

35. In order to determine whether section 36 is engaged the Commissioner must determine whether the QP's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -

- Whether the prejudice/inhibition relates to the specific subsection that has been cited, in this case sections 36(2)(b)(i), (ii) and (c).

⁴ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

⁵ *ibid*

If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.

- The nature of the information and the timing of the request.
- The qualified person's knowledge of, or involvement in, the issue.

36. The QP is of the view that the disclosure of the withheld information "would be likely to prejudice" (the Commissioner has taken this to mean "inhibit") the free and frank provision of advice in the form of feedback from NHSE/I on the draft submissions. It would also inhibit the free and frank exchange of views in the form of the Trust acting on that advice to develop a revised version of the SOC and compromise the 'safe space' needed to refine it and any adjustments to the proposals from DHSC and NHSE/I feedback. The Trust also contended that disclosure would be likely to prejudice the effective conduct of public affairs for two reasons:

- Disclosure would prejudice the approval and construction of new hospitals and facilities which is an aspect of the conduct of public affairs.
- Cooperative behaviours between NHS bodies is a statutory duty in section 72 of the NHS Act 2006. NHSE/I has expressed concern about disclosure. The Trust argues that weight should be given to this view and that it is prejudicial to the effective conduct of public affairs to disclose the requested information in the face of those concerns.

37. The Trust did consider what arguments were on the side of disclosure. It stated that as significant parts of the SOC were in the public domain, from one point of view, it could freely disclose at least some of the further elements with little or no prejudice. The Trust describes it as a 'good news' project and that there are few downsides that the public would be unhappy about, explaining that it is planning rebuilds of facilities with no major changes to what services are delivered where or workforce changes. The Trust says that it is not suggesting anything radical which would provide a stronger reason for needing a safe space in order to consider, develop, deliberate and refine the project. The NHS organisations involved are professional organisations and the proposals will be considered objectively and no one concerned will be swayed by the SOC being in the public domain.

38. However, the Trust considered that the arguments in favour of maintaining the exemption are stronger. The full SOC contains significantly more information than the public presentation, including financial information and the various options available to the Trust, depending on available funding. Some of the information is based on

draft recommendations that require review and agreement. The Trust contends that it needs a 'safe space' out of the public gaze to discuss those plans. Its view is that further down the line it will know the financial envelope and timelines, then public consultation will take place along with public release of those plans. The resource envelope is the determining factor in the light of feedback from NHSE/I and the DHSC. Premature publication may force the Trust's hand or NHSE/I in determining what is available. The feedback they provide could be considered 'advice' which the Trust will need to implement as part of developing and refining its proposals. The Trust also needs a 'safe space', away from the public gaze, to discuss any amendments to the plans as a result of that feedback. Premature publication may fetter the Trust's free and frank deliberation internally, should the current version of the SOC be published.

39. The Trust states that it is focussed on covid recovery. If it had to work on addressing any public misunderstandings based on the disclosure of the full SOC, this would absorb a disproportionate amount of Trust resource when it should be focussed on recovery from the pandemic and addressing other challenges that it is facing.
40. Another factor that the Trust took into account is that significant parts of the SOC have been published voluntarily by the Trust. It has only found one example of where a Trust has published the full SOC. Most other new hospital candidate organisations have published a summary version of their SOC.
41. The Commissioner accepts that the QP's reasoning covers sections 36(2)(b)(i), (ii) and, to a lesser extent, section 36(2)(c) and that the QP's signed opinion is one that a reasonable person could hold. The release of most of this information would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation and prejudice the effective conduct of public affairs. He agrees that the likelihood of inhibition or prejudice is at the lower level, "would be likely to". The QP was provided with arguments on several occasions and gave their opinion again, after the Commissioner began his investigation.
42. However, the Commissioner notes that the list of the appendices provided by the Trust alongside the appendices themselves states that certain of them could be disclosed. These are appendices G, N and Q. In fact these were already in the public domain. The Trust explained to the complainant that it was no longer relying on section 36 for these appendices and provided them on 8 March 2022 in the form of links to the information now in the public domain which was not at the time of the internal review. The Commissioner is satisfied that the

information has been provided and the complainant has acknowledged its receipt, though stressed that it was not what they were seeking.

43. The Commissioner therefore accepts that sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged regarding the remaining requested information.

Public interest

44. Even though the exemption is engaged, the Commissioner still needs to consider whether it is in the public interest to disclose this information.

Public interest factors in favour of disclosing the information

45. The complainant argues that the SOC should be disclosed in full in order that local people can understand and participate in the planning of their health services. Their view is that information could be provided with redactions though, as they have been unable to see the information, it is difficult for the complainant to say. The complainant suggests that there might be other options to provide the information. As the public are supposed to be involved in the plans, they do not understand why any redaction would be necessary or appropriate.
46. The complainant stated that the Government announced funding for a new hospital at Eastbourne and hospital improvements in Hastings and Bexhill. The complainant disagrees with the Trust's decision to withhold the requested information. Given the document's importance to the local population it argues that those wishing to provide input to plans should have access to it. As a summary has been published there can be no valid objection to disclosure of the whole report. Publication would help to inform public debate about the contents and the consequent feedback may lead to improvements. The public should be allowed to contribute to its contents. There is overwhelming public interest in disclosing the information. Local people need sight of the full document to assess it and contribute to the planning of their future health services. The complainant's view is that this is greater than any public interest that may exist in withholding it.
47. The Trust has also provided the Commissioner with its public interest arguments in favour of disclosure. Firstly, it acknowledges the understandable public interest in the new hospital programme, both nationally and locally. Disclosure would allow an early sight of the proposed plans under this programme. It would also improve transparency about the way the Trust operates and improve public understanding of the risks and benefits of the programme. Disclosure

would help members of the public give high quality responses to the public engagement on the proposals. This would be consistent with the Trust's commitment to proactively publishing data on matters of wider public interest. Finally, the Trust notes the views of the complainant and the reasons behind those views which favour disclosure.

Public interest factors in favour of maintaining the exemption

48. Despite the above, the Trust considers that the public interest in maintaining the exemption is greater than that in disclosure. It is important for the Trust to be able to discuss the SOC with NHSE/I and the NHP without the various options that include financial information going into the public domain. There is a strong public interest reflected in the Trust and NHSE/I's statutory duties to exercise their functions economically, effectively and efficiently. The Trust considers that facilitating the proper scrutiny and approval process of the SOC without the external pressure of it being prematurely disclosed is in the public interest.
49. The Trust acknowledges that there are local anxieties about the new hospital programme, that it is 'privatisation' or the 'closure' of existing facilities. The Trust states that this is not true but that stakeholders need careful handling on the unmediated disclosure of the SOC which may be prone to misinterpretation. This would divert the resources of the Trust into managing the impact of disclosure which is not in the public interest, particularly when the Trust remains focused on the pandemic response and the recovery from it.
50. Finally, there is a strong public interest in what the Trust describes as 'joined up' public authorities. By this the Trust means, giving appropriate weight to any concerns raised by these public authorities. The Trust argues that it should not behave in a way that is contrary to the interests of all the bodies concerned and that this is reflected in its statutory duty to cooperate as NHS bodies in line with section 72 of the NHS Act 2006.

The balance of the public interest

51. Firstly, the Commissioner is not persuaded by the Trust's public interest arguments regarding any misunderstandings that might arise from disclosure because it is always open to the Trust to provide explanation and context where it feels it is necessary. Although sympathetic to the resource difficulties inflicted by the pandemic on public authorities (and particularly NHS authorities) the Commissioner does not accept that this equates to the non-disclosure of any information that might divert resources.

52. However, the Trust believes that the public interest in scrutiny and transparency can be met in other ways than disclosure. For instance, the local authority scrutiny committee could review the BFF project. It points out that there are various layers of NHS oversight in project approval. The information is also 'live' which weighs against disclosure. Significant elements of the SOC have already been disclosed in the 'summary' which means that the public interest in the disclosure of the whole document is weaker.
53. The Commissioner acknowledges the complainant's concerns about the full SOC which they have only been able to see in summary. There is clearly a fundamental public interest in individuals located in the area covered by the Trust's hospital provision being able to assess the full SOC, comment, and contribute to the plans. Set against this, the Trust argues that it requires a 'safe space' for the reasons provided earlier in this decision notice.
54. On balance, the Commissioner agrees with the Trust's view that the release of the requested information is not in the public interest at this time. This may not have been the case had the Trust not published a summary of the SOC and attempted to alleviate public anxiety about 'privatisation' and the 'closure' of existing facilities. He accepts that the full SOC contains a range of options which are dependent on a number of factors such as approval and funding. The SOC is subject to feedback from NHSE/I and the DHSC and therefore could be amended in the light of that input. The full SOC is, as the Trust describes, the first stage in a process. The Trust argues that it requires a 'safe space' for this reason. In this instance, the public interest at the time the request was made, lay in the maintenance of the exemption.

Right of appeal

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

56. 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.
57. 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

Janine Gregory
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