



Neutral citation: [2023] UKFTT 780 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Numbers: EA/2022/0155; 0331;
0333; 0340; and 0384

Considered on the papers
On 1 September 2023

Decision given on: 26 September 2023

Before

JUDGE OF THE FIRST-TIER TRIBUNAL SWANEY
TRIBUNAL MEMBER MURPHY
TRIBUNAL MEMBER TAYLOR

Between

MARK BILL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

LIVERPOOL UNIVERSITY HOSPITALS NHS FOUNDATION TRUST

Second Respondent

DECISION

1. The appeals are dismissed.
2. The decisions made on 15 June 2022, 20 October 2022, 1 November 2022, and 23 November 2023 are confirmed.

REASONS

Background

3. These are five linked appeals relating to requests for information made by the appellant which largely relate to the construction of a new hospital. The respondent

made his requests to the second respondent (the Trust), who responded. He complained to the first respondent (the Commissioner) in each case. The Commissioner issued five separate decision notices, against which the appellant has lodged appeals. Given the nature of the requests and the overlapping issues, all five appeals were linked. We address each of the appeals in turn below.

4. The appellant requested that the appeals be determined on the papers, to which the respondents did not object. We considered that it was possible to determine the appeals justly without a hearing on the basis of the information and evidence before us.

The law

5. 'Environmental information' is defined in regulation 2(1) of the Environmental Information Regulations 2004 (the EIR). Regulation 5(1) provides that a public authority holding environmental information is required to make it available on request, subject to a number of exceptions.
6. The exceptions applicable in these appeals are contained in regulations 12, 13 and 14 of the EIR and sections 40 and 43 of the Freedom of Information Act 2000 (FOIA). Regulations 12, 13, and 14 of the EIR provide where relevant:

12. – Exceptions to the duty to disclose environmental information

- (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if-
 - (a) an exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-
 - (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;

- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–
- (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person–
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
 - (g) the protection of the environment to which the information relates.

13. – Personal data

- (1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if –
 - (a) the first condition is satisfied, or
 - (b) the second or third condition is satisfied and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.
- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –
 - (a) would contravene any of the data protection principles, or

14. – Refusal to disclose information

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) The refusal shall specify the reasons not to disclose the information requested, including–
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulation 13(1)(b) or (5A).

7. Section 14 of FOIA provides:

14. – Vexatious or repeated requests.

- (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
- (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

8. Sections 40 and 43 of FOIA provide where relevant:

40.— Personal information.

- (2) Any information to which a request for information relates is also exempt information if—
- (a) it constitutes personal data which does not fall within subsection (1), and
 - (b) the first, second or third condition below is satisfied.
- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—
- (a) would contravene any of the data protection principles, or
- (7) In this section—
- ‘the data protection principles’ means the principles set out in—
- (a) Article 5(1) of the UK GDPR, and
 - (b) section 34(1) of the Data Protection Act 2018;
- ‘data subject’ has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);
- ‘personal data’ and ‘processing’ have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);
- ‘the UK GDPR’ has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

43.— Commercial interests.

- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Findings and reasons

Appeal EA/2022/0155

9. The appellant made requests for information on 12 May 2021, 23 June 2021, and 5 July 2021 which are relevant to this appeal. There were 12 separate pieces of information requested. Only requests 7, 8, 9 (made on 23 June 2021), 11 and 12 (made on 5 July 2021) are relevant to this appeal and they were made in the following terms:

- (7) I would also like details re. the laing O'Rourke (sic) invoices - i.e. what was actually purchased - likewise re. the NHS litigation authority, an explanation as to why this information wasn't released in the fOI (sic) request? Also why aren't the details released in the monthly releases?
- (8) Finally a new request - can you please provide me with all the information the trust possesses in relation to the compensation given to Liverpool University re. the Duncan building; I recall c. £17.5 million.
- (9) Further to the points below re. the costs of the new build: Is there no estimate or budget? If not why not?
- (11) If the Trust is not pursuing legal avenues what exactly does 'continue to work with our legal advisors' actually mean and can you please disclose all material relating to this? Thanks.
- (12) What legal or other action is the Trust taking in relation to the following referred to decision:

'The Department of Health & Social Care (DHSC) paid £42 million compensation to Royal Liverpool's investors to terminate the PFI contract. The contract required the Trust to pay compensation to the PFI company's lenders, based largely on the estimated cost to complete the hospital, before the actual cost to complete the hospital was known. Had the Department and Trust better understood the cost to complete the hospital, they may not have paid anything to the lender'

- 10. The Trust responded to requests (7)-(9) on 30 June 2021 and to requests (11) and (12) on 7 July 2021. The appellant requested an internal review on 7 July 2021. The Trust provided some information in relation to request (9) and sent a full response on 13 August 2021 in which it addressed each of the 12 requests. The Trust relied on section 42 of FOIA as the basis for withholding some of the requested information.
- 11. The appellant complained to the Commissioner on 14 August 2021 and the Commissioner issued the decision notice challenged in this appeal on 15 June 2022. The Commissioner identified that the requested information was environmental information and contacted the Trust to seek confirmation as to whether it wished to rely on regulation 12(5)(b) of the EIR rather than section 42 of FOIA as the basis for the refusal to disclose. The Trust confirmed that it did.
- 12. During the course of the Commissioner's investigation, the Trust disclosed copies of original invoices with bank details redacted which related to request (7), and an extract from a document that related to request (8).

The Commissioner's decision

13. The Commissioner identified that the scope of his investigation was to determine which information access regime the request should have been dealt with under, whether the Trust holds further information within the scope of requests (7), (8) and (9) and whether it is entitled to withhold the information requested in requests (11) and (12).
14. The Commissioner's decision can be summarised as follows:
 - The requested information is environmental information and the appellant's requests should have been considered pursuant to the Environmental Information Regulations 2004 (the EIR).
 - Request (7) related to specific invoices that the Trust had paid, which have been disclosed and the Trust has disclosed the information it holds.
 - Save for the extract provided to the appellant, the remainder of the document is not within the scope of request (8) and the Trust has disclosed the information it holds.
 - The Trust has disclosed the information it holds that falls within the scope of request (9). If the appellant wants a more detailed analysis of the figure provided, he may make a new request.
 - The exception to disclosure contained in regulation 12(5)(b) of the EIR was correctly applied to the information requested in requests (11) and (12).
 - The balance of the public interest lies in favour of maintaining the exception.

The appellant's grounds of appeal

15. In respect of requests (7), (8) and (9) the appellant argues that the information disclosed is not sufficiently detailed.
16. In respect of the Commissioner's decision that regulation 12(5)(b) was correctly applied, the appellant accepted that some or even most of the information requested is subject to legal advice and/or litigation privilege, but not all. The appellant argues that the public interest in the Trust's case being undermined in respect of any litigation carries no weight in situations where the Trust is not pursuing litigation. He contends that in those circumstances the public interest lies in understanding why litigation was not pursued.

Discussion

17. Having considered the grounds of appeal, we agree with the Commissioner's approach to the appellant's complaint and its scope. It is apparent that the appellant did not take issue with the scope as identified by the Commissioner. We therefore focus on requests (7) to (9) and (11) and (12).

18. It was not disputed by the appellant that the information requested is environmental information and we find for the reasons set out in the decision notice that it is.
19. We deal with request (9) first. The appellant asked whether there was an estimate of costs or a budget. He was advised that the agreed budget to complete construction was £357.5 million. We consider that the appellant has been provided with the information he requested. We reject his argument that the information provided was not sufficiently detailed. His request did not seek a detailed breakdown of how the budget would be spent and the Trust was not required to provide one.
20. Request (8) was in some respects a broad one in that the appellant asked for 'all the information', however, in our view it was limited to the payment made to Liverpool University. Following an internal review the Trust advised the appellant on 13 August 2021 that it had made payments to Liverpool University totalling £20 million in relation to the University surrendering their interest in a number of buildings occupied on the site of the existing Royal Liverpool Hospital site. The Trust noted that the payments were not considered to be 'compensation' as per the wording of the appellant's request.
21. In a further review, the Trust identified a document that it was prepared to release in redacted form to provide further information about the surrender of interests by the University. The disclosed information confirmed the nature of the agreement between the Trust and the University including that it involved the University surrendering their entire interests in the numerous buildings it occupies at the Trust site in return for a surrender premium to be paid by the Trust. It also confirmed that it was a full and final settlement. In his grounds of appeal the appellant complains that the Trust has refused to detail what the interests were, presumably in reference to the term 'entire interests' in the disclosed information. The Commissioner argues that that this amounts to the appellant asking questions about the information received and that the appellant has not provided any evidence to suggest that the Trust holds more information than has been received. We agree and in addition, we are satisfied that nothing else within the document which has been disclosed in redacted form is within the scope of the appellant's request.
22. In respect of request (7), the appellant argued that the information disclosed was not sufficiently detailed. As is set out in the Trust's response to the Commissioner (page C307, open bundle), some additional information relating to the Laing O'Rourke invoices was disclosed to the appellant on 21 July 2021. During the Commissioner's investigation the Trust also disclosed copies of original invoices with bank details redacted. There is no objection by the appellant to the redactions.
23. The appellant's complaint is essentially that he believes more detail should be available. The Trust advised the Commissioner that the data requested was not centrally recorded in an accessible format or collated as specifically as had been requested. While he may believe that such detail should be available, he has provided no evidence to suggest that it is in fact recorded or available. The Trust argued that providing the requested data would necessitate repeating the original data verification

process and creating a new schedule in a format that could be shared. The Trust contended that it was not required to create information in order to answer a request and that the appellant was effectively asking it to do just that.

24. We find on the balance of probabilities that the information he has requested is not recorded in an accessible format and that the Trust is not required to generate new information in order to answer the appellant's request.
25. In respect of requests (11) and (12), the Trust relies on regulation 12(5)(b) of the EIR on the basis that to disclose the information requested would adversely affect the course of justice. Regulation 12(5)(b) has been held to include information subject to legal privilege. This includes both legal advice and litigation privilege. The Trust sets out that it considered legal advice privilege applied initially because there had been confidential communication between the Trust and its legal advisers for the dominant purpose of seeking and receiving legal advice. Subsequently it considered that litigation privilege applied because it had entered the pre-action protocol stage, which is part of the process of initiating litigation and which we find demonstrates that litigation was reasonably contemplated, if not in existence. We note that there is no evidence that the Trust had waived privilege in respect of any of the information sought. We find that legal advice and/or litigation privilege is engaged in respect of the requested information.
26. It is important to note that the appellant does not dispute that legal privilege may apply, albeit that he does not accept that it applies to all the information requested. The appellant does not clearly identify the information to which he considers that legal privilege does not apply. He argues that because some of the information has been disclosed to the parties to the litigation, that it ought not to be protected by legal privilege. We disagree. Disclosure to the parties within litigation is entirely different to disclosure to the world at large in response to a request made via FOIA or the EIR. Importantly, disclosure within litigation would *not* include privileged material.
27. For the purposes of determining whether disclosure of information would adversely affect the course of justice, we do not consider that it is material which kind of privilege the information attracted. It is apparent that one or both may apply as a matter progresses. It is common sense that legal advice privilege may apply during the phase where a party seeks advice about potential legal remedies and then, once a decision has been taken to commence litigation, that litigation privilege would apply. Disclosing the reasons for not pursuing legal action at a particular time may be damaging to future prospects of successfully pursuing legal action or indeed reaching a negotiated settlement without the need to pursue legal action. On this basis, we find that legal privilege is engaged and we are satisfied that disclosing the information requested in requests (11) and (12) is capable of adversely affecting the course of justice.
28. The appellant seeks to argue that the public interest in disclosure outweighs the strong public interest in maintaining legal privilege. The appellant refers to the background

to his requests, which is the collapse of the contractor Carillion and what he terms as the failings of the Trust generally.

29. There is clear public interest in a public authority being able to obtain informed legal advice in confidence and to provide information to their legal advisers. It has been held that significant weight attaches to the public interest in withholding information to which legal privilege applies.
30. We accept that there is likely to be strong public interest generally in how public money is spent and in understanding whether and how failings involving public funds may have occurred. We also accept that there may be some public interest in understanding why a particular course of action, in this case legal action, is/was not being pursued. In the present circumstances however, the appellant does not articulate clearly what he considers the factors weighing in favour of disclosure are, he simply asserts that the information may indicate failings by the Trust. In our view this is not sufficient to displace the significant weight attached to the public interest in withholding legally privileged information.
31. For these reasons, we find that the balance lies in favour of maintaining the exception afforded by regulation 12(5)(b) of the EIR.
32. It follows that the appellant's appeal falls to be dismissed.

Appeal EA/2022/0331

33. On 9 November 2021 the appellant requested the following information:
 - (1) Relating to the new build and the structural failings - what precautions/measuring equipment is being put in place to assess long term issues/risks?
 - (2) In the Board Papers of the meeting of 26/10/2021 the following was included:
 - 'C) New Hospital Committee - 5 August and 2 September 2021 Whilst concern was raised surrounding a potential delay of materials related to cladding work, it was noted that any delay would not affect the readiness to move to the New Hospital. Board members discussed additional concerns relating to risks about several services scheduled to move to the New Hospital. A workshop has been scheduled to take place in October for assurance to be presented about operational readiness for the move alongside anticipated workforce issues,'

What was the outcome of this workshop?

34. The Trust responded on 8 December 2021 and refused to provide the requested information. In respect of the request (1) the Trust relied on section 42 of FOIA because the information was subject to legal professional privilege. In respect of request (2), the

Trust relied on section 22 of FOIA because the information was intended for future publication.

35. The appellant requested an internal review of the decision. The Trust provided its response on 8 December 2021 maintaining the original decision.
36. The appellant complained to the Commissioner on 24 December 2021 and the Commissioner issued the decision notice challenged in this appeal on 20 October 2022.
37. As for the previous appeal, the Commissioner identified that the requested information was environment information and wrote to the Trust asking if it wished to rely on regulation 12(5)(b) of the EIR rather than section 42 of FOIA. The Trust confirmed that it did.

The Commissioner's decision

38. The Commissioner considered that the appellant did not challenge the Trust's response to request (2) and he therefore confined the scope of his investigation to whether the Trust was entitled to rely on regulation 12(5)(b) of the EIR to withhold information.
39. The commissioner's decision can be summarised as follows:
 - The requested information is environmental information and the appellant's requests should have been considered pursuant to the Environmental Information Regulations 2004 (the EIR).
 - Even if litigation privilege does not apply, if the requested information were disclosed, it may hamper the Trust's ability to win a claim or impede the Trust from pursuing a claim and would therefore adversely affect the course of justice. Regulation 12(5)(b) is engaged.
 - The balance of the public interest lies in favour of maintaining the exception.

The appellant's grounds of appeal

40. The appellant contends that the public interest in disclosure overrides any other considerations. He submits that the exception relied on ought not to apply because information has been disclosed to the respondents to potential litigation and because the requested information may provide a basis on which to challenge the decision not to pursue action in respect of some people or organisations.

Discussion

41. It was not disputed that the requested information is environmental information and we find that it is. It consisted of a report, a supplementary annex and slides from a PowerPoint presentation which date back to April 2018. They record the findings of a structural survey of the new Royal Liverpool University hospital, which at that time (i.e. in April 2018) was under construction.

42. The Trust relied on regulation 12(5)(b) of the EIR to withhold the requested information. It argued that litigation privilege applied because in December 2021 it has commenced legal action in relation to the construction project and that the withheld information was key evidence in proceedings, including to establishing the quantum of its claim. The Trust did not consider that it had waived privilege and that the information still formed part of live proceedings.
43. The Commissioner accepted that the Trust was at least contemplating litigation at the point at which the withheld information was created, but was not satisfied that the requested information was created for the dominant purpose of litigation, even if that is how it is now being used. He did not consider that it was necessary to make a firm finding on the point because the focus of regulation 12(5)(b) is not on whether the information is privileged, but whether its disclosure would adversely affect the course of justice.
44. Whether the information was created for the dominant purpose of litigation or not, the Trust's claim that it forms a key part of the reason for its claim and that it is likely to be relevant to the quantum of the claim is not disputed. Equally, it is not disputed that attempts to assess the extent to which there are structural defects in the construction and the likely cost of remedying them, are likely to form part of the trust's legal strategy and the basis on which proceedings will ultimately be resolved. We are satisfied on the balance of probabilities that this is the case.
45. There is significant public interest in the Trust securing the most favourable outcome possible. At the time the Trust responded to the request, proceedings had only recently begun. We agree with the Commissioner's assessment that disclosing its position at that stage, before it was required or was ready to do so in the proceedings, could have hampered the Trust's ability to either succeed in its claim or to achieve the most favourable settlement possible. Again, this was not disputed.
46. On this basis we find that disclosure of the requested information could reasonably have given rise to unfairness in the proceedings and on that basis would adversely affect the course of justice.
47. We find that there is public interest in disclosure of the requested information. As with the previous appeal, it relates to the expenditure of public money. In addition, it also relates to the safety of a building both during construction and once in use as a public building.
48. The Commissioner points out that the information was almost four years old at the time the Trust responded to the request. We consider that this reduces the weight to be given to the public interest in disclosure, as it would give only a historic picture of the structural issues and would not take into account any steps taken to remedy any defects since then.
49. Conversely, we consider that the public interest in ensuring that the Trust is able to pursue legal action against contractors who have not fulfilled their contractual obligations and succeed in recovering public money is significant.

50. For these reasons, we find that the balance of the public interest lies in maintaining the exception. Accordingly the appeal falls to be dismissed.

Appeal EA/2022/0333

51. The appellant made four separate requests for information which are relevant in this appeal.

52. On 17 August 2021 the appellant requested the following information:

(1) As you are not clear as to what 'legal' enquiries are ongoing can you please clarify whether this includes any insurance claims in relation to the new build? To be clear has the Trust or any organisations working for the Trust made any insurance claims re. the new build?

53. On 18 August 2021 the appellant requested the following information:

(2) (i) I point out that the Trust has given two contrary and different responses to the issue of new build costs. So I am to understand that the costs below are fixed and will not be subject to change?

(ii) What warranties / guarantee does this include?

(iii) Has there been any consideration/plans including – demolition to the old building and have costs been estimated/budgeted for?

54. On 20 August 2021 the appellant requested the following information in relation to published transparency data:

(3) Financial Transparency - simply the excel spreadsheets do not provide transparency - again I request details/description for the items on the spreadsheet and that they be published in future. I am clearly asking for the details as an FOI request as well as that the information is provided in the transparency releases as a matter of course (i.e. both future and past ones). Is it possible to add in a description on the Transparency Reports?

55. Again on 20 August 2021 the appellant requested the following information:

(4) (i) Is there a document itemising the costs of the new build of c. £357 million on the website? If not can one be put on the website? Or provided?

(ii) Does this cost include installation of all equipment and the podium as described in this article: <https://www.liverpoolecho.co.uk/news/liverpool-news/striking-images-show-plans-long-21266448> Likewise can this information be put on the website or provided?

(iii) If not otherwise included in the above requests what are the estimated costs of opening the new hospital in addition to construction costs? What are

these composed of? Likewise can this information be put on the website or provided?

- (iv) Other than the £20 million previously identified payment to Liverpool University has the Trust or its previous entities made any other payments in respect of similar “interests” to other parties or any compensation to other parties? Again can this information be put on the website or provided?

- 56. The Trust responded to all four requests on 16 September 2021. It stated that any information it held in respect of request (1) would be covered by section 42 of FOIA, but did not confirm whether or not such information was held. The Trust provided information in respect of request (2)(i) and some information in respect of (2)(ii) and (iii), but relied on section 43 of FOIA to withhold the remainder of the information. The Trust refused request (3) on the basis that the cost of compliance would exceed the appropriate limit relying on section 12 of FOIA. The Trust accepted that it held information within the scope of request (4)(i) and (ii), but withheld the information relying on section 43 of FOIA. The Trust denied holding information within the scope of request (4)(iii) and (iv).
- 57. The appellant requested an internal review on 17 September 2021 which was carried out and on 11 November 2021 the Trust maintained its decision.
- 58. The appellant complained to the Commissioner on 12 November 2021. The Commissioner’s decision was issued on 20 October 2022.

The Commissioner’s decision

- 59. The Commissioner considered that the information requested in requests (1), (2), and (4) was environmental information and asked the Trust to confirm whether it wished to rely on the exceptions contained in regulation 12(5)(b) and (e) rather than sections 42 and 43 of FOIA. The trust confirmed that it did. It maintained its reliance on section 12 of FOIA in respect of request (3) and additionally relied on regulation 12(4)(b) of the EIR.
- 60. The Commissioner further contacted the Trust because some of the activities in its estimate in respect of request (3) were not permissible under section 12 of FOIA and asked whether the Trust wished to rely on section 14(1) of FOIA. The Trust confirmed that it did.
- 61. The Commissioner also contact the Trust to advise that he considered that it had over-relied on regulation 12(5)(e) of the EIR to withhold information and that it should either provide further submissions to justify its decision or disclose some of the information. The Trust identified four documents, three which it was prepared to disclose in redacted form and one which it wished to withhold in its entirety.
- 62. The Commissioner considered that the scope of the decision was to determine whether the Trust was entitled to rely on either of the exceptions and whether it was entitled to

rely on section 14 of FOIA to refuse request (3). The Commissioner's decision can be summarised as follows:

- The reasons as to why the Trust was entitled to rely on regulation 12(5)(b) as set out in the decision notice challenged in appeal EA/2022/0155 apply here. Regulation 12(5)(b) is engaged and the balance of the public interests lies in favour of maintaining the exception.
- The redacted information in documents one to three engages regulation 12(5)(e) because disclosure would have an adverse effect on commercial confidentiality. To redact financial information from document four would render the remaining information meaningless and it can be withheld in its entirety.
- Request (3) relates to both environmental and non-environmental information. In so far as the request sought environmental information, it is manifestly unreasonable as it would require the Trust to separate the environmental and non-environmental information and because the request would impose a grossly oppressive burden on the Trust.
- There are no mitigating factors which would require the request to be complied with.
- The value of the additional information that would be revealed by disclosure is disproportionate to the burden that would be incurred.
- The presumption in favour of disclosure does not outweigh the public interest in protecting the Trust's resources from the burdensome request.

The appellant's grounds of appeal

63. The appellant argues that the Trust could release such information as could be processed within the time below which the request would not be manifestly unreasonable.
64. In respect of the application of regulation 12(5)(b), the appellant argues that the public interest in disclosure should override any other considerations. He also argues that where information has been disclosed to the respondents in proposed legal action, its disclosure cannot be seen as undermining the course of justice.

Discussion

65. We address request (3) first. The Trust's decision was that the requested information was likely to contain personal information, information that was provided in confidence and commercially sensitive information, all of which may result in exceptions to disclosure being applicable. The Trust estimated that the maximum limit as specified in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 would be exceeded in reviewing the information to determine the applicability of the exclusions. The Trust had not at that stage

considered that the request included both environmental and non-environmental information. The significance of this is that the appropriate limit does not apply to requests for environmental information, albeit that it may be a useful guide.

66. The appellant does not dispute that the request includes both environmental and non-environmental information or that it creates an unreasonable burden on the Trust. He simply argues that the Trust could release such information as could be processed in the time limit.
67. We find that request (3) is a request for both environmental and non-environmental information. Accordingly, both section 14(1) of FOIA and regulation 12(4)(b) apply. The Trust may include the cost of separating the information as it is necessary in order to determine which is environmental and which is non-environmental information.
68. The Trust provided an estimate of how long it would take to review the information (which comprised a total of 3,630 records) using March 2021 as an example. There were 328 records which it assessed it would take 15 minutes each to review, giving a total of 82 hours. The Commissioner considered that this was excessive, but noted that it would require each of the 3,630 items to be assessed in less than a minute not to exceed 50 hours of staff time which he considered represented a grossly oppressive burden.
69. In so far as non-environmental information is concerned, we are satisfied that the cost exceeds the appropriate limit and the Trust was entitled to find that it was entitled to rely on section 14(1) of FOIA. Furthermore, while the same appropriate limit does not apply to environmental information, we consider that it provides a useful guide. Even assuming that it took one minute per record to review the information, that would take 60.5 hours of staff time at a cost of £1,512.50 which is nearly four times the appropriate limit. We find that the request is manifestly unreasonable pursuant to regulation 12(4)(b) of the EIR.
70. We reject the appellant's submission that the Trust should simply release as much information that can be processed within a reasonable and proportionate limit because to release partial information is likely to render it meaningless, or if not meaningless, then of significantly less value than complete information. While there is public interest in transparency, in our view the public interest in releasing partial or incomplete information is significantly reduced.
71. The Commissioner found that there were no mitigating factors that would require the request to be complied with despite the burden. He considered that the Trust is a medium sized public authority and as such the resources required to comply with such a burdensome request would be disproportionate. The Commissioner had regard to the function of the Trust and considered that this made it particularly undesirable to require it to comply with a burdensome request. We agree. In addition, the Commissioner considered that there would be little value in the additional information being released. This request was made in the context of already published transparency data. Having reviewed the information, we agree that the limited value of the additional information is disproportionate to the significant burden that would

be incurred in complying with the request. We confirm the decision in respect of request (3).

72. The Trust relied on regulation 12(5)(b) and (e) of the EIR to withhold the remaining requested information. The Commissioner found that the withheld information was the same as that withheld in the first appeal (EA/2022/0155) and relies on his submissions in respect of regulation 12(5)(b) made in support of EA/2022/0155 here. The appellant does not dispute that the withheld information is the same and we find that it is. We rely on our findings in respect of regulation 12(5)(b) set out at paragraphs 25 to 31 above here. We find that the balance of the public interest lies in maintaining the exception.
73. With regard to the Trust's reliance on regulation 12(5)(e), the appellant did not dispute that the redacted information engages this exception. For the reasons set out in the decision notice, we find that it does. The appellant refers to paragraphs 25 to 29 of the decision notice in his grounds of appeal and states that he does not understand how disclosure of the requested information would adversely affect the course of justice. It appears that the appellant has misunderstood those paragraphs. Those paragraphs contain the Commissioner's reasons as to why the public interest lies in maintaining the exception on the basis that disclosure would have an adverse effect on commercial confidentiality.
74. The Commissioner notes that the overall budget information is in the public domain. He found that the requested information is commercial because it relates to the purchasing of goods and services, is not trivial, and unlike the overall budget information, it is not in the public domain. We find that this information is commercial information for the reasons given by the Commissioner.
75. The Commissioner considered that the overall budget information being in the public domain allows the public to exercise scrutiny of public spending and accepts that this is in the public interest. This scrutiny is, in the Commissioner's view, enhanced by both internal and external audit procedures. Given this, the Commissioner considered that disclosure of the withheld information would do little to enhance scrutiny of the Trust.
76. On the other hand, he considered that because the redacted information includes specific items of spend or budget for forthcoming phases of the site development, disclosure would hamper the Trust's ability to extract value of money in negotiations with suppliers. It was not disputed by the appellant and we agree that it is the case. That the Trust should be hampered in obtaining value for money when spending public money is not in the public interest.
77. The appellant argues that accessing detailed budget information in a timely manner helps to 'understand failures in the Trust's finances and operation and potentially provide grounds for challenging the Trust'. He contends that the overall budget information in the public domain is not adequate for this purpose. While that may be the case, there is nothing before us to suggest that there are failures in the Trust's

finances such that the public interest in disclosure outweighs the public interest in maintaining the exception.

78. For these reasons, the appellant's appeal is dismissed.

Appeal EA/2022/0340

79. On 8 June 2022 the appellant made the following requests for information:

- (1) Thank you for your response to FOI 8216 – is there some reason why it is taking so long to release this information? If so can you please explain what the problems are thanks?
- (2) Further I am still not happy with the lack of detail – can you please provide itemised detail the following for the March release thanks? I would expect there to be a simple download from your purchasing system.
- (3) To be clear my email was a complaint and appeal i.e. a belief that the monthly data should release more information than released as standard in the past not a request for new information.

80. The Trust responded on 6 July 2022. It stated that it does not hold or collate the information in requests (1) and (3). In respect of request (2), it disclosed 24 documents containing 35 invoices itemised by supplier with some information redacted relying on sections 40 and 43 of FOIA.

81. The appellant requested an internal review on 7 July 2022 and stated that he challenged all of the redactions. He requested details of the contracts outlined in the invoices or for the Trust to detail what goods and services had been provided. He disputed that the Trust did not hold any recorded information about how it was processing his earlier request.

82. The Trust upheld its decision on 28 July 2022. In respect of the further detail the appellant had requested in relation to the invoices, it informed the appellant that this was a new request, allocated a separate reference number and advised that it would respond separately in due course.

83. The appellant complained to the Commissioner on 29 July 2022. The Commissioner's decision was issued on 20 October 2022.

The Commissioner's decision

84. The Commissioner agreed that the appellant's request for further information in relation to the invoices and is not within the scope of his original request. The Commissioner accordingly limited the scope of his investigation to the wording of requests (1) to (3) set out above. The Commissioner's decision can be summarised as follows:

- Requests (1) and (3) are not valid requests for information because they do not request recorded information the Trust may hold or describe recorded information they wish to receive.
- Withheld information comprising of the names and email addresses of third parties is personal information pursuant to section 40(2) of FOIA.
- There is a legitimate interest being pursued by the appellant.
- Disclosure of the redacted information is not necessary to meet the legitimate interest.
- As disclosure is not necessary, there is no need to conduct the balancing test.
- Disclosure is not lawful and the Trust is entitled to withhold the requested information under section 40(2) of FOIA.
- Withheld information includes bank account details, invoice/account/order numbers and individual/tailored/negotiated pricing.
- Disclosure of bank account details is likely to prejudice the commercial interests of the Trust.
- Individual and tailored pricing information would be useful to third party competitors and may prejudice the Trust's ability to secure best prices in the future.
- Section 43 of FOIA applies. There is public interest in openness and transparency in knowing how public money is spent, however this cannot be at the expense of the commercial interests of the Trust or a third party. The balance of the public interest lies in maintaining the exception.

The appellant's grounds of appeal

85. The appellant disputes that request (1) was not a valid request and contends that the Trust must record internal information about how it processes information and how and when it is disclosed.
86. The appellant accepts that he does not require bank details or details that would facilitate fraud and in doing so does not dispute the redaction of personal data pursuant to section 40(2) of FOIA. He submits that there may be public interest in disclosing pricing information on the basis that it could facilitate competition. He contends that disclosure of as much information as possible should be the default position.

Discussion

87. The appellant asserts that the Trust must record information about how it deals with requests for information. His request is essentially a request for an explanation as to

the length of time the Trust was taking to respond to an earlier request. The Trust was not obliged to answer the appellant's question or provide an explanation unless it was recorded information already held. The appellant may believe that information is recorded about how requests are processed, but there is nothing before us to suggest that this is the case and accordingly we find that request (1) is not a valid request.

88. We find that request (3) is a statement by the appellant that his email was a complaint on the basis that he was not satisfied that the monthly transparency data contained sufficient detail. We find that it is not a valid request for information because it does not request recorded information held by the Trust.
89. With regard to request (2), the appellant does not dispute the redactions made on the basis that the redacted information is personal information. We find that the reasons set out in the decision notice for upholding the redactions pursuant to section 40 of the FOIA are correct.
90. In respect of information withheld pursuant to section 43 of FOIA, the appellant accepts that in some situations disclosure could undermine the Trust's ability to secure best prices in the future, but argues that in other situations, disclosure of tailored pricing information may increase competition and potentially save the Trust money.
91. Section 43(2) of FOIA provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of *any person* (including the public authority). In arguing that disclosure may increase competition, the appellant implicitly accepts that this would be the case. Competition whereby one person or company was able to undercut another is to prejudice that other person's/company's commercial interests. The fact that it may ultimately benefit the Trust is irrelevant for the purposes of this exemption.
92. Where it was known to third parties what the Trust was willing to pay, rather than disclosure increasing competition, it may just as likely serve to lead those third parties to inflate their tender to as close to the Trust's ceiling as possible. This would be in the interests of those third parties but would be likely to prejudice the commercial interests of the Trust because it could no longer secure best prices. Section 43 is engaged in both scenarios.
93. The Commissioner recognises the public interest in openness and transparency in relation to how public money is spent. We agree that this is in the public interest. We find however that the public interest in protecting the commercial interests of the Trust and/or third parties outweighs the public interest in disclosure. We find that the Trust was entitled to rely on section 43(2) of FOIA.
94. The appeal is dismissed.

Appeal EA/2022/0384

95. On 13 May 2022 the appellant requested copies of all documents considered at three specific meetings of the New Hospital Committee. The Trust responded on 14 June

2022 and provided redacted copies of each document pack. It relied on sections 40(2), 42, and 43 of FOIA as the basis for making redactions.

96. The Trust carried out an internal review and considered the appellant's request under the EIR and relied on regulations 12(5)(b) and (e) and 13 as the basis for the redactions.
97. The appellant complained to the Commissioner and the Commissioner's decision was issued on 23 November 2022

The Commissioner's decision

98. The Commissioner considered that although it had not been provided with unredacted copies of the requested information, it was clear from the context of the documents what the nature of the information was. The Commissioner noted that an unredacted copy of table that had been redacted in its entirety was provided and that it can be seen that it sets out the various responsibilities and legal liabilities the Trust has in relation to its building project.
99. The Commissioner's decision can be summarised as follows:
 - Factual information can attract legal advice privilege because it is the selection and curation of the facts rather than the facts themselves which attracts privilege.
 - Information relating to ongoing and prospective litigation engages regulation 12(5)(b) and the public interest lies in maintaining the exception for the reasons given in appeal EA/2022/0155.
 - Information relating to budget and financial information for an ongoing project engages regulation 12(5)(e) and the public interest lies in maintaining the exception for the reasons given in appeal EA/2022/0333.
 - The vast majority of each document has been disclosed, with only the most sensitive information having been withheld. That so much information has been disclosed reduces the public interest in further disclosure.
 - The Trust is entitled to rely on regulation 13 of the EIR to withhold the names of junior members of staff. There is no legitimate interest in disclosing this information.

The appellant's grounds of appeal

100. The appellant simply contends that the public interest in disclosure outweighs the reasons for withholding the information.

Discussion

101. Although the appellant claims that the public interest in disclosure outweighs the reasons for withholding the information, he does not elaborate as to why. We agree with the Commissioner that it is only the most sensitive information which has been

redacted. That so much information has been disclosed reduces the public interest in further disclosure absent any cogent reasons why it is necessary. We rely on our findings above in relation to the application of regulation 12(5)(b) to the withheld information in this appeal and for our finding that the balance of the public interest lies in maintaining the exception.

102. The appellant has not challenged the Trust's reliance on regulation 12(5)(e) in respect of the request in this appeal. In so far as the withheld information relates to budget and financial information for an ongoing project, we find that regulation 12(5)(e) is engaged and we rely on our findings above in respect of why the balance of the public interest lies in maintaining the exception.
103. The appellant has not disputed the withholding of the names of junior staff and we uphold the Trust's reliance on regulation 13 of the EIR.
104. The appellant's appeal is dismissed.

Signed *J K Swaney*

Date 18 September 2023

Judge J K Swaney
Judge of the First-tier Tribunal