

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 November 2015

Public Authority: Sandwell and West Birmingham Hospitals NHS Trust

Address: City Hospital
Dudley Road
Birmingham
B18 7QH

Decision (including any steps ordered)

1. The complainant made a request for information to the Sandwell and West Birmingham Hospitals NHS Trust ("the Trust") for information about the purchasing of land for the Midland Metropolitan Hospital. The Trust disclosed some of the requested information but withheld information related to the price paid for plots of land under the exceptions in regulation 12(4)(d) (material still in the course of completion), regulation 12(5)(e) (commercial confidentiality) and regulation 13 (personal information).
2. The Commissioner's decision is that some of the withheld information is exempt under regulation 12(5)(e) and the public interest favours maintaining the exception. However, the Commissioner also found that some of the withheld information was not exempt under regulation 12(5)(e) or any of the other exceptions cited by the Trust and should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Trust shall disclose the information in part i) of the request to the complainant.
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

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 5 October 2014 the complainant made a freedom of information request to the Trust which is repeated below. The Commissioner understands that the complainant had previously submitted the same request to the Trust in October 2013 but it is the recent request which is the subject of this Decision Notice.
- i. How much has the trust spent buying properties/land needed for the Midland Metropolitan Hospital, Grove Lane? How much of it was the trust's money; how much was given to the trust by Government?*
 - ii. Did the trust spend any money valuing the properties/land before purchases with any independent firms - if so, how much and with which firms?*
 - iii. Can the trust provide a list of the properties/land it bought? Please provide the independent valuation of the property/land, and the actual amount paid for the property/land and the ratio of £s to each square foot if you have it please? Please also say the date of each purchase, and whether that was before or after the general vesting declaration in 2012. For clarity, can I also check the exact date when the general vesting declaration was issued? If you cannot provide the ratio of £s to square feet, please simply provide the size of each piece of property/land.*
 - iv. Has the trust finished buying all of the property/land it needs for the Midland Metropolitan Hospital, Grove Lane? If not, are any other deals pending or any property/land under offer? If so, how many and can you please provide the names of the properties/addresses.*
6. The Trust responded to the request on 15 October 2014. For parts 1 and 2 of the request it referred the complainant to the information it disclosed in its response of 4 November 2013 to his earlier request. For parts 3 and 4 of the request the Trust explained that the individual prices of property was exempt under the exemption in section 43(2) of the Freedom of Information Act 2000 (FOIA).

7. The complainant subsequently asked the Trust to carry out an internal review of its handling of the request. In doing so he suggested that his request should have been considered under the EIR.
8. The Trust presented its findings on 30 January 2015 when it said that it was now reconsidering the request under the EIR. It now concluded that information regarding the amounts paid for individual plots of land was exempt from disclosure under regulations 12(4)(d) (material still in the course of completion), 12(5)(e) (commercial confidentiality) and regulation 13 (personal data). In each case the Trust found that the public interest in maintaining the exception outweighed the public interest in disclosure.

Scope of the case

9. On 15 April 2015 the complainant contacted the Commissioner to complain about the Trust's decision to refuse to disclose some of the information he requested.
10. The information which the complainant considers to be outstanding is the breakdown of payments for each plot and the independent valuation advice (part iii) of the request). The complainant also complains that the Trust has not revealed how much of its resources it has used alongside the £8m public Dividend Capital it mentioned in its response to part i) of the request. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether the Trust was correct to withhold this information by relying on the regulation 12(4)(d), 12(5)(e) and 12(3) exceptions.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
12. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*. All four elements are required in order for the exception to be engaged:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

13. The Commissioner has considered each of these factors in turn.

(i) Is the information commercial or industrial in nature?

14. On this point the Trust explained that the information relates to the commercial interests of individuals and companies, as well as the Trust itself. This is because, it said, the cost of plots which are not acquired by private treaty are based on the rules governing compulsory purchases. Therefore the final amount paid by the Trust in each case is reached through negotiation with interested parties (owners and their tenants), supported by independent professional valuation advice, and with the potential for any disagreement on value to be settled through the Lands Tribunal.
15. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. In this case the withheld information relates to the acquiring of plots of land through compulsory purchase in order to allow for the building of a new hospital. As the Trust explained, the levels of compensation paid for the property are reached through negotiation and the Commissioner accepts that this amounts to commercial activity.

(ii) A duty of confidence provided by law and (iii) the confidentiality is required to protect a legitimate economic interest

16. The Trust explained that the negotiations between the Trust and interested parties pursuant to the compulsory purchase order are undertaken with an expectation of confidence by both parties. This is because, it said, the negotiations are based in part on information that is sensitive commercial information which it said was specific to organisations' experiences and approach to business. It argued that since disclosure would allow individual business owners to be identified, and reveal the level of compensation they received it considered that it would be inappropriate to release the information without their consent.

As such, it said that it has concluded that the information was subject to the common law duty of confidence.

17. The test for a common law duty of confidence requires that information has the necessary quality of confidence and that it was provided under an obligation of confidence. On the first point, information will have the necessary quality of confidence if it has been held in confidence and is not trivial. In this case it is clear that the information has not previously been disclosed and the Commissioner is satisfied that since it concerns compensation payments for a major development scheme it is not trivial. Therefore this element of the test is met. As to whether the information was provided in circumstances importing an obligation of confidence, the Commissioner is mindful that negotiations were carried out with an expectation of confidentiality. In the Commissioner's view it would have been reasonable for both parties to have expected that information about levels of compensation would not be disclosed given the importance and sensitivity of the negotiations. Therefore, the Commissioner would accept there was an implied obligation of confidence and that as such the withheld information can be said to be subject to a duty of confidence provided by law.
18. However, just because the information is confidential is not enough in itself to engage the exception – it must be required to protect an economic interest. On this point the Trust explained that its own commercial interests would be prejudiced by disclosure by revealing the levels of compensation offered. It said that the factors which influence the negotiation for each plot are unique to each individual interested party, and, should the requested information be published, this would undermine the Trust's ability to engage in free and frank negotiations of a similar nature in the future, which are heavily dependent on the individual status of each interested party.
19. It went on to say that a number of negotiations for vacant possession are still on-going, and should the interested parties have access to the proposed level of compensation offered in specific circumstances (without knowing the unique and commercially sensitive context in which those levels are set), this would affect the Trust's ability to effectively negotiate the sale of the relevant plots, as it has the potential to distort the bargaining position of parties with whom negotiations are currently on-going.
20. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational

damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. In this case the Commissioner accepts that a link can be drawn between disclosure of the withheld information and protecting the Trust's commercial bargaining position. The Trust has confirmed that negotiations are ongoing with some of the owners of plots of land that have been acquired as part of the compulsory purchase. Clearly if the parties knew what the Trust had paid in compensation to the owners of other plots or the independent advice that informed the level of compensation, this would make it more difficult for the Trust to secure the best terms when negotiating for the further plots.

21. The Trust had also suggested that confidentiality is necessary to protect the economic interests of the land or business owners whose properties have been acquired because they would not want the levels of compensation they received made public. The Commissioner does not accept that the exception can be engaged on this basis without further information about how disclosure might affect their economic interests. Similarly, the Trust had suggested that its legitimate economic interests included its ability to ensure that suppliers who do business with the Trust in the future can have confidence that the information they supply will remain confidential. The Commissioner does not accept that disclosure would deter other companies from doing business with the Trust.

(iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information

22. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.
23. The Commissioner is satisfied that disclosure would adversely affect the confidentiality of the withheld information and that the confidentiality is necessary to protect the legitimate economic interests of the Trust. The exception is only engaged on the basis that disclosure would adversely affect the Trust's negotiating position when agreeing vacant possession and levels of compensation with land and business owners. It is unclear if the Trust also intended this exception to apply to part i) of the request which asked for the amount spent by the Trust in addition to the £8m public Dividend Capital it received from the Government. However, for the avoidance of doubt, the Commissioner wishes to make clear that he

does not accept that regulation 12(5)(e) can be applied to that part of the request. This is because the information is the total amount spent by the Trust rather than details of any individual payments and as such does not give rise to the concerns the Commissioner discusses above.

24. The Commissioner has decided that regulation 12(5)(e) is engaged in respect of part iii) of the request but since all exceptions under the EIR are qualified, the Commissioner has gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exception.

Public interest test

Public interest arguments in favour of disclosure

25. The complainant argues that there is a public interest in comparing the prices paid with the independent valuation advice. This would show whether the Trust had obtained value for money for the tax payer, and/or whether the business and land owners had received fair compensation for their properties.
26. For its part the Trust said that it accepted that there is a public interest in openness and accountability in the activity of public bodies and also in allowing individuals to understand decisions made by public bodies and potentially enabling the same to be challenged. Therefore it acknowledges that there is a public interest in whether the Trust has paid above market price for sites compulsorily purchased.

Public interest arguments in favour of maintaining the exception

27. In favour of maintaining the exception the Trust said that disclosure would prejudice its ability to spend public funds in the most appropriate manner and that this would not be in the public interest. It concluded that the public interest in withholding the information at the time of the request outweighed the public interest in disclosing the information while negotiations were on-going.
28. The Trust went on to say that it does not consider that the public interest is served by disclosing details of individual negotiations with interested parties while it is still in the process of obtaining vacant possession of a number of plots. This is because the potential price which may be paid will fluctuate during the course of those negotiations, and no commitment of public funds will in fact have been made.

Balance of the public interest arguments

29. The Commissioner has considered the competing arguments and accepts that there is a public interest in disclosure to the extent that this would allow for scrutiny of the way in which the Trust has spent public money. Therefore the arguments surrounding transparency and accountability do carry some weight.
30. However, the Commissioner is also mindful that the Trust has already disclosed a certain amount of information about the purchase of the land for the Midland Metropolitan hospital and this goes some way to meeting the public interest in disclosure. In particular, the Commissioner notes that the cost of properties obtained outside of the compulsory purchase order will be available through the Land Registry.
31. As regards the public interest in maintaining the exception the Commissioner considers that the arguments for withholding the information are very strong given that negotiations were still ongoing at the time of the request. The timing is crucial and the fact that the Trust was still involved in negotiations with some of the land owners means that disclosure would have prejudiced its negotiations to obtain vacant possession, including when negotiating compensation payments which the Trust has confirmed could still change. This has the potential to increase costs to the Trust, and thereby the taxpayer, as well as making it harder to progress the development of the site and in the Commissioner's view this would not be in the public interest.
32. The Commissioner has decided that in all the circumstances of the case the public interest in maintaining the regulation 12(5)(e) exception outweighed the public interest in disclosure.

Regulation 12(4)(d) – material still in the course of completion etc

33. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
34. The Commissioner understands that regulation 12(4)(d) has been applied to part i) of the request where the complainant has asked for the total sum (as opposed to the costs of individual plots) that the Trust has spent buying properties/land needed for the hospital. Specifically, it said that it was relying on the 'material still in the course of completion' limb of the exception given that a number of negotiations for vacant possession were ongoing and the level of compensation payments could change.

35. In the Commissioner's view the Trust has not adequately demonstrated how this exception might apply. The complainant has simply asked how much the Trust has spent. He did not ask how much the Trust intends to spend once it has finished negotiating on all the properties. A reasonable interpretation would be for how much the Trust has spent acquiring properties to date. Even if the Trust expected that the amount it would spend would change in the future, at the time the request was received the information would be held and the Commissioner would expect the Trust to be able to produce a figure for this. Therefore the Commissioner has decided that section 12(4)(d) is not engaged.

Regulation 13 – personal data

36. The Commissioner has not considered the application of this exception because he is satisfied that the withheld information in part iii) of the request is exempt under regulation 12(5)(e). He also understands that regulation 13 has not been applied to part i) of the request.

Right of appeal

37. 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

38. 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.
39. 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

Paul Warbrick
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