

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 September 2015

**Public Authority:** The Rotherham NHS Foundation Trust

**Address:** Rotherham Hospital  
Moorgate Road  
Rotherham  
S60 2UD

### Decision (including any steps ordered)

---

1. The complainant has requested information on quotations, contracts and bid submissions received by Rotherham NHS Foundation Trust for services associated with Sexual Assault Referral Clinics. The Trust initially considered this information to be exempt on the basis of section 43(2) of the FOIA but later revised its position and sought to rely on section 31 to neither confirm nor deny if the information was held.
2. The Commissioner's decision is that the Trust has correctly refused to confirm or deny if the information is held and the public interest favours maintaining the exemption. He requires no steps to be taken.

### Request and response

---

3. On 17 February 2015, the complainant wrote to The Rotherham NHS Foundation Trust ("the Trust") and requested information in the following terms:
  - 1) *"On or around March 2014 companies by the name of Total Care Direct and Healthy Hedgehogs provided quotations to the Trust for services associated with Rotherham SARC (these will be dated around November 2013) – please provide copies of these quotations.*
  - 2) *"On or around November 2013 a company by the name of Mountain Healthcare Ltd provided quotations to the Trust for services associated with Rotherham SARC – please provide a copy of this quotation.*

*3) Please provide a copy of the Contract between Rotherham NHS FT and Mountain Healthcare Ltd for SARC related services.*

*4) Please provide a copy of the bid submission made by Mountain Healthcare Ltd around November 2013 for SARC related services."*

4. The Trust responded on 20 February 2015. It stated it could not provide the information for each numbered part of the request as it considered it exempt on the basis of section 43(2) of the FOIA – that the information concerned was commercially sensitive and its disclosure would be likely to prejudice the commercial interests of any person.
5. Despite intervention from the Commissioner, no internal review was carried out by the Trust. As such the Commissioner began his investigation and during the course of this the Trust reviewed its position and withdrew its use of the section 43 exemption as it been applied on a blanket basis and without establishing if the information was in fact held. Instead the Trust was seeking to rely on the section 31 exemption to, in parts withhold information and to neither confirm nor deny if information was held.

### **Scope of the case**

---

6. The complainant contacted the Commissioner on 27 April after receiving an internal review response to complain about the way his request for information had been handled.
7. The Trust has argued that some information is exempt on the basis of section 31(1)(g) in conjunction with 31(2)(a) and that for other parts of the request it can neither confirm nor deny if information is held on the basis of section 31(3). However, the Commissioner is concerned that stating that some information is held and is exempt on the basis of section 31(1)(g) and it cannot confirm or deny if other information is held would in fact be revealing whether the information is held as if it was held the Trust would be exempting it under section 31(1)(g). It stands to reason therefore that dividing the request into parts, some it confirms are held and others it cannot confirm or deny holding, would not be consistent.
8. As such the Commissioner considers the scope of his investigation to be to determine if the section 31(3) exemption has been correctly cited to neither confirm nor deny if the requested information is held.

## Reasons for decision

---

### Section 31 – law enforcement

9. Section 31(3) provides that a public authority is not obliged to confirm or deny whether it holds information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). The Trust specified that the relevant matters are those set out in section 31(1)(g).
10. Section 31(1)(g) states that information will be exempt if it would, or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes listed in subsection (2). The Trust has identified subsection 31(2)(a) as being most relevant in this case. This states that the information is held for the purpose of ascertaining whether any person has failed to comply with the law.
11. Therefore, the issue for the Commissioner to consider here is whether confirming or denying if the requested information is held would be likely to prejudice the purpose of ascertaining if any person has failed to comply with the law.
12. In order for the section 31 exemption to be engaged the Commissioner must be satisfied the function specified by the public authority for the purposes of section 31(1)(g) is a function which is:
  - designed to fulfil one of the purposes specified in 31(2);
  - imposed by statute; and
  - specifically entrusted to the relevant public authority to fulfil
13. In the case of section 31(2)(a) the use of the word “ascertaining” limits the application of the exemption to cases where the public authority, in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law. The Commissioner considers this to limit the use of section 31(2)(a) to law enforcement or regulatory bodies. However, if a public authority is conducting its own investigation at the same time as an ongoing investigation by a regulatory body then a public authority can rely on this exemption if it argues that disclosure (or in this case confirming or denying if information is held) would be likely to be cause prejudice to the public authority charged with the function to ascertain if the law has been complied with.
14. In this case, the Trust has explained that it is governed by the National Health Services Act 2006 as amended by the Health and Social Care Act

2012. As such, it has a duty to ensure that public funds are protected and that its employees and contractors comply with all relevant legislation.

15. The NHS Contract includes mandatory clauses that require providers of NHS services to put in place and maintain appropriate counter fraud and security management. Service condition 24.6 of the NHS Contract requires the Trust to report any suspected fraud or corruption involving a service user or NHS funds to the relevant NHS body and NHS Protect.
16. NHS Protect's role is to protect NHS staff and resources from crime and it has national responsibility for tackling fraud, violence, bribery, corruption, criminal damage and theft. NHS Protect states one of its main objectives is to hold to account those who have committed crime against the NHS by detecting and prosecuting the offenders and seeking redress. For this reason, the Commissioner accepts that NHS Protect has a specific function to ascertain if the law has been complied with and the section 31(2)(a) subsection can be engaged if the Trust can demonstrate that information it may or may not hold is relevant to an ongoing investigation being conducted by NHS Protect.
17. The Trust has stated that the information requested, if it were held, is relevant to an ongoing investigation by NHS Protect and confirming whether or not this information is held would be to reveal evidence which is part of this investigation and would therefore be likely to prejudice this investigation.
18. The Commissioner accepts the general argument that confirming or denying if information is held which may be part of an investigation could have a prejudicial effect on the process of considering a prosecution. However, in determining whether the likelihood of prejudice occurring is real and of substance he has considered the timing of the request.
19. The Trust has explained that NHS Protect has been involved with this case since late 2014 on behalf of the Trust, in ascertaining whether any person has failed to comply with the law relating to anti-fraud, bribery and corruption.
20. In this respect the Commissioner accepts that the issue was still 'live' in that NHS Protect was still investigating the matter at the time of the request. As the issue was still 'live' the likelihood of confirming or denying the existence of the information requested impacting on the investigation and affecting the ability of NHS Protect to ascertain if any person has complied with the law would remain high.

21. The Commissioner therefore considers that prejudice to NHS Protect's investigation would be likely to occur if the Trust confirmed or denied that the information was held.
22. As section 31 is a qualified exemption the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming or denying the information is held.

*Public interest arguments in favour of disclosure*

23. The complainant has argued that as the services to which the information requested relates are services for vulnerable adults and young people who have been subject to sexual assault there is an increased need for transparency.
24. The complainant has also made the more general arguments that disclosure, or in this case confirming or denying if information is held, would promote accountability in decisions taken by public authorities and in the spending of public money. It would also allow the public to understand decisions made that affect their lives.
25. The Trust also acknowledges there is a public interest in openness and transparency to increase public confidence in each Trust and the wider NHS.

*Public interest arguments in favour of maintaining the exemption*

26. The Trust considers there is an inherently strong public interest in this exemption in that it would not be in the public interest to prejudice the ability of public authorities to enforce the law.
27. The Trust does not consider there would be any public interest in confirming or denying if the information is held while the investigation is ongoing but considers it may be appropriate to do so if a prosecution were to take place or once the investigation has been concluded.
28. However, whilst the investigation is ongoing the Trust argues that details of the evidence from the case should be kept secure to ensure the investigation is fair and impartial. Investigators need space to be able to fully explore all aspects of the claims. The Trust believes that premature disclosure of the evidence used in an investigation or confirming or denying what evidence exists, could lead to a flawed investigation with undue scrutiny and allegations made in the media.

*Balance of the public interest*

29. The Commissioner does give weight to the argument that with issues around the provision of services which relate to sexual assault and abuses there will be appetite for the public to know how services were commissioned and to be aware of any ongoing issues. The complainant has argued the provision of the information he requested would increase transparency and accountability and the Commissioner accepts this argument.
30. However, the existence of the ongoing NHS Protect investigation must be balanced against the general public interest argument about transparency and accountability. The Trust has strongly argued that information it holds, if any, which is forming part of the investigation is of great importance to the investigation. The Commissioner considers that he cannot underestimate whether the information that has been requested, if held by the Trust, is of significance to the investigation. He has therefore placed significant weight in favour of neither confirming nor denying if the information is held on this basis.
31. The Commissioner has taken into account the very strong public interest in not undermining the investigation process which may result in a prosecution. The public interest is still high in this regard as the NHS Protect investigation is still live and the argument that confirming or denying if the information is held would impact on the investigation is therefore still strong and carries weight.
32. Taking this into account the Commissioner considers that, in all the circumstances of the case, if the Trust were to confirm or deny if the information was held there would be a real and significant risk to NHS Protect's ability to carry out its investigation and ascertain if any person has complied with the law. Therefore the public interest favours maintaining the exemption.
33. The Commissioner accepts that the section 31(3) exemption is engaged and the Trust has correctly balanced the public interest test to maintain the exemption. He requires no steps to be taken.

## Right of appeal

---

34. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**