

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 January 2016

**Public Authority:** East of England Ambulance Trust

**Address:** Whiting Way  
Melbourn  
Royston  
SG8 6NA

### **Decision (including any steps ordered)**

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1. The complainant has requested full details of any meetings, including papers, presentations, minutes, actions and list of attendees relating to the West Essex PTS contract. The Trust provided the complainant with some of the requested information but withheld some information under section 36(2)(b)(ii) and section 43(2) FOIA.
2. The Commissioner's decision is that the Trust correctly applied section 36(2)(b)(ii) and 43(2) FOIA to the withheld information. In relation to the information the Trust did disclose to the complainant, as it did not provide this information within the statutory time for compliance, it breached section 10 FOIA.
3. The Commissioner requires no steps to be taken.

### **Request and response**

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4. On 23 April 2015 the complainant requested information of the following description:  
  
"Please can you provide under the freedom of information act, full details any meetings, including papers, presentations, minutes, actions and list of attendees relating to the west Essex PTS contract that has recently been awarded to the trust. Please can you ensure these details list the terms and conditions (including pay) of the staff tupe'ing into the trust and any proposals and decisions relating to the staffs

ongoing terms and conditions."

5. On 22 May 2015 the Trust responded. It provided the complainant with some information but refused to provide some information under section 43(2) FOIA.
6. The complainant requested an internal review on 22 May 2015. The Trust did not conduct an internal review.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 10 June 2015 to complain about the way her request for information had been handled.
8. During the course of the Commissioner's investigation the Trust provided the complainant with some further information. It confirmed that it was applying section 43(2) FOIA to the technical questionnaire and schedule 3. It also applied section 36(2)(b)(ii) FOIA to some notes from a Private Board meeting dated 26 November 2014.
9. The Commissioner has considered whether the Trust was correct to apply section 36(2)(b)(ii) and section 43(2) FOIA to the withheld information.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

10. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
11. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."<sup>1</sup>*

12. Upon viewing the withheld information the Commissioner considers that it relates to a tendering process to win a contract for the provision of Trust services. This does therefore fall within the scope of the exemption.
13. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

#### *Whose commercial interests and the likelihood of prejudice*

14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. The Trust has stated that disclosure of the information would be likely to prejudice its own commercial interests.

#### *The nature of the prejudice*

16. The Trust explained that the information contained within the technical questionnaire and the commercial offer relates to a commercial contract won by the Trust. It said that the Trust bid and won for the contract amongst other providers. The Trust believes that the terms and conditions have enabled them to win the contract and therefore allow the service to be more efficiently delivered by the staff. It said that although ICO guidance states that it is less likely to be sensitive once the contract has been won (this particularly applies to public sector contracts where there is a wider public interest in how public organisations procure business), the Trust does not believe this information becomes less commercially sensitive upon completion of

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<sup>1</sup> See here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

the contract in this case. This is because the Trust applies the same service model and standards to all similar tenders. It confirmed that it is likely that prejudice will be caused to the Trust as the releasing this information would enable competitors to understand how the Trust won the contract and potentially successfully outbid the Trust in relation to similar contracts (of which the Trust has two imminent tenders).

17. The Trust confirmed that the Cambridgeshire tender was due to have been published on Monday 14 December 2015 as the current contract expires at the end of August 2016. The South Essex tender is expected in January as the current contract expires at the end of September 2016.
18. The Commissioner considers that as the information contained within the withheld information is going to be used within two imminent tenders, it is likely that disclosure could provide the Trust's competitors with a commercial advantage within these upcoming tenders. The Commissioner therefore considers that section 43(2) was correctly applied to the technical questionnaire and schedule 3.
19. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest in this case.

### **Public interest test**

#### *Public interest arguments in favour of disclosure*

20. The Trust has not provided any public interest arguments in favour of disclosure.
21. The complainant has argued that there is a significant public interest over the pay and terms and conditions of staff transferring into an NHS organisation.

#### *Public interest arguments in favour of maintaining the exemption*

22. The Trust has argued that it should be able to submit bids for additional contracts and work without the risk of their bid details becoming publicly available. This would undoubtedly affect the interests of the organisation and their ability to compete fairly in the future.

#### *Balance of the public interest arguments*

23. The Commissioner considers that there is a very strong public interest in disclosure of the withheld information as it affects a significant number of staff within the NHS.

24. However, equally, the Commissioner does not consider that it would be in the public interest to damage the Trust's commercial position by disclosure of current commercially sensitive information which will be relied upon by the Trust within two upcoming tender exercises.
25. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly engaged.

**Section 36(2)(b)(ii)**

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.

27. The Trust has applied section 36(2)(b)(ii) FOIA to the withheld information.
28. In determining whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the 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 Trust explained that the qualified person is the Chief Executive. It explained that the qualified opinion was provided on 15 December 2015 and 19 January 2016. The qualified person's opinion was that

section 36(2)(b)(ii) FOIA was applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the opinion was provided to the Commissioner.

30. The qualified person explained that although this exemption had been applied late, this was because the information to which it had been applied was only found/located/identified during the course of the Commissioner's investigation. He confirmed that he made his decision in relation to the application of section 36(2)(b)(ii) based upon the circumstances at the time of the request.
31. The qualified person explained that release of the withheld information would be likely to prejudice the Trust's ability to operate an emergency service, have appropriate discussions and make changes to the Trust's service and is therefore exempt from release under section 36(2)(b)(ii) FOIA. Furthermore he explained that release of this information would prejudice the conduct of the current discussions and decisions at the Private Board if it was to be disclosed.
32. The qualified person argued that there is a general need for senior officers and the executive team to freely and frankly discuss issues around the provision and procurement of services in confidence. If the Private Board minutes were routinely made public, the release of this data would prejudice the Trust's commercial position and could lead to the publication of misleading information. The very risk that the information could be made public would also have a "chilling effect" on the conduct of discussions about the future provision of the service and procurement of other services going forward. He summarised that disclosure of the Private Board minutes would be likely to inhibit the Trust's ability to consider and discuss new projects as well as private Trust business
33. Although the qualified opinion was not given until the Commissioner's investigation had commenced, as he has confirmed that he considered the circumstances at the time of the request the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Whilst some of the factors that have been taken into account are not relevant, that is that the withheld information if published could be misleading or the arguments relating to the Trust's commercial interests, this does not detract from the relevant factors that were considered when forming the opinion.
34. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweigh the public interest in disclosing the information. In his approach to the competing public interest arguments in this case,

the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)<sup>2</sup>.

35. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

### **Public interest arguments in favour of disclosing the requested information**

36. The Trust acknowledged that there is a general public interest in ensuring that the decisions around procuring new contracts are conducted fairly and effectively.

### **Public interest arguments in favour of maintaining the exemption**

37. The Trust has explained that it believes the following public interest arguments favour maintaining the exemption:

#### **The Chilling Effect**

As an organisation facing increasing pressures to review the delivery and efficiency of all of its functions, it has to be able to consider ideas for changes to services or the procurement of new services freely, and to explore different ideas and methods of service. Disclosure of these

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<sup>1</sup> EA/2006/0011; EA/2006/0013

Private Board minutes would be likely to inhibit the Trust's ability to consider new projects.

### **The Timing of the Request**

As explained in relation to the arguments presented under section 43(2) FOIA, whilst the contract in question had been awarded at the time of the request, the Trust is imminently going to be involved in similar tendering exercises in two other locations. Furthermore the Commissioner is aware that the withheld Private Board minutes pre-date the awarding of the contract relevant to this case.

### **Balance of the public interest arguments**

38. The Commissioner considers there is a strong public interest in openness and transparency, particularly to ensure that decisions around procurement such as in this case are made fairly and effectively. This is because it would provide the public with a greater understanding and reassurance of how the Trust has tackled this matter and whether their actions are appropriate, fair and effective.
39. The Commissioner does however consider that there is a requirement for the Private Board to be able to meet to consider procurement matters prior to contracts being awarded. Disclosure of information which would be likely to inhibit these discussions would not be in the public interest. Particularly as at the time the request was made, the contract had been awarded fairly recently and the Trust is imminently going to be involved in two further similar procurements.
40. The Commissioner considers that there is a strong public interest in disclosure of information as it could potentially effect a number of staff members. However the Commissioner considers that there is also a strong public interest in allowing the relevant parties' to be able to consider matters privately at the pre-contract stage. More poignantly in this case, the Trust is also going to be imminently involved in two further procurement exercises. The timing of the request adds greater weight to the arguments in favour of maintaining the exemption.
41. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case.

### **Section 10**

42. Under section 10 FOIA a public authority must provide information in response to an FOIA request, unless it is exempt, within 20 working days of receipt of the request. In this case the Trust did not provide all



of the information it held relevant to the scope of this request, which is not exempt, within the statutory time for compliance. It therefore breached section 10 FOIA in the handling of this request.

## Right of appeal

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43. 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)

44. 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.
45. 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 .....**

**Gemma Garvey**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**