

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2017

Public Authority: East Cheshire NHS Trust

Address: Silk House
Macclesfield Distirct General Hospital
Victoria Road
Macclesfield
Cheshire
SK10 3BL

Decision (including any steps ordered)

1. The complainant has requested information relating to a contract between East Cheshire NHS Trust and Parking Eye. The Trust provided the complainant with some of the information requested, confirmed that some was not held and refused to provide some information under section 40(2), 41 and 43(2) FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2), 41 and 43(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 16 March 2016 the complainant requested information of the following description:

"Please supply me with a copy of the contract you have with ParkingEye

If you have not used the NHS Standard Contract (Supply of Goods & Provision of Services March 2015) The document/ minutes of the meeting, where it was approved, that a different contract may be used

Reports produced stating & evidence produced that Parking Eye are complying with the Terms & Condition's of the contract.

If no reports or evidence have been produced. Then any document held that provides assurance that the T &C's of the contract have been met."

5. On 20 April 2016, the Trust responded. The Trust provided the complainant with some minutes that fell within the scope of the request and confirmed that the contract was already publicly accessible. It said that it did not hold any reports or evidence produced by Parking Eye.
6. The complainant requested an internal review on 21 April 2016 as the contract that is publicly available is redacted. The Trust provided the result of the internal review on 23 June 2016. It confirmed that the redactions to the contract had been made under section 43(2) (prejudice to commercial interests), section 41 (information provided in confidence) and section 40(2) third party personal data).

Scope of the case

7. The complainant contacted the Commissioner on 23 June 2016 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Trust was correct to apply section 40(2), 41 and 43(2) FOIA to make redactions to the requested contract.

Reasons for decision

Section 43 – commercial interests

9. The Trust explained that section 43 had been applied where disclosure of the information relates to the commercial arrangements in place between the Trust and ParkingEye. This is primarily in relation to pricing, but also includes information about service levels, liability apportionment and fees for early termination.
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."*¹

12. Upon viewing the withheld information the Commissioner considers that it relates to the commercial arrangements in place between the Trust and ParkingEye. 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 on to consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

The nature of the prejudice

14. The Trust is of the opinion that disclosure of the information redacted under section 43(2) FOIA would be likely to prejudice the commercial interests of Parking Eye.
15. The Trust contacted Parking Eye to obtain their views as to the nature of the prejudice in this case. They made it clear that disclosure of the information redacted under this exemption would be likely to cause them real harm as disclosure would reveal details of their pricing, agreed service levels and the fees payable by the Trust should it wish to terminate the agreement early. This information could be used by competitors of ParkingEye to try and undercut them, or to try and poach its business, or the business of their other clients. ParkingEye also confirmed that this information is not already known and would not be easily obtained by competitors; therefore disclosure would be likely to cause them harm that would not otherwise occur.
16. It went on that as ParkingEye does not have a monopoly over the market disclosure of the commercial arrangements in place with the Trust including how ParkingEye is remunerated will have an impact on their ability to compete. It said that ParkingEye is currently carrying out preliminary evaluation and assessment, as to whether it will bid for

¹ 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

car park management services with another Trust. Whilst the exact commercial model is yet to be finalised, in the event that ParkingEye decides to submit a bid, this is likely to be based on a similar commercial basis, as is in place with the Trust. As it is anticipated that other car park management providers would also be submitting bids for the same services, disclosure of the commercial arrangements in place between ParkingEye and the Trust could enable a competitor of ParkingEye to submit a bid for the same services, but at a reduced rate.

17. It went on that ParkingEye is not privy to the commercial deals offered by other car park management companies and they are not privy to ParkingEye's, so ParkingEye believe that the obvious consequence of disclosure of the number of Parking Charges issued at the Car Park and the resulting inference that this forms ParkingEye's revenue would be a restriction to: ParkingEye's ability to compete in respect of this tender; any future tenders with the Trust; and, potentially, any other business that ParkingEye wishes to submit a bid for in the future.
18. Furthermore it said that if the basis of the commercial arrangements between ParkingEye and the Trust were to be disclosed, there is a real possibility that other car park management providers could use this as an opportunity to speak to ParkingEye's existing client base and to encourage them to terminate the services provided by ParkingEye by offering such clients an improved commercial deal. Clearly this would have a huge detrimental impact on ParkingEye's ability to carry out its business of car park management.
19. The Trust argued that there is a risk of reputational harm as Car park management at hospitals is a controversial area and so disclosure of ParkingEye's revenue in particular could cause real risk of reputational harm to ParkingEye.

Likelihood of prejudice

20. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."
21. In this case the Trust has argued that disclosure would be likely to prejudice the commercial interests of Parking Eye.

22. To demonstrate that the prejudice would be likely to occur, the Trust must show that there is a real and significant risk of prejudice. The withheld information is contained within a live contract and if ParkingEye were to submit a bid in relation to the upcoming procurement it is considering, it would be based upon similar commercial terms. The Commissioner is therefore satisfied that this level of detail would be a commercial advantage to potential competitors within this upcoming procurement exercise and in terms of revealing how lucrative the current contract is to Parking Eye. Section 43(2) was therefore correctly engaged in this case.
23. 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

24. There is a general public interest in terms of openness and accountability as to how the Trust is contracting out its car parking management and upon what terms.

Public interest arguments in favour of maintaining the exemption

25. The Trust argued that there is a public interest in ensuring that companies such as ParkingEye can compete fairly, and for the public sector to obtain best value for money.

Balance of the public interest arguments

26. The Commissioner considers that there is a public interest in disclosure of the withheld information as it promotes openness and transparency surrounding Trust operation and contracting out of services, as in this case car park management. As the Trust has highlighted this is a particularly controversial area and a large number of individuals within the local population will use the car park in question.
27. However, equally, the Commissioner does not consider that it would be in the public interest to damage ParkingEye's commercial position by disclosure of current commercially sensitive information which would be likely to be relied upon by their competitors to obtain a commercial advantage in upcoming procurements.
28. 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 applied.

Section 41 – information provided in confidence

29. Section 41(1) of the FOIA states that:

“Information is exempt information if –

a) it was obtained by the public authority from any other person (including another public authority), and

b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Was the information obtained from another person?

30. The Trust has stated that the information redacted under this exemption was provided to it by ParkingEye. This includes the installation and civils documentation which were produced and provided to the Trust by ParkingEye to detail the work required to install the equipment and therefore demonstrates ParkingEye’s recommendations as to the positioning of the equipment. In addition, it was ParkingEye who provided the Trust with suggestions as to which categories of vehicles may be exempt from the terms and conditions of parking and what the cancellation threshold should be.

31. Whilst the Commissioner’s position is that information within a contract are mutually agreed terms between the contracting parties and therefore not provided from one to another, his guidance does acknowledge that (paragraphs 19-20)²:

“However, we recognise that in some cases a contract will contain technical information, given to the authority by the other party to the contract, in addition to the mutually agreed terms and obligations. Sometimes the technical material will form part of main body of the contract, although more often than not it will feature in separate schedules.

Where technical information is included, it may, depending on the circumstances of the case, constitute information obtained by the authority from another person.”

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

32. Upon viewing the information withheld under this exemption, the Commissioner is satisfied that it does constitute technical information provided to the Trust by ParkingEye. The requirement of section 41(1)(a) is therefore satisfied.

Would disclosure constitute an actionable breach of confidence?

33. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

34. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
35. The Commissioner does not consider that the parts of the contract that have been withheld under section 41 FOIA have been put into the public domain and furthermore he does not consider that recommendations as to the positioning of the equipment or suggestions as to which categories of vehicles may be exempt from the terms and conditions of parking and what the cancellation threshold should be is trivial.
36. The information redacted from the contract under section 41 FOIA does therefore have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

37. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
38. The Commissioner considers that at the very least there was an implicit obligation of confidence as the technical information was shared by

ParkingEye with the Trust for the purpose of entering into the contract with it. The Trust has already confirmed that ParkingEye would not want this information to be put into the public domain.

Detriment to the confider

39. The Trust has argued that the redacted information could be utilised by either competitors of ParkingEye or by motorists to avoid gaining a Parking Charge, to seek to receive a Parking Charge in bad faith, or to dishonestly request a cancellation. This would cause a detriment to ParkingEye.
40. On this basis the Commissioner is satisfied that disclosure would cause a detriment to ParkingEye.

Is there a public interest defence for disclosure?

41. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
42. The Commissioner acknowledges that there is a public interest in openness and accountability surrounding NHS contracts and particularly with the controversial area of car park management but the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
43. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

44. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant; and that the Trust would not have a public interest defence for breaching its duty of confidence.
45. Having considered all the circumstances of this case, and information withheld under section 41 FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
46. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Section 40(2)

47. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
48. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
49. The Trust has redacted the names, job titles and contact details of referees used by ParkingEye in order to successfully tender for the services.
50. In order to reach a view on the Trust's arguments the Commissioner has first considered whether this would constitute the personal data of third parties.
51. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
52. The Commissioner does consider that the names and direct contact details of the data subjects would be information from which they would be identifiable. It does therefore constitute personal data.
53. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of

personal data is fair and lawful. The Commissioner has initially considered whether the disclosure of this information would be fair.

54. When considering whether the disclosure of this information under the FOIA would be fair, the Commissioner has to take into account the fact that FOIA is applicant blind and that disclosure should be considered in the widest sense – that is, to the public at large.
55. The Commissioner does not consider that the data subjects would have an expectation that their personal data would be disclosed in the context of them acting as referees in relation to this contract.
56. The Commissioner has however gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subjects set out above.
57. The Commissioner does not consider that there is any significant legitimate public interest in disclosure of the names and contact details of the data subjects. It would not, to any significant extent, promote openness or transparency surrounding this contract.
58. After considering the nature of the withheld information, and the reasonable expectations of the data subjects, the Commissioner believes that the disclosure under FOIA would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subjects in this case.
59. Therefore the Commissioner believes that section 40(2) FOIA is engaged, and provides an exemption from disclosure.

Right of appeal

60. 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

61. 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.
62. 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

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