

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 August 2017

**Public Authority:** University Hospitals Coventry and Warwickshire  
NHS Trust

**Address:** University Hospital  
Clifford Bridge Road  
Coventry  
CV2 2DX

#### Decision (including any steps ordered)

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1. The complainant requested emails and other information relating to the Sustainability and Transformation Planning (STP) process.
2. The public authority refused to provide the complainant with the requested emails, citing section 12 of the FOIA (cost) as its basis for doing so. In relation to other STP related information the public authority refused the request citing sections 43(2) (commercial interests), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) as its reason for refusal.
3. The Commissioner's decision is that the public authority has correctly applied section 12 of the FOIA to the request for emails. In respect of other STP related information the Commissioner finds that sections 36(2)(b)(i) and (ii) of the FOIA are engaged and that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.
4. The Commissioner requires no steps to be taken.

#### Background

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5. By way of background and in terms of context, in December 2015 NHS England published a document "Delivering the Forward View: NHS Planning Guidance 2016/17 – 2020/21" which sets out what a STP is intended to do. Effectively, health bodies and social care partners within

an STP footprint were asked to come together to jointly plan services for the period October 2016 to March 2021, in order to meet the triple challenge set out in the 5 Year Forward View, which is a public document.

6. The triple challenge is as follows:
  - How will we close the health and well-being gap?
  - How will we drive transformation to close the care and quality gap?
  - How will we close the finance and efficiency gap?
7. It was recognised from the outset that in order to meet the triple challenge, there would need to be changes to the way that healthcare is delivered across the Coventry and Warwickshire STP, and as a forerunner, it would be necessary for partners to share information in the way that would not ordinarily be in the public domain and to this end members of the STP signed an agreement for mutual exchange of confidential information for use regarding the development of the STP.
8. The STP was very high level and embryonic and had no status in terms of this not being effectively 'signed off' by the regulator. Prior to any plans being enacted, each constituent body would need to follow internal governance processes and take a decision through their respective Board or Governing Body as the STP is a meeting of partners; it is not entity in its own right and has no legal status.
9. There was always an intention to publish the STP once it had been through due process with NHS England as the regulator for the sector, and the STP plan was published by each member organisation on 6 December 2016:

<http://www.uhcw.nhs.uk/about-us/stp>

## **Request and response**

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10. On 2 December 2016, the complainant, on behalf of Trinity Mirror newspaper group, wrote to University Hospitals Coventry and Warwickshire NHS Trust (UHCW) and requested information in the following terms:

*Please could you provide copies of the following for the past 24 months (Jan 1, 2015 to Dec 2, 2016):*

*Any emails sent and received by [Chief Executive Officer] in relation to the STP*

*Any emails sent and received by [name redacted] relation to the STP  
Any emails sent and received by [name redacted] in relation to the STP  
Any emails sent and received by [name redacted] in relation to the STP  
Any emails sent and received by [name redacted] in relation to the STP  
Any emails sent and received by any member of the press team in  
relation to the STP or in relation to press enquiries about the STP*

*Any minutes / notes taken during meetings in relation to the STP  
planning process*

*Specifically: Any minutes / notes taken during meetings in relation to  
A&E in Coventry and Warwickshire and the STP AND Any minutes /  
notes taken during in relation to forward planning for maternity services  
/ paediatrics in the region.*

*Please also provide any documents (presentations, powerpoint  
slideshows, graphics, charts etc) produced as part of the STP process  
relating specifically to A&E, maternity or paediatrics care in Coventry /  
Warwickshire.*

11. UHCW provided its response on 4 January 2017 in which it confirmed that it holds the requested information, however it refused to provide the complainant with the requested emails, citing section 12 of the FOIA (cost) as its basis for doing so. In relation to minutes and papers of STP meetings it cited sections 43(2) (commercial interests), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) as the reason for its refusal.
12. On 4 January 2017 the complainant wrote to UHCW requesting an internal review of its decision to refuse his request.
13. In its internal review outcome dated 6 February 2017 UHCW upheld its decision to refuse the complainant's request.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 20 April 2017 to complain about the way his request for information had been handled and asked the Commissioner to encourage UHCW to provide him with the requested information.
15. The Commissioner considers that the scope of the case is whether section 12 has been appropriately applied to the requested emails, and whether UHCW was correct to rely upon the exemptions contained in sections 43(2), 41 and 36 of the FOIA in refusing the request for other SPT related information.

## Reasons for decision

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### Emails

#### Section 12 (cost)

16. Section 12(1) provides that:

*"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."*

17. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.

18. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:

- Determining whether it holds the information;
- Locating the information, or a document which may contain the information;
- Retrieving the information, or a document which may contain the information;
- Extracting the information from a document containing it.

19. In its response to the complainant UHCW highlighted that he had requested emails for a 24 month period from 5 individuals plus one team comprising 4 individuals, each of whom receive on average in excess of 50-60 emails per day. UHCW advised the complainant that in order to respond to his request it would be required to examine each sent and received item from each day during the period of his request to extract any STP related information which would very quickly exceed the cost limit set out in section 12 of the FOIA.

20. UHCW informed the complainant that in line with its duty to assist under section 16 of the FOIA, the requirement for STPs to be developed was not announced until December 2015, and so it was possible to pare back his request to the period December 2015 to the date of his request, representing 12 months emails at the rate of arrival detailed previously. However UHCW still considered that a refined request on these terms would exceed the appropriate cost limit.

21. In his request for an internal review, the complainant considered that email searches for keywords would eliminate the need to inspect each email individually and rejected the notion that this would be an overly time-consuming process.
22. UHCW's internal review based its outcome on an average daily receipt of 60 emails per named individual, which does not include emails that the individuals have sent. This equates to on average 558 emails received per day and approximately 400,000 emails received over the period to which the request relates. The overall figure would in reality be much higher to account for emails which those individuals sent in the same period.
23. UHCW accepted the point that it is possible to perform a search using specific terms, but did not agree that the search terms that could be applied to the request would produce the desired result. This is because any emails in connection with STP related matters might not feature the word abbreviation 'STP' or the full text. This is because the STP is a Coventry and Warwickshire-wide proposal that involves partners from health and social care and it is therefore broken down into the work-streams that are set out within the document that has been published. It is entirely possible therefore that STP related emails could be held that do not actually refer to the term STP anywhere within the text or the subject matter.
24. To illustrate this point, UHCW said there could be STP related emails in existence relating to emergency services, as urgent and emergency care is one of the work streams. If a search were to be conducted using the phrase 'emergency care' this would undoubtedly return thousands of results as this is a very common parlance in the NHS. Similarly the preventative and proactive work-stream covers a huge amount of services and any such search terms would also, in all likelihood, produce thousands of results. In order to respond to the request, the detail of each email would need to be read to determine whether the content was relevant to it and to remove any element which was not. Without going through every single email that was sent and received by the individuals named in the request, it would not be possible to confirm that it had provided all of the information that it held and to discharge its duties under the FOIA.
25. Given the sheer volume of emails referred to above, even with search terms applied, and if reducing the time period to which the request relates, UHCW believes that the cost of compliance would quickly exceed the appropriate limit.

26. During the course of her enquiries the Commissioner asked a number of questions to enable her to consider whether UHCW has correctly applied section 12 of the FOIA, to which it responded on 19 July 2017.
27. UHCW confirmed that the complainant has requested emails from five named individuals and from the communications team, who each receive on average 60-70 emails per day (in addition to any emails that individual might send). Searching for emails that are STP related, even given the reduced search period (given that the announcement for STP development was not made until December 2015) would exceed the appropriate limit. UHCW confirmed its position that a search using specific search terms would not necessarily capture all STP related information and so it would be necessary to review every email.
28. The Commissioner enquired whether UHCW had carried out a sampling exercise in order to back its assertion that to comply with the request for emails would exceed the appropriate cost limit.
29. UHCW confirmed that it had looked at the email folder of its Director of Corporate Affairs, who is an attendee at the STP board and has a dedicated folder related to STP matters (unlike other individuals named by the complainant in his request). There were 1,395 emails within this folder. Out of the total 1,395 emails, 480 contained attachments, many of which fell within the 'huge' or 'enormous' category (1mb to 10mb of data).
30. In its sampling exercise, UHCW confirmed that each email would have to be reviewed; dependent on the individual performing this task, they would either do it electronically on a screen or print off each email in order to highlight and extract the relevant information in relation to the request. Using an efficient member of staff, it would still take 3 to 5 minutes per email; more in the event that the email contains attachments of the size referred to above.
31. This would equate to anything between 69.5 hours to 116 hours; using the mid-point between the two, it would take 92 hours which would cost £2,375 which exceeds the limit of 18 hours or £450. This exercise would have to be repeated for the other individuals named in the request. UHCW pointed out that the STP dedicated account considered in the sampling exercise is unlikely to represent the full email traffic around STP as the individuals named within the request have all contributed to specific elements of the STP and they are likely to have emails that far outnumber the amount held in this particular account.
32. In respect of the complainant's assertion that the use of search terms would eliminate the need to inspect each individual email, UHCW conducted a search of the dedicated STP inbox using the term

'maternity' (being one of the services highlighted in the complainant's request for minutes/notes of meetings). 164 emails were captured by this search, many of which contain attachments. The Commissioner notes that this search was effective only for the reason that it had been carried out the only folder already dedicated to STP. In respect of all other non STP dedicated accounts a similarly termed search would reveal all information for each work stream irrespective of whether it is STP related and so a review of each email would be necessary to establish if it fell within the scope of this request. In any event the Commissioner further notes that the complainant's request for emails asked for 'any emails.....in relation to the STP' and was not refined to specific work streams, therefore searching for a specific work stream would not capture all of the requested information.

33. UHCW has provided the Commissioner with screenshots of the email account referred to which confirm the number of emails contained within the dedicated STP account referred to above and shows that a large proportion have attachments. She is also satisfied, having viewed the screenshots, with the explanation that using the search terms 'SPT' and the full text in relation to non STP dedicated accounts would not necessarily reveal STP related information, as not all of the emails (even within the dedicated account) contain the abbreviation 'STP' or its full text within the title. She therefore accepts that UHCW would need to review each and every email in each of the individual non STP dedicated accounts in order to establish whether it contained information falling within the scope of the complainant's request.
34. The Commissioner is therefore satisfied that the cost of complying with the complainant's request for emails would significantly exceed the appropriate limit and accordingly she finds that section 12 of the FOIA has been correctly applied in this case.

### **Other SPT related information**

#### **Section 36 (prejudice to effective conduct of public affairs)**

35. The Commissioner has been informed by UHCW that it has applied section 36 to the entirety of the withheld information, comprising a series of meeting minutes. In particular, the withheld information falls to be considered under sections 36(2)(b)(i) and (ii) of the FOIA.
36. Sections 36(2)(b)(i) and (ii) of FOIA state that:

*2) 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 –*

*(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.*

37. Sections 36(2)(b)(i) and (ii) can only be engaged if, in the reasonable opinion of the qualified person, disclosure would, or would be likely to result in any of the effects set out.
38. In the present case, UHCW's Chief Executive Officer, Mr Andrew Hardy, provided the opinion. The Commissioner is satisfied that he is the qualified person for the purposes of section 36. The Commissioner was informed that the qualified person is the Chair of the meetings and STP lead and is fully aware of the content of the minutes/papers which form the withheld information. UHCW has provided the Commissioner with a copy of the qualified person's opinion.

### **Is section 36 engaged?**

39. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. When making her determination, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd – that is, if it is an opinion that a reasonable person could hold – then it is reasonable.
40. However, this is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion will not be deemed unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Therefore, the qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
41. The Commissioner has considered the relevant factors including:
- Whether the prejudice relates to the specific subsections of section 36(2) that are being claimed. If the prejudice or inhibition is not related to the specific subsections, the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.



42. The qualified person stated that the STP is a centrally mandated development that requires the input of health & social care partners from across the health economy. In order to meet the triple challenge laid out, members must exchange commercially sensitive information and information that would prejudice their ability to operate on a level playing field given the competitive nature of the NHS. The exchange of information required is to an unprecedented degree and in order for members to have the trust and confidence to do this a non-disclosure agreement was signed at the outset. The information that is contained within minutes is highly sensitive and confidential and is not information that would ever ordinarily appear in the public domain.
43. He believes it is imperative to the development of the STP that a full and frank exchange of views and advice takes place between members and the minutes reflect these views and advice. If members are unable to speak freely and frankly for fear of the information being put into the public domain then the STP is unlikely to deliver the stated requirements to develop plans that will ensure the sustainability of local health economies.
44. Furthermore, the STP represents nothing other than a high level planning document and any plans that are taken forwards will require further discussion and debate with Trust Boards and governing bodies and in some cases full public consultation.
45. The qualified person pointed out that it is difficult to see what benefit making the minutes public knowledge would have as these would need to be redacted to such a degree because of the sensitivity of the information discussed that they would be meaningless and unintelligible. The STP once published would be accompanied by a public facing summary which will be written in way that is intended for public consumption and that the public will understand.
46. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank provision of advice and the exchange of views either 'would' occur or would only be 'likely' to occur. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
47. In the qualified person's opinion, he stated that disclosure 'would' inhibit the matters set out in section 36(2)(b)(i) on the basis that members will be reluctant to provide their confidential and sensitive information if they are concerned that it will become a matter of public knowledge. He stated that disclosure 'would be likely to' inhibit the matters set out

in section 36(2)(b)(ii) on the basis that members will be reluctant to provide their views or deliberate to the extent required to develop a successful STP if they are mindful that these deliberations or views might be a matter of public record.

48. The complainant pointed out that the minuted conversations have led to the production of a publicly available document dealing with the expenditure of millions of pounds of public funds and healthcare provision for millions of people. With the document already released he felt there was little justification for continuing to keep those conversations private.
49. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would be likely to inhibit the processes of providing advice or exchanging views.
50. Having reviewed the information withheld under this section of the FOIA, which comprise a series of meeting minutes, the Commissioner is satisfied that it was reasonable for the qualified person to conclude that sections 36(2)(b)(i) and (ii) applied.
51. This is because she considers that UHCW needed to provide advice and deliberate sensitive and high profile issues in a 'safe space' and away from the public domain. She agrees that if each and every step of these processes is put into the public domain then members are likely to be inhibited from providing open and honest advice and exchanging free and frank views for the purposes of deliberation in the future. This in turn would affect the ability of UHCW to make effective and fully informed decisions in the future in relation to its core function of providing value for public money and high quality public healthcare.
52. Whilst the Commissioner is of the view that members should be sufficiently robust to make decisions without being deterred by concerns about advice and deliberations being publicly available, this view does not outweigh the need to deliberate and provide advice in a 'safe space' in relation to high profile and large scale issues, as was involved in the particular circumstances of this case.
53. In forming her view the Commissioner took into account that at the time of the request, the STP process was live and ongoing; UHCW has described the planning process as 'high level and embryonic'. The STP document had not been published at the time of the request. In any event, the development of the STP was in effect the first stage in a longer term plan, which will require ongoing discussion and deliberation in relation to turning those initial ideas into a solid proposal and future

implementation of the STP. Whilst publication of the STP occurred only four days after the complainant's request, and when presumably the provision of advice and exchange of views in relation to that stage of the process had already taken place, the complainant's request captures all information stemming from the time of the initial announcement of STP requirement and so would include the very early stages of discussions and 'blue sky' thinking.

### **Public interest test**

54. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition 'would' (in respect of the matters set out in section 36(2)(b)(i)) and 'would be likely' (in respect of the matters set out in section 36(2)(b)(ii)) to result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.
55. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable, she will consider the weight of that opinion in applying the public interest test.

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

56. The complainant, in his request for an internal review considered that transparency of decisions on how public funds are spent will generate confidence in the integrity of the procedures involved. He felt there was a clear public interest in the scrutiny of how decision on public spending and healthcare provision are made.
57. UHCW accepts that the public at large has an interest in local health services and their development and that there should be a duty of transparency.

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

58. UHCW's strongly held view is that the public interest in releasing the documents is outweighed by the public interest in maintaining the exemption.
59. In terms of the public interest test, UHCW's position is that failure to rise to the challenge presented to it by NHS England, given the current financial position in the NHS and social care, would not only be contrary to the public interest, but prejudicial to it.

60. There had been a stated intention to publish the high level STP plan later in the year and to engage and consult with the public. The plan would therefore become public knowledge and will allow the public to ask questions and understand the rationale behind any options that are put forward. UHCW finds it difficult to see how the release of information leading to the publication would be of benefit to the public given that a full engagement plan and publication was always intended and has since taken place.
61. UHCW believes that the published document as it stands satisfies the public interest as it provides sufficient information as to the current plan. As the plan is further developed, more detail is to be published in relation to which the public will be given the opportunity to respond.
62. UHCW also believes that the release of information shared for the specific purpose of STP planning would undermine the trust between organisations and would be prejudicial to working together in partnership in the future. This in itself would be prejudicial to the public interest in that organisations increasingly need to work together given the current financial climate, to ensure that the finite resources that are available are used wisely to provide high quality care.

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

63. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
64. When attributing weight to the 'chilling effect' arguments ie. that disclosure of information would inhibit free and frank provision of advice and discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making, the Commissioner recognises that the members are expected to be robust and impartial when providing advice and deliberating.
65. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure. However, she also considers that chilling effect arguments cannot be dismissed out of hand. In this case, she accepts that UHCW should be able to hold free and frank discussions which include the provision of advice and the exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made.

66. With regard to UHCW's 'thinking space' argument, the Commissioner considers that there is a need for any public authority to have a safe space in which to develop ideas or make decisions.
67. The Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability, however she considers that the publication of the STP document is sufficient to achieve these ends. The Commissioner does not consider that the wider public interest would be better served by disclosure of the withheld information.
68. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and exchange of views for the purposes of deliberation, against the public interest in openness and transparency. In particular, in accepting the qualified person's opinion that disclosure 'would' inhibit the matters set out in section 36(2)(b)(i), and 'would be likely' to inhibit the matters set out in section 36(2)(b)(ii), she has had due regard to the inherent weight of that opinion when applying the public interest test. In her deliberations she has also considered UHCW's and the complainant's arguments regarding disclosure, and has paid particular attention to the timing of the request, which occurred at a time prior to publication of the plan and when the issue was very much live and ongoing.
69. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in UHCW's ability to conduct its affairs effectively and in a 'safe space'. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Conclusion**

70. Taking all of the above into account, the Commissioner is satisfied that sections 36(2)(i) and (ii) have been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
71. As the Commissioner has concluded that section 36 has been correctly applied to all of the withheld information she has not gone on to consider SWFT's application of sections 41 and 43(2).

## Other matters

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72. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to someone making an information request, including helping an applicant refine a request so that it can be answered within the appropriate costs limit. In this case the Commissioner notes that in line with this duty UHCW considered reducing the period of the request to include only the time post December 2015 when the requirement for STPs was announced, however this would not take the request within the appropriate limit. The Commissioner has considered whether UHCW could reasonably offer any other advice and assistance to the complainant, however given that the estimated cost of providing emails from one dedicated STP email account would exceed the appropriate limit she feels there is limited scope for doing so, as any refined search would be unlikely to provide the complainant with a sufficiently meaningful response. The Commissioner therefore considers that UHCW has complied with its duty under section 16.

## Right of appeal

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73. 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)

74. 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.
75. 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**