

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2019

Public Authority: Leeds Teaching Hospitals NHS Trust
Address: Trust Headquarters
St James's University Hospital
Beckett Street
Leeds
LS9 7TF

Decision (including any steps ordered)

1. The complainant has requested information relating to the Leeds Teaching Hospitals NHS Trust (the trust) proposals to implement a Wholly Owned Subsidiary Company (WOSC) and transfer certain services to it. The trust disclosed some information but refused to disclose other information citing sections 36(2)(b) and (c) and 43 of the FOIA.
2. The Commissioner's decision is that the trust is entitled to withhold the remaining withheld information under section 36(2)(b)(ii) of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 23 May 2018, the complainant wrote to the trust and requested information in the following terms:

"I am concerned about the implications of the Wholly Owned Subsidiary Company (WOSC) under discussion by the Trust. I am interested in decisions that the Trust may have made regarding the transfer of staff, assets etc. from itself to a WOSC, and the implications of this for staff, patients and members of the public.

Can you please disclose:

- 1) Copies of all papers on the subject of the establishment and management of the WOSC that were considered by:
 - a) Trust Board (in public or private meeting)
 - b) Trust Board sub-committees (for example, but not limited to, the Finance sub-committee)
 - c) The central management team
- 2) The relevant section from the minutes of the above meetings, recording the discussion and any decisions made regarding the WOSC.
- 3) Copies of any professional advice commissioned/received by the Trust relating to the establishment of a WOSC and its subsequent management and expansion - including, but not limited to, tax, financial and employment law advice from external advisors or consultants.
- 4) A summary of the cost of professional advice commissioned/received by the Trust relating to the WOSC.
- 5) Details of and estimation of value of the equipment, property and facilities which the Trust anticipates may be transferred to, or entered into lease or other commercial agreements with the WOSC."
4. The trust responded on 22 June 2018. It provided some information and directed the complainant to where he could access other information falling within the scope of his request. It however refused to disclose all other information citing sections 36(2)(b) and 42 of the FOIA.
5. The complainant requested an internal review on 11 July 2018.
6. The trust carried out an internal review and notified the complainant of its findings on 17 August 2018. It informed the complainant that it upheld the application of the exemptions cited.

Scope of the case

7. The complainant contacted the Commissioner on 2 July 2018 to complain about the way his request for information had been handled. Specifically, the complainant disagrees with the application of the exemptions cited and considers the information should be disclosed.
8. During the Commissioner's investigation the trust withdrew its application of section 42 and confirmed that it now wished to rely on section 43 of the FOIA. It was also identified that some of the previously withheld information did not fall within the scope of the request, as it

post dated it. The Commissioner can only consider what recorded information is held at the time of the request.

9. The trust also reviewed what information it had previously withheld and decided to release some of it to the complainant. This was carried out on 30 May 2019.
10. The remainder of this notice will consider the remaining withheld information and the trust's application of section 36(2)(b) and 43 of the FOIA. The Commissioner will first consider the application of section 36(2)(b) as this has been applied to all the remaining withheld information. She will only go on to consider section 43 of the FOIA if the information withheld under this exemption is not exempt from disclosure under section 36(2)(b).

Reasons for decision

11. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. The trust confirmed that the qualified person for the purposes of section 36 of the FOIA is the trust's Chief Executive Officer. It stated that he considered the nature of the withheld information, the timing of the request and the specific subsections of section 36(2) of the FOIA and provided his opinion that subsections (b) and (c) apply on 21 June 2018.
13. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

14. The trust explained that it is exploring the formation of a WOSC for the delivery of estates, facilities, procurement and some clinical engineering services. It stated that this has followed a number of other NHS trusts in West Yorkshire and elsewhere in the NHS who are already employing a similar model or in the process of developing their plans. In March 2018 the trust took the decision to continue the engagement around the development of a WOSC. It stated that this includes exploring alternative delivery models, reviewing services in scope and continuing discussions with trade unions. At the end of May/beginning of June 2018 (around the time the complainant's request was made) the trust proceeded on to a further stage of staff engagement events with a revised offer to staff who would be potentially moving into the WOSC (if it was set up). At this stage no decision had been made as to whether to set up a WOSC or not, it was still exploring and debating its options.
15. The trust said it is the qualified person's opinion that it requires the safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. Disclosure would be likely to inhibit the ability of trust employees and others to express themselves openly, honestly and completely or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. It stated that the rationale for this is that inhibiting the provision of advice or the exchange of views will impair the quality of decisions made by the trust.
16. The trust also advised that it is the qualified person's opinion that disclosure would be likely to cause a chilling effect. Disclosure would be likely to inhibit free and frank discussions in the future and that the loss of frankness and candour would be likely to damage the quality of advice and deliberation and lead to poor decision making.
17. The Commissioner is satisfied in this case that section 36(2)(b)(ii) of the FOIA is engaged. Although the trust had commenced staff engagement and the involvement of trade unions, it is apparent that the trust's proposals to implement a WOSC were still at the design and consideration phase. It was a proposal put to staff for consideration and the trust had not made any firm decisions on how to proceed either way. A meeting had taken place in March 2018 but at the time of the request in May 2018 the trust was still in the process of considering its options, the advantages and disadvantages of these, deliberating internally and seeking the opinions of its staff and the relevant unions and putting proposals to them. The Commissioner considers the qualified person's opinion that safe space was still required away from public disclosure to be a reasonable opinion to hold. She can see how the qualified person reached the opinion that disclosure would be likely to prejudice the process of deliberation and inhibit those involved from sharing their opinions and offering their advice in an open, honest and candid way.

She accepts that safe space is required whilst decisions are being made and whilst deliberation is taking place. Without it, it is likely that the trust would be hindered in its ability to make important decisions.

Public interest test

18. The trust confirmed that it recognised the public interest in transparency and accountability and that disclosure assists public understanding and debate in relation to decisions which will affect them and the local community. It accepts that disclosure can aid decision making and ensure that the most appropriate decisions are made.
19. However, in this case the trust considers there are stronger public interest arguments in favour of maintaining the exemption. It stated that public bodies need the safe space to fully consider their policy options to enable them to reach an impartial and appropriate decision away from public interference. The trust argued that disclosure would be likely to inhibit the ability of the trust employees and others to express themselves openly, honestly and completely and to explore extreme options, when providing advice or giving views as part of the process of deliberation. It stated that this is not in the interests of the wider public, as this will impair its ability to deliberate effectively and impair the quality of decision making. It said that it requires the safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction.
20. The complainant, on the other hand, considers the public interest rests in disclosure. He states that the WOSC is a very important issue for the 2300 NHS staff affected and the people of Leeds. He commented that the trust is not a foundation trust and is therefore not in a position to set up an WOSC without first getting the approval from the Secretary for Health and Social Care. The complainant stated that at the trust board meeting on 29 March 2018 representations were taken from trade unions and members of the public. The board decided to delay pursuing plans for the WOSC until further discussions and staff engagement had occurred. The complainant advised that there has, in fact, been little staff engagement since that time and two unions representing some of those employees affected have opted to ballot over strike action. He stated that this clearly signifies the high level of concern by staff facing the prospect of being moved out of the NHS, their families and friends, and those patients and citizens of Leeds who do not wish to see further fragmentation of the NHS. He confirmed that five local MP's have also expressed opposition to the proposals.
21. The complainant referred to the core values of the trust and how these are encapsulated in 'the Leeds Way' – "who we are and what we believe" (<http://www.leedsth.nhs.uk/about-us/the-leeds-way/>). He

stated that the Leeds Way is central to the way the Trust works and sees itself, and includes the following commitments:

- to: "Act with integrity and always be true to our word"
- to: "Be honest with patients, colleagues and our communities at all times"
- to: "Disclose results and accept responsibility for our actions"

He argued that given the above, it is disingenuous for the trust to refuse to answer his questions over the WOSC. He stated that in fact only by being open and transparent can the merits of the arguments be judged and, in his view, the trust having any hope of winning over staff to their position.

22. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
23. The Commissioner acknowledges the public interest arguments in favour of disclosure. She notes that the complainant and others directly effected have real concerns over the potential development of a WOSC and certain functions being moved to it. She accepts that disclosure of the withheld information would enable them to understand more closely what options are being explored and why, what the alleged advantages and disadvantages are of those options and participate more fully in the debate.
24. The Commissioner appreciates that disclosure assists public debate and enables the public to full scrutinise the decisions made by public authorities and hold them to account where necessary.
25. However, in this case, considering the circumstances at the time of the request, the Commissioner is of the view that the public interest rests in maintaining this exemption. At the time of the request the trust was still in the process of deliberation. It was still considering its options and debating these internally in a free, frank and candid manner. She accepts that despite the real concerns of the trust employees and local community, the trust is entitled to the free and private thinking space that is required in order to assess and deliberate on its options. Safe space is required especially when the issues under discussion are still live and in the development/proposal stage. At this time there is a real likelihood that disclosure would hinder the trust's ability to consider its options fully and comprehensively and discourage those staff involved in the process (on which their advice and views are relied) from participating in a free and frank way. These effects would be likely to be fairly extensive and severe and impact negatively on the trust's ability to arrive at the most appropriate way forward for the trust.

26. Although the complainant may not agree entirely, it is noted that the trust has shared information with its staff, released further information to the complainant during this investigation and entered into discussions with the appropriate trade unions. No firm decision had been made at the time of the request and the trust had entered into a further stage of staff and trade union engagement.
27. The Commissioner does not consider it is in the wider interests of the public to hinder the trust's ability to continue to consider its options and reach the most appropriate way forward and decision for the trust as a whole. Safe space is required to develop ideas and debate these without the fear of premature public disclosure and interference. If this was not available to public authorities it would be likely to lead to poorer decision making and again this would not be in the public interest.
28. For the above reasons, the Commissioner has decided in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
29. As the Commissioner is satisfied that section 36(2)(b)(ii) applies, there is no need for her to go on to consider the trust's application of section 43.

Right of appeal

30. 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

31. 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.
32. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF