

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2019

Public Authority: Royal Free London NHS Foundation Trust
Address: Royal Free Hospital
Pond Street
London
NW3 2QG

Decision (including any steps ordered)

1. The complainant requested information from the Royal Free London NHS Foundation Trust ("the Trust") about the creation of a wholly-owned subsidiary property service company. The Trust disclosed some correspondence to the complainant. It withheld some correspondence as being out of scope of the request, and it withheld some correspondence under section 36(2) – prejudicial to the effective conduct of public affairs. The Trust also disclosed some reports and minutes to the complainant, but withheld some information under section 43(2) – prejudicial to commercial interests.
2. The Commissioner's decision is that the Trust correctly withheld some correspondence as being out of scope of the request, and correctly withheld some correspondence under section 36(2). The Commissioner has also determined that the Trust correctly withheld some reports and minutes under section 43(2).
3. However, the Trust failed to consider email attachments for disclosure as part of the bundle of correspondence, thereby breaching the requirements of section 1(1) of the FOIA.
4. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation.

- Issue a response to the complainant in respect of the attachments to the correspondence in the emails bundle (as explained in this notice) which complies with the requirements of the FOIA.
5. The Trust must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 4 April 2018, the complainant wrote to the Trust and requested information in the following terms:

"Please supply the following:

1) The section of the minutes of the confidential Board meeting held on 24th January 2018, which relates to the exploration of the creation of a wholly owned subsidiary property service company.

2) All papers presented to the confidential Board meeting held on 24th January 2018 which relate to the item on the agenda regarding the exploration of the creation of a wholly owned subsidiary property service company.

3) All other information held which relates to the Trust's exploration of the creation of a wholly owned subsidiary property service company, regardless as to whether that information is dated before or after the confidential Board meeting held on 24th January 2018. I would expect that the Trust would hold recorded information relating to their exploration of the creation of a wholly owned subsidiary property services company, and that this may be located in emails, memoranda, notes of meetings, minutes of meetings, records of decision taken and other records."

7. On 2 May 2018, the Trust responded and provided some background information, and confirmed that it held some relevant information. It withheld the requested information under section 36 of the FOIA (prejudicial to the effective conduct of public affairs).
8. The complainant requested an internal review on 23 May 2018. The Royal Free sent her a response on 27 July 2018. It determined that it would undertake a fresh review of the documents with a view to their disclosure because *"the decision regarding the wholly owned subsidiary property service company has now been completed and... it may be*

possible to disclose a significant number of documents". It said it would limit its considerations to *"formal board and committee reports and minutes relating to the establishment of the property services company"* and asked for her view.

9. On 4 August 2018, the complainant wrote to the Trust and explained that she did not wish to change the scope of her request and still wished to receive emails and other correspondence, as well as reports and minutes.
10. On 8 August 2018, the Trust advised her that it would endeavour to provide the reports and minutes by 17 August 2018; however it would not be able to review and/or provide correspondence within the same time frame.
11. On 12 November 2018, the Trust provided the complainant with the outcome of its internal review. It disclosed some information. This was provided in two bundles – a reports and minutes bundle, and an emails bundle. Some information was redacted from both bundles under a number of different exemptions of the FOIA:
 - section 21 – information accessible by other means;
 - section 22 – information intended for future publication;
 - section 36(2) – prejudicial to effective conduct of public affairs;
 - section 40(2) – third party personal data;
 - section 41 – information provided in confidence;
 - section 42 – legal professional privilege;
 - section 43 – commercial interests.

The course of the investigation

12. The complainant contacted the Commissioner on 7 August 2018 to complain about the way her request for information had been handled. At this stage, she was awaiting a substantive response to her request for an internal review.
13. Following the Trust's internal review response of 12 November 2018, together with the disclosure of some redacted information, the complainant confirmed to the Commissioner that she was still dissatisfied. She wished the Trust to clarify which exemption(s) applied

to which redacted section of information. She was also unclear as to whether any information may have been withheld in its entirety.

14. The Commissioner wrote a letter of investigation to the Trust on 17 December 2018.
15. On 7 January 2019, the Trust wrote to the complainant. It stated that no information had been withheld in its entirety, although it acknowledged that attachments to emails had not been provided. It clarified that no information had, in fact, been redacted under section 21 or 22 of the FOIA. The Trust offered to review any specific document or set of information which the complainant may be interested in.
16. On 11 January 2019 the complainant questioned, to the Commissioner, whether the Trust had considered providing external reports. On the same day, she wrote to the Trust explaining that she wished to pursue her complaint.

Reports and minutes bundle

17. On 17 January 2019, the Trust advised the complainant that it was further reviewing its position with regard to the reports and minutes bundle. Subsequently, it wrote to her on 30 January 2019. With its letter, the Trust provided a further copy of the reports and minutes bundle with fewer redactions than before. It also enclosed a schedule detailing the redactions, which had been made under the following sections of the FOIA:
 - Section 40(2) – third party personal data;
 - Section 42(1) – legal professional privilege; and/or
 - Section 43(2) – prejudicial to commercial interests.
18. This information was also provided to the Commissioner, together with the unredacted information for consideration.
19. On 6 February 2019, the complainant confirmed to the Commissioner that redactions made under section 40(2) did not form part of her complaint. She confirmed that she wished the Commissioner to examine the application of sections 42(1) and/or 43(2) to the redacted information. She also commented that she had not received reports prepared by external advisers.

Emails bundle

20. The complainant also reiterated that she remained dissatisfied with the redactions (other than those made under section 40(2) of the FOIA) to the emails bundle, which she had received on 12 November 2018.
21. The Commissioner sought some clarification from the Trust regarding the emails bundle. On 26 February 2019, the Trust wrote to the Commissioner and provided a schedule explaining that redactions to the emails bundle had been made under some or all of the following sections of the FOIA:
 - Section 36(2) – prejudicial to the effective conduct of public affairs;
 - Section 40(2) – third party personal data;
 - Section 41 – information provided in confidence;
 - Section 42(1) – legal professional privilege; and/or
 - Section 43(2) – prejudicial to commercial interests.
22. On 24 May 2019, after receiving a request for further clarification from the Commissioner, the Trust provided the Commissioner with more detail of the redactions that had been made to the emails bundle, covering which redaction had been applied to which part of the information being withheld. However, the Trust at this stage considered that more information could be disclosed and, prior to the issue of this notice, has provided the complainant with a revised bundle of emails.
23. In this latest version of the emails bundle, the Trust explained that some correspondence had now been redacted as being out of scope. It considered that section 36(2) covered all of the other redacted information in the bundle, and that, in addition, sections 41, 42(1) and/or 43(2) also applied to certain discrete pages.

The scope of the case

24. The Commissioner notes that the complainant understands that some information has been redacted from both bundles as being third party personal data under section 40(2) of the FOIA, and has not challenged this.
25. The following analysis covers whether the Trust correctly redacted the information it provided to the complainant, either as being out of the scope of the request, or under a specific exemption of the FOIA, detailed

above. It covers whether all of the information that was considered for disclosure in fact fell within the scope of the request. It also covers whether the Trust holds any further information falling within the scope of the request.

Reasons for decision

Information outside the scope of the investigation

26. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled:
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him or her.
27. A public authority is therefore required to consider what information is held at the date of the request. It should also seek to identify *all* information which it holds at the date of the request and which falls within the scope of the request.
28. The Commissioner has therefore considered whether the Trust has correctly identified the information falling within the scope of the request.

Reports and minutes bundle

29. From the reports and minutes bundle provided to the complainant, the Commissioner notes that pages 169 onwards in fact fall outside the scope of the complainant's request of 4 April 2018, since they were not held at the date of the request. The documents were created later than the 20 working day period following the request during which the Trust would have been expected to be considering information for disclosure.
30. The Commissioner, therefore, has not considered any redactions which were applied to this information, since they cannot form part of the complainant's application to her under section 50 of the FOIA.
31. She considers, nevertheless, that it was good practice for the Trust to have considered some later reports and minutes for disclosure when carrying out its internal review.

Emails bundle

32. Regarding the emails bundle, having revised its position prior to the issue of this notice, the Trust now considers that certain of the correspondence (originally withheld under specific exemptions) in fact falls outside the scope of the request, due to its subject matter. It has redacted this information.
33. The Commissioner has considered this correspondence in relation to the scope of the request. The complainant stated in the request that she was seeking information relating to *"the exploration of the creation of a wholly-owned subsidiary property company"*.
34. The Commissioner has considered whether the redacted information would fall within the scope of this request, and, if so, whether the Trust should now consider it for disclosure.
35. The Commissioner notes that this information relates to separate projects under consideration by the Trust and she is satisfied that it does not relate to the exploration of the creation of the subsidiary property company.
36. She therefore agrees that this correspondence falls outside the scope of the complainant's request.

Further information which falls to be considered

Emails bundle only

37. Section 1(1) of the FOIA, as set out above, requires a public authority to consider *"information of the description specified in the request"*.
38. The Commissioner notes that the Trust has not considered the disclosure of any email attachments to the complainant.
39. In the Commissioner's view, in responding to a request for *"correspondence"*, a public authority is expected to consider for disclosure any attachments to emails, along with the emails themselves.
40. The Commissioner requires the Trust to reconsider the correspondence in the emails bundle (which dates from August 2017 to April 2018) and determine whether any or all of the email attachments fall within the scope of the request and may be disclosed to the complainant.
41. The Trust should issue a response, in respect of the attachments, which complies with the requirements of section 1(1) of the FOIA. In the event that the Trust wishes to redact, fully or in part, any of the attachments,

it should issue a refusal notice which complies with section 17(1) of the FOIA.

Section 36(2) – prejudicial to effective conduct of public affairs

Emails bundle only

42. This section of the decision notice considers the redacted information in the emails bundle (other than that which was redacted as being outside the scope of the request). The Trust considers that section 36(2) applies to all of this information.

43. Section 36(2) of the FOIA states that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a “qualified person”, disclosure of the information:

(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

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

44. In order to engage section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person (“QP”) as to whether inhibition or prejudice relevant to the subsection cited would be at least likely to occur as a result of disclosure of the information in question.

45. The Trust has confirmed that its QP is Chief Executive David Sloman. When responding to the complainant in May 2018, the Trust sought the opinion of the Deputy Chief Executive, since Mr Sloman was away. However, in reconsidering the request in November 2018, it obtained Mr Sloman’s opinion as to the application of the exemption.

46. The Trust has explained that Mr Sloman considered the withheld information on 9 November 2018. The information was described to him, and he was aware of its nature through his personal involvement in discussions and the decision-making process. In Mr Sloman’s opinion, the exemptions at all three limbs of section 36(2) were engaged with regard to the email correspondence.

47. The Trust has explained the reasons for Mr Sloman’s opinion. The Commissioner will consider those which were relevant to the issue of disclosure at the date of the request.

48. Regarding the free and frank provision of advice (section 36(2)(b)(i)), the opinion of the QP was that the Trust relies on internal and external professional advisers to provide free and frank professional advice. The Trust stated: *"advisers need to be confident that they can provide free and frank advice, including around difficult and potentially contentious decisions, without the risk of the advice being released into the public domain. This is especially important where the Trust is moving into innovative and untested areas, such as with the property services company"*.
49. Regarding the free and frank exchange of views (section 36(2)(b)(ii)), the opinion of the QP is that *"the RFL [Royal Free London] group is a vanguard organisation and will be considering other innovative developments including the property company, other wholly owned subsidiaries and partnerships with other organisations which require a full and frank debate to be had about the full range of options and risks and benefits. Disclosure of documents containing information relating to or setting out full and free exchanges of views would be likely to inhibit the ability and willingness of the Trust's board, its advisers, and staff to express themselves openly, honestly and completely, or to explore extreme options thereby impairing the quality of decision making by the Trust"*.
50. The Trust has also stated that, in the opinion of the QP, disclosure would be likely to result in a chilling effect to the discussions which the Trust needs to have *"in order to meet its demanding service obligations for the benefit of the public and service users"*. It states that: *"disclosure of information relating to or setting out the content of those discussions would be likely to inhibit free and frank discussions in the future, and the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. This would in turn impact upon the public purse and innovative service delivery"*.
51. It has stated that it requires a *"safe space"* to *"develop ideas, debate live issues, and reach decisions"* and added that *"disclosure of the information caught by the exemption would be likely to increase external interference and distraction, and promote premature public or media involvement which would be likely to prevent or hinder the free and frank exchange of views"*. The QP considered that the safe space was essential in order to *"innovate and spearhead new ways of working"*. The Trust also stated that it is required to do everything it can against a backdrop of increased demand and reduced budgets, including *"exploring potentially controversial and innovative schemes and methods of delivery"*.
52. Regarding whether disclosure would otherwise prejudice the effective conduct of public affairs (section 36(2)(c)), the approach of the

Commissioner to this subsection is that it should only be cited in relation to a prejudice that would not be relevant to any of the other exemptions in Part II of the FOIA. As reasoning for the citing of section 36(2)(c) the Trust has stated that it *"is facing increasing demand for services against a backdrop of decreasing funding. This requires the Trust to have to take difficult decisions, as well as to think innovatively about service delivery models. Disclosure would likely be prejudicial to the Trust's effective conduct of its affairs to the detriment of service users and tax payers. The creation of a property company is a new and novel arrangement, and it is unlikely to be the last instance of the Trust being innovative in the ways that it provides services"*. The Trust has also explained that discussions regarding the structure of the company remain ongoing with HMRC, and it considers that disclosure of the information would be likely to prejudice those discussions.

53. This indicates that the basis for the QP's opinion on section 36(2)(c) was a requirement to preserve a safe space in which to carry out business relating to the creation of the property company. The Commissioner accepts that this reasoning would not be directly relevant to any other Part II exemption and so it was appropriate to consider section 36(2)(c).
54. The Commissioner is satisfied that the inhibition and prejudice which the QP considers would be likely to be caused, relates to all three of these limbs of the exemption. The next step is to consider whether the opinion of the QP on the likelihood of those outcomes was reasonable.
55. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the QP's opinion was 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 QP 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 was reasonable; in other words, that it was an opinion that a reasonable person could hold.
56. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection 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 QP's knowledge of or involvement in the issue.
57. The Commissioner has considered the withheld correspondence and is satisfied that it relates to the Trust's decision-making process regarding the setting up of the subsidiary company, and that it includes the provision of advice and/or the exchange of views.
 58. The QP considers that it is likely that there would be inhibition to the free and frank provision of advice and the free and frank exchange of views, and prejudice to the conduct of the Trust's business in creating the property company.
 59. Regarding the nature of the information and the timing of the request, having reviewed the content of the withheld information the Commissioner is satisfied that the correspondence relates to the formation of the company and to a number of aspects as to its structure which, at the date of the request, had not been finalised. She accepts that these were significant matters, about which there needed to be free and frank exchanges of views and provision of advice.
 60. The Commissioner is also satisfied that the QP has had knowledge of and involvement in the issues.
 61. The Commissioner notes that the QP is relying on the view that disclosure of the information 'would be likely' to inhibit and prejudice the relevant matters. This is a lower level of probability than 'would', but one which is still significant. The Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), stated:

"We interpret the expression 'likely to prejudice' as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."
 62. With this view in mind, the Commissioner has considered the opinion of the QP, and is satisfied that it is reasonable for him to hold the opinion that inhibition would be likely to occur to the free and frank provision of advice and the free and frank exchange of views, and prejudice relevant to section 36(2)(c), if the information from the emails bundle was disclosed.
 63. This engages the exemption at the three limbs of section 36(2)(b) and (c). Since this is a qualified exemption, the Commissioner has considered the balance of the public interest in this case.

The balance of the public interest

64. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would be likely to result was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP.
65. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Trust to carry out its work. As to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the inhibition and prejudice identified by the QP.

The complainant's view

66. The complainant has argued that the balance of the public interest lies in the information being disclosed. She has provided some detailed submissions to the Commissioner.
67. The Commissioner notes that the complainant has stated that some of her submissions regarding the application of section 36(2) to the emails bundle, which follow, are potentially also relevant to any exemption(s) which may be found to be engaged in respect of the reports and minutes bundle. The Commissioner will therefore also consider these submissions in respect of the reports and minutes bundle, if appropriate, further on in this notice.
68. The complainant considers that, at the date of the request, it was not possible for the public to inform itself about the setting up of the company other than by way of an FOI request, since little information was in the public domain.
69. She considers that, in addition to a general public interest in transparency, there is a need for public understanding of public authorities' decisions. Specifically, in this case, she considers that disclosure of consultants' reports, minutes and notes from meetings, and email correspondence would aid public understanding of what is proposed.
70. The complainant notes that, subsequent to her own request, a freedom of information request made by a third party revealed that the Trust had paid a large amount of money for expert advice. The complainant's view is that the Trust has not disclosed any of this advice, and has redacted, in some cases, what the advice relates to. She states: "*It is in the public interest for the public to have information to be able to assess the*

robustness of any financial assumptions underpinning this proposed change, and to be given information regarding any changes to the Trust's liability for tax".

71. The complainant notes that information relating to the comparison of the Trust's options, including costs and savings, was redacted from the information that was disclosed to her, so *"no comparison or scrutiny is possible"*.
72. The complainant also has concerns that setting up a property subsidiary company could lead to *"privatisation by stealth"*, since she understands that the Trust could sell its interest in the company in future. In her view, this operating model *"has the potential to be used as a vehicle for the rapid disposal of NHS land and buildings across the North Central London footprint"* and forms part of a wider public concern about privatisation within the NHS.
73. The complainant has also highlighted that in September 2017, the Department of Health and Social Care voiced concerns over tax avoidance in connection with *"new arrangements or different ways of working"*. She argued: *"Discussions appear to have taken place between the Trust and its advisers regarding VAT. Complete disclosure of all advisers' reports, reports of meetings both within the Trust and with external bodies, would permit scrutiny as to whether the Trust has acted properly"*.

The Trust's view

74. The Trust has also provided details of its considerations regarding the balance of the public interest. It has argued that the balance of the public interest lies in the exemption being maintained.
75. The Commissioner notes that, as with the complainant's submissions, some of the Trust's submissions regarding the application of section 36(2) to the emails bundle, which follow, would also potentially be relevant to any exemption(s) engaged in respect of the reports and minutes bundle. As with the complainant's submissions, she will therefore also consider any relevant submissions in respect of the reports and minutes bundle, if appropriate, further on in this notice.
76. In its initial response of 2 May 2018 to the complainant, the Trust explained why it considered that the balance of the public interest lay in the exemption being maintained. It stated that *"[While the Trust] is publicly accountable for the decisions it makes and the money it spends and therefore there is a strong argument in favour of transparency and disclosure... however... there is at present a stronger public interest in*

favour of non-disclosure at this stage... particularly taking into account that the decision making process is still taking place”.

77. The Trust has since expanded on these considerations in correspondence with the Commissioner. In favour of the information being disclosed, it stated: *“There is a public interest in the transparency and accountability of public bodies both in terms of how public money is spent, and how decisions are made. Disclosure of the redacted information may assist the public in satisfying themselves that the Trust is acting appropriately and in their best interests, and therefore increasing public confidence in the Trust”.*
78. It also stated: *“The public have an interest in ensuring that persons advising public authorities such as the Trust are providing appropriate advice in the circumstances. If the Trust were to disclose the content of the advice received from those advisers this might arguably increase the quality of that advice because the adviser will be mindful of the increased levels of scrutiny”.*
79. With regard to the balance of the public interest lying in the exemption being maintained, however, it reiterated its concerns regarding the importance of a public authority being able to conduct its public affairs, especially with regard to a live issue, as explained in detail in the opinion of the QP.
80. It also stated that, in reconsidering the request prior to the internal review, it had disclosed significant parts of the requested information to the complainant to support public scrutiny and transparency, thereby, in its view, going *“significantly toward meeting the public interest in disclosure”.*
81. It argued that there are no credible allegations or concerns of wrongdoing or impropriety in this case, nor concerns over the quality of the advice received.

The balance of the public interest: the Commissioner’s view

82. The Commissioner has considered the comprehensive arguments by both parties, set out above. As explained, her role where section 36(2) has been cited is to consider the severity, extent and frequency of the prejudice which the QP believes would be likely to occur, weighed against the factors in favour of disclosure. In order to determine this, the Commissioner has considered both the nature of the requested information and the timing of the request.
83. She has considered the factors in favour of disclosure as follows. She agrees that there is a public interest in promoting public understanding of any decision-making process when it comes to public authorities. She

also agrees that there is a public interest in changes to operating models within the NHS. It is right, therefore, that there should be some transparency around the setting up of an entity such as the property subsidiary company in this case.

84. However, the Commissioner accepted that the exemption is engaged since it is reasonable for the QP to believe that prejudice to the effective conduct of public affairs would be likely to occur in the ways specified. Specifically, regarding the need for a 'safe space' in which correspondence could be exchanged, advice could be received, and options regarding the property company could be considered going forward, she was satisfied that it was reasonable to believe that this would be likely to be prejudiced by the disclosure of the information.
85. She has therefore considered the likely severity, extent and frequency of the prejudice.
86. The Commissioner notes that the withheld correspondence relates to numerous specific details relating to the setting up and running of the proposed company. These include, as would be expected, details of issues such as asset transfer, structure, risk, accounting and governance.
87. The correspondence dates from immediately before and after the company was incorporated, and prior to the date which it began operating, which, the Commissioner has been advised, was June 2018. The Commissioner considers that at the date of the request, therefore, the issues addressed in the withheld information were very much "live". In the circumstances of this case, where the engagement of the exemption has relied on the need for a safe space, as previously set out, this increases the severity of the likely prejudice.
88. With regard to the timing of the request, the Commissioner notes that, after initially withholding the whole of the emails bundle under section 36(2), the Trust subsequently re-considered its position, both in November 2018 when the internal review had been completed, and shortly prior to the issue of this notice. On both occasions, further information was disclosed to the complainant since the Trust considered that it had become less sensitive owing to the passage of time. While the Commissioner considers this to have been good practice by the Trust, in focusing on the disclosure of the remaining information withheld under section 36(2), the Commissioner is, as previously stated, concerned with the situation as at the date of the request.
89. The QP provided his opinion on the basis that prejudice *would be likely* to occur, and not that prejudice *would* occur. The engagement of the exemption therefore brings less weight to the public interest

considerations than would have been the case had the exemption been engaged at the level of *would* occur.

90. However, the Commissioner is satisfied that the issues were live at the date of the request, when the company had not yet started operating. She agrees that it was in the public interest for the Trust to be able to exchange views and receive advice away from scrutiny with regard to the detail of the new company that it was setting up, and preserve its safe space going forward, and has considered the likely severity, extent and frequency of the inhibition and prejudice in these circumstances.
91. Due to the nature of the information and timing of the request, the Commissioner is satisfied in this case that there is a real and significant risk that the prejudice identified by the QP would be likely to occur. While there is some public interest in the disclosure of the information, the Commissioner is not aware of anything in the information which gives rise to public concern over the Trust's conduct. She therefore does not consider that the public interest in disclosure outweighs the severity, extent and frequency of the likely inhibition and prejudice identified by the qualified person.

The Commissioner's decision

92. With regard to the withheld information in the emails bundle (other than that which has been held to be out of scope), the Commissioner is satisfied in the circumstances of this case that the balance of the public interest lies in the exemption at section 36(2) being maintained.
93. She is, therefore, satisfied that the relevant redacted information in the emails bundle was correctly withheld under section 36(2) of the FOIA. It has not been necessary, therefore, for her to consider whether this correspondence was correctly withheld under any other exemption of the FOIA.

Section 43(2) – prejudicial to commercial interests

Reports and minutes bundle only

94. This section of the decision notice considers the reports and minutes bundle. As explained previously, the Commissioner has determined that only pages 1 – 168 of the bundle fall within the scope of the request. She has not, therefore, considered pages 169 onwards as part of her investigation. She notes that all redactions to pages 1 – 168 which fall to be considered in this notice were made under section 43(2) of the FOIA.
95. Section 43(2) of the FOIA states that information is exempt if its disclosure 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, if engaged, is therefore subject to the public interest test.

96. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the Trust alleges would be likely to occur if the withheld information was disclosed has to relate to identified commercial interests;
- Secondly, the Trust must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the Trust (either 'would', or 'would be likely') is met.

97. The Commissioner has considered whether a commercial interest or interests have been identified by the Trust, and if so whether the Trust has identified harm which relates to those interests.

98. The Trust has provided a detailed explanation of the redactions it made to the information, and has argued that all of the redacted information relates both to the commercial interests of the Trust and/or to the commercial interests of a third party (one of the Trust's advisers).

99. With regard to its own commercial interests, the Trust has explained that these relate to, in summary, the proposed company structure, potential customers, and the procurement of services.

100. The Trust considers that disclosing advice in respect of, and its reasons for, preferring one structure over another would be likely to prejudice its commercial interests.

101. It also considers that it may lose competitive advantage by disclosing information which relates to procurement and potential customers, due to the ongoing nature of negotiations at the date of the request and going forward.

102. With regard to the commercial interests of its adviser, the Trust has explained that it consulted the adviser about potential disclosure. The adviser explained that it placed a tangible commercial value on its insight and experience in relation to commercial structures, which had, it considered, naturally been acquired over time.

103. The Commissioner is satisfied that the harm which the Trust alleges would be likely to occur if the withheld information were disclosed relates to identified commercial interests. Specifically, she thinks that there is a clear commercial interest in being able to procure services. She also agrees that there is some commercial interest, as well as financial interest, in selecting a financially beneficial operating model, since this affects the company's ability to operate going forward. Combined with the commercial interest identified by the adviser, the first of the three limbs is met.
104. The Commissioner has considered whether the Trust has demonstrated that there is a causal link between the disclosure of the information and the likely prejudice.
105. The Trust has specified two types of its own commercial interests which it considers would be likely to be prejudiced. It has explained that, at the date of the request, the detail of the company's structure had still not been settled upon. The Trust considered that it would be commercially prejudicial to disclose publicly those details of the reports which relate to the consideration of different options.
106. In addition, with regard to potential customers and procurement, the Trust considered that it would lose commercial advantage by publishing details of its proposed spending.
107. The Trust's adviser considered that harm would be caused by placing details of its insight and expertise about preferential commercial structures into the public domain. It considered this would be likely to de-value its expertise and reduce its competitive advantage.
108. The Commissioner is satisfied from the detail of the Trust's arguments that, in the case of both the Trust itself and its adviser, it would be the disclosure of the information which would be likely to result in the alleged prejudice. The second limb is met.
109. The Commissioner has therefore considered whether the threshold for the chance of prejudice occurring is met. In this case, the Trust has relied on the lower threshold – that prejudice 'would be likely' to occur.
110. In relation to the lower threshold, as set out previously, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk.
111. The Commissioner has considered the adviser's arguments that disclosure of its expertise with regard to preferred company structures would be likely to prejudice its commercial interests. She notes that the adviser is an extremely large and well-known firm. She considers that,

while some prejudice could potentially occur if the adviser's business rivals used the disclosed information as a short-cut to obtaining expertise for themselves, it is unlikely that this would be real or significant. She also considers it unlikely that any real or significant prejudice would be likely to be caused by other organisations which are setting up subsidiary companies choosing to rely on any information disclosed in this case, rather than consulting experts in their own right.

112. The Commissioner considers that the Trust's identified commercial interests in selecting a beneficial operating model would have been likely to be prejudiced had the information been disclosed at the date of the request, due to potential disruption from the debate being widened into the public domain. However, she has not been provided with evidence that the risk of prejudice in relation to this would have been real and significant.
113. The Commissioner has, focused her considerations on the Trust's view that prejudice would be likely to be caused to its ability to conduct its procurement process. The company was required to negotiate contracts with several service providers – in some cases, such negotiation is still ongoing – and the Trust considers that prejudice would be likely to be caused if it disclosed indicative expenditure amounts, since this would inform potential bidders as to the budget for capital schemes.
114. Having considered the redacted information, the Commissioner agrees that it would be likely that prejudice would be caused to these commercial interests of the Trust. She is satisfied that the likelihood of the prejudice reaches the threshold of real and significant.
115. Since she has concluded that disclosure would be likely to result in prejudice to the commercial interests of the Trust, the Commissioner is satisfied that the exemption at section 43(2) is engaged, and she has gone on to consider the public interest test.

The balance of the public interest

The complainant's view

116. The complainant's general views regarding the public interest in the disclosure of the information have been set out in paragraphs 66 – 73 of this notice. The Commissioner has not set them out again, but has considered those which are relevant in relation to the information redacted under section 43(2), as requested by the complainant.

The Trust's view

117. The Trust acknowledged that there is a general public interest in the disclosure of the information. These views have been set out previously in this notice.
118. The Trust considers that some of its arguments in favour of maintaining the exemption at section 36(2) of the FOIA with regard to the emails bundle (at paragraphs 74 – 81 of this notice) would also be relevant here, with regard to the information in the reports and minutes bundle redacted under section 43(2), and the Commissioner has considered the relevant arguments accordingly.
119. In addition, with particular relevance to section 43(2), the Trust states that there is a public interest in its being able to compete "*properly and fairly*" in commercial markets, in order to obtain best value and improvement in service delivery. It states that the disclosure of the information would be likely to put the Trust at a commercial disadvantage, which, it argues, is contrary to the public interest.
120. The Trust also believes that there is a public interest in its being able to obtain the best advice, and therefore considers that it is in the public interest to preserve the confidentiality of commercially sensitive information that it has obtained from a third party.
121. The Trust has commented that there is a public interest in its being able to respond competitively in a changing and developing market.

The balance of the public interest: the Commissioner's view

122. The Commissioner has considered the relevant public interest arguments put forward by the complainant and the Trust.
123. The Commissioner agrees that there is some public interest in the disclosure of the information which has been withheld under section 43(2). In addition to the general public interest in transparency, she agrees that decisions around the creation of this type of subsidiary company by an NHS Trust are a matter of some public interest. There is some public interest in scrutinising the options considered by the Trust, in order for the public to understand why one model may have been preferred over another.
124. However, regarding the commercial interests of the Trust, the Commissioner considers that, at the date of the request, considerable weight attached to the need to protect these interests from harm. Specifically, at the date of the request, the Trust was seeking to protect its commercial interests in an effort to procure the best services and to explore possible relationships with future customers of the company,

going forward. She considers that the public interest in protecting these interests outweighs the public interest in disclosure of the information.

The Commissioner's decision

125. With regard to the part of the reports and minutes bundle which is within the scope of the request (pages 1 – 168 inclusive), due to the balance of the public interest lying in favour of the Trust's commercial interests being protected going forward, the Commissioner is satisfied in the circumstances of this case that the balance of the public interest lies in the exemption at section 43(2) being maintained.
126. She is, therefore, satisfied that the relevant information in the reports and minutes bundle was correctly redacted under section 43(2) of the FOIA. She does not require the Trust to take any steps in respect of this bundle.

Right of appeal

127. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

128. 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.

129. 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

**Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**