

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 12 June 2020

**Public Authority:** East Suffolk and North Essex NHS Foundation Trust

**Address:** Trust Offices  
Colchester Hospital  
Turner Road  
Colchester  
CO4 5JL

**Decision (including any steps ordered)**

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1. The complainant has requested information on the awarding of a contract, including the options report, valuation report and legal advice. East Suffolk and North Essex NHS Foundation Trust ("the Trust") provided some information but refused to provide the remaining information on the basis of the exceptions at regulation 12(5)(b) and 12(5)(e).
2. The Commissioner's decision is that the Trust has correctly applied the cited exceptions to the remaining information and the public interest favours maintaining the exception. The Commissioner requires no steps but does expect the Trust to disclose the additional information it is no longer seeking to withhold as set out in its submissions to the Commissioner.

**Request and response**

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3. On 22 January 2019 the complainant made a request to the Trust in the following terms:

*"With reference to the Contract award notice 2018/S 246-563390 published in Supplement to the Official Journal of the European Union on*

*the 21<sup>st</sup> December 2018 and relating to the above, I wish to request the following information;*

- 1) A copy of the Option Agreement between Noviniti Colchester Ltd and the Trust.*
  - 2) A copy of the independent valuation advice the Trust received prior to the grant of the option and subsequent ground lease.*
  - 3) A copy of the legal advice received by the Trust that this transaction is exempt from the Public Contracts Regulations 2015 (as amended) and Directive 2014/24/EU"*
4. The Trust responded on 20 March 2019 and stated it had considered the request under the EIR as the information related to the development of land. The Trust provided some information to the complainant but redacted other information on the basis of regulation 12(5)(b) for legal advice, regulation 12(5)(e) for commercially sensitive information, regulation 12(3) for personal data and regulation 12(4)(d) for draft information.
  5. The complainant asked for an internal review on 27 March 2019. He specifically asked the Trust to focus on the decision to refuse the legal opinion and the redaction of the commercial information within the Valuation and Option Agreement.
  6. The Trust conducted an internal review and responded on 30 April 2019. The Trust upheld its decision to apply the cited exceptions to redact information.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 23 May 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly withheld information or redacted information on the basis of either regulation 12(5)(b) or 12(5)(e).

### **Reasons for decision**

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## **Regulation 12(5)(b) – adversely affect the course of justice**

9. This regulation states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
10. The threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure *would* have an adverse effect. 'Would' means that it is more probable than not; that is, a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
11. The 'course of justice' element of this exception is very wide in coverage and, as set out in the Commissioner's guidance<sup>1</sup> on the application of the exception, encompasses, amongst other types of information, material covered by legal professional privilege (LPP).
12. In this case, the Trust has explained that it considers that the information is covered by the type of LPP known as 'advice privilege'. The information withheld under this exception comprises of legal advice given by the Trust to Bevan Brittan LLP and two advice notes from a QC to the Trust and another party.
13. In the case of the two advice notes these expressly stated that the Trust could rely on the advice in relation to legal rights and regulatory requirements concerning land transactions as well as legal risks and how to address them.
14. In summary, it is argued these documents comprise confidential communications between a client and legal advisors for the purposes of obtaining legal advice.
15. The Commissioner, having had sight of the information, is satisfied that the correspondence comprises confidential communications between client and lawyer, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

16. She has considered whether the confidence attached to the information has subsequently been lost. Having considered the Trust's arguments, and referred to the withheld information and publicly-available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
17. With regard to the requirement to show that there would be an adverse effect on the course of justice from disclosure of the information, the Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
18. On this point, the Trust has explained that in its view the information is still 'live'. At the time of the request the project to which the information relates was underway but not yet complete, added to this is the fact the information was considered to be applicable to a wider range of projects the Trust would be considering.
19. The Commissioner notes that the project was still ongoing at the date of the request so it is fair to say the legal advice would still have been 'live'. Added to this is the suggestion from the Trust that the advice would be used in decisions being made on broadly similar projects in the future and this leads the Commissioner to conclude the advice is still 'live'. Regardless of this, the Commissioner considers there is no requirement for the relevant issue to be 'live' for the disclosure of legally privileged advice under the EIR to have an adverse effect on the course of justice.
20. This was confirmed by the Upper Tribunal in *DCLG v the Information Commissioner & WR [2012] UKUT 103 (AAC)*<sup>2</sup> in which the Tribunal, as set out in the Commissioner's guidance referenced previously, stated that, in the absence of special or unusual factors, an adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege.
21. Having regard to the Trust's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of this information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

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<sup>2</sup> <http://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>

22. Regulation 12(5)(b) is a qualified exception and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exception being maintained.
23. Under regulation 12(2) of the EIR, there is a presumption of disclosure, which adds weight in favour of environmental information being disclosed under the legislation.
24. The Trust acknowledged there is a public interest in transparency around decision making in the NHS including information on the decisions themselves and also any relevant advice provided to decision makers in order to make those decisions. However, the Trust considers it has met this public interest to a large extent through the disclosure of a significant amount of information already to the complainant.
25. The Trust also considers disclosing the legal advice might assist members of the public in satisfying themselves that appropriate advice and information was provided, as well as assisting in the public's understanding of the decision making process both in terms of decisions relating to the Trust property and around how the Trust achieves best value for its assets for the benefit of residents within the Trust's area.
26. It is also acknowledged that the development to which the request relates would be of interest to hospital users and the local community in that it is likely to improve the facilities available at the hospital. That being said, the Trust countered this by stating that the information in question would provide very little that would aid further practical understanding.
27. The Trust also considers there is a public interest in the disclosure of information that allows for scrutiny of the Trust's decisions as this goes towards accountability. This is particularly so where those decisions have an impact on the environment. Again the Trust argues this argument is weakened by the fact the impact on the environment in this case from the development would be nominal.
28. The complainant is concerned that the Trust has entered into a contract to provide a significant new multi-million pound building and entrance to the Hospital without any form of competition or tender process. The complainant is of the view that disclosing the information is important to allow the public to assess whether the commercial agreement reflects good value for money and was based on sound decision-making.
29. Balanced against this the Trust argues that it is under pressure financially (as is the whole public sector) and is required to be

innovative in making best use of its assets to allow for continuing provision of high quality services to service users. In this context, the need for timely and appropriate legal advice is especially important to mitigate increased potential risk and enable sound, well-reasoned and balanced decisions for the benefit of service users.

30. The development itself is, according to the Trust, an example of the Trust being innovative in order to improve service delivery to the public. The legal advice is a good example of the Trust ensuring it takes appropriate and necessary advice to cover any risks.
31. The Trust has also highlighted the general public interest in the maintenance of LPP and the fact it is fundamental to the course of justice and the legal system as a whole to safeguard openness in all communications between lawyer and client to ensure access to full and frank legal advice.
32. LPP is a fundamental principle of justice and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
33. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal has previously recognised this and stated that there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest. The Tribunal further stated that it is important that public authorities be allowed to conduct a free exchange of views as to their legal right and obligations with those advising them without fear of intrusion.
34. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
35. The Commissioner has made her decision in this case based on the contents of the information, and on the evidence she has regarding the Trust's decision-making process and conduct in the relevant matters.

36. The Commissioner has no evidence that the Trust, in seeking legal advice, was aiming either to justify or to conceal its reasons for decisions about the awarding of the contract.
37. The Commissioner is not satisfied that most of the factors described in paragraph 34 above are present, except for the use of public money, such as would lend the required weight required to overturn the strong public interest in maintaining the exception. Whilst the information does relate to decisions on the use of public funds, it is still reasonable for the Trust to be able to obtain legal advice on which to base its decision and to ensure that all relevant legal issues have been considered. The Commissioner therefore considers that the balance of the public interests favours the exception being maintained.

### **Regulation 12(5)(e) - commercial confidentiality**

38. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
39. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e) of the EIR, the authority must demonstrate that:
  - the information is commercial or industrial in nature;
  - the information is subject to confidentiality provided by law;
  - the confidentiality provided is required to protect a legitimate economic interest; and that the confidentiality would be adversely affected by disclosure.
40. The Trust has stated that some of the information considered initially to be excepted under this exception within the valuation report can now be disclosed but it maintains that the small remaining amount of information in the valuation report should still be withheld under this exception. The Trust has also stated the small amount of information previously withheld from the options agreement and ground lease can now be disclosed.
41. For the information in the valuation report that continues to be withheld; in reference to the first bullet point, the Trust confirmed the information is commercial in nature and consists of detailed formulae, percentage yields and pricing details concerning the development. It argues it is

commercial in nature as it relates to a commercial agreement between the Trust and Noviniti (the developer) for the development of land.

42. The Commissioner has reviewed the remaining withheld information within the report and she is satisfied that it is commercial in nature. It is a report into the assessment of the premium that should be paid for the grant of a lease over the land. The report details the agreement made with Noviniti and goes into specifics of the agreement, including costings, timings and financial breakdowns.
43. Addressing the second bullet point, the Trust has stated there is a binding contractual agreement in place which contains an express confidentiality clause that remains operative and applicable to both the Trust and Noviniti. The Trust argues that regardless of this express clause the information would in any case be considered to be confidential as it includes detailed costing and formula which are not trivial and are not in the public domain.
44. The Commissioner notes the valuation report clearly states that the information is not to be shared with other third parties and not to be copied or included in any other published document. She accepts the information is subject to an obligation of confidence.
45. However, a confidentiality agreement will not in itself be sufficient to prevent the disclosure of information or to override the requirements of the EIR. Therefore although the bullet point is met, it is necessary to go on to consider whether disclosure of withheld information in this case would adversely affect the legitimate economic interests of the parties involved.
46. The Trust acknowledges the project has moved on since the request was initially made but states it is still not complete. In acknowledging the situation has changed the Trust points out this is the reason it is not prepared to disclose information it previously withheld and it is only the most commercially confidential information it is seeking to withhold from disclosure.
47. The Trust states it is under financial pressure, as most Trusts are, to ensure proper delivery and quality of services to the public whilst also reducing costs. The Trust is expected to explore innovative means of improving services and this will often involve partnerships and commercial arrangements with third parties and commercial entities. The Trust must be able to obtain best value when managing assets and using public funding and disclosing the remaining withheld information would adversely affect the Trust's commercial reputation and its ability to obtain best value when contracting with third parties. The third parties may factor in the increased risk of the their confidential



information being disclosed and increase costs to the Trust or they may choose not to share important information with the Trust or not enter into a contract at all.

48. The Trust is also of the view that disclosing this information would harm the legitimate economic interests of Noviniti. The information is commercially valuable as it forms part of a proprietary structure developed by Noviniti which is of critical importance to its business model. Disclosure would enable competitors to acquire specialist knowledge and financial modelling information to the detriment of Noviniti's legitimate economic interests. It would place pressure on Noviniti's current third party funding arrangements and impact upon it being able to obtain appropriate and commercially competitive funding in the future.
49. The Commissioner recognises both the Trust and Noviniti have already invested time and resources into the proposals and planning at the time of the request. The Commissioner understands when the request was initially made the construction had not begun but by the time the Trust was made aware of the complaint to the Commissioner, construction was well underway and nearing completion hence the reasons the Trust has now agreed to disclose the majority of the information.
50. That being said, at the time of the request and the internal review the project was still in the early stages and the Commissioner accepts the disclosure at that stage would have adversely affected the commercial interests of the parties involved, mainly Noviniti. The information withheld is the most proprietary and is specific to not just the project but also Noviniti. The consequence of this disclosure is that it may place Noviniti at a disadvantage in future bids by providing competitors with in depth details of Novitini's pricing structure and calculations.
51. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) applies.

#### *Public interest test*

52. The Trust acknowledges there is a public interest in transparency and accountability relating to the management of public assets and the use of public funds. Disclosure of the information may further the transparency agenda and allow the public to satisfy themselves that the detailed financial information for the project is appropriate.
53. The Trust also considers there is a public interest in being held to account and disclosure of the detailed financial information would provide a complete picture for scrutiny.

54. However, the Trust also considers there is public interest in ensuring it is able to deliver critical high quality services and support with the limited assets and financial available to it and maintaining the exception would protect the Trust's ability to do so.
55. It also stated that the public have an interest in ensuring the Trust's procurement exercises are fair and that contracts are awarded to the most appropriate third party contractors in the best interests of the Trust and its service users, and the high quality of the service delivery. It argued if it were required to disclose the remaining information this would result in third parties not sharing full information with the Trust or not seeking to enter into contracts with the Trust. This would create a distorted market and would not result in best value or best service delivery which would then impact on service users.
56. The public have an interest in the Trust being able to explore innovative and sometimes radical service solutions, some of which might not be possible otherwise, with limited resources for the benefit of service users, and disclosure of information of this nature would impact upon the Trust's ability to do so.
57. The public also have an interest in ensuring a free and open market in which all businesses can compete fairly without unfair advantages being secured by some to the detriment of other competitors. The Trust argued disclosure of the information would go against this public interest.
58. In any event, the Trust considers that disclosure of the very small amount of information regarding the specific financial workings is not necessary and would have no tangible benefit in terms of furthering the public interest under the EIR. Neither is there any credible allegation of anything unlawful or untoward having taken place which might strengthen the public interest in disclosure.
59. The Commissioner considers there is a public interest in openness, transparency and accountability. There is also a public interest in ensuring that public money is being spent appropriately. It is understandable that members of the public will be concerned about any projects which involve spending large amounts of public money.
60. However, in this case the Commissioner considers the public interest rests in maintaining the exception. At the time of the request the project was in an early stage and construction had not begun. The Trust and third parties should be afforded the private space to finalise proposals and options without the fear of disclosure of very detailed proprietary financial information and formulae. It is in the public interest to maintain

the confidentiality of early discussions to protect the commercial interests of the parties involved.

61. The Commissioner does not consider it is in the public interest to disclose information which would adversely affect the commercial interests of the Trust or the third parties involved. They are entitled to explore options in private and finalise proposals, protecting sensitive commercial information which could be used by competitors to their detriment.
62. The Commissioner therefore finds based on the above that the balance of the public interest favours withholding the remaining commercially confidential information in the valuations report.

## Right of appeal

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63. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

64. 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.
65. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**