

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

**Date:** 25 June 2021

**Public Authority:** Frimley Health NHS Foundation Trust  
**Address:** Frimley Park Hospital  
Portsmouth Road  
GU16 7UJ

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to Frimley Health NHS Foundation Trust ("the Trust")'s interactions with React Specialist Cleaning LTD, including any invoices. The Trust provided invoices but redacted some information from the invoices on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the Trust has failed to demonstrate that the exemption as set out in section 43(2) of FOIA is engaged in relation to the information that has been redacted.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose unredacted copies of the invoices.
4. The public authority must take these steps 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**

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5. On 6 March 2020 the complainant made a request to the Trust in the following terms:

*"All information related to React Specialist Cleaning LTD and any other employment agency or business including but not limited to all emails, letters, invoices and any other correspondence and documentation for the period from 1 November 2019 to 31 January 2020."*

6. The Trust responded on 10 March 2020 stating the request was very broad and asking the complainant to narrow this down to identify where information could be held.

7. On 19 March 2020 the complainant clarified the request as follows:

*"All information related to the Trust's accounts department and React Specialist Cleaning LTD and any other employment agency or business including but not limited to all emails, letters, invoices and any other correspondence"*

8. Further clarification was requested and received on 26 and 27 March. The Trust asked if the 'other employment agency or business' was in relation to React Specialist Cleaning LTD and the complainant clarified that this was in relation to the Trust.

9. The Trust provided its response on 23 April 2020 and attached a number of invoices it considered within the scope of the request.

10. On 24 April 2020 the complainant asked for an internal review of this decision as the information had been redacted from the invoice dated 22/11/2019 without explanation.

11. An internal review was conducted and the response sent to the complainant on 28 May 2020. The Trust stated it had redacted information from the invoices on the basis of section 43(2) of the FOIA.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 17 June 2020 to complain about the way their request for information had been handled.
13. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly redacted information on the basis of section 43(2) of the FOIA.

## **Reasons for decision**

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### Section 43 – commercial interests

14. Section 43(2) provides an exemption from disclosure where the requested information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
15. The Commissioner considers that three criteria must be met for the exemption to be engaged:
  - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
  - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - it is necessary to establish whether the level of likelihood of the prejudice being relied upon by the public authority is met. In other words, disclosure 'would or would be likely' to result in prejudice.
16. The term 'commercial interests' is not defined in the FOIA. In the Commissioner's guidance on section 43 the Commissioner considers that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".*
17. The Commissioner must consider the prejudice that disclosure of the withheld information would cause in respect of the Trust's commercial interests, and to any other party or parties that would be affected.
18. For the purpose of this case, the Trust has identified that React Specialist Cleaning LTD's commercial interests would, or would be likely to be prejudice if the redacted information was disclosed. The redacted information is account information, order numbers and a breakdown of staff recruited and the number of days they were recruited for. The Trust has provided evidence to the Commissioner that this information can clearly be used to calculate how much React is able to charge as an hourly and daily rate.
19. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. She is also

satisfied that the commercial activity involved – procurement of cleaning services - is conducted in a competitive environment.

20. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
21. Secondly, there must be what the Tribunal in the case of *Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030)* called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.
22. In relation to the third party suppliers' commercial interests, the Trust has stated that it is not aware if different rates have been negotiated for different companies by React but releasing information relating to its pricing structure could affect React's ability to be able to charge an organisation accordingly for the work or skill set required; similarly if the day rate is the same for all organisations disclosing the information would give an insight into the business model for React's competitors placing them at a commercial disadvantage in future bids for work.
23. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to consult the third party for its view.
24. In this case, there is no evidence that the Trust has consulted with relevant third parties either at the time of the request or during this investigation. In fact, the Trust advised the Commissioner that it would not normally approach a supplier regarding direct costing when it is clearly identified that to release the information would jeopardise their commercial interests.
25. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.
26. The Commissioner's guidance on this<sup>1</sup> advises public authorities that:

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<sup>1</sup> [Section 43 - Commercial interests | ICO](#)

*"you must have evidence that this accurately reflects the third party's concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances."*

27. In assessing whether there is a real and significant risk, the Commissioner considers that third party companies engaging with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. Her view is that companies providing services to public authorities can reasonably expect that core information related to the services they provide, including some commercial information, will be subject to a high level of public scrutiny.
28. In this case, the Trust told the Commissioner that disclosure would be damaging to React Cleaning. However, in the absence of evidence that that statement reflects the third party's view, the Commissioner cannot accept that there is a causal link between the disclosure of the withheld information and the likely prejudice to third party suppliers' commercial interests.
29. The Commissioner therefore does not consider it has been sufficiently demonstrated there would be any prejudice to the commercial interests of a third party supplier and in light of the above, the Commissioner has concluded that the Trust failed to demonstrate that the exemption is engaged. As she does not consider that the exemption is engaged, the Commissioner has not gone on to consider the public interest arguments.

## **Right of appeal**

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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: 0203 936 8963

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)

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 .....**

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