

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 February 2022

Public Authority: The Hillingdon Hospitals NHS Foundation Trust
Address: Field Heath Road
Uxbridge
Middlesex UB8 3NN

Decision (including any steps ordered)

1. The complainant has requested information about a tenancy with Vodaphone Limited. The Hillingdon Hospitals NHS Foundation Trust ('the Trust') withheld the information under section 43(2) of the FOIA (commercial interests) and section 21(1) (information accessible to the applicant by other means).
2. The Commissioner's decision is as follows:
 - The Trust is entitled to withhold the requested information under section 43(2) of the FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require the Trust to take any corrective steps.

Request and response

4. On 15 March 2021 the complainant wrote to the Trust and requested information in the following terms:

"I am making a request under the Freedom of Information Act for the information below in respect of a claim made by Vodafone Limited for a new tenancy under the Landlord and Tenant Act 1954 at Hillingdon Hospital, Pied Heath Road, Uxbridge.

- A.1] The rent paid under the previous tenancy as against A.2] the rent agreed with Vodafone Limited under the new tenancy
- B) The approximate level of legal costs incurred by the Trust in dealing with the renewal with Vodafone Limited; and
- C) The amount of any back rent paid pursuant to any form of interim rent application by Vodafone or any other sums paid to Vodafone as a result of the application.”
5. The Trust responded on 21 April 2021. It withheld the majority of the requested information under section 43(2) of the FOIA.
 6. Its position regarding part A.2 of the request – the rent agreed under the new tenancy – was less clear. The Trust advised that the terms of the new tenancy were the subject of ongoing court proceedings. It was therefore withholding this information as it would be “commercially sensitive until the final court order had been made, finalising those proceedings”. The Trust said it would not be in the public interest to disclose information during ongoing court proceedings as doing so could prejudice the outcome of those proceedings. However, the Commissioner notes that the Trust went on to say that this information “is *also* likely to be commercially sensitive”, suggesting that it was, in fact, applying two exemptions to part A.2; section 43(2) and another, unspecified exemption.
 7. The complainant requested an internal review on 2 May 2021. He noted that information that had been published in the interim showed that the Trust had made a particular payment to Vodafone.
 8. The Trust provided an internal review on 6 July 2021. It acknowledged that circumstances had changed in that the litigation had concluded. The Trust confirmed that, regarding the information at A.2, it therefore no longer sought “to rely on this reason” to refuse disclosure. The Trust then confirmed that it maintained its reliance on section 43(2) to withhold the remainder of the information and that the balance of the public interest favoured maintaining this exemption.
 9. The Trust went on to say that registration of the lease is at Vodafone’s discretion and that the Trust could not control if or when that occurred. It advised that some of the information the complainant had requested – presumably that requested under A.2 – may also be reasonably accessible through a request to the court, “under CPR5.4”. In the Trust’s view, this meant that the information was “reasonably accessible via other means” under section 22 of the FOIA. [In fact, the exemption relevant to that circumstance is section 21(1).]

10. However, in the summary of its position at internal review, the Trust confirmed that it was continuing to rely on section 43(2) with regard to the entire request, including the information requested in A.2.

Scope of the case

11. The complainant contacted the Commissioner on 13 June 2021 to complain about the way his request for information had been handled.
12. Having confirmed the scope of his complaint with the complainant, the Commissioner's investigation has focussed on the whether the Trust is entitled to withhold all the requested information under section 43(2) of the FOIA, and the balance of the public interest. If necessary, he will also consider the Trust's reliance on section 21(1) of the FOIA.

Reasons for decision

Section 43 – commercial interests

13. In its submission to the Commissioner, the Trust has confirmed it is relying on section 43(2) in respect of all parts of the request; that is, parts A.1, A.2, B and C.
14. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is subject to the public interest test. In cases where information is exempt from disclosure the information may still be disclosed if the public interest in releasing the information is greater than in maintaining the exemption.
15. For section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption. Second, 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 that is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

16. The information in this case is the amounts paid in relation to various aspects of Vodafone Limited's lease arrangement with the Trust. In its submission to the Commissioner, the Trust has provided the following background and reasoning.
17. The Trust has a communications site on the roof of one of its buildings. It leases space on the communications site to third party operators, who place aerials on it, on commercial terms in a competitive marketplace. The Trust receives income from renting out the space for aerials on the tower, further to its powers under section 43(3) of the NHS Act 2006. This provides that an NHS foundation trust may undertake commercial activities for the purpose of making additional income available in order better to carry on its principal purpose of providing services as part of the NHS.
18. More than one tenant has aeralis on/'occupies' the communications site, and all of the leases are on different terms and set at different rents. Current or prospective tenants may wish to enter into new leases in the future with the Trust. One of the current occupiers of the communications tower is Vodafone, which historically has paid the Trust a significant rent to use the Trust's communication site as part of Vodafone's network.
19. The Electronic Communications Code ('the Code') is set out in Schedule 3A of the Communications Act 2003, as modified by the Digital Economy Act 2017. The Code provides for a set of rights that are designed to facilitate the installation and maintenance of electronic communications networks in locations such as the Trust's communications tower. The Code ultimately confers rights on providers of such networks and on providers of systems of infrastructure (such as Vodafone) to install and maintain apparatus on, under and over land and results in simplified planning procedures to install equipment. The new version of the Code plus recent case law generally favours the interests of telecommunications operators over the interests of landholders. It is generally in the interests of the operator to renew existing lease agreements to bring it under the 2017 Code, whereas landlords' interests are better served by pre-2017 Code agreements. The effect of this is that landlords such as the Trust now have to negotiate more aggressively to try to maximise the rents/achieve other favourable terms under telecoms leases.
20. Telecoms leases do not have to be sited on public buildings, and commercial landlords who are not subject to FOIA would not be subject to requirements to disclose lease terms that they have negotiated.
21. Ordinarily, the Code provides that landowners (such as the Trust) and system operators (such as Vodafone, or the Trust's other

tenants/prospective tenants) can and should negotiate between themselves the terms on which a lease of space/facilities for equipment (such as the Trust's communications mast) can be agreed. This is a commercial negotiation with each party looking to achieve best possible terms in its own interest. However, where the parties cannot agree terms, the Court has a power to impose terms, including compensation and consideration (ie money, including in the form of rent) payable to the landowner in exchange for a compulsory lease. Setting the level of compensation is done using various valuation methods which ascribe a market value to the lease, but the Court ultimately has a discretion as to precisely what to award. Valuations are informed by professional valuers/surveyors using market knowledge, including evidence from other leases. Parties generally do not want to go to Court because of the time and cost that is involved.

22. In this case, as Vodafone and Trust could not agree the terms of the new lease, Vodafone asked the Court to set a value for rent and other terms going forward. It also asked the Court to adjudicate on what rent the Trust should receive for the period between the 'old' lease expiring and the 'new' lease coming into effect, and this ultimately forms part A and C of the disputed information in this case. The parties did then reach agreement at a late stage, so the Court was only asked to approve their agreement, which it did in the form of a consent order.
23. Disclosure 'to the world at large' of the terms of the new tenancy, in particular the specific rent now being paid as well as interim rent (ordered for the period between the expiry of the previous lease and the current lease determined by the Court (ie parts A and C of the request), would undermine the Trust's ability to maintain a competitive negotiating position when transacting with other organisations in future, at this site and any other similar sites. Disclosing this information would allow comparisons to be made between the previous rent and the current agreed rent by prospective tenants, as well as by other current tenants looking to re-negotiate existing leases. It would allow them to ascertain with some certainty what the Court considers/has approved as being an appropriate market value. In turn, armed with this information, other telecommunications operators would use that as an 'anchor'/'backstop' to negotiations with the Trust. This would harm the Trust's ability to achieve best value in future negotiations.
24. Whilst the marketplace for this type of lease might not be 'highly competitive', as the complainant pointed out in his correspondence to the Trust, it is still a commercial environment in which disclosure would prejudice the Trust's interests in terms of any future negotiations it enters into with other operators. The Trust has had, and will continue to have, commercial discussions with other telecoms operators to determine similar leases, including as to annual and interim rents, which

the operator is liable to pay to the Trust as a condition for the grant of use of its telecoms mast whether under the Code or otherwise.

25. Disclosing the circumstances of the Vodafone lease (beyond the Trust's existing disclosure) would prejudice the Trust's negotiating position (and therefore its commercial interests) by giving an indication of what it has previously been forced to accept. The Trust expects operators to use this information, as well as the threat of the time and cost associated with Court/Tribunal proceedings, to seek to impose lower rents and compensation on the Trust than would otherwise be payable were this information not to be disclosed.
26. Whilst the Trust has approached this request in an applicant- and motive-blind manner, it has highlighted that the applicant acts on behalf of an organisation that acquires and manages mobile phone mast leases. That organisation's interest in these figures is demonstrative of the importance of this information to interested parties: the basis of which is likely to assist it, its clients, or both, in negotiating similar agreements. The organisation will in particular be aware of the use and deployment of comparable sites and knowledge of individual parties' negotiating stances as a way of informing rent calculations, so as to minimise or maximise the rents payable (as the case may be). This is contrary to its assertion that this information is 'highly unlikely' to change the position of an operator under the Code. Disclosing 'to the world' the rent payable to the Trust would also undermine the Trust's ability to negotiate with investors, such as the organisation in question, who are interested in acquiring telecoms leases from landowners such as the Trust.
27. The Trust has not been able to find any other of the Commissioner's previous decisions that concern Code leases. However, the Trust notes that in the decision IC-53159-H5T8, which concerned the General Dental Council, the Commissioner accepted that disclosing rent payable under an existing lease of a building would be likely to harm the ability of the public authority to obtain best available terms in respect of any future leases. The Trust says for the same reasons the financial terms of the Vodafone lease in this case, requested in parts A and C of the request, should not be disclosed under the FOIA.
28. Part B of the request concerns legal costs. The Trust has confirmed that it is also relying in section 43(2) to withhold that information. It explained that it considers that disclosing the legal costs would be prejudicial to its own commercial interests.
29. In its submission the Trust explained that disclosing this information to 'the world at large' would prejudice the Trust's position in future settlements for retender of this, and other, sites. The information would

give other operators an unfair advantage in the course of negotiating settlements. They would be able to pressure the Trust into accepting lower offers, as having even an approximate figure of the legal costs associated with pursuing such a matter to court would give those operators an understanding of the cost versus savings ratios the Trust would be weighing in such negotiations.

30. The Trust is concerned at the prospect that specific knowledge of past legal costs would become a concrete element that could be 'weighed in the balance' in future negotiations in other leases.
31. The Commissioner has considered the Trust's submission against the section 43(2) criteria at paragraph 15. He has also taken into account the fact that, in his internal review request the complainant had noted that particular information about a payment the Trust had made to Vodafone had been published since he had first submitted his request – in a financial report and Board meeting minute. In both instances however, the information as published gave an amount paid, but did not provide detail on the nature of that payment.
32. In relation to all three parts of the request, the Commissioner is satisfied that the harm the Trust envisions if the withheld information was disclosed relates to the interests relevant to section 43(2) because it relates to its own commercial interests.
33. Regarding the second of the criteria, and in relation to all parts of the request, the Commissioner is satisfied that a causal relationship exists between releasing the withheld information and prejudice to the Trust's commercial interests. This is because at the time of the request and internal review response, releasing the requested information would give an indication of how much an organisation has paid and is paying/will pay to the Trust to lease a site from it, and how much was paid in legal costs. The Trust has provided the Commissioner with more detail on this point which she does not intend to include in this decision notice. But she accepts that disclosure would undermine the Trust's future negotiating position, with the organisation in this case or other organisations. This is because disclosing financial information associated with the Vodafone lease would benefit surveyors seeking to negotiate other leases against the Trust. The Commissioner is also satisfied that such commercial prejudice is not trivial and would be of substance.
34. As noted, the Commissioner is aware that at the time of the internal review request, certain information had been published. If sufficient accompanying detail had been published to evidence that the payment related to either part A, B or C of this request, then the associated prejudice that the Trust envisioned in respect of that part would fall away as that information would have already been in the public domain.

However, that is not the case as no detail on the payment was provided. That he could not identify the published payment as being relevant to any part of his request presumably contributed to the complainant progressing to request an internal review and to submit his complaint to the Commissioner.

35. Regarding the third of the criteria, the Trust's position in its submission to the Commissioner is that the envisioned prejudice **would** happen. However, the Trust has not presented compelling evidence that the prejudice it envisions is more likely to occur than not. The Commissioner considers the prejudice being **likely to** happen is more credible but that still means that the chance of prejudice occurring is more than a hypothetical possibility and that there is a real and significant risk.
36. Since the three criteria have been met, the Commissioner's decision is that the information the complainant has requested engages the exemption under section 43(2) of the FOIA. He has gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

37. In his request for an internal review, the complainant argued that "in the current climate", there is public interest in understanding why the Trust is paying a particular sum to a commercial operator, such as Vodafone.
38. The complainant also argued that the government had also recently closed a consultation on giving operators, such as Vodafone, further powers under a reformed Code. One of the proposals was to allow Code operators to back date any financial terms of a new agreement. In the complainant's view, disclosing the information was key to understanding the impact this proposed change may have, by referencing the Trust's experience in dealing with a Code operator under the existing legislation.
39. The Trust has noted the general public interest in openness and transparency. Disclosure would inform debate, provide accountability on how the Trust manages public money/ resources and enable scrutiny of its income generation activities.

Public interest in maintaining the exemption

40. The Trust considers there are strong public interest factors against disclosure. First, it considers it is in the public interest for the Trust to be able to negotiate and operate freely in a commercial environment in

order to maximise income. Distortion of negotiation through providing information 'to the world' about one party's position is not in the public interest.

41. Second, the income that the Trust receives from operators supports the work of the Trust, including providing staff, facilities, and other resources all designed to maximise outcomes for patients. Income generation powers for this purpose are provided for under a statutory scheme and there is a significant risk that this would be undermined by disclosing the information for the reasons set out.
42. Third, guidance to the NHS – such as 'Health Building Note 00-08'¹ - encourages Foundation Trusts to achieve the best value from their estate. It emphasises that rent from leases not connected with the provision of healthcare (eg telecoms leases) should be maximised unless there is a good reason to depart from this (paragraph 6.17). Paragraph 6.43 of this guidance sets out that it is important that NHS bodies obtain a fair and reasonable return from commercial activity on their land and property. Paragraphs 6.52 – 6.60 explain some of the challenges connected with telecoms leases. Given these and the inherent structural advantage to telecoms operators under the Code, it is in the public interest that nothing is done which tips the balance ever more in favour of the telecoms operators/tenants in seeking to negotiate further in the future.

Balance of the public interest

43. In assessing the balance of the public interest, the Trust says it has taken account of the fact that the benefits from transparency can be met in other ways, and that disclosing information is not necessary in order to achieve sound financial oversight and governance.
44. The Trust has noted that it publishes details of matters connected with the lease in its public board papers and also financial matters connected with telecoms leases are included in its annual accounts. The accounts are subject to external audit and scrutiny by the Trust's non-executive directors and governors, who are drawn from members of the public. The Trust's most recent annual accounts make specific reference to income from telecoms leases.

¹ https://www.england.nhs.uk/wp-content/uploads/2021/05/HBN_08_Part_B.pdf

Although that income figure is not broken down into specific categories, the Trust considers that the public interest has been served through it publishing its accounts and reporting this figure.

45. In the Commissioner's view there is significant public interest in the Trust being able to achieve the best value for its estate, and the maximum income that it can. Being in a strong negotiating position helps the Trust to achieve this. The Commissioner does not consider that the complainant has made a compelling case for there being greater public interest in financial information concerning one specific tenancy, or in the effects of a reformed Code. The Commissioner is satisfied that the financial information, and lease information, that the Trust proactively publishes, and the work of the National Audit Office, meets the general public interest in transparency and the Trust's financial affairs. And Ofcom, for example, provides oversight of the Code. As such, the Commissioner is satisfied that there is greater public interest in the Trust maintaining its negotiating position through withholding the requested information in this case.

Right of appeal

46. 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

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

47. 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.
48. 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

Cressida Woodall
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