

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

Date: 8 February 2023

Public Authority: Liverpool University Hospitals NHS Foundation Trust

Address: Prescot Street
Liverpool L7 8XP

Decision

1. The Commissioner's decision is that the Trust should have dealt with the request for information about a large building project under the EIR, and not FOIA.
2. However, the Commissioner finds that regulation 12(4)(b) is engaged in respect of parts 1 and 2 of the request and regulation 12(5)(b) is engaged in respect of information within scope of part 4. These exceptions concern manifestly unreasonable requests and the course of justice respectively. In both cases the Commissioner finds that the balance of the public interest favours maintaining the exception.
3. As the Trust failed to rely on an EIR exception within 20 working days, it breached regulation 14(2) of the EIR. It is not necessary for the Trust to take any steps.

Request and response

4. The complainant submitted information requests to Liverpool University Hospitals NHS Foundation Trust ('the Trust') on 28 January 2022 and 14 February 2022, which they clarified on 16 February 2022 as follows:

"[1] Can you please send me a copy of all the material you have in relation to the current status of the new build – Basic, limited

summary updates released in the Board papers (under New Hospital Committee) nor similar material dated 26/01/2021 covers what has been requested or what should be available.

Re. Clarification in relation to all material in relation to the new Build. As the FOIA team should be aware I initially asked about a workshop held into the new build and it was the failure to provide details that I subsequently asked for all material.

There must be project details in relation to construction of the new build as well as details of the Workshop previously detailed.

I am requesting all material in relation to the new build as from 26/01/2021. This is all the material that the hospital should have already in an accessible form [sic] for management purposes

[2] All the information relating to what is going to happen with the old building this year (2022) including costs associated with continued running of any part of the building

What budgeting and plans are there for the old building for 2022?

[3] When will demolition start? Re demolition – am I to understand that no contracts have been agreed/signed

[4] also information in relation to legal action in relation to the new build - including decisions not to take legal action?

Re. legal matters. Obviously, the situation may have changed since November 2021 and the ICO are planning to review the Trust's decision in November 2021. If there are no decisions not to undertake legal action, then they would not be covered by legal privilege. Again your refusal makes a mockery of claims of transparency. Are there not any Court cases – that would be in the public domain?"

5. The Trust had responded to the initial request(s) on 16 February 2022 and that had generated the complainant's clarified request above. In that response, with regard to parts 1 and 2, the Trust had explained that it provides updates on the status of the new build in the published papers associated with its Board meetings. It had provided the complainant with a link to those meetings. The Trust had also provided the complainant with links to the most recent published New Hospital Committee update and its regular Transparency (Spending) Reports.
6. In its response to the clarified request dated 7 April 2022 with regard to part 1, the Trust noted that in a response to a separate request (its reference 7856) it had previously directed the complainant to a published 'Liverpool University Hospitals Clinical Services Reconfiguration' document that is relevant to the workshop referred to.

The Trust said it therefore relied on section 21 of FOIA with regard to that element. The Trust disclosed papers from the New Hospital Committee in response to this part but withheld some information from that material under sections 40 and 43 of FOIA, which concern personal data and commercial information.

7. The Trust addressed part 2 of the request, advising that decisions about the old building had not been finalised. It also explained that a final cost for demolition had not been determined, that any planned budget for this work would be exempt under section 43 of FOIA and again directed the complainant to its published Transparency (Spending) Reports.
8. Regarding part 3, the Trust advised that no contracts for demolition had been signed and subsequently confirmed to the Commissioner that, as such, it does not hold any recorded information within scope of that part. Finally, the Trust withheld information within scope of part 4 of the request under section 42(1).
9. In its internal review dated 4 May 2022, the Trust's final position was to apply section 14(1) of FOIA to parts 1 and 2 of the request. The Trust maintained its position regarding parts 3 and 4.

Reasons for decision

10. This notice is focussed only on the complainant's request referred to above, the Trust's reference 8041. The reasoning first considers whether the Trust should have handled the request under the EIR rather than FOIA.
11. The Commissioner will then go on to consider the Trust's reliance on the EIR equivalents of section 14 and section 42; namely regulation 12(4)(b) in relation to parts 1 and 2 and regulation 12(5)(b) in relation to part 4.

Is the requested information environmental information?

12. The Commissioner has explained his reasoning on this point in an earlier decision he made about a complaint about the Trust that the complainant brought to him, reference [IC-147660-Q5X2](#). As such, the Commissioner does not consider it necessary to repeat that reasoning here. It is sufficient to say that since the current request again concerns the construction of the new Royal Liverpool University Hospital the requested information can again be categorised as environmental information. The Trust should therefore have handled the request under the EIR and it has acknowledged this in its submission to the Commissioner.

13. Under regulation 14(2) of the EIR, if a public authority is going to refuse to disclose information under regulation 12, it must issue a refusal notice citing the exception it is relying on within 20 working days of the request. Because the Trust handled the request under FOIA and not the EIR, it did not comply with regulation 14(2).

Regulation 12(4)(b) – manifestly unreasonable request

14. Under regulation 12(4)(b) a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
15. A request may be manifestly unreasonable because it is vexatious, as in this case, or because of the burden complying with the request would impose on the authority, in terms of cost or time.
16. The Trust is relying on regulation 12(4)(b) in respect of parts 1 and 2 of the request. Part 1 is for “all material in relation to the new build as from 26/01/2021” and information about a workshop. Part 2 is for “all information” about what is going to happen to the old building in 2022 including related budget information for 2022.
17. In its internal review response, the Trust noted that it had addressed the subject of the old and new hospital on several occasions – in September 2021 and May 2022. The Trust advised the complainant that they appeared to be attempting to re-open an issue that the Trust had comprehensively addressed.
18. Finally the Trust referred to a separate complaint the complainant had brought to the Commissioner and which had not concluded at that point. The Trust said that until it received the Commissioner’s decision in that case, its position was that parts of the request were vexatious on the basis of unreasonable persistence. The Trust has not provided the Commissioner with a reference for the case that it was referring to and, since the complainant has submitted a number of complaints to him about the Trust, he has not been able to identify that case.
19. In its submission to the Commissioner, the Trust did confirm that, in relation to part 1 of the request and the workshop referred to, it had advised the complainant that relevant information is already accessible and in the public domain. It had already provided the complainant with a link to the published information in a response to a separate request (its reference 7856).
20. The purpose of regulation 12(4)(b) is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in the handling of an information request.

21. Part 1 of the request concerns the status of the new building and an associated workshop; part 2 concerns the status of the old building. Irrespective of what the complainant considers the Trust **should** publish about those matters, the Trust regularly provides information about the progress of the new build in its published Board papers and New Hospital Committee papers, to which it has directed the complainant. It has also directed the complainant to published information which was within scope of the element of the request concerning the workshop. No decision about the old building have been made and the Trust provides information about its spending in published Transparency reports, to which it has again directed the complainant.
22. In its 16 February 2022 correspondence the Trust had also asked the complainant to clarify what they meant by "all material" [and "all information"]. For example parts 1 and 2 could have been narrowed to emails between particular individuals between particular dates or could have been narrowed to the specific type of document they were seeking. The complainant did not narrow down their request in such a way.
23. The Commissioner considers that the information about the new building that the Trust proactively publishes, and which it has released to the complainant in response to this and earlier requests, addresses the complainant's request to an adequate degree. He considers the complainant's request for further information about the new building and the old building - which they have declined to meaningfully refine - demonstrate an unreasonable level of persistence that at this point is creating a disproportionate burden to the Trust. As such his decision is that regulation 12(4)(b) is engaged in respect of parts 1 and 2 of the request.
24. With regard to the public interest test, the complainant has told the Commissioner that they consider that the Trust should publish the information they have requested as matter of course, in the interests of transparency. Clearly, the old and new hospital buildings are of interest to the complainant. And that there appears to have been a problem with the new building has some wider public interest. However, the Commissioner considers that the relevant information the Trust publishes about the project addresses the public interest in transparency to a satisfactory degree. As such, in his view there is greater public interest in the Trust's stretched resources not being exposed to further disruption through complying with parts 1 and 2 of the request.

Regulation 12(5)(b) - course of justice

25. The Trust is relying on regulation 12(5)(b) in relation to part 4 of the request. This is for information on "the legal action" relating to the new building.
26. Regulation 12(5)(b) was discussed in the previous decision IC-147660-Q5X2, dated October 2022. The request in that case had been submitted in November 2021 and was again about the building project. The Commissioner found that the exception was engaged. To summarise the Commissioner's reasoning in the earlier case, he found regulation 12(5)(b) was engaged because:
 - the Trust had commenced legal action in December 2021 in relation to the construction project
 - the documents requested in that case formed part of its Letter of Claim; and
 - the proceedings were still 'live'.
27. The complainant submitted their current request to the Trust only three months after they submitted the request in IC-147660-Q5X2. Unsurprisingly, the situation remained the same and for the same reasons the Commissioner therefore finds that the regulation 12(5)(b) exception is also engaged in this case.
28. The complainant has brought no new public interest arguments to the Commissioner's attention. Therefore the Commissioner also finds that, as in IC-147660-Q5X2 and for the same reason (principally that there is greater public interest in allowing the Trust to recover public monies in situations where contractors have not fulfilled their contracts), the public interest favours maintaining the exception in this case.

Right of appeal

29. 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

30. 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.
31. 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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Wycliffe House
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