

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2023

Public Authority: Leeds Teaching Hospitals NHS Trust
Address: Trust Headquarters
St James's University Hospital
Beckett Street
Leeds
LS9 7TF

Decision (including any steps ordered)

1. The complainant has requested information relating to the construction of new hospitals. Leeds Teaching Hospitals NHS Trust ('the Trust') disclosed some information but withheld some information under section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that:
 - The Trust should have handled the request under the Environmental Information Regulations ('the EIR') and therefore breached regulation 14(3) as it incorrectly issued its refusal under FOIA and not the EIR.
 - Some of the withheld information engages regulation 12(5)(e) and the public interest favours maintaining the exception. However, other withheld information doesn't engage the exception.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested in part 3 of the request.

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

5. On 30 May 2023 the complainant requested:
 1. Has the outline business case for the adult ambulatory day care centre and Children's hospital now been approved in full?
 2. How much money has been confirmed for funding these projects?
 3. Will this allow both projects to go ahead based on the currently submitted plans?
 4. Given the imposition of a standardised design approach (Hospital 2.0) will current building plans require further revision in the light of funding now allocated before work can proceed?
 5. If yes, what changes (in broad terms) to the original plans will be made?
 6. What is the estimated time scale for completion of each wing and opening to patients?
 7. When will building work (as opposed to site preparation) begin?"
6. The Trust responded on 27 June 2023 and disclosed all information except that requested in parts 2 and 3, which it withheld under section 43(2) (commercial interests).
7. On 21 June 2023 the complainant requested an internal review.
8. The Trust provided the outcome to its internal review on 19 July 2023, upholding its original position.

Reasons for decision

Regulation 12(5)(e) – commercial or industrial information

9. The Commissioner has carefully considered whether the request should have been dealt with under FOIA or the EIR. Whilst the request relates to the funding of new hospitals under the new hospital programme, it also relates to the building of new hospitals on specific sites.
10. As such, the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) of the EIR¹, and also regulation 2(1)(c).
11. Because the Trust issued its refusal under FOIA and not the EIR it breached regulation 14(3) of the EIR, which states that a public authority must state, no later than 20 working days after received the request, what exceptions it is relying upon.
12. Regulation 12(5)(e) states that a public authority can refuse to disclose information if disclosure would adversely affect the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest.
13. The exception imposes a four-stage test which is:
 - Is the information commercial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
14. The Trust has provided the Commissioner with a copy of the information that is being withheld, in response to part 2 of the request, which is details of the funding awarded, from the DHSC, to the Trust in relation to the new hospitals.

¹ [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](http://legislation.gov.uk)

15. The emails discussed details of the funding and projections for the building of the hospitals. The Commissioner is satisfied the withheld information is commercial.
16. The Commissioner considers confidentiality provided by law to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. He can see there's a clear expectation that the funding information will be treated as confidential and the withheld information is marked up as such.
17. Having studied the withheld information, the Commissioner is satisfied that it is not trivial and is not already in the public domain. He is also satisfied that it was imparted in circumstances creating an obligation of confidence and therefore, the withheld information is subject to confidentiality provided by law.
18. The Commissioner will now go onto consider whether this confidentiality is required to protect a legitimate economic interest.
19. The Trust has explained 'Disclosing the information would disadvantage the Trust in future dealings for any potential future purchases. It would place suppliers at distinct commercial advantage when negotiating and therefore prejudice our ability to engage in future commercial activities. It would also allow potential suppliers an insight into our methodology and proprietary information they would otherwise not have considered in their offering.'
20. The two new hospitals will have to be built from scratch. The Trust will need to outsource the building of the hospitals, furnishing including equipment etc and the development and construction of specific departments and units. The Trust has explained to the Commissioner that, if it released its budget for the hospitals, this will influence the bids that are submitted in relation to the projects. For example, if the Trust discloses that its budget for one hospital is £1 million, bids to construct the hospital will be influenced by this figure.
21. The Commissioner accepts that if any bids towards constructing or furnishing the hospital are influenced by the disclosed figure, this could compromise the Trust's ability to obtain value for money and therefore, would prejudice the Trust's economic interests.
22. However, the Commissioner doesn't see how disclosing whether or not funding will allow the projects to go ahead would prejudice the Trust's economic interests. From the Commissioner's communication with the Trust, he fails to see the causal link between disclosure of this information and any prejudice to the Trust's economic interests.

23. The Commissioner notes that the information disclosed in response to part 3 of the request can be disclosed as a yes or no; but either way this is unlikely to influence a third party's bid to work on the hospital. Each individual service will be secured by the Trust via negotiations, contract and ultimately payment.
24. Furthermore, the Commissioner notes that part 3 of the request asks will the funding allow the projects to go ahead as part of the currently submitted plans. The answer the Trust discloses in response to part 3 is subject to change, based on how the business case for each hospital develops and changes.
25. So, the Commissioner is satisfied that the figure in response to part 2 engages regulation 12(5)(e), on the basis that the confidence needs to be maintained in order to protect the Trust's economic interests. In relation to this information, the Commissioner will now go onto consider whether the public interest lies in disclosure or in maintaining the exemption.
26. However, he doesn't accept that the information requested in part 3 engages the exception. Therefore the Trust must disclose it.

Public interest test

Arguments in favour of disclosure

27. In favour of disclosure, the Trust acknowledges 'the public interest in openness and transparency, particularly in terms of ensuring that the Trust as a public authority is accountable on how it receives spends public money and that the money is invested wisely.'
28. The complainant has echoed the need for transparency and accountability, explaining 'My argument is that this is very much in the public interest, and the amount of funding for some projects elsewhere has been shared. In addition, I would make the point that it is taxpayers who are paying for these new hospital projects and therefore have a right to be kept informed.'

Arguments in favour of maintaining the exemption

29. The Trust has explained that 'the information captured is very much current information' and construction and developments for the projects is a live issue.
30. The Trust has reemphasised its arguments that disclosure would be likely to impact its ability to secure funding for the projects and in turn, 'the resultant harm should this information be released, would be substantial in securing the best use of public resources, good decision-

making by public bodies and in ensuring fair commercial competition in a mixed economy.'

Balance of the public interest arguments

31. In this case, the Commissioner has determined that the balance of the public interest lies in maintaining the exemption. He's taken into account that the Trust is required to, in compliance with the steps ordered in this notice, disclose whether or not current funding will allow the work to be undertaken. The Commissioner considers this goes some way in meeting the public interest that the complainant is talking about.
32. The Commissioner notes the complainant's concern that the amount of funding for some projects elsewhere has been shared. However, each request must be handled on a case-by-case basis; the Commissioner doesn't know enough about the other projects the complainant is referring to to comment.
33. In its response to the request the Trust confirmed that construction for the projects is expected to commence in 2026 and complete in 2029 and the matter is still live. Clearly, there is still time for the Trust to obtain value for money in the tendering exercises that it carries out and the information requested in part 2 of the request would compromise the Trust's ability to obtain value for money. When this value for money directly relates to the healthcare services these new hospitals will provide to a significant number of people, the Commissioner doesn't consider it in the public interest to compromise the Trust's economic interests in this way.

Right of appeal

34. 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

35. 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.
36. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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