

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 December 2023

Public Authority: Liverpool University Hospitals NHS Foundation Trust (the Trust)

Address: Prescot Street
Liverpool
L7 8XP

Decision (including any steps ordered)

1. The complainant has requested information held by the Trust explaining an estimate cost quoted in a Trust Board paper. The Trust identified information in a Full Business Case that would provide detail about this figure but withheld this on the basis of regulation 12(4)(d).
2. The Commissioner's decision is that the exception is engaged but the public interest favours disclosure of the requested information.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Disclose the information in scope of the request, as identified and highlighted by the Trust in the Full Business Case.
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 9 June 2023, the complainant wrote to the Trust and requested information in the following terms:

“The latest board papers refer to a capital spend “Royal Phase 2 £18,210 million” – what is this for?

Is there any continuing occupation/utilisation of the three main buildings slated for demolition?

If there is when [sic] what use is being made and when is this expected to end?

If not when was occupation/utilisation ended?”

6. The Trust responded initially on 15 June 2023 explaining the figure. The complainant responded to clarify he had been looking for details of the capital expenditure not simply an explanation. The Trust asked the complainant to clarify what information he was seeking on 19 June 2023. On 20 June the complainant confirmed he wanted any and all information relating to this expenditure.
7. Following acceptance of the refined and clarified request, the Trust responded on 18 July 2023. It further explained the figure quoted related to planning assumptions and was a budgeting estimate to the Royal Phase 2 project which had not yet occurred. It advised it held a document titled ‘Future Phases’ in scope of the request but withheld this under regulation 12(4)(d) of EIR as it was in the process of finalising the document which would detail the estimated costs of the Royal Phase 2 project.
8. Following an internal review the Trust wrote to the complainant on 10 August 2023. It stated that having revisited the request it noted the ‘Future Phases’ document had in fact already been disclosed to the complainant in response to a previous FOIA request and the document had now been superseded by a Full Business Case which was currently with the Department of Health and Social Care (DHSC) for review. As such the Trust maintained this was being withheld under regulation 12(4)(d).

Scope of the case

9. The complainant contacted the Commissioner on 15 August 2023 to complain about the way their request for information had been handled.

10. The Commissioner considers that the scope of his investigation is to determine if the Trust has correctly withheld the information in scope of the request under regulation 12(4)(d) of EIR.

Reasons for decision

11. Regulation 12(4)(d) of EIR provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
12. This is a class-based exception which means that if the information falls within its scope then the exception is engaged. It's not necessary to demonstrate that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is subject to the public interest test.
13. The information being withheld in this case is contained in the Full Business Case but is not the Business case in its entirety. The Trust has identified specific information within the Full Business Case that is in scope of the request ie that provides details explaining the £18.2m figure. Regardless, the position of the Trust is that the information in the Business Case is still subject to change as it has been submitted to the DHSC and NHS England in line with established processes for having business cases approved. At this stage it is not a final document as there is scope for the document to be subject to change or that some of the contents will not be approved.
14. The Trust argues that even though disclosure of the entire Business Case is not necessary to meet the request, the Full Business Case as a whole remains pending and is considered in draft format. It is therefore not appropriate to disclose excerpts from it at this time, particularly relating to costs when this information may be subject to change.
15. The Commissioner considers the Full Business Case that contains the withheld information to constitute material in the course of completion as it is a working document which is subject to amendment following DHSC and NHS England input. As the withheld information is contained within that document, the Commissioner is satisfied that the information also constitutes material in the course of completion. Therefore, he finds that regulation 12(4)(d) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest arguments in favour of disclosure

16. The Trust has recognised there is a public interest in disclosure as it would provide greater openness and transparency with regard to plans for public services and how public money will be spent.
17. The complainant considers there is a strong public interest in knowing what is planned so the public can comment on it as early as possible.

Public interest arguments in favour of maintaining the exception

18. The Trust argues that, although the Full Business Case is subject to DHSC/NHS England approval, it requires a safe space to hold discussions and to negotiate with the DHSC/NHS England freely and frankly.
19. The Trust acknowledges the new Royal Liverpool Hospital construction project has been a topic of high public interest for a number of years but argues that release of detailed information relating to costs, that have potential to change, could be seen by the public as an attempt by the Trust to 'mislead'. It further adds that the due diligence process is still underway so premature disclosure would not provide an accurate picture of the Trust's plans and could misinform the public.

Balance of the public interest arguments

20. The Commissioner does not accept that disclosing the withheld information would mislead the public. Whilst he recognises that the estimated costs are subject to change, the Commissioner considers that the Trust would be able to explain this to the complainant and provide context to the information.
21. The Commissioner recognises the Trust needs a 'safe space' to develop its Business Case away from public scrutiny. He also recognises staff need to be able to have free and frank discussions about the Business Case. However, the complainant has only asked for information relating to the estimated £18.2m figure rather than the Full Business Case in its entirety. The Commissioner therefore considers that disclosing the information in the Business Case that has been highlighted by the Trust as in scope of the request would not impact on the Trust's ability to have free and frank discussions with DHSC/NHS England when finalising the Business Case, nor would it impede on the Trust's 'safe space'.
22. The Commissioner is mindful that under regulation 12(2) requests for information handled under the EIR carry a presumption in favour of disclosure, and is not satisfied that the arguments for withholding the information presented by the Trust override this presumption. Therefore, the Commissioner's decision is that the public interest in disclosure outweighs the public interest in maintaining the exception.

Right of appeal

23. 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

24. 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.
25. 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
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Wilmslow
Cheshire
SK9 5AF