

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

Date: 13 November 2023

Public Authority: Liverpool University Hospitals NHS Foundation Trust

Address: Aintree University Hospital
Lower Lane
Liverpool
L9 7AL

Decision (including any steps ordered)

1. The complainant has requested minutes of New Hospital Committee Meetings from Liverpool University Hospitals NHS Foundation Trust (the Trust). The Trust redacted some of the information contained within the minutes, citing regulation 12(5)(b) (disclosure would adversely affect the course of justice) and regulation 13 (personal data) of the EIR.
2. The Commissioner's decision is that the Trust is entitled to withhold the redacted information under regulations 12(5)(b) and 13 of the EIR.
3. The Commissioner does not require the Trust to take further steps in relation to this request.

Request and response

4. On 16 November 2022, the complainant made the following request for information from the Trust:

"Can you please provide minutes of all New Hospital Committee minutes subsequent to the last ones I received for the July 2022 meeting? Thanks.

Also any Clerks of Works subsequent to the last one provided?
Thanks.”

5. The Trust’s final position is that it holds minutes from the New Hospital Committees meetings held on the 26 August 2022, 23 September 2022, and 28 October 2022. It provided the complainant with a copy of all three minutes but made some redactions to the minutes from the meetings held on 23 September 2022 and 28 October 2022. It relied on regulation 12(5)(b) (disclosure would adversely affect the course of justice), and regulation 13 (personal data) to make the redactions. The Trust also confirmed that it did not hold Clerks of Works reports post-dated July 2022.

Scope of the case

6. On 5 July 2023 the Commissioner issued a decision notice under case reference IC-209259-H3M2¹ in relation to the redactions made to the minutes of the meeting held on 23 September 2022.
7. The complainant contacted the Commissioner on 13 February 2023 to complain about the redactions made to the New Hospital Committee minutes dated 28 October 2022.
8. The Commissioner therefore considers the scope of his investigation is to determine if the Trust is entitled to rely on regulations 12(5)(b) and 13 to withhold the information redacted from the minutes of the meeting held on 28 October 2022.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025804/ic-209259-h3m2.pdf>

and its components, including genetically modified organisms, and the interaction among these elements.

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements.
 - (d) reports on the implementation of environmental legislation.
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. As the requested information relates to the New Royal Liverpool Hospital construction project, the Commissioner believes that the requested information is likely to be information on measures affecting or likely to affect the elements of the environment. He has therefore assessed this case under the EIR.

Regulation 12(5)(b) – the course of justice

- 11. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
- 12. In this case, the Trust has relied on Regulation 12(5)(b) to withhold the redacted information on page 6 of the New Hospital Committee minutes held on 28 October 2022.
- 13. The Trust has stated that disclosing the redacted information would have an adverse effect on the course of justice because the information attracts legal litigation privilege.

14. The Trust has explained that the redacted information is an update to the Trust's senior leadership team outlining its legal strategy following the receipt of legal advice. The Trust has stated that it has a right to keep elements of its legal strategy secret to assist securing the most favourable outcome and disclosure of this information would add unfairness into the proceedings and would therefore adversely affect the course of justice.
15. The Trust has stated that the disclosure of the redacted information into the public domain would place the Trust at a considerable disadvantage in litigation as it would highlight to the opposing parties its legal strategy, the strengths and weaknesses within the case and would be something that the other parties to the litigation are not required to disclose. This would add unfairness into the case, and disclosure would therefore have an adverse effect on the course of justice.
16. As pointed out by the Trust, the redacted information is not a direct communication between the Trust and its legal advisor. However, the Trust has explained that it is an update to its senior leadership team outlining its legal strategy following receipt of legal advice. The Trust has stated that it has a right to keep elements of its legal strategy secret to assist securing the most favourable outcome.
17. The Commissioner has viewed the withheld information and is satisfied that it constitutes the content of confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice.
18. As the withheld information is subject to legal professional privilege and relates to a live matter, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

19. The Trust acknowledges that disclosure of the withheld information would help inform public curiosity. However, this does not equal or outweigh the strong public interest that is inherent in maintaining the Trust's right to keep elements of the legal advice secret to secure the most favourable outcome.
20. The Trust has argued that the premature release of the withheld information would not be in the public interest because disclosure has a high potential to prejudice the Trust's ability to defend its legal interests resulting in serious consequences to its ability to recover public funds.

21. In balancing the opposing public interest factors in this case, the Commissioner considers that it is necessary to take into account the inbuilt public interest in the importance of maintaining the principle behind legal professional privilege (LPP). LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
22. The Commissioner accepts that there will always be a public interest in transparency, accountability and in members of the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed.
23. However, the Commissioner does not consider that, in this case, there are sufficient or compelling enough arguments in favour of disclosure which would override the inbuilt public interest in information remaining protected by LPP.
24. The Commissioner's decision is therefore that the balance of the public interests favours the exception being maintained. This means that the Trust was not obliged to disclose the requested information.
25. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

Regulation 13 - personal data

26. Regulation 13(1) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
27. In this case the relevant condition is contained in regulation 13(2A)(a)². This applies where the disclosure of the information to any member of

² As amended by Schedule 19 Paragraph 307(3) DPA 2018.

the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

28. The withheld information in this case is the name of a junior member of the Corporate Governance Team. The Commissioner considers that the information clearly relates to that individual and is therefore their personal information.
29. Disclosure under either FOIA or the EIR is effectively an unlimited disclosure to the world at large, without conditions.
30. The Trust does not consider there to be any a legitimate interest in disclosure of the withheld personal information. It explained that the member of staff attended the meeting as a minute taker and did not have any influence, accountability, or a decision-making role in the meeting.
31. The Commissioner must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.
32. In this case, the Commissioner is satisfied that it would not be within the reasonable expectations of the individual concerned for their personal data to be disclosed to the wider world in response to an EIR request, nor has he seen any evidence of any wider public interest in disclosure of the individual's name.
33. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that disclosing the information in question would contravene a data protection principle as it would not be lawful. Therefore, he has decided that the data is exempt under regulation 13(1) by virtue of 13(2A)(a).
34. It follows that the Trust is entitled to withhold this information.

Right of appeal

35. 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

36. 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.
37. 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

Pamela Clements
Group Manager
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Wycliffe House
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