

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2024

Public Authority: NHS Business Services Authority
Address: Stella House, Goldcrest Way
Newburn Riverside
Newcastle upon Tyne NE15 8NY

Decision (including any steps ordered)

1. The complainant has requested information about NHS Business Services Authority's interactions with Stonewall. NHS Business Services Authority (NHSBSA) initially disclosed some information and withheld personal information under section 40(2) and information it considered to be commercially sensitive under section 43(2).
2. NHSBSA's revised position in respect of part 3 of the request is that it's prepared to disclose some information it previously withheld but will continue to withhold the remainder of the information under section 40(2) and 43(2). In addition, it's now applied section 31(1)(a) and sections 36(2)(b)(ii) and 36(2)(c) to this information. Section 31 concerns law enforcement and section 36 concerns prejudice to the effective conduct of public affairs.
3. The Commissioner's decision is as follows:
 - The information to which NHSBSA has applied only section 31(1)(a) of FOIA is exempt under that exemption.
 - NHSBSA correctly applied section 43(2) and section 40(2) to the majority of the information to which it applied these exemptions and, in the case of section 43(2), the public interest favours maintaining this exemption.

- NHSBSA correctly applied section 36(2)(b)(ii) and section 36(2)(c) to some of the information to which it applied these exemptions but the public interest favours disclosure.
 - The remaining information to which NHSBSA applied sections 36(2)(b)(ii), 36(2)(c), 40(2) and 43(2) doesn't engage these exemptions; either because it's already in the public domain or because, in relation to section 40(2), a small amount of the information isn't personal data.
4. The Commissioner requires NHSBSA to take the following steps to ensure compliance with the legislation:
- Disclose the information that doesn't engage section 43(2) of FOIA, and which is noted at paragraph 46 of this notice.
 - Disclose the information that doesn't engage section 36(2)(b)(ii) or 36(2)(c) of FOIA and which is noted at paragraph 76 of this notice, having first redacted the information to which NHSBSA has correctly applied section 40(2).
 - Disclose the information which doesn't engage section 40(2) of FOIA, and which is noted at paragraph 181 of this notice and listed in paragraph 11 of the confidential annex to this notice.
 - Disclose the information NHSBSA has advised it's now prepared to disclose, and which is referred to in paragraphs 2 and 21 of this notice.
5. NHSBSA must take these steps within 30 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.

Background and context

6. In its submission to the Commissioner, NHSBSA has provided the following background and context to its Workplace Equality Index (WEI) submission.
7. The NHSBSA is a special health authority established further to section 28 of the NHS Act to provide centralised procurement and back-office service management for the NHS, managing over £48 billion of NHS spend annually. It delivers a range of national services to NHS organisations, NHS contractors, patients, and the public, including administering the NHS pension scheme, arrangements for damages

arising from injuries from NHS vaccination programmes, and the UK Global Health Insurance Card (UK GHIC) for people travelling overseas.

8. NHSBSA has advised that it has approximately 4,422 staff as of 1 January 2024. It says its people are critical to the success of the NHSBSA, and it recognises just how important a role they play. NHSBSA's 'people' strategy, which enables its people to "bring their best" while creating a great, inclusive place to work, is one of the key pillars of its published business strategy for 2023-2026. Through its employee engagement survey, NHSBSA colleagues indicate they feel proud to work for the NHSBSA and that it has a culture of care and respect for each other. However, like many organisations, NHSBSA faces difficulties in recruiting and retaining the best talent (particularly as the job market over recent months has been particularly challenging for public sector employers). Its published business plan recognises that it also has an underrepresentation of women, people from ethnic minority backgrounds, neurodiverse, and LGBTQ+ people in its workforce and/or senior management.
9. NHSBSA says it aims to foster a truly inclusive workplace including having a diverse workforce which is representative of the populations it serves. This leads to better decision making and innovation but also enables it to deliver accessible services that meet the needs of its customers. Both are fundamental to the organisation.
10. NHSBSA's published Diversity and Inclusion Annual Report outlines its strategic objectives for 2022 to 2023. NHSBSA says that this reflects not only NHSBSA's legal requirements but goes beyond that to deliver great services for its customers, and to be a great place to work, by putting its people at the heart of everything it wants to do.
11. NHSBSA says it's important to convey this from the outset, as its high ranking in the Stonewall WEI and its work in the diversity and inclusion space is of real and tangible importance to NHSBSA as an organisation. It says it takes pride in being a workplace that 'walks the walk' and this is reflected in its approach to responding to this request, keeping in mind at all times, its LGBTQ+ employees and allies whose lived experiences are at the heart of its submission and all NHSBSA's work in the diversity and inclusion space.
12. The Stonewall Top 100 Employers list is compiled from the WEI. The index is a powerful benchmarking tool used by employers to assess their achievements and progress on LGBTQ+ equality in the workplace, as well as their wider work in the community and on service provision. The submission process for entry into the WEI is competitive with hundreds of organisations competing to achieve the highest rank possible.

13. In its first entry to the WEI in 2014, NHSBSA was ranked 310th. In its most recent entry in 2023 (which is the subject of this FOIA request), NHSBSA was ranked 4th, making it the highest ranked public authority with the three organisations above being a law firm, a professional services firm, and a charity. This significant improvement was due to NHSBSA's continuous investment in LGBTQ+ inclusion over the past 10 years.
14. NHSBSA says that scoring a high ranking in the WEI is a key part of its talent acquisition strategy and is important to retaining its staff. NHSBSA then considers how its place on Stonewall's WEI helps it to acquire and retain staff, and its engagement in LGBTQ+ events.
15. NHSBSA's submission goes on to discuss issues related to its LGBTQ+ activities. It considers these issues to be sensitive and has asked the Commissioner not to include these matters in this decision notice, which he has respected.
16. Finally, NHSBSA has told the Commissioner that it has received 14 FOIA requests about Stonewall or inclusion during 2022 and 2023. In 2022, the requests related mainly to budgets and the number of staff employed in those roles, banded, or combined salaries, training, and its strategy documents. However, in 2023 the requests nearly doubled and were worded in a more negative tone with the use of 'staff working days lost from regular work', targeting roles which relate to promoting equality, diversity and inclusion and their exact pay as well as NHSBSA's WEI submission document.

Request and response

17. The complainant made the following information request to NHSBSA on 11 July 2023:

"1. Please provide all emails sent between NHS Business Services Authority and Stonewall between these two dates. (01/01/2022 – 31/03/2023)

2. Please provide information about all moneys paid to Stonewall by the NHS Business Services Authority between these two dates. (01/01/2022 – 31/03/2023)

3. Please provide the NHS Business Services Authority's submission to Stonewall's Workplace Equality Index for 2023 which resulted in the NHSBSA coming 4th in the Stonewall Top 100 Employers 2023."

18. NHSBSA responded to the request on 5 September 2023, having relied on section 10(3) of FOIA to take additional time to consider the public interest test. NHSBSA disclosed some relevant information (with personal data redacted under section 40(2)) and advised that some of the requested information – information about a training course within scope of part 1, and the information requested in part 3 - was exempt from disclosure under section 43 of FOIA.
19. NHSBSA maintained its position following its internal review dated 1 November 2023.

Scope of the case

20. In their complaint to the Commissioner, the complainant confirmed that they were dissatisfied that NHSBSA had refused to provide its most recent submission to Stonewall's WEI (part 3 of the request). They considered that the Commissioner's decision in IC-129040-Y4T2¹ is relevant, which also concerned WEI submissions to Stonewall. The Commissioner has noted, however, that the public authority in that case had relied on section 41 of FOIA which concerns information provided in confidence. That exemption hasn't been applied in this case.
21. In its submission to the Commissioner dated 19 January 2024 NHSBSA said it had reconsidered part 3 of the request. NHSBSA said that it's now prepared to disclose information within scope of this part that it had previously withheld but advised that some information remains exempt.
22. At this point, 19 January 2024, NHSBSA confirmed that the exemptions it's now relying on in respect of the information it intends to continue to withhold are section 31(1)(a) and sections 36(2)(b)(ii) and 36(2)(c) in addition to section 43(2) and section 40(2).
23. This reasoning therefore focusses on NHSBSA's application of the above exemptions to information within scope of part 3 of the request that it has withheld and will continue to withhold.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022502/ic-129040-y4t2.pdf>

24. In its submission to the Commissioner, NHSBSA also advised that it had aggregated the public interest arguments associated with the qualified exemptions on which it's now relying, namely sections 31, 36 and 43.
25. In November 2023, the Court of Appeal in **Montague**² decided that a public authority can aggregate the public interest in maintaining more than one FOIA exemption if it's applied the exemptions to the same information, as NHSBSA has done in this case in some instances.
26. The Court of Appeal judgment found aggregation would be permissible "when the different public interests ... overlap or are otherwise capable of aggregation." In contrast to this, it would not be appropriate "to aggregate the different public interests underlying the different provisions conferring exemption because the subject matter, or the particular aspect of the public interest reflected in certain provisions, is so distinct that they do not lend themselves to aggregation."
27. The Commissioner's approach to the public interest test in this case is discussed in the relevant sections of this notice.
28. NHSBSA provided the Commissioner with what it described as a "definitive" spreadsheet which detailed, somewhat broadly, what information it was withholding under what exemption(s) and the associated reasoning. On request, NHSBSA subsequently provided the Commissioner with more detail on exactly what information it was withholding under what exemption.
29. As noted, NHSBSA had advised that it had aggregated the public interest arguments for the exemptions on which it's relying. However, its submission provided a suite of public interest arguments that didn't clearly indicate which arguments it considered relevant to sections 36 and 43(2) specifically. The Commissioner asked NHSBSA to clarify that situation, including differentiating between the two section 36 exemptions on which it's relying.
30. The Commissioner will first consider NHSBSA's application of section 31 only to certain information in scope.
31. He'll then consider NHSBSA's application of section 43(2) to other information. Depending on his decision about section 43(2) the

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https://assets.caselaw.nationalarchives.gov.uk/ewca/civ/2023/1378/ewca_civ_2023_1378.pdf

Commissioner may consider NHSA's application of section 36(2)(b)(ii) and section 36(2)(c) to that same information, as well as to information to which it didn't apply section 43(2). Finally, the Commissioner will consider NHSBSA's application of section 40(2) to some of the withheld information.

32. The spreadsheet referred to above was accompanied by two documents. An 'Attachment 1' document is a copy of the submission to the WEI ('the WEI submission'). This copy shows the intended redactions. As indicated above at paragraph 21, NHSBSA has confirmed it will now disclose the remaining information in the WEI submission.
33. An 'Attachment 2' document shows different types of information which NHSBSA says it's provided for "illustrative purposes." The Commissioner understands that the information in Attachment 2 illustrates information that supported and evidenced NHSBSA's WEI submission. NHSBSA has also provided the Commissioner with original, unredacted copies all the evidence supporting the WEI submission.

Reasons for decision

Section 31 – law enforcement

34. NHSBSA is relying on section 31(1)(a) only to withhold a small amount of the information in scope.
35. Under section 31(1)(a) of FOIA, information is exempt if its disclosure would or would be likely to prejudice the prevention or detection of crime.
36. NHSBSA says that URLs (ie addresses on the Web), toolbars and taskbars visible in screenshots used within the WEI submission could give insight into the services/systems the NHSBSA is using. This could lead to an increase in phishing attempts, spoof websites/intranet sites and links, and vulnerabilities. The URLs give insight into the base structure of NHSBSA's URLs which could be used to create a malicious version of the sites.
37. NHSBSA notes that the information covered by this exemption is peripheral to the substance of its WEI submission, but it considers it would increase its vulnerability to attack if it were to disclose this information, which forms part of the overall WEI submission.
38. NHSBSA made the redactions to the information contained in the URLs, toolbars, and taskbars at the direct request of its Information Security team. That team's view is that this information would lead to an

increase in phishing attempts, spoof website/intranet sites and links, and vulnerabilities.

39. NHSBSA says it's already a significant target of cyber-attacks due in part to the wide remit of its work and its engagement with the general population. It's the subject of approximately 900,000 potential phishing attempts each year and takes the upmost care when disclosing information to the public which may increase the likelihood of success of these attempts. NHSBSA doesn't consider that this information adds anything of substance to the disclosure, such that its removal would be detrimental to the complainant.
40. The Commissioner is satisfied, having considered NHSBSA's reasoning, that disclosing the withheld information would be likely to prejudice the prevention or detection of crime. His decision is therefore that the information to which NHSBSA has applied section 31(1)(a) is exempt information for the reasons it's given. The Commissioner's gone on to consider the public interest test.
41. NHSBSA has applied only section 31 to the information being considered in this section. NHSBSA accepts that this piece of information doesn't engage the other exemptions. Therefore, the Commissioner has considered the section 31 public interest arguments separately.
42. In its submission to the Commissioner, NHSBSA has argued that disclosing the information to which it's applied section 31 would allow would-be cyber criminals to target their attacks in a way which allow an increased chance of success. A successful cyberattack could lead to:
 - a loss of personal data, some of which is sensitive, and confidential business information;
 - substantial damage to NHSBSA reputation and distress to data subjects; and
 - impact on NHSBSA's ability to operate effectively and provide public services, which would negatively impact the general population.
43. The Commissioner agrees with NHSBSA that the information to which it's applied section 31 has very little wider public interest and that there's substantially more public interest in NHSBSA's IT systems remaining safe and secure. As such, the Commissioner's satisfied that the public interest favours maintaining the section 31 exemption.

Section 43 – commercial interests

44. NHSBSA has applied section 43(2) to some of the information in scope.
45. Under section 43(2) 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).
46. First, as NHSBSA has noted in its submission to him, some of the information to which it's applied section 43(2) is already in the public domain. This matter is discussed in paragraph 1 of the confidential notice.
47. Because that information is already in the public domain, the Commissioner considers that it can't engage the exemption under section 43(2). The information to which the Commissioner finds NHSBSA incorrectly applied section 43(2) is listed in paragraph 1 of the confidential annex to this notice.
48. The Commissioner has gone on to consider the remaining information to which NHSBSA has applied section 43(2). This information is in the WEI submission and the evidence that NHSBSA considered supported that submission. It includes information associated with a strategy, corporate events, initiatives and promotions, personal experiences, articles and a Diversity and Inclusion annual report. It also includes information about NHSBSA's wider business. This is caught by the request because it forms part of a longer piece of evidence that NHSBSA submitted to the WEI, but it doesn't concern LGBTQ+ matters.
49. When he's deciding whether section 43(2) is engaged, the Commissioner considers whether the envisioned harm relates to commercial interests, why disclosing the information would or could prejudice those commercial interests and how likely it is that the envisioned prejudice will happen.
50. In its submission to the Commissioner, NHSBSA has confirmed that the party whose commercial interests would be prejudiced is its own. It says that the primary commercial interest (which Information Tribunals have said should be interpreted broadly) is recruiting and retaining staff, which is itself a commercial activity (DWP v IC and Slater, First-tier Tribunal, 3 April 2023 at paragraph 50). NHSBSA says that there's significant cross-over in the rationale for this exemption and section 36.
51. NHSBSA has next explained why its commercial interests would be prejudiced if it disclosed the information. As it has noted, the process of submitting to Stonewall's WEI is competitive with hundreds of organisations competing to achieve the highest rank possible. NHSBSA's Stonewall submission (and resulting fourth place ranking) reflects

hundreds of hours of work of the NHSBSA Diversity & Inclusion (D&I) team, years of implementing improvements in the organisation's LGBTQ+ organisation processes, and lifelong journeys of its staff, particularly its LGBTQ+ colleagues, whose lived experiences formed the basis of its submission.

52. NHSBSA says that disclosing the information would prejudice its commercial interests as other organisations would be given an unfair advantage when submitting their own WEI application. It would weaken its competitive nature when reapplying for the submission and place NHSBSA at an unfair disadvantage to non-public authority competitors who aren't subject to FOIA. If others replicated and/or built on NHSBSA's work, it would lose its high ranking (most probably being replaced by private competitors, who can expend large amounts of resources into their D&I strategies and implementation).
53. NHSBSA's rating in the WEI enhances how attractive it is to a diverse talent pool. By placing its submission into the public domain, it considers it's at risk of other organisations, including non-public authorities, from copying its submission. In turn this will reduce its attraction and would impact its ability to recruit effectively and have the diverse colleague base. This in turn will have a detrimental impact on NHSBSA delivering its strategic goals.
54. NHSBSA's position is that disclosing the withheld information, and the consequential negative impacts on its relationships with staff and partners, would have a domino effect on its rankings in competitions such as the Stonewall WEI.
55. In its submission to the Commissioner, NHSBSA has provided further discussion on the consequences of disclosing the information but has asked the Commissioner not to reproduce this discussion in this notice. This is because NHSBSA considers that reproducing the discussion in full would be likely, in effect, to cause the prejudice it's seeking to prevent through its application of sections 43 and 36.
56. First, the Commissioner is satisfied that the interests that would or could be prejudiced are the commercial interests that section 43(2) of FOIA is designed to protect.
57. Second, the Commissioner accepts that disclosing the information would or could prejudice NHSBSA's commercial interests, for the reasons NHSBSA has explained and, in respect of the small amount of wider corporate information discussed in paragraph 48, because it would give other organisations an insight into NHSBSA's business and decisions. NHSBSA's high placing on the WEI is likely to make it an attractive place to work for prospective employees; it's likely to be attractive to more

people and to more people with diverse experience and from diverse backgrounds. This increases the likelihood of NHSBSA being able to recruit high calibre and experienced candidates who are able to help NHSBSA deliver its wide range of services to a wide range of service users. Disclosing the information being withheld would be likely to give its competitors an insight into the types of activities and initiatives that NHSBSA undertakes to achieve its high WEI ranking, and to copy those activities and initiatives. This would commercially disadvantage NHSBSA.

58. Finally, level of likelihood. NHSBSA's submission to the Commissioner suggests that it considers that the prejudice it envisions **would** occur ie it's more probable than not that the prejudice would occur. Regarding section 43(2), the Commissioner doesn't consider that NHSBSA has made a sufficiently strong case that the higher threshold of likelihood is met. He will accept, however, that the lower threshold – would be likely – is met.
59. Because the conditions at paragraph 49 are met, the Commissioner finds that the withheld information the Commissioner is considering engages section 43(2) of FOIA. He's gone on to consider the public interest test associated with section 43(2).

Public interest test

Public interest arguments for disclosure

60. In correspondence to the Commissioner, the complainant has said that journalists regularly request WEI's under FOIA and review them in the press. They also note that in the past the Commissioner has said that workplaces need to release Stonewall's feedback on their WEI submissions.
61. The circumstances of the Commissioner's decision in IC-129040-Y4T2 have been noted ie that that case (and other cases where the Commissioner ordered disclosure) concerned the application of section 41. In a further decision - IC-144583-B8L3 - the Commissioner found that section 43(2) wasn't engaged in respect of prejudice to Stonewall's commercial interests; however, the current case concerns NHSBSA's commercial interests. In IC-208689-S9B1 and IC-125081-Q8J6 the Commissioner found section 43(2) was engaged or partly engaged but that the public interest favoured disclosure. However, those cases concerned different information associated with the WEI.
62. Stonewall's WEI is a tool through which organisations can measure their progress on LGBTQ+ inclusion in the workplace. In a conversation with the Commissioner, the complainant acknowledged that the general

types of information that Stonewall considers should form part of a submission to its WEI is in the public domain. However, they consider that it's extremely important for the public to know the specific actions NHSBSA is taking around LGBTQ+ matters, and transgender matters in particular. This is because the NHS is a public body, serving millions of people and, as such, has a great deal of impact and influence.

63. The complainant subsequently presented the following public interest arguments for disclosure:

- As NHSBSA is a body funded by taxpayers, there should be a strong presumption in favour of openness, both with respect to how it spends taxpayers' funds and how it conducts its affairs.
- Under the Equality Act there are nine protected characteristics. The Public Sector Equality Duty requires public authorities to foster good relationships between people with and without different protected characteristics. Stonewall is explicitly focused (as it has every right to be) on two protected characteristics only - those of sexual orientation and gender reassignment.
- Stonewall has a strong public footprint and has been very effective in promoting the advancement of these characteristics across public sector organisations. However, the public has an interest in seeing whether this advancement is potentially putting public authorities in breach of their Public Sector Equality Duty.
- The complainant considers that there's evidence that this is occurring. They say that there's a great deal of public discourse at the moment with women raising their voices to say that the advice Stonewall provides to companies / or the pressure it applies on companies via the WEI undermines the interests of women and discriminates against women.
- Arguments have been made that Stonewall runs the risk of 'misrepresenting the law' to public authorities. This involves Stonewall not necessarily being clear about what the law is, but rather stating what Stonewall would like it to be, in a manner that implies that its position is the law - or is even just a balanced representation, when it's not. The complainant has provided the Commissioner with what they consider to be examples of this.
- The complainant argues that there's a public interest in seeing what Stonewall is asking of organisations; how organisations such as the NHSBSA respond; and then how Stonewall responds to that response. There is an interest in seeing whether Stonewall pushes entities towards violating their Public Sector Equality Duty by not

outlining approaches that carefully balance different people's protected rights and interests.

- The complainant says that NHSBSA has a role in disseminating practices and systems right across the NHS. These might include IT systems or template documents for management or contracting or patient care. The complainant considers that there are few organisations where the public has a greater interest in seeing how they respond to Stonewall and whether they're able to fairly balance Stonewall's suggestions and recommendations against their own wider need to balance protected characteristics and comply with the Public Sector Equality Duty. NHSBSA's response to the Stonewall WEI has implications for the entire NHS with which the entire population interfaces. The complainant says that the public interest in openness and transparency is surely plainly evident.

64. In relation to section 43(2), NHSBSA has considered the following:

- There's a public interest in increasing the transparency of public authorities as this increases public trust.
- There's a particular public interest in understanding organisational progress concerning LGBTQ+ inclusivity.
- NHSBSA recognises that there's been some media and political interest in aspects of Stonewall's views as a campaigning organisation. Disclosure helps to demonstrate the objective and reasonable approach that NHSBSA and Stonewall have taken to demonstrate, assess and accredit NHSBSA as a good place to work.
- Disclosure could further demonstrate that NHSBSA is an attractive employer for diverse individuals.
- Some other organisations have published their Stonewall submissions (whether voluntarily or under FOIA).
- Decisions about recruitment and retention are often multifaceted and therefore disclosing the submission may not, in itself, impact on NHSBSA's recruitment and retention.

Public interest arguments against disclosure

65. In relation to section 43(2), NHSBSA has confirmed that it's considered the following:

- There are inherent public interests against disclosure reflected in the harms in the qualified, prejudice-based exemptions in FOIA.
- The submission is provided as part of a competitive process and others, such as non-governmental organisations (who are not subject to FOIA) would be likely to gain a competitive advantage over NHSBSA by having access effectively to copy its submission and policies. This would impact on the ranking NHSBSA receives and being seen as an employer of choice. Given the very high value and complexity of work that NHSBSA does to support the activities of the wider NHS, it's in the public interest that it isn't prejudicing its ability to attract, recruit and retain the best talent and a diverse workforce.
- Stonewall shares any identified practice through its account managers and resources therefore any identified best practice will be shared appropriately and with agreement from the NHSBSA. This has the same outcome as disclosing the information but doesn't harm the NHSBSA's commercial interests; any public interest in disclosure can therefore be met in other ways.
- NHSBSA makes some information publicly available, and so there's already a significant amount of transparency around this information, which is being provided in Diversity and Inclusion Strategy and in annually published Diversity and Inclusion Reports. The public interest isn't better served by disclosing the limited withheld information within the WEI report.
- NHSBSA's ranking in the Stonewall Index displays its organisational progress on this work and lists it as an employer of choice. It's in the public interest, reflected in its approved business and strategic plans, that it demonstrates continuous improvement on equality issues within its workforce and the way it works; disclosing the information may jeopardise its ranking and therefore undermine future work in this space.
- Disclosing the information would likely lead to negative discourse. NHSBSA has provided more detail on the consequences of this on its staff and others, and a wider consequence, but the Commissioner has agreed not to detail this in this notice. NHSBSA says that disclosure would also result in taxpayers' money having to be spent on recruitment campaigns to replace staff who otherwise would have been motivated by NHSBSA's high Stonewall ranking. (The Commissioner understands that here NHSBSA means staff would be motivated to remain at NHSBSA.) This would consequently impact NHSBSA's ability to attract and retain talent and partner with external organisations and individuals who work

in diversity and inclusion space. Based on historical instances this would also be likely to cause disruption and impact on its business-as-usual activities for the team.

- NHSBSA staff would be discouraged from participating in forums and activities designed to promote diversity at work. There is a strong public interest in promoting diversity and plurality of thought, and staff feeling confident to express views (including those who may otherwise feel vulnerable or exposed by doing so). This promotes better decisions, reflective of broader society, including groups experiencing wider inequalities.

Balance of the public interest

66. The Commissioner agrees that, in addition to the general public interest in transparency, there's a public interest in disclosing the information in this case for the reasons discussed at paragraphs 62-63 of this notice.
67. However, he considers that the relevant information that NHSBSA has disclosed, and the further information which it's advised the Commissioner it intends to proactively disclose, addresses the public interest arguments for disclosure to a satisfactory degree, when balanced against the arguments for withholding the information.
68. The Commissioner has noted that a small amount of the information in scope concerns a third-party charity (not Stonewall) that has been subject to scrutiny. This could have been a public interest factor for disclosing that particular information. However, NHSBSA's interactions with this charity preceded the scrutiny this charity subsequently came under. In the Commissioner's view this lessens the public interest in disclosing that information.
69. Given the number of people it employs and the number of people it delivers services for, directly and indirectly, the Commissioner's satisfied that there's greater public interest in NHSBSA maintaining its competitive advantage through its current high WEI placing.
70. The Commissioner has decided that the public interest favours withholding the information to which NHSBSA has applied section 43(2), which isn't already in the public domain and which the Commissioner has considered in this section.
71. To summarise, the Commissioner has found that NHSBSA is entitled to withhold some of the information to which it's applied section 43(2) and he's also found that the balance of the public interest favours withholding that information.

72. Following the Upper Tribunal's decision in **[2018] AACR 29 (Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC) GIA/447/201**³, where the Commissioner has found that one exemption can be relied on to withhold the information in question, he's not required to consider every other exemption that has been applied to the same information. Therefore, having found that NHSBSA is entitled to withhold the information under section 43(2) he hasn't gone on to consider its application of section 36 or 40 to that same information. As a consequence, in respect of the section 36 exemptions, the issue of aggregating the public interest in maintaining these multiple exemptions doesn't arise. Section 40 is an absolute exemption and isn't subject to the public interest test,
73. However, NHSBSA applied exemptions under section 36(2) of FOIA to some information without also applying section 43(2) to that same information. The Commissioner will therefore consider whether those two section 36(2) exemptions are engaged in respect of that particular information.

Section 36 – prejudice to effective conduct of public affairs

74. In addition to the information covered by the Commissioner's section 43(2) analysis, NHSBSA has also applied section 36(2)(b)(ii) and section 36(2)(c) of FOIA to other information within scope of part 3 of the request.
75. The information to which NHSBSA has applied the section 36 exemptions but not section 43, is in documents: Q1.8, Q2.1A, Q2.6B, Q2.6C, Q2.6D, Q2.6E, Q2.6G, Q2.9, Q3.1, Q5.2A, Q5.2B and Q5.2H and those questions' corresponding entries in pages 35/36, 42 and 83 of the WEI submission.
76. Other information to which NHSBSA has applied section 36 but not section 43, is in the public domain. The information that's in the public domain has been detailed in the confidential annex.
77. The information being considered in this section includes information associated with a policy, promotions, articles, events, and invoices.

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https://assets.publishing.service.gov.uk/media/5e208b08e5274a6c38aae2a2/2018_AACR_29ws.pdf

Section 36(2)(b)(ii) – free and frank exchange of views

78. Section 36(2)(b)(ii) says that information is exempt information if, in the reasonable opinion of a qualified person (QP), disclosure would prejudice, or would be likely to prejudice, the free and frank exchange of views.
79. To determine, first, whether NHSBSA correctly applied this exemption, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
80. NHSBSA has confirmed that its QP was its Chief Executive Officer, Michael Brodie and the Commissioner is satisfied that Michael Brodie is an appropriate QP. NHSBSA applied the section 36 exemptions late, as a result of the complaint to the Commissioner, but it's provided the Commissioner with evidence that Michael Brodie gave his opinion on 19 January 2024. NHSBSA has made a late application of section 36(2)(b)(ii), but Michael Brodie considered the circumstances as they were at the point when its response had been due, ie September 2023. The Commissioner therefore considers the timing of the opinion was appropriate and in line with the UT decision in **Home Office v IC 2011 UKUT 17 (AAC)**⁴ and in **Montague v Information Commissioner and Department for International Trade [2022] UKUT 104 (AAC)**⁵.
81. The Commissioner has considered whether the opinion about section 36(2)(b)(ii) is reasonable. It's important to note that 'reasonableness' isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
82. The test of reasonableness isn't meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
83. For the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36

⁴ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3161>

⁵

https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf

the Commissioner notes that it's in public authority's interests to provide him with all the evidence and arguments that led to the opinion, to show that it was reasonable. If this isn't done, then there's a greater risk that the Commissioner may find that the opinion isn't reasonable.

84. NHSBSA has provided the Commissioner with a copy of the submission it provided to the QP. This shows that the QP was provided with a summary of the information being sought, detailed arguments for why the prejudice envisioned under section 36(2)(b)(ii) would or could occur, and counter arguments.
85. The QP made their decision on the basis that the envisioned prejudice would happen rather than would be likely happen. This means that the QP considers that it's more probable than not that the prejudice would occur. Regarding the section 36(2)(b)(ii) exemption, the Commissioner notes in its submission to him, which he hasn't detailed in this notice, NHSBSA has set out the rationale for why the higher threshold of likelihood is met.
86. As noted, NHSBSA's submission to the QP provided detailed discussion about why disclosing the information would prejudice the free and frank exchange of views. NHSBSA has asked the Commissioner not to reproduce that discussion – and other information in its submission to him - in this notice as it considers doing so could cause the harm that it's trying to avoid through its application of section 36(2)(b)(ii).
87. The Commissioner has respected that request on this occasion. Broadly the QP's opinion was that disclosing the information would prejudice the free and frank exchange of a range of views associated with NHSBSA's deliberations about, and activities associated with, diversity and inclusion.
88. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b)(ii) exemption to form an opinion on the matter of whether relying on that exemption was appropriate regarding the information being withheld.
89. With respect to some of the information in scope, since the Commissioner is satisfied that the relevant considerations have been addressed, he must accept that the QP's opinion about withholding that information is one a reasonable person might hold. He therefore finds that NHSBSA correctly applied section 36(2)(b)(ii) to some of that information.
90. However, as has been noted, some of the information to which it's applied section 36(2) is already in the public domain.

91. The Commissioner appreciates the view NHSBSA has about this matter which is discussed in the confidential annex. But for the reasons discussed in the confidential annex, the Commissioner finds that the QP's opinion about that information isn't reasonable and that NHSBSA incorrectly applied section 36(2)(b)(ii) to that information.
92. The information to which the Commissioner finds NHSBSA incorrectly applied section 36(2)(b)(ii) is listed in paragraphs 1 and 2 of the confidential annex to this notice.
93. The Commissioner has gone on to consider the public interest arguments associated with the section 36(2)(b)(ii) exemption in respect of the information to which NHSBSA correctly applied that exemption.

Public interest test

94. With regard to section 36(2)(b)(ii), as noted, the Commissioner asked NHSBSA to separate out the public interest test (PIT) arguments for the two section 36 exemptions on which it's relying.
95. In a further submission to him NHSBSA explained that the PIT factors for section 36(2)(b)(ii) and section 36(2)(c) are the same because they're intrinsically linked - the prejudice envisioned under section 36(2)(b)(ii) would then cause the prejudice envisioned under section 36(2)(c). Regarding both exemptions, NHSBSA says its PIT arguments partly explore its Equality Act obligations in relation to the prejudice envisioned for both exemptions.

Public interest arguments for disclosure

96. The public interest arguments that the complainant put forward have been detailed in the section 43 analysis.
97. NHSBSA has considered the following arguments for disclosure, for both section 36(2)(b)(ii) and section 36(2)(c):
 - Disclosure would promote equality (an obligation NHSBSA has under section 149 of the Equality Act) by showing what a 'best in class' public authority does to improve the experience of LGBTQ+ people in its workforce.
 - There's a public interest in increasing the transparency of public authorities as this increases public trust.
 - Disclosure could further demonstrate that NHSBSA is an attractive employer for diverse individuals.

- Decisions about recruitment and retention are often multifaceted and therefore disclosing the submission may not, in itself, impact on NHSBSA's recruitment and retention.

Public interest arguments against disclosure

98. With regard to section 36(2)(b)(ii) and section 36(2)(c), NHSBSA has confirmed that it has considered the following:

- There are recognised public interests reflected in the statutory principles in section 149 of the Equality Act which require public authorities to have regard to:
 - a) eliminate discrimination, harassment, victimisation, and any other conduct that is prohibited by or under this Act
 - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

99. Disclosing the withheld information would be harmful to those principles, therefore not in the public interest and therefore would be contrary to NHSBSA's compliance with the Public Sector Equality Duty.

- There are inherent public interests against disclosure reflected in the harms in the qualified, prejudice-based exemptions in FOIA.
- NHSBSA makes some information publicly available, and therefore there's already a significant amount of transparency around this information. It is provided in the Diversity and Inclusion Strategy and in annually published Diversity and Inclusion Reports. The public interest is not better served by disclosing the limited withheld information within the WEI report.
- Disclosing the information would likely lead to negative discourse. As above, NHSBSA has provided more detail on the consequences of this on its staff and others, and a wider consequence, but the Commissioner has agreed not to detail this in this notice. Disclosure would also result in taxpayers' money having to be spent on recruitment campaigns to replace staff who otherwise would have been motivated by NHSBSA's high Stonewall ranking. This would consequently impact NHSBSA's ability to attract and retain talent and partner with external organisations and individuals who work in the diversity and inclusion space.

- Based on historical instances disclosure would also be likely to cause disruption and impact on its business-as-usual activities for the team.
 - NHSBSA staff would be discouraged from participating in forums and activities designed to promote diversity at work. There is a strong public interest in promoting diversity and plurality of thought, and staff feeling confident to express views (including those who may otherwise feel vulnerable or exposed by doing so). This promotes better decisions, reflective of broader society, including groups experiencing wider inequalities.
100. Regarding section 36(2)(b)(ii) specifically, in its further submission to the Commissioner NHSBSA has confirmed that there's a public interest in not stifling the safe space it has with its colleague support programs and networks, which is a hallmark of the NHSBSA.

Balance of the public interest

101. The Commissioner has discussed why he considers NHSBSA incorrectly applied the section 36 exemptions to some of the information it's withholding (listed in the confidential annex). As such, he's considering the public interest associated only with disclosing the information to which NHSBSA has correctly applied section 36.
102. NHSBSA's public interest arguments don't make a clear distinction between those relevant to section 36(2)(b)(ii) and those relevant to 36(2)(c). NHSBSA has explained that it considers that the two exemptions and associated public interest considerations are intrinsically linked.
103. However, the Commissioner understands – from its submission to him and he's also taken account of the advice in the submission to the QP - that NHSBSA's position is the following. For both section 36(2)(b)(ii) and 36(2)(c), NHSBSA has noted the general public interest in transparency.
104. In relation to section 36(2)(b)(ii) NHSBSA, considers there's greater public interest in a wide range of its staff feeling confident to, and being prepared to, share their views and thoughts on NHSBSA's work. This helps NHSBSA to make decisions that reflect the broader society that it serves.
105. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.

106. The QP in this case was NHSBSA's Chief Executive Officer, and, as such, had the requisite knowledge of how their organisation works and the consequences of any disclosure. The Commissioner recognises that the QP's opinion was that the envisioned prejudice would occur. The weight of that opinion is therefore greater than if the QP considered the envisioned prejudice would be likely to occur.
107. The Commissioner has next considered the timing of the request. The public interest in being able to exchange views about an issue freely and frankly, for example, will be greater if the issue is ongoing and live at the time of a request.
108. The request was submitted in July 2023 and the information caught by the request covers a period from 2021 to 2023. The Commissioner understands that the results of the 2023 WEI – for which NHSBSA provided the submission being considered here – had been published before the complainant submitted their request. The 2023 WEI was therefore no longer live. However, while it may have revised its approach to publishing LGBTQ+ matters more recently, NHSBSA continues to promote inclusion and diversity and to publish corporate information about LGBTQ+ subjects. To that degree, therefore, NHSBSA's approach to inclusivity and diversity was live at the time of the request and remains live and ongoing.
109. The Commissioner has gone on to consider the severity, extent and frequency of the envisioned prejudice or inhibition.
110. The Commissioner has found that some of the information in scope is already in the public domain and so section 36 was incorrectly applied to that information. He found that the QP's opinion about the remaining information was reasonable. A little of that remaining information has been in the public domain in the past (paragraph 2 of the confidential annex) and the remaining information is corporate, internal information. The Commissioner notes that the information also includes copies of invoices (Q2.1A) but that NHSBSA didn't apply section 43(2) to that information, which would have been the more appropriate exemption. NHSBSA hasn't presented a public interest argument for withholding the invoices specifically, that relates to the interests under section 36(2)(b)(ii).
111. Stonewall works for equality for all LGBTQ+ people. However, its position on transgender issues has been criticised for undermining compliance with the Equality Act 2010. Some groups and individuals are concerned that Stonewall promotes the primacy of gender identity – the personal sense of one's own gender (that is, the socially constructed characteristics of being a woman, man, girl, or boy) – over sex – the different biological and physiological characteristics of males and

females. They consider that this marginalises and damages the rights and freedoms of women who were born female and who identify as female. There are others who are critical of the focus on LGBTQ+ and diversity and inclusion matters more generally.

112. Some private, public, and voluntary organisations are said to be reconsidering their participation in Stonewall's UK Workplace Equality Index and their membership of Stonewall's Diversity Champions programme; some, such as the Equality and Human Rights Commission and Department of Health and Social Care have withdrawn from that programme.
113. With regard to its interactions with the NHS, many NHS Foundation Trusts and other health bodies such as NHS England, NHS Digital and NHSBSA are Diversity Champions, with some also being in the 2022 WEI top 100, such as NHS England and NHSBSA. Stonewall has also helped to draw up gender policies at some NHS Trusts (although in August 2023 a health minister said that Stonewall shouldn't write policies for NHS bodies).
114. NHSBSA has explained to the Commissioner what its concerns are about disclosing the requested information at the time of the request (discussed in the confidential annex), and it has provided evidence which it considers supports those concerns.
115. Regarding section 36(2)(b)(ii) and NHSBSA staff being reluctant to fully engage in NHSBSA initiatives and share their views, the Commissioner understands that NHSBSA employs almost 4,500 people. Not all its staff will feel inhibited if the information were to be disclosed, but a proportion may. The Commissioner isn't convinced that the prejudice NHSBSA envisions would be severe and he considers the extent of it would be limited.
116. This is because first, while certain individuals may have volunteered information about themselves (information that's in the public domain), the information largely concerns NHSBSA's corporate initiatives and activities. Second, NHSBSA is currently ranked fourth on the WEI and as such will foster a more inclusive and supportive workplace culture than many other organisations. Third, NHSBSA continued to publish information about its LGBTQ+ activities in the period following the request and, at the time of this notice, up to February 2024. NHSBSA hasn't explained why disclosing the information caught by the request would inhibit its staff from sharing their views (because the information might attract criticism and negative feedback), but the information it regularly proactively publishes wouldn't have that effect. In addition, the Commissioner isn't convinced that disclosing the information would increase or worsen the tone of the negative commentary that NHSBSA

already receives. Finally, the Commissioner has reviewed the information being withheld. In the context of the LGBTQ+ space, he doesn't consider any of it to be especially sensitive or unusual, or likely to attract more criticism than the information NHSBSA has published and continues to publish might attract.

117. The Commissioner also considers that the public interest argument NHSBSA has cited about retaining staff is more relevant to section 43(2) or section 36(2)(c), than to section 36(2)(b)(ii). And other public interest arguments NHSBSA has made which aren't detailed in this notice appear to be more relevant to section 38 of FOIA, which concerns health and safety.
118. For the above reasons, the Commissioner isn't persuaded that the interests at paragraph 99 carry significant weight in respect of the information being considered here. In his view, the public interest associated with section 36(2)(b)(ii) favours disclosing that information.
119. The Commissioner has carefully considered the public interest arguments for and against disclosing the information to which NHSBSA has applied the section 36(2)(b)(ii) exemption. He has noted the QP's opinion and NHSBSA's concerns but he nonetheless considers that the general public interest in transparency, the concerns that existed about Stonewall at the time of the request and NHSBSA's size and reach swing the balance in favour of disclosing the information he's considered in this section.
120. To summarise, the Commissioner has found that NHSBSA wrongly applied section 36(2)(b)(ii) of FOIA to some of the information in scope because that information is already in the public domain.
121. The Commissioner has found that NHSBSA has correctly applied section 36(2)(b)(ii) of FOIA to the remaining information to which it applied that exemption. But he has found that the public interest associated with section 36(2)(b)(ii) favours disclosing the information.
122. Because he has found that section 36(2)(b)(ii) either isn't engaged or that it's engaged but the public interest favours disclosure, the Commissioner's gone on to consider NHSBSA's application of section 36(2)(c) to the same information.

Section 36(2)(c) – otherwise prejudice conduct of public affairs

123. Section 36(2)(c) of FOIA says that information is exempt information if, in the reasonable opinion of a QP, disclosing the requested information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

124. As above, to determine whether NHSBSA correctly applied this exemption, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
125. For the reasons given above, the Commissioner is satisfied that Michael Brodie was the appropriate QP and that he gave his opinion at an appropriate time.
126. As with section 36(2)(b)(ii) and taking the same factors into account, the Commissioner has considered whether the opinion about section 36(2)(c) is reasonable.
127. As noted, NHSBSA has provided the Commissioner with a copy of the submission it provided to the QP. This shows that the QP was provided with a summary of the information being sought, detailed arguments for why the prejudice envisioned under section 36(2)(c) would or could occur, and counter arguments.
128. The QP made their decision on the basis that the envisioned prejudice **would** happen rather than would be likely happen. The Commissioner again notes in its submission to him, which he hasn't detailed in this notice, NHSBSA has set out the rationale for why the higher threshold of likelihood is met.
129. As noted, the Commissioner won't give the detail of that submission in this notice. Broadly however, the QP's opinion concerns the diversion of NHSBSA's human and financial resources. The opinion also concerns NHSBSA's ability to recruit and retain staff, and to protect its staff, in the context of its Equality Act obligations.
130. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(c) exemption to form an opinion on the matter of whether relying on that exemption was appropriate regarding the information being withheld.
131. With respect to **some** of the information in scope, since the Commissioner is satisfied that the relevant considerations have been addressed, he must accept that the QP's opinions about withholding that information is one a reasonable person might hold. He therefore finds that NHSBSA correctly applied section 36(2)(c) to that information.
132. However, as has been noted, some of the information to which it's applied section 36(2)(c) is already in the public domain.
133. For the reasons given in his section 36(2)(b)(ii) analysis the Commissioner finds that the QP's opinion about that information isn't reasonable and that NHSBSA incorrectly applied section 36(2)(c) to that information.

134. The information to which the Commissioner finds NHSBSA incorrectly applied section 36(2)(b)(c) is listed in paragraphs 1 and 2 of the confidential annex to this notice.

135. The Commissioner has gone on to consider the public interest arguments associated with the section 36(2)(c) exemption in respect of the information to which NHSBSA correctly applied that exemption.

Public interest test

Public interest arguments for disclosure

136. The public interest arguments that the complainant put forward have been detailed in the section 43 analysis.

137. The arguments that NHSBSA has considered in respect of both of the section 36(2) exemptions it's relying on have been given above.

Public interest arguments against disclosure

138. The arguments that NHSBSA has considered in respect of both of the section 36(2) exemptions it's relying on have been given above.

139. In addition, in its further submission to the Commissioner NHSBSA indicated that disclosing the information and causing the harm it's seeking to avoid by relying on section 36(2)(b)(ii) – ie stifling the safe space for diverse views – would, in turn, cause the harm it's seeking to avoid by relying on section 36(2)(c); ie it would make NHSBSA appear less attractive to potential employees including from diverse backgrounds.

Balance of the public interest

140. Again, the Commissioner is considering the public interest associated only with disclosing the information to which NHSBSA has correctly applied section 36(2)(c).

141. As discussed, for both section 36(2)(b)(ii) and 36(2)(c), NHSBSA has noted the general public interest in transparency.

142. Regarding section 36(2)(c), NHSBSA considers there's greater public interest first in using taxpayers' money efficiently, for example by not having to run campaigns to recruit staff. Second, it considers there's greater public interest in it being able attract and retain talented people to work for it and to be able to partner with external organisations and individuals with LGBTQ+ knowledge and experience. The Commissioner considers that NHSBSA's concern about attracting people to fulfil certain roles is also relevant here. Finally, NHSBSA considers there's greater

public interest in it being able to focus on its day-to-day business, without the disruption and negative impact that it considers disclosing the information would cause.

143. The Commissioner has again taken account of the weight of the QP's opinion and the timing of the request and finds that those factors are as discussed in his section 36(2)(b)(ii) analysis.
144. The Commissioner has gone on to consider the severity, extent and frequency of the envisioned prejudice or inhibition.
145. He has considered the information being withheld, as discussed at paragraph 116. He has also again considered Stonewall's work and influence.
146. The Commissioner has then considered section 36(2)(c) and the use of NHSBSA's human and financial resources and taxpayers' money, NHSBSA's ability to attract and also to retain staff and partnerships, attract people into certain roles and its ability to focus on its day-to-day work without distraction.
147. The Commissioner appreciates the wider context in which NHSBSA is working, which it has discussed in its submission to him. However, NHSBSA is now fourth on Stonewall's WEI and, as such, is well placed both to provide support to any staff who may need it as a result of disclosing the information in this case (with personal data redacted if and as appropriate), and to attract people to work for it. The Commissioner doesn't disregard the effect disclosure may have on some individuals, but he has taken account of NHSBSA's culture, the content of the information, and the fact that NHSBSA continues to publish information on LGBTQ+ matters including on a dedicated LGBTQ+ Network area of its website. Taking those factors into account, the Commissioner considers that the weight of the interests discussed at paragraph 99 is lessened.
148. The Commissioner has carefully considered the public interest arguments for and against disclosing the information to which NHSBSA has applied the section 36(2)(c) exemption. He has noted the QP's opinion and NHSBSA's concerns but he nonetheless considers that the general public interest in transparency, the concerns that existed about Stonewall at the time of the request and NHSBSA's size and reach again swing the balance in favour of disclosing the information he's considered in this section.
149. To summarise, the Commissioner has found that NHSBSA wrongly applied section 36(2)(c) of FOIA to some of the information in scope because that information is already in the public domain.

150. The Commissioner has found that NHSBSA has correctly applied section 36(2)(c) of FOIA to the remaining information to which it applied that exemption. But he has found that the public interest associated with 36(2)(c) favours disclosing the information.

Aggregating the public interest

151. In the scoping section of this decision, the Commissioner has referred to the matter of aggregating the public interest arguments associated with different exemptions applied to the same information, as NHSBSA has done in this case.

152. NHSBSA has applied section 36(2)(b)(ii) and section 36(2)(c) of FOIA to the same information. The Commissioner has found that NHSBSA correctly applied these exemptions to some of the information it applied them to but that, in both cases, the public interest favours disclosing that information. He'll therefore consider whether aggregating the public interest arguments for withholding the information associated with the two separate exemptions is appropriate and, if so, whether it generates a different outcome.

153. In line with the Montague decision, the Commissioner must first consider whether the two exemptions overlap or are capable of being aggregated.

Can the two section 36 exemptions be aggregated?

154. The Commissioner has considered whether there's an overlap in the public interests being protected by section 36(2)(b)(ii) and section 36(2)(c).

155. As noted above, NHSBSA considers that disclosing the information and causing the harm it's seeking to avoid by relying on section 36(2)(b)(ii) – ie critical feedback stifling the safe space for diverse views – would, in turn, cause the harm it's seeking to avoid by relying on section 36(2)(c) ie it would have a negative effect on staff and make NHSBSA seem less attractive to current and potential employees and partners.

156. NHSBSA considers that the two exemptions and associated public interests are intrinsically linked, and ultimately linked to NHSBSA's obligations under the Equality Act.

157. The primary public interest being protected under section 36(2)(b)(ii) in this case appears to be the interest in NHSBSA demonstrating it's adhering to the principles of the Equality Act by being an organisation that fosters a 'safe space' in which a diverse range of its staff feel able to participate in initiatives and to share their views – internally and externally. This increases the likelihood of it being able to retain and

attract a diverse range of staff and work with a diverse range of partners, which relates to one of the interests associated with section 36(2)(c).

158. Regarding section 36(2)(c), NHSBSA has identified the interests in staff being able to focus on their core duties rather than be distracted by any external attention disclosing the information may generate, and in using taxpayers' money efficiently.
159. However, it appears that the primary public interest NHSBSA is protecting under section 36(2)(c) is again the interest in NHSBSA demonstrating it's adhering to the principles of the Equality Act. In the context of section 36(2)(c), it does this through being an organisation that's able to retain and attract a diverse range staff with a range of lived as well as professional experience. NHSBSA partly achieves this through the confidence its staff has (internally), and the perception people have (externally) that NHSBSA protects its staff, and also through the 'safe space' and variety of viewpoints it fosters and promotes. These factors link back to the interest associated with section 36(2)(b)(ii).
160. The Commissioner has considered the arguments NHSBSA has made. Its position is that the harm envisaged to the conduct of public affairs discussed under section 36(2)(c) is, to a large extent, the consequence of the inhibition to that would be caused by the inhibition to the free and frank exchange of views discussed under section 36(2)(b)(ii). Therefore, the Commissioner is satisfied that, in the circumstances of the case, it is permissible to aggregate the public interests in maintaining those exemptions because the public interests overlap.

The balance of the public interest in aggregate

161. The Commissioner has carefully considered the public interests associated with section 36(2)(b)(ii) and section 36(2)(c) separately and together.
162. As noted, NHSBSA considers that the public interest arguments associated with the two section 36 exemptions are intrinsically linked. The Commissioner considers them to be very similar such that aggregating those public interests has very little impact. He has noted that NHSBSA presented one public interest argument under section 36(2)(b)(ii) that is more relevant to section 36(2)(c); namely the public interest in it being able to retain its staff. He therefore accepts that there are additional public interest factors to be considered when the public interest arguments for both exemptions are aggregated. However, ultimately the Commissioner has concluded that it doesn't

materially alter the consideration of the public interest in relation to either of the section 36 exemptions on which NHSBSA is relying.

163. Having aggregated the public interest arguments presented in favour of maintaining each of these exemptions, the Commissioner is not satisfied that, in all the circumstances of the case, the (aggregated) public interest in maintaining the exemptions outweighs the public interest in disclosing the information.
164. To conclude, the Commissioner considers that the public interest associated with the information to which NHSBSA has correctly applied section 36(2)(b)(ii) and section 36(2)(c) favours disclosing the information.
165. Finally, the Commissioner will consider NHSBSA's application of section 40(2) to information within scope of the request.

Section 40 – personal data

166. In this section the Commissioner will consider the information which is already in the public domain and the information to which NHSBSA has applied section 40(2) only or which forms part of the information to which NHSBSA applied section 36(2)(b)(ii) and 36(2)(c) but which the Commissioner found should be disclosed.
167. NHSBSA has applied section 40(2) to some of the information that's already in the public domain. This information is detailed in paragraphs 1 and 2 of the confidential annex to this notice.
168. Despite it being in the public domain, for reasons discussed from paragraph 3 of the confidential notice the Commissioner finds that NHSBSA is entitled to withhold some of that information under section 40(2) of FOIA. He finds that the remainder of that information – at paragraph 11 of the confidential annex - doesn't engage section 40(2).
169. Turning to the information that isn't in the public domain and which isn't covered by the section 36(2) exemptions – in the WEI submission and supporting evidence – this information comprises: people's names – of those internal and external to NHSBSA – images of individuals, dates and times of events, job titles, roles, contact details, a blog by a named person who's left NHSBSA, names and protected characteristic information in a spreadsheet about complaints and 'metadata' associated with a presentation (such metadata can identify, for example, the presentation's author).
170. Under section 40(2) of FOIA information is exempt information if it's the personal data of another individual and a condition under section 40(3A) is satisfied.

171. In this case the relevant condition is contained in section 40(3A)(a). This applies where disclosing the information to any member of the public would contravene any of the principles relating to the processing of personal data as set out in Article 5 of the UK General Data Protection Regulation (GDPR).

Is the information personal data?

172. Section 3(2) of the Data Protection Act (DPA) defines personal data as:

“any information relating to an identified or identifiable living individual.”

173. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

174. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

175. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

176. NHSBSA has confirmed in its submission that the information being withheld and which the Commissioner is considering here, is the personal data of individuals working for NHSBSA, particularly those who are engaged in LGBTQ+ activities and mentioned in the [WEI] submission, former employees, and external speakers.

177. In some cases, individuals are specifically identified (by name) but NHSBSA says it accepts that the withheld information doesn't always directly identify individuals ie in some instances it doesn't include their name or other direct identifiers. But NHSBSA points out that because the name of an individual isn't known, it doesn't mean that an individual can't be identified. NHSBSA discusses the Commissioner's published guidance on section 40(2). In it, the Commissioner explains that it may be possible to identify a specific individual from the information being withheld combined with the other available means that somebody could use to identify someone – particularly a determined and motivated person with a particular reason to want to identify individuals.

178. NHSBSA has discussed this topic in more detail in its submission to the Commissioner but has asked that it isn't reproduced in this notice.

179. NHSBSA originally applied section 40(2) to the dates and times of certain events but during the Commissioner's investigation advised that it would disclose the information about times. The Commissioner has therefore first considered a) the dates of events and b) the references to certain roles, and whether this information is personal data.

180. Regarding a), this information is dates of events in three documents – 'Q2.6B', 'Q2.6E' and 'Q2.6G'. NHSBSA says that through this information and other information in the public domain, it would be possible to identify individuals who attended these events. This is discussed in more detail at paragraphs 11-14 in the confidential annex. The Commissioner will accept that there's a chance that someone with the necessary degree of motivation would be able to identify specific individuals if the dates of particular events were to be published. The Commissioner acknowledges that there are, unfortunately, plenty of people who are very motivated to leave hateful and negative commentary and to harass individuals online. As such, there's a chance that someone could make the effort to link a specific event with specific individuals from that information and information that the individuals may have posted online in a personal capacity or professional capacity. The Commissioner therefore finds that the date information in the 'Q2.6B', 'Q2.6E' and 'Q2.6G' documents can be categorised as personal data.

181. Regarding b), this information – references to certain roles – is contained in a somewhat generic terms of reference document – document 'Q3.1'. As one might expect, this document sets out a particular group's scope, function, membership and so on. It sets out the terms of reference in general terms and no individuals are named. The Commissioner hasn't been persuaded that specific individuals could be identified if this information were to be disclosed. He finds that this information is therefore not personal data under section 40(2) of FOIA.

182. To summarise, the Commissioner finds that the information in the 'Q3.1' document to which NHSBSA has applied section 40(2) isn't personal data and so doesn't engage that exemption.

183. However, the Commissioner is satisfied that in the context of the information being considered, the remaining information relates to specific people and they - the data subjects - can be identified from it. That information can be categorised as personal data.

Is any of the information special category data?

184. Information relating to special category data is given special status in the UK GDPR.

185. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious, or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
186. Having viewed the withheld information, and considered NHSBSA's discussion of the matter, the Commissioner finds that at least some of the information is special category data. He's reached this conclusion on the basis that some of it is associated with individuals' sexual orientation. And, as NHSBSA says, some of the data, while it isn't 'special category' per se (ie the information relates to individual's work in the LGBTQ+ space, without identifying their own sexual orientation) it's still at the more sensitive end of the spectrum.
187. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
188. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
189. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to FOIA request or that they have deliberately made this data public.
190. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
191. Regarding the personal data that isn't special category data, the fact that this information constitutes the personal data of identifiable living individuals doesn't automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
192. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

193. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

194. In the case of a FOIA request, the personal data is processed when it's disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.

195. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

196. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

197. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”

198. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it's necessary to consider the following three-part test:

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects

199. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

200. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
201. In this case, the complainant is interested in what information NHSBSA provided in its submission to Stonewall's WEI. They're interested because they consider that the submission will indicate the type of policies, activities, events, and behaviours that NHSBSA promotes and that it considers may give it a good ranking on the Index. The Commissioner considers that's a legitimate interest for the complainant to have. There's also a general interest in public authorities being open and transparent.

Is disclosure necessary?

202. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
203. The Commissioner doesn't consider that it's necessary to disclose the personal information of specific individuals in order to meet the complainant's legitimate interest in NHSBSA's WEI submission. Disclosing the personal data won't provide insight on NHSBSA's LGBTQ+ policies, activities, events, and behaviours, which is what the complainant is interested in. And the general interest in transparency has been through the information that NHSBSA has disclosed and intends to disclose.
204. As the Commissioner has decided in this case that disclosure isn't necessary to meet the legitimate interest in disclosure, he hasn't gone on to conduct the balancing test. As disclosure is not necessary, there's no lawful basis for this processing and it's unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

The Commissioner has therefore decided that, in addition to the special category personal data which he's found to be exempt under section 40(2), NHSBSA is entitled to withhold the remaining information to which it's applied section 40(2) of FOIA, which is personal data and which is being considered in this section, by way of section 40(3A)(a).

Right of appeal

205. 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

206. 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.

207. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF