

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2024

Public Authority: NHS Property Services Limited

Address: Regent House
Heaton Lane
Stockport
SK4 1BS

Decision (including any steps ordered)

1. The complainant has requested correspondence and information between named people at NHS Property Services Limited (NHSPS) relating to Hightown Village Surgery and its lease between specific dates. NHSPS withheld information in scope of the request under section 40(2) and 43(2) FOIA.
2. The Commissioner's decision is that some of the information is reasonably accessible to the applicant by other means and therefore exempt under section 21 FOIA. For the remaining information, NHSPS has correctly applied section 40(2) to withhold personal information but has not demonstrated that section 43(2) is engaged in relation to information on lease negotiations, maintenance and supplier requests.
3. The Commissioner requires NHSPS to take the following steps to ensure compliance with the legislation:
 - Disclose the information in the folders 'Lease Negotiations', 'Letter to Landlord', 'Maintenance Correspondence' and 'Supplier Requests', redact any names/contact information and exclude any information already accessible to the applicant as a recipient/sender.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 November 2023, the complainant wrote to NHSPS and requested information in the following terms:

"Please could you provide details of all correspondence and information contained therein, including memos, emails, letters, minutes of meetings etc, between any of the following people;

XXXXXXXX, Principal Property Manager, NHS Property Services Ltd

XXXXXXXX, Senior Property Manager, NHS Property Services Ltd

XXXXXXXX, Estates Coordinator, NHS Property Services Ltd

XXXXXXXX, Facilities Coordinator, NW region, NHS Property Services Ltd

XXXXXXXX, Senior Estates Manager, NHS Property Services Ltd

regarding any matter related to Hightown Village Surgery, (1 St George's Road, Hightown, Liverpool, L38 3RY), including its lease, maintenance, sub tenants, service provision or any other related matters, between and including the following dates: 1 April 2023 and 16 October 2023."

6. NHSPS responded on 28 November 2023 confirming information in scope of the request was held but refusing to provide it under section 40(2) and 43(2).
7. Following an internal review NHSPS wrote to the complainant with the outcome on 15 December 2023 upholding its position.

Scope of the case

8. The complainant contacted the Commissioner on 29 December 2023 to complain about the way their request for information had been handled. They explained that any names/contact information could be redacted from any communications and that any specific financial figures could be removed if this was the reason information was being withheld as commercially sensitive under section 43(2) FOIA.
9. The Commissioner considers that the scope of his investigation is to determine what information is held and if NHSPS has correctly withheld this information under section 40(2) or 43(2) FOIA.

Reasons for decision

10. When responding to the Commissioner's questions around the use of the exemptions, NHSPS divided the information it held into several different categories:
 - Complaints: received by NHSPS and withheld under section 40(2).
 - Lease negotiations: communications with NHSPS negotiating a new lease and withheld under section 43(2)
 - Letter to the landlord: letter and internal communications regarding this withheld under section 43(2)
 - Maintenance correspondence: correspondence relating to the regular maintenance of the property.
 - Supplier requests: withheld under section 43(2).
11. Turning first to the information that NHSPS has identified as personal data, the complainant had agreed that names/contact information could be redacted from any of the information in scope of the request and this has therefore not been considered by the Commissioner. The information that has been withheld under section 40(2) by NHSPS is a number of complaint emails received by NHSPS following the publication of an article suggesting Hightown Village Surgery may be under threat of closure.
12. NHSPS points out that some of these complaint emails are already in possession of the complainant, as is some of the other correspondence relating to lease agreements and negotiations by virtue of their involvement in the correspondence or having been copied (cc'd) into the correspondence.
13. The Commissioner must therefore consider if any of the information already in possession of the complainant is exempt from further consideration under section 21 FOIA.

Section 21 – information reasonably accessible to the applicant

14. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to them.
15. Information is exempt from disclosure if it is accessible to the applicant by other means.

16. Section 21 is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.
17. Unlike most exemptions, the circumstances of the requester can be considered, as the information must be reasonably accessible to the particular requester.
18. In this case, the complainant has been copied into or is the direct recipient/sender of a number of the emails and correspondences identified by NHSPS as in scope of the request. Any information such as this that NHSPS holds would therefore also be held by the complainant and is already reasonably accessible to them.
19. This information is therefore exempt from disclosure under section 21 FOIA and NHSPS is not required to disclose it.
20. The remaining information withheld under section 40(2) that is not exempt under section 21 amounts to a handful of complaint emails that were not copied to the complainant. The Commissioner has gone on to consider the application of section 40(2) to these emails.

Section 40(2) – personal information

21. Section 40(2) of FOIA 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 section 40(3A) (3B) or 40(4A) is satisfied.
22. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of 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').
23. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
24. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

Is the information personal data?

25. Section 3(2) of the DPA defines personal data as:

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

26. 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.
27. 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.
28. The complaint emails contain the views of people in the local community. The Commissioner is satisfied that the information relates to the individuals and could be used to identify the individuals concerned as they contain details of their personal situations and connection to the Surgery. The withheld information therefore meets the definition of personal data at section 3(2) of the DPA.
29. The fact that information constitutes the personal data of an identifiable living individual does not 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. The most relevant DP principle in this case is principle (a).
30. 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”.
31. In the case of an FOIA request, the personal data is processed when it is 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.
32. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

33. Special category data is given special status in the UK GDPR. Article 9 defines ‘special category data’ as being personal data which reveals a

number of things about an individual, amongst them, data concerning their health.

34. The Commissioner has viewed the content of these complaint emails and there is information contained in several of these that discusses the health of the individuals, he is satisfied this is special category data.
35. Special category data is particularly sensitive and 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.
36. 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.
37. The Commissioner has seen no evidence or indication that these individuals have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
38. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. To the extent that any of the information in these complaint emails is special category data, processing it in response to this request would breach principle (a) and so this information is exempt from disclosure under section 40(2) of FOIA.
39. In terms of the information in these emails that is not special category data, the Commissioner has gone on to consider whether disclosure would be lawful. 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

40. 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"²

41. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
42. 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

43. In considering any legitimate interests 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 interests 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.
44. The complainant has not specifically stated why he wants this information other than wanting an overall picture of all of the

² Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks". However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"

correspondence NHSPS has had regarding the lease on the property that Hightown Village Surgery operates from.

45. The Commissioner can see there is some legitimate interest in disclosing the information in the complaint emails to show that overall there was concern in the local area about the alleged possibility of the Village Surgery closing.

Is disclosure necessary?

46. '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.
47. The Commissioner appreciates there is legitimate interest in knowing the importance of Hightown Village Surgery to the local community. However, he does not consider that this interest extends to knowing the specifics of complaints made to NHSPS by local residents. That level of information is not necessary to satisfy the general interest in knowing that the issue has raised concerns in the community.
48. Therefore, in the particular circumstances of this case, the Commissioner does not consider that disclosure under FOIA is necessary to meet the legitimate interests identified at paragraph 45 and therefore he has not gone on to conduct the balancing test.
49. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).
50. The Commissioner's decision is that NHSPS was entitled to withhold the information from the complaint emails under section 40(2), by way of section 40(3A)(a) of FOIA.

Section 43 – commercial interests

51. The remaining information, divided into categories by NHSPS, has been withheld under section 43(2) FOIA as NHSPS considers it is commercially sensitive to some extent. Again, the Commissioner stresses that any information identified by NHSPS as having been sent to or from the complainant is exempt under section 21 FOIA as reasonably accessible to the applicant by other means.

52. Section 43 of FOIA allows a public authority to withhold information whose disclosure could harm its own commercial interests or those of another party.
53. In order to apply the exemption, a public authority must be able to show a causal link between disclosure and the harm it considers would occur.
54. NHSPS argue it would be directly impacted by the disclosure of any of the remaining information as it is actively involved in commercial negotiations with the landlord of the property that houses Hightown Village Surgery.
55. The first category of information identified by NHSPS is communications with NHSPS regarding the negotiations of a new lease. NHSPS considers this is commercially sensitive as it would not wish the negotiations to be made public as it may undermine its position in the market and allow for competitors to leverage this information against NHSPS, diminishing its bargaining power.
56. With regard to the letter to the landlord and internal communications around this, NHSPS argues that disclosing this information would be likely to damage its commercial relationship with the landlord and cause reputational damage.
57. For the maintenance correspondence, NHSPS states this consists of regular property maintenance emails and to the end of lease maintenance clauses. NHSPS admits there is little commercial sensitivity to this information but considers there is also no real public interest either.
58. Finally, there is documentation relating to suppliers. This contains some pricing information which would, NHSPS argues, allow for competitors to undercut suppliers and would be likely to prejudice their commercial viability.
59. In the Commissioner's view, the public authority has failed to demonstrate why its commercial interests would be harmed by disclosure.
60. To deal with lease negotiations first, the Commissioner accepts that the public authority in this case operates in a competitive marketplace. He also accepts that precise details of lease negotiations will not usually be available to any competitors in the marketplace or to landlords who may also be looking to negotiate or re-negotiate leases with NHSPS.
61. However, in order to demonstrate commercial harm, the public authority must demonstrate not only that its competitors do not currently have

access to the information, but that, if they did have access to it, they could exploit it for commercial gain.

62. The Commissioner has viewed the withheld information provide to it by NHSPS. It is noted that in the 'Lease Negotiations' folder or documents identified by NHSPS much of the more detailed information relating to the lease is contained in emails already available to the complainant as the sender/recipient. The remaining emails contain broad details about the lease and the ongoing negotiations but it is difficult to see how this information would be of use to NHSPS' competitors. It is not clear who else might be interested in taking over similar properties and each property will be different so no two negotiations will be the same.
63. NHSPS has not explained why disclosure would harm its ability to negotiate other leases or even how it would impact the ongoing negotiations in this case so the Commissioner can give little to no weight to such an argument.
64. The Commissioner is therefore of the view that section 43(2) does not apply to the information categorised as 'Lease negotiations' by NHSPS.
65. NHSPS had argued the letter to the landlord and internal communications around this would prejudice its commercial relationship with the landlord and cause reputational damage. Reputational damage, much like accuracy of information, is not a factor the Commissioner can consider. There is no reason why public authorities cannot provide additional explanations to place information in the proper context when making disclosures. It is not clear how disclosing this information would be likely to prejudice the commercial interests of NHSPS or any other parties. The Commissioner acknowledges it may have an impact on the relationship between itself and the landlord (either positive or negative) but this is not itself a reason to believe there will be a real and actual possibility of commercial prejudice.
66. The Commissioner therefore finds that the information identified by NHSPS in the folder 'Letter to the landlord' does not engage section 43(2) FOIA.
67. In regard to the maintenance correspondence, the Commissioner points to the fact that NHSPS by its own admission does not consider the property maintenance emails are particularly commercially sensitive. The Commissioner has viewed this information and sees no obvious reason that this information should be prejudicial to NHSPS' commercial interests or those of any third parties and therefore finds section 43(2) is not engaged in relation to the information in the 'Maintenance correspondence' folder.

68. Finally, the supplier requests information consists of one document from a supplier in which they provide an amount of money owed for a service carried out at the property. NHSPS' argument is that competitors could use this information to undercut the specific supplier in future.
69. The Commissioner is not convinced this information is of significant interest to the suppliers competitors, let alone that they would be able to exploit it to the supplier's detriment. The information is brief and gives no indication of the scope or scale of the work carried out. Nor was this an ongoing concern but a one-off piece of work so is not likely to be relevant to any future work or negotiations.
70. The Commissioner considers section 43 is not engaged in respect of the information in the 'Supplier requests' folder.

As he has found that section 43 is not engaged in relation to any of the information in the folders provided by NHSPS to the Commissioner he does not need to go on to consider the balance of the public interest.

Right of appeal

71. 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

72. 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.
73. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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