

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 June 2024

**Public Authority:** Doncaster and Bassetlaw Teaching Hospitals  
NHS Foundation Trust

**Address:** Doncaster Royal Infirmary  
Armthorpe Road  
Doncaster DN2 5LT

### Decision (including any steps ordered)

---

1. The Commissioner's decision is that information in a financial report that the complainant has requested is exempt from disclosure under section 41(1) of FOIA. This is because it's information that was provided to Doncaster and Bassetlaw Teaching Hospitals NHS Foundation Trust ('the Trust') in confidence. In respect of the exempt information, the Trust breached section 17(1) of FOIA as it didn't confirm to the complainant the exemption on which its relying, within the required timescale.
2. It's not necessary for the Trust to take any corrective steps.

### Request and response

---

3. The complainant made the following information request to the Trust on 20 September 2023:  

"South Yorkshire ICS board papers refer to a Doncaster & Bassetlaw Teaching Hospitals (DBHT) driver of the deficit specification and report (p 83 in the PDF viewer)

Please could these documents be provided. I have previously requested the information from South Yorkshire ICS but they said they did not hold the information and directed me to yourselves."
4. In its initial response to the request, the Trust disclosed some relevant information – the tender document – and indicated that some of the

requested information was commercially sensitive. It didn't cite any FOIA exemption.

5. In its internal review of 20 December 2023, the Trust advised that:

"The Information requested is protected by a Confidentiality Clause and has not been released into the Public Domain therefore we are not required to provide 'unpublished' or 'subjective' information under the FOIA"

Again, the Trust didn't cite any FOIA exemption.

6. In subsequent correspondence of 11 April 2024, which the Trust appears to have sent to the complainant, the Trust confirmed it's relying on section 41 of FOIA to withhold some information – a "commissioned report relating to the organisation's financial position."

### **Reasons for decision**

---

7. The Commissioner's reasoning focusses on whether the Trust is entitled to withhold information the complainant has requested under section 41 of FOIA. He'll also consider the Trust's refusal notice.
8. Under section 41(1) of FOIA, information is exempt from disclosure if (a) it was obtained by the public authority from any other person and (b) disclosing it would constitute an actionable breach of confidence. Section 41 is an absolute exemption and not subject to the public interest test.
9. Considering section 41(1)(a) first, in its correspondence of 11 April 2024, and submission to the Commissioner, the Trust confirmed that the report was prepared for it by Deloitte.
10. The Commissioner has viewed the information and he's satisfied that the Trust obtained the information from another person, namely Deloitte. He's gone on to consider section 41(1)(b).
11. In their complaint to the Commissioner, the complainant has argued that other trusts and public bodies routinely commission reports from external companies and that these are regularly published or disclosed under FOIA.
12. When he's considering whether disclosing information would constitute an actionable breach of confidence, the Commissioner takes account of four tests.

13. First, he's satisfied that the information has the necessary quality of confidence because it's not trivial – concerning as it does the Trust's financial position – and because it's not otherwise accessible. If it were otherwise accessible, the complainant wouldn't need to request it from the Trust.
14. Second, was the withheld information imparted in circumstances importing an obligation of confidence? The Trust has said that the report contains detailed, confidential information about Deloitte's findings, and reflects conversations with Trust staff which were held in confidence. The report was provided with the expectation that it would only be read by senior colleagues at the Trust and not by a wider audience. As such, permission would be needed to share the report.
15. In its submission the Trust says that Deloitte provides financial services to it under a service level agreement which stipulates that property in working papers and reports is retained by Deloitte. Deloitte's view is that disclosing such reports would, or would be likely to, prejudice the functions that Deloitte provides by discouraging organisations and individuals to cooperate with it. This would adversely impact on its ability to fulfil its responsibilities to the Trust and other audited bodies in the future.
16. Additionally, the Trust says, the report contains sensitive and confidential information about other organisations in relation to benchmarking. The Trust says it's not privileged to share these details publicly.
17. In the circumstances that the Trust has described, the Commissioner is satisfied that the withheld information was imparted to the Trust in circumstances importing an obligation of confidence.
18. Third, the Commissioner has considered whether unauthorised disclosure of the information would cause a specific detriment to either the party which provided it or any other party. The Commissioner has noted that the approach taken by the courts in some cases is that detriment is not always a pre-requisite to an actionable breach of confidence.
19. In terms of detriment, the Commissioner accepts that unauthorised disclosure of the information would cause a detriment to the confider (Deloitte), for the reason explained. Disclosing the report would or could deter organisations that Deloitte audits from fully cooperating with it, which could prejudice its function as an auditor.

20. Finally, with reference to the three tests discussed, the Commissioner is satisfied that, with regard to Deloitte, disclosing the information would constitute a breach of confidence. This is because of Deloitte's reasonable expectations of confidentiality discussed above.
21. But for section 41 to apply the breach must be actionable. This means that there must be a good chance of such an action succeeding because the public authority wouldn't have a valid defence to such a claim.
22. A public authority can defend itself against an action for a breach of confidence if it can establish a public interest defence – that the breach of confidence was necessary in the public interest. The Commissioner isn't satisfied that such a defence would be viable here for the following reason.
23. In its submission to him the Trust has noted that, as it has advised the complainant, it always intended to publish a version of the report as part of the Trust's Board of Directors meeting. The information to be published will summarise all of the relevant findings and details, without betraying the confidence of those who helped develop the report, or the agreements which the Trust entered into with Deloitte when it commissioned the report.
24. To note, this summary information hadn't been published at the time of the request. In that respect, this is one of the ways in which the situation differs from the situation in FS50583797<sup>1</sup> (2015), which considered a different kind of report that Deloitte had provided to a different Trust. The Commissioner had found section 41 wasn't engaged in that case.
25. In this case, the Commissioner considers that the information the Trust disclosed and the version of the report that the Trust intends to publish satisfies the general public interest in transparency. He's satisfied that there's greater public interest in the Trust and Deloitte maintaining a strong working relationship, and in the Trust and other organisations that Deloitte audits being willing to engage and cooperate with Deloitte.

---

<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560468/fs\\_50583797.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560468/fs_50583797.pdf)

26. In the absence of a compelling public interest defence, the Commissioner is therefore satisfied that it would be an actionable breach of confidence for the Trust to disclose the withheld information under FOIA. The Commissioner's decision is therefore that the Trust is entitled to rely on section 41(1) of FOIA to withhold information in scope of the request.

### **Procedural matters**

---

27. If a public authority intends to refuse to disclose information, section 17(1) of FOIA obliges the authority to provide the applicant with a refusal notice promptly and within 20 working days following the date of receipt of the request, that states the exemption being relied on and explains why the exemption applies.
28. In this case, in its response and internal review, the Trust referred to information being commercially sensitive and confidential. However, it didn't state what exemption it was relying on until 11 April 2024. The Trust therefore didn't comply with the requirements of section 17(1).

## **Right of appeal**

---

29. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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**