

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2019

Public Authority: Harrogate and District NHS Foundation Trust
Address: Lancaster Park Road
Harrogate
HG2 7SX

Decision (including any steps ordered)

1. The complainant has requested a copy of a business case about the formation of an Alternative Services Delivery Model (ASDM) by Harrogate and District NHS Foundation Trust (the Trust) for estates and facilities management. The Trust provided redacted copies of the business case and its associated appendices and documents but withheld some information on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the Trust has failed to demonstrate that disclosure of the remaining information from the business case would have any prejudicial effect on the commercial interests of any party and as such, she has found that the Trust has incorrectly applied the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all remaining information from the business case and its associated documents including the appendices and tables.
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 21 January 2018, the complainant wrote to Harrogate and District NHS Foundation Trust ("the Trust") and requested information in the following terms:

"I will appreciate receipt of a copy of the business case in respect of the setting up of an ASDM Company as an arm of the Harrogate and District NHS Foundation Trust."

6. The Trust responded on 16 February 2018. It provided the complainant with a redacted copy of the business case. The Trust stated information had been redacted from the document on the basis of section 40 and 43 of the FOIA.
7. Following an internal review the Trust wrote to the complainant on 20 March 2018. It stated that it upheld its decision to withhold information from the business case on the basis of section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 25 March 2018 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied section 43(2) to withhold information from the business case and, if so, where the balance of the public interest lies.

Reasons for decision

Section 43 – prejudice to commercial interests

10. As background to this issue, the Trust has explained that it established a wholly owned subsidiary – Harrogate Healthcare Facilities Management Limited ("Harrogate Healthcare") as an alternative service delivery model ("ASDM") to deliver managed services with the intention of benefiting from financial and operational efficiencies. The Trust states this is not outsourcing and any profit made by Harrogate Healthcare is returned to the Trust.
11. The decision to establish an ASDM for the Trust was approved by the Board of Directors in November 2017. The approved business case which is the subject of this request contained the reasoning for establishing an ASDM and analysed pay, terms and conditions for staff and other aspects to ensure financial viability and effective performance of service delivery.

12. Section 43 FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

13. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."¹

14. The withheld information in this case is that redacted from the business case, which includes its appendices, tables and charts. This information is the financial models and financial figures which are referenced in the business case as well as tables and charts containing financial information. This information is commercial in nature as it is financial information used to analyse the benefits of the ASDM.

15. Having determined that the information withheld from the business case is commercial in nature the Commissioner has gone on to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

The nature and likelihood of the prejudice occurring

16. The Trust has argued that the party whose commercial interests would, or would be likely to, be prejudiced by disclosure is Harrogate Healthcare. The Trust further argues that by extension it would realise reduced benefit from the establishment of the ASDM if its ability to compete effectively was reduced.

17. However, the arguments presented by the Trust focus on the prejudice to Harrogate Healthcare and the Commissioner has therefore focused her attention on this.

18. The Trust argues that disclosure would be likely to prejudice the commercial interest of Harrogate Healthcare by placing detailed costings and forecasts into the public domain. These costings and forecasts were

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

integral to the establishment of the ASDM and it is argued that exposing those costings to potential rival bidders for commercial contracts would allow them to underbid the ASDM. The Trust further argues there would be detriment to Harrogate Healthcare in terms of its ability to establish revenue contracts with external clients as disclosing the financial details and costings would reduce or eliminate any potential competitive advantage of the ASDM and the opportunity to generate revenue and realise profit to be returned to the Trust would be denied.

19. The Trust has indicated it did contact the management of Harrogate Healthcare regarding the release of the information and it responded that it had concerns that the release of the information would be likely to prejudice its ability to compete for third party contracts. It further explained this was because release of the financial details of the business model would provide competitors with sensitive information that could affect its commercial position.
20. The Commissioner also notes that the Trust stated in its internal review response that Harrogate Healthcare would be seeking to develop further income from third parties i.e. not the Trust, and this would be prejudiced by disclosure.
21. The Commissioner has been guided in her thinking by the approach of the Information Tribunal in *London Borough of Southwark v Information Commissioner and Lend Lease and Glasspool*². This case related to a viability report produced in relation to a proposed redevelopment of an estate. The Information Tribunal found that regulation 12(5)(e) (the equivalent exception in the EIR to section 43 in the FOIA) was engaged and the operating model and commercial projections in particular should be withheld. In explaining its thinking, the Tribunal commented that financial models are used as analytical tools on large projects and allow for different scenarios to be run and tested.
22. In this case, the information that has been withheld is financial models and figures which explain the financial viability of the ASDM. The primary argument presented by the Trust is around the idea that disclosing the withheld information would hinder Harrogate Healthcare from establishing revenue contracts and competing for external contracts.
23. The Commissioner has carefully reviewed all of the withheld information to ascertain if this argument has merit. As the majority of the business

² EA/2013/0162

case has been disclosed the Commissioner is able to discuss the categories of financial information that have been withheld.

24. The business case discusses the financial benefits and cost analysis of the ASDM; as such much of the financial information relates to costs of the ASDM service, some of which relates to staffing costs, operational efficiencies and expenditure to the Trust. There is also information on changes to VAT paid by the Trust and overall financial impacts in the short and medium term to the Trust.
25. The Commissioner is of the view that the information that has been withheld is information that has been used to persuade the Trust Board of the financial benefits of establishing a wholly-owned subsidiary to deliver estates and facilities. In fact, the business case itself states that three main questions that had been tested in all of the options considered:
 - *"Can the creation of an ASDM whose focus is the delivery of estates and facilities services, led by its own Board of Directors, develop its vision to create a more connected and efficient service delivery arrangement from which the Trust can benefit?;*
 - *The potential ASDM would affect circa 350 staff and present a sizable TUPE transfer arrangement. Staff consultation has commenced and is still ongoing. A significant element in this is the transfer of NHS pension arrangements for those who transfer and engagement with the Pensions Agency has commenced; and*
 - *There are clear financial benefits to the Trust in operating an ASDM and also to use this model to recruit into posts which have traditionally been difficult due to Agenda for Change pay rates being uncompetitive with private industry."*
26. This further cements the fact that the withheld information all relates to the financial analysis of establishing the ASDM and the impact on the finances of the Trust. It is not clear how disclosing this would affect Harrogate Healthcare in its future contract negotiations in the event that the Board approved the ASDM (which it did and Harrogate Healthcare is now established and operational).
27. Regardless of this, in relation to the arguments presented by the Trust about prejudice to commercial interests of Harrogate Healthcare (and by extension, itself); the Commissioner notes that the Trust has not identified any specific elements of the withheld information and causally linked disclosure to specific effects.
28. Damaging future relationships and avoiding disclosure which would result in loss of revenue or income are general arguments and in order

to be convinced that such an effect would occur, the Commissioner considers that the commercial significance of such information needs to be identified. Simply identifying information as commercial information does not explain why the information is particularly sensitive or why disclosing it would be likely to have a prejudicial effect. The Commissioner is of the view that the exemption has been applied on a general basis.

29. The Commissioner considers in order for the exemption to be applied, it must be shown that the disclosure of specific information will result in specific prejudice to one of the parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of withheld information and specific prejudice which disclosure of these elements would cause.
30. The Commissioner is of the view that the Trust has adopted a “blanket” approach to the application of the exemption and has not had sufficient regard to the nature of the actual information. Furthermore, the rationale presented is particularly limited and contains a lack of detail and absence of any reference to the information in itself. The Commissioner does not consider it her role to demonstrate arguments on behalf of public authorities.
31. Having considered the available evidence the Commissioner does not find she can support the Trust’s application of the exemption. The arguments provided do not demonstrate that prejudice to the commercial interests of Harrogate Healthcare or the Trust would be likely.
32. For the reasons described above, the Commissioner has concluded that the Trust has not demonstrated to her the required standard that it had correctly engaged the exemption at section 43(2) of the FOIA. The Commissioner has, therefore, not considered the application of the public interest in this case.

Right of appeal

33. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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