

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 5<sup>th</sup> June 2008

**Public Authority:** Plymouth Primary Care Trust  
**Address:** Building One  
Derriford Business Park  
Brest Road  
Plymouth  
PL6 5QZ

### Summary

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The complainant requested a copy of a contract agreed by the Plymouth Primary Care Trust for the provision of an independent treatment centre. He also requested copies of correspondence concerning the contract. The public authority refused to disclose some of the requested information on the basis of the exemptions contained in sections 38 (health and safety), 40 (personal information), 41 (confidential information), 42 (legal professional privilege), 43(1) (trade secrets) and 43(2) (prejudice to commercial interests) of the Act. The Commissioner determined that some of the information contained in the contract, relating to how the service provider had calculated its prices, was exempt under section 41 and a limited amount of information contained in the additional documents was exempt under sections 40 and 43(2). He ordered the disclosure of the remainder of the information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 3 January 2005, the complainant requested a copy of the contract and all payment arrangements between Care UK Afrox (the "Service Provider") and Plymouth PCT (the "Trust") in relation to the development of an independent treatment centre in Plymouth. He also requested copies of all of the correspondence between the Department of Health (the "Department") and the Trust about the centre during the course of the previous year.
3. On 11 February 2005, the Trust provided the complainant with some of the information which he had requested. However, it withheld some information contained in the contract and its correspondence with the Department of Health on the basis that it was exempt from disclosure under sections 22 (information intended for future publication), 36 (prejudice to the effective conduct of public affairs), 38 (health and safety), 40 (personal information), 41 (information provided in confidence), 42 (legal professional privilege) and 43 (prejudice to commercial interests).
4. On 9 March 2005, the complainant wrote to the Trust challenging its application of the exemptions and asking it to carry out an internal review of its decision.
5. On 13 May 2005, the Trust wrote to the complainant providing some additional information but substantially upheld its original decision. It confirmed that it was withholding information on the basis of sections 22, 38, 40, 41 and 43(1) and (2) but did not seek to rely on section 36.

## The Investigation

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### Scope of the case

6. On 19 July 2005, the complainant wrote to the Commissioner to complain about the Trust's refusal to disclose all the information in the contract and the information contained in the correspondence between the Trust and the Department of Health.

### Chronology

7. There was a considerable amount of correspondence between the Commissioner and the public authority with regard to the complaint, the most significant of which is outlined below.
8. On 1 February 2007, having received copies of the requested information, the Commissioner wrote to the Trust raising queries about the application of the exemptions to the withheld information.

9. On 18 April 2007, the Trust wrote to the Commissioner providing him with detailed arguments regarding the application of the exemptions. It indicated that having reviewed the information that had been withheld, it had decided to disclose some further information to the complainant. In the light of this it stated that it no longer wished to rely on section 22. The arguments presented by the Trust with regard to the application of the other exemptions are considered in detail in the "Analysis" section of this notice.
10. On 27 June 2007, the Commissioner wrote to the Trust with further queries about the application of the exemptions.
11. On 16 July 2007, the Trust provided the Commissioner with a detailed response to the queries which had been raised.
12. On 11 September 2007, the Commissioner sent the Trust a schedule detailing the information he believed the Trust argued was exempt and the basis on which it claimed the information was exempt. He asked the Trust to confirm that the schedule was correct. In addition, he asked some further questions about the application of sections 42 and 43.
13. On 22 October 2007, the Trust responded to the queries regarding the application of sections 42 and 43.
14. On 26 October 2007, given the complexity of some of the issues involved, representatives from the Commissioner's Office held a meeting with a representative from Plymouth PCT, representatives from another Trust, which was involved in a similar complaint, and the Department of Health. The purpose of the meeting was to obtain further clarification as to why it was believed information might be exempt from disclosure under sections 41 and 43.
15. On 3 December 2007, the Commissioner sought further evidence from the Trust regarding the application of section 43. He asked it for details of any negotiations being undertaken by the Service Provider or the Trust at the time of the request which might have been prejudiced by disclosure of the withheld information. He also requested confirmation that the schedule of information that he had forwarded to the Trust accurately reflected its application of exemptions to the withheld information.
16. On 4 January 2008, the Trust emailed the Commissioner to confirm that the schedule accurately reflected its application of exemptions to the withheld information. It also provided further information as to the reasons why it was believed that the Service Provider and the Trust might have suffered prejudice from the disclosure of the requested information.
17. On 8 February 2008, the Commissioner sought clarification from the complainant as to whether he was seeking to obtain communications regarding legal advice on the contract and, also, whether he was seeking information contained in draft business cases about how organisations that had put in a bid for the contract had determined the prices contained in their bids.

18. On 12 February 2008, the complainant confirmed that he was not seeking access to communications between the Department and the Trust concerning legal advice related to the contract. In addition, he informed the Commissioner that, whilst he wished to seek disclosure of the original bids for the contract, he was not seeking information as to how tendering organisations had arrived at their bids.

## Analysis

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19. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice. The procedural matters are considered initially and then matters relating to the application of the exemptions.

## Procedural matters

### Section 17(1)(a) – Time for compliance with request

20. Section 17(1)(a) requires that a public authority which is seeking to rely on an exemption in Part II of the Act must inform a person in writing of that fact within 20 working days of the receipt of a request. The complainant made his request on 3 January 2005 but the Trust did not send a refusal notice until 11 February 2005. The Trust therefore breached section 17(1)(a).

## Exemptions

## Background

21. In 2002 the Government introduced a policy of setting up independent treatment centres to allow NHS patients to be treated by private sector healthcare providers for certain types of non emergency surgery and diagnostic procedures, referred to as Wave 1 contracts. The intention was, amongst other things, to reduce waiting lists, increase patient choice, and stimulate innovation and reform. It was also believed that it would help the NHS to reduce the prices it paid when buying services from the private sector and result in better value for money.

22. The request related to the development of an independent treatment centre in Plymouth for which the Trust was the lead commissioner. The contract for the treatment centre was agreed on 14 May 2004 and was signed by Plymouth PCT, three other PCTs, the Department of Health and the Service Provider.

23. In March 2005, the Government announced that it would commission a second wave of independent treatment centres, referred to as Phase 2 contracts. It was proposed that these treatment centres would also provide non emergency surgery and diagnostic procedures but that there would be differences in the way that the contracts would operate compared with those in Wave 1.

## **Section 38 – Health and safety**

24. Schedule 2 of the contract contained five sets of plans related to the treatment centre. These were initially withheld by the Trust under section 38 of the Act which provides that information is exempt if its disclosure would, or would be likely to, endanger the physical, mental health or safety of any individual.
25. Following discussions with the Commissioner, the Trust released three sets of plans but withheld the remaining two. It believed that these plans were exempt from disclosure because the plans provided details of entrance and exit points, the layout of each floor and the purpose to which rooms were to be put. The Trust argued that the release of these plans would have assisted those intent on criminal or terrorist activity and so would have been likely to put the safety of staff, patients and visitors at risk.
26. The Commissioner has spoken to the council which deals with planning matters for the area in which the treatment centre is situated. He understands that detailed plans would have had to be submitted to the council at the time planning permission was sought. These plans are available to the general public and would provide details as to the layout of the treatment centre and the use to which rooms were to be put.
27. The Commissioner acknowledges the Trust's concerns for people's safety. However he does not believe that the release of the two remaining sets of plans would have been likely to endanger the safety of any individuals as it would not have added to the information which was already in the public domain. He is not therefore satisfied that section 38 was engaged in relation to the plans for the treatment centre. As the exemption was not engaged the Commissioner felt it unnecessary to proceed to consider the public interest test.
28. The Trust also argued that these plans were exempt as disclosure would have been likely to prejudice the commercial interests of the Service Provider. These arguments are considered in relation to the application of section 43(2).

## **Section 40(2) – Personal information**

29. The Trust withheld information contained in an email from the Trust to the Department of Health dated 23 September 2004 as it believed the information was exempt under section 40(2) of the Act.
30. Section 40(2) of the Act provides an exemption for information which is the personal data of a person who is not the requester and where its disclosure would contravene any of the data protection principles contained in the Data Protection Act (the "DPA").
31. In so far as the email contained names of individuals who were employed by a particular employer and were identified as being on leave or about to take maternity leave at that time, the Commissioner shares the concerns of the Trust that disclosure might have breached the data protection principles.

32. Section 1(1) of the DPA provides that personal data is data that relates to a living individual and from which that person can be identified. The Commissioner is satisfied that the information relating to the reasons why the individuals named in the email were, or were about to be, absent from work constituted their personal data.

33. The Commissioner then considered whether disclosure would breach the DPA, in particular the first principle. The first data protection principle has two components:

- (i) personal data should be processed fairly and lawfully and
- (ii) personal data should not be processed unless at least one of the conditions in schedule 2 of the DPA is met.

34. In determining whether disclosure of the names of individuals who were on leave and about to take maternity leave at a particular point in time would have been unfair and therefore contravened the requirements of the first data protection principle, the Commissioner has taken into consideration the following factors:

- the reasonable expectations of the individuals as to what would happen to their personal data;
- whether the information related to a person's public or private life;
- the legitimate interests of the public in knowing the information, against the effects of disclosure on the members of staff.

35. The Commissioner believes that the individuals concerned would have had a reasonable expectation that details about their leave or maternity leave would not be disclosed to the public. He is of the view that this expectation would have been strengthened by the fact that the information could be seen to relate more to their personal lives, than acting in an official or work capacity. The Commissioner is not aware of any particular public interest in the information in this specific case being placed in the public domain. He is therefore satisfied that disclosure of the names of the individuals who were on leave and about to take maternity leave, contained in the email in question, would have breached the first data protection principle and that the information was exempt under section 40(2).

#### **Section 41 – Information provided in confidence**

36. The Trust sought to rely on section 41 to withhold information in Schedule 9 of the contract on the basis that it contained confidential information provided by the Service Provider. The schedule contained financial models consisting of very lengthy and detailed computer spreadsheets on the financial projections of the Service Provider for the proposed five year duration of the contract.

37. In addition to the projected numbers of procedures to be carried out and the projected rates of charges for those procedures, the spreadsheets included details of the Service Provider's projected revenue, overheads, cash flow, investment, financing, taxation, profit and loss accounts and balance sheets.

38. Section 41(1) provides that information is exemption from disclosure if:-

- (a) it was obtained by the public authority from another person and
- (b) the disclosure of the information by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

39. The Commissioner's view is that disclosure would constitute an actionable breach of confidence if:-

- (i) the information has the necessary quality of confidence;
- (ii) the information was imparted in circumstances importing an obligation of confidence; and
- (iii) disclosure would be an unauthorised use of the information and, in the case of commercial information, would have a detrimental impact on the commercial interests of the confider.

40. If these parts of the test were satisfied, the Commissioner would then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

**(a) Was the information contained in the financial models obtained by the Trust from another person?**

41. The Commissioner accepts that most of the information contained within the financial models was provided to the Trust by the Service Provider as the relevant figures have not resulted from negotiations between the parties or been stipulated by the Trust.

42. However, there are some figures which have been negotiated or stipulated by the Trust and, therefore, the Commissioner is of the view that section 41 does not apply to this information. The figures to which he believes the section does not apply are:-

- (i) the volume of each type of procedure to be carried out by the Service Provider in each of the five years of the contract;
- (ii) the price to be paid for each type of procedure in each of the five years of the contract; and
- (iii) the total amounts to be paid for each type of procedure in each of the five years of the contract.

43. This information is detailed on the page of Schedule 9 headed "Procedure Pricing Table". The Trust's claim that these figures were also exempt from disclosure under section 43(2) is considered later in this notice.

**(b) Would the disclosure of the financial models have constituted an actionable breach of confidence?**

**(i) Did the financial models have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?**

44. The Commissioner considers that the financial models provided by the Service Provider, which detail matters such as potential income, likely expenditure, anticipated profits and tax liability, is of a sensitive nature and is not something which could be regarded as trivial. He believes that such information is likely to have a significant degree of commercial sensitivity. He is also satisfied that the information contained within these financial models is not information which is readily available or in the public domain. As a result the Commissioner is of the view that the information concerned had the necessary quality of confidence to justify the imposition of an obligation of confidence.

**(ii) Were the financial models communicated in circumstances that created such an obligation?**

45. The Commissioner notes that Clause 44 of the contract appears to create an express obligation of confidence in respect of any information which is supplied by one of the parties to another party to the agreement. This would seem to apply to the information being considered.

46. Even if this express provision was not applicable to the financial models, the Commissioner believes that an obligation of confidence would have been implied from the circumstances that existed at the time the information was provided to the Trust.

47. The models provide very detailed information about the financial assumptions being made by, and financial implications for, the Service Provider of carrying out the contract. Such information would have been likely to have been of significant interest to its competitors. Its disclosure could have placed the Service Provider at a serious commercial disadvantage. The Commissioner is satisfied that the Service Provider would have had an expectation of confidence in providing this information and that the expectation was a reasonable one. He also believes that the Trust would have viewed the information, because of its nature, as confidential.

48. The Commissioner is satisfied that the financial models were communicated in circumstances that created an obligation of confidence which was still in existence at the time this request was made.



**(iii) Would disclosure of the financial models have been unauthorised and have had a detrimental impact on the commercial interests of the Service Provider?**

49. The Commissioner is satisfied that the Service Provider had not consented to the disclosure of the financial models and that their release into the public domain would have had a detrimental impact on the Service Provider's commercial interests, given the sensitive nature of the information contained within them.

**(c) Would the Trust nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?**

50. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under the Act. However, under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information concerned.

51. Under the Act, the public interest test assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. Under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The public interest test in relation to the duty of confidence is therefore the reverse of that under the Act.

52. In the *Derry City Council v The Information Commissioner (EA/2006/0014)* case, the Information Tribunal's view was that no exceptional case has to be made to override the duty of confidence that would otherwise exist. All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence. Disclosure would be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

**Public interest arguments in favour of disclosure of the information**

53. The Commissioner recognises that there is a general public interest in furthering the understanding of and participation in the public debate on issues of the day and promoting accountability and transparency in the spending of public money. The programme for the introduction of independent treatment centres involves the spending of a very large amount of money allocated to the NHS and inevitably raises considerable public concern that value for the money is being obtained. In addition, the development of the treatment centres has involved a policy of using private sector organisations to deliver public services, again an area of considerable public debate, particularly in relation to the NHS.

54. The Commissioner acknowledges that the Trust has already disclosed a significant amount of the non financial information that it holds in relation to the treatment centre. However, a lot of the debate concerning the treatment centres has revolved around issues related to whether they are providing good value for money. The major criticism of those who have tried to assess the cost

effectiveness of the programme has been the lack of detailed financial information in the public domain.

55. However the Commissioner is not convinced that the disclosure of information illustrating how the Service Provider arrived at the prices contained in the contract, details of its projected costs, profits, cash flow and tax liability would be of great assistance to the public in assessing whether public money was being spent wisely. It is the overall pricing structure, rather than how those prices were arrived at, which would have been of most significance in assessing the value for money of what was being proposed. Whilst the disclosure of this information might have provided some assistance in assessing whether the contract for this particular treatment centre was providing value for money, the Commissioner is not convinced it would have made a significant contribution.

### **Public interest arguments in favour of maintaining the duty of confidence**

56. The Commissioner recognises the strong public interest in maintaining a duty of confidence where information has been provided to a public authority in circumstances where such a duty is owed to the provider of the information. If such duties of confidence were too readily overridden it may lead, in situations such as this, to contractors being unwilling to provide information which may have been of assistance to a public authority in determining the outcome of a procurement exercise. This may lead to the public authority taking a decision without being as fully informed as it might have been and, consequently, affect the quality of the decisions that are taken. This in turn could impact on the value for money obtained by the public as a result of the procurement process.
57. The Commissioner accepts that the disclosure of very detailed information about the Service Provider's financial calculations and assumptions, which are linked to the prices contained in the contract, could have been harmful to its commercial interests. This is particularly the case where disclosure of this information might have allowed competitors to draw conclusions about the financial models the Service Provider was using in tendering for future contracts and so make predictions about the prices it might include in its bids in later procurement processes. If this were to happen, it would be contrary to the public interest as it might deter the Service Provider from bidding for future contracts and, if it were to bid, give its competitors an unfair advantage. This could result in procurement processes for this type of contract operating unfairly and the public consequently not obtaining value for money.
58. Having considered the public interest arguments, the Commissioner is not satisfied that the public interest in the disclosure of the information subject to the duty of confidence outweighed the public interest in maintaining the duty of confidence. He has therefore concluded that, whilst the information contained on the page headed "Procedure Pricing Table" did not fall within section 41, the Trust was correct in its decision to withhold the remaining information under this section of the Act.

## **Section 42 – Legal professional privilege**

59. The Trust claimed that some communications were exempt from disclosure under section 42 as they were covered by legal professional privilege. However, the complainant confirmed to the Commissioner that he did not wish to seek access to communications between the Department and the Trust concerning legal advice related to the contract. The Commissioner therefore treated these communications as outside the scope of the request and did not consider the application of the exemption to them.

## **Section 43(1) – Trade secrets**

60. The Trust argued that the forms used by the Service Provider for recording patient information, contained in Schedule 3 Part 1 Annexes A-C of the contract, were exempt from disclosure under section 43(1) as they constituted a trade secret.

61. The Commissioner's own guidance on section 41 ("Awareness Guidance No. 5") points out that what is meant by the term "trade secret" is not defined by the Act. However, it advises that there are certain questions that should be considered in determining whether something is a trade secret. These include:-

- i. Is the information used for the purpose of trade?
- ii. Would the release of the information cause harm?
- iii. Is the information already known?
- iv. How easy would it be for competitors to discover or reproduce the information for themselves?

62. As regards the forms used for recording patient information, the Trust accepted that many of the forms were accessible to patients receiving treatment and to those who wished to access their clinical records. Many of the forms were also readily available to large numbers of medical staff as working documents and were not believed by the Trust to be individually commercially sensitive.

63. The Trust indicated that it did not believe the documents were commercially sensitive on an individual basis. However it argued that, taken together, the forms, proformas, charts and checklists used for recording patient information constituted a comprehensive system of work which was of considerable commercial value to the Service Provider. These documents formed a clinical pathway made up of many separate documents and related to the Service Provider's clinical operating model.

64. The Trust accepted that some of the documents might be readily accessible but believed that a complete set of the documents were not in the public domain. The Trust therefore contended that disclosure of the documents would have been commercially detrimental to the Service Provider as it would have been likely to

assist its competitors. As a consequence, it considered that section 43(1) was applicable to this information.

65. The Commissioner acknowledges that these are lengthy documents which will have involved the contractor in a considerable amount of work to prepare. However, the fact that something has involved a considerable investment of resources of time or money to produce does not in itself indicate that it constitutes a trade secret.
66. In addition, he is of the view that these forms would have to be disclosed to any patients treated at the centre who were seeking access to their medical records. They could also have been accessed by a wide range of staff employed at the treatment centre.
67. The Commissioner is not convinced that the release of this information would have been likely to cause the contractor any harm. In addition, given these circumstances, he does not believe that it would be difficult for a competitor who wished to access the forms to obtain copies of them. He is therefore not satisfied that the forms constituted a trade secret and does not accept that section 43(1) was engaged. As the exemption was not engaged the Commissioner felt it unnecessary to proceed to consider the public interest test.

#### **Section 43(2) – Prejudice to commercial interests**

68. The Commissioner considered the various pieces of information within the contract and other documents which the Trust claimed were exempt from disclosure under section 43(2). The information he considered included the hospital plans which he had determined was not exempt under section 38 and the information in the financial models which he determined was not exempt under section 41.
69. The information which was withheld comprised a significant amount of financial information in the following categories:-
  - the amounts of money payable under the contract to the Service Provider for different procedures carried out and the minimum take values that it was entitled to receive;
  - financial penalties for failure by the Service Provider to meet performance targets;
  - amounts of money payable on the termination of the contract;
  - default interest rates which were applicable;
  - methods of calculating the payments due to the Service Provider;
  - circumstances in which the financial models could be adjusted;
  - insurance requirements regarding the construction and operational phases of the scheme;

- the process for payments to be made;
- a detailed business case for the treatment centre which assessed the bids which had been made for the contract.

70. Other information related to:-

- the numbers of procedures to be carried out by the Service Provider under the contract;
- list of furniture and medical equipment to be provided for the treatment centre;
- numbers of different categories of staff to be employed at the treatment centre and general discussion of human resource issues;
- organisation chart related to the Service Provider;
- detailed construction proposals for the treatment centre;
- the scheme delivery plans;
- comments, prior to the contract being agreed, on the Service Provider's business case;
- discussions regarding contract management processes;
- discussions on the impact of the treatment centre on local waiting lists and times;
- discussion of the stakeholder and communications strategy;
- discussion of contract compliance issues;

71. Section 43(2) provides an exemption from the disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

72. The Trust argued that disclosure of the information outlined above would have been likely to prejudice the commercial interests of the Service Provider, the Department of Health and the Trust, itself. The Commissioner is aware that the Trust consulted extensively with the Service Provider and the Department in preparing its arguments in relation to the potential prejudice that that these parties might suffer from the disclosure of the information.

73. The Trust purchased treatment services from a variety of competing providers. It believed that the disclosure of pricing information would have provided all of

these providers with an indication as to its “bottom line” in relation to the purchase of specific services. This would have allowed the providers to make adjustments to bids they made to the Trust and so inhibit its ability to obtain services on the best possible financial terms.

74. At the time of the request the procurement process for the Phase 2 contracts had not commenced. However, the Trust argued that interested parties were aware that it would begin shortly. The Trust was, therefore, of the view that disclosure of the withheld information would have prejudiced the commercial interests of the Trust and the Department of Health. This was because it would have allowed potential bidders in that procurement process to know in advance what prices were acceptable or what concessions might be made.
75. In addition, it was argued that the disclosure of the prices contained in the contract would be likely to prejudice the commercial interest of the Service Provider by allowing competitors to outbid it in future procurement exercises with the Trust or other health service bodies.
76. The Trust stated that the Department of Health negotiated the central contracts on which the Trust’s contract with the Service Provider was based. This formed part of a national programme involving competing providers. In procuring healthcare services on a national scale, the Department of Health had a significant commercial interest in ensuring that procurement took place in a fair and truly competitive commercial environment so as to ensure best value for public money. It contended that disclosure of information related to pricing contained in the contract would have undermined this. This was particularly the case as the Department was at the time going to be engaged in a tendering process for the next wave of treatment centres under Phase 2.
77. The Commissioner accepts that the information withheld related to the commercial activities of the Trust, the Service Provider and the Department of Health and therefore fell within the scope of the exemption contained in section 43(2). He then went on to consider the likelihood that the release of the information would have prejudiced the commercial activities of all or any of those bodies.
78. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
79. He has also taken into account the views of the Tribunal in the same case that it accepted that “the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction.” (para 15). However, the Tribunal noted that certain factors should be considered in such cases, stating

that whether or not prejudice was likely “would depend on the nature of the information and the degree of similarity between the two transactions.” (para 15).

80. In considering the likelihood of prejudice the Commissioner considered the following:-

- i. the degree of similarity between the contract for the treatment centre and other negotiations ongoing at the time of the request;
- ii. the nature of the information that was withheld;
- iii. additional arguments raised by the Trust relating to the prejudicial effect of the disclosure of the withheld information.

**(i) Degree of similarity between the contract and other negotiations ongoing at the time of the request**

81. The Commissioner considered whether the contract for the treatment centre was comparable with other negotiations which the Trust, the Service Provider or the Department of Health were engaged in at the time of the request and, therefore, whether those negotiations could have been prejudiced by the disclosure of the information from the contract.

82. At the time of the request, the Trust, the Department and the Service Provider were involved in preparing for the procurement process for new treatment centres under Phase 2 for the provision of procedures similar to those provided under the contract for the Plymouth treatment centre. In addition, the Trust was involved in negotiating for contracts outside the treatment centre programme.

**(a) Negotiations for contracts outside the treatment centre programme**

83. The Trust believed that the disclosure of the prices for procedures from this contract could have influenced the pricing for other contracts outside the treatment centre programme for similar procedures to those undertaken at Plymouth.

84. It was argued that the introduction of the treatment centres had led to a significant drop in the prices for the contracts outside the treatment centre programme. The disclosure of the prices in the Plymouth contract would have caused service providers who were bidding for future contracts to put in bids which were just below those agreed for the current contract, rather than more competitive bids. This would have prevented the Trust being able to obtain good value for money.

85. Alternatively, it could have resulted in a squeeze on prices. This could have led to unrealistically low bids being made in order to win contracts which, in turn, could lead to reductions in the quality of the services provided.

86. In addition, the Trust was of the view that the release of the information would have been likely to prejudice the commercial interests of the Service Provider in its negotiations for other contracts at the time of the request.
87. The Trust indicated that it had asked the Service Provider for details of the contracts outside the treatment centre programme that it was negotiating or tendering for at the time of the request. However, the Service Provider had not provided the Trust with any information on this.
88. Without any evidence from the Service Provider the Commissioner is unable to accept that it might have suffered prejudice to its commercial interests outside the treatment centre programme from the release of the information.
89. The Commissioner then considered the impact of disclosure on the Trust's commercial interests. It informed the Commissioner that, around the time of the request, it was negotiating with four other independent sector providers for the provision of the same procedures as those under the treatment centre contract. It believed that disclosure of the information in the contract would have been likely to have prejudiced those negotiations.
90. The Trust also argued that disclosure of the information would have been likely to prejudice the commercial interests of other Primary Care Trusts ("PCTs") who were seeking to purchase similar health care services, other than through the treatment centre programme. This was because if the prices agreed in the Plymouth contract had been put in the public domain it would have made it difficult for other PCTs to negotiate lower prices.
91. The contracts for the development of the treatment centres in Wave 1, such as the one under consideration, were based on a single generic model contract developed by the Department of Health. This, however, allowed a degree of flexibility with the aim of meeting local healthcare needs. There were therefore a considerable number of common features in the Wave 1 contracts. These included provisions that:-
- prevented providers from employing healthcare professionals who had worked in the NHS in the previous six months;
  - allowed negligence claims against the providers to be covered by the NHS scheme;
  - provided a guaranteed income for providers for a five year period;
  - allowed spare capacity to be used by Trusts other than the one with which the contract has been agreed; and
  - provided that payments due to the providers were to be guaranteed by the Secretary of State.
92. All of these elements would have meant that the contract for this treatment centre would have been considerably different to any contracts that the Trust, and other



PCTs, would have been involved in negotiating at the time of the request. The prices contained in the contract for the treatment centre would not therefore have been directly comparable with the prices for an ad hoc contract with an independent sector provider to carry out similar procedures to those carried out at the treatment centre. Such a contract would not have been likely to involve elements such as the leasing of a building and equipment, would not have been on the same large scale or over such a long period of time and would not have incorporated many of the distinctive elements of a treatment centre contract.

93. The Trust could point to economies of scale and a range of other variables to counter any strategy which sought to use the prices in this treatment centre contract as a basis for determining the prices in any other contract it was negotiating.

94. The Commissioner, therefore, does not believe that the disclosure of the pricing information in this contract would have been likely to prejudice the commercial interests of the Trust, or other PCTs, in relation to negotiations that were being undertaken at the time of the request over any ad hoc contracts for the provision of similar medical procedures to those contained in the contract for the Plymouth treatment centre.

#### **(b) Negotiations for new treatment centres**

95. The procurement process for the treatment centres in Phase 2 had a number of stages. Adverts were placed inviting Expressions of Interest from potential providers in March 2005 for diagnostic schemes and May 2005 for elective schemes. These had to be returned to the Department of Health by May 2005 for diagnostic schemes and June 2005 for elective schemes. Pre Qualification Questionnaires were then issued and the responses received in August 2005 in the case of diagnostic schemes and September 2005 in respect of elective schemes.

96. A short list of possible providers was then drawn up and they were issued with Invitations to Negotiate. When these had been returned, all the bids were assessed according to criteria determined by the Department of Health, at which point clarification might be sought from bidders of certain aspects of their bids. On completion of this process a Preferred Bidder was chosen (and, where appropriate, a Reserve Bidder) and negotiations took place to finalise the details of the contract.

97. At the time of the request in January 2005 the Trust indicated that it was involved in discussions with a number of PCTs in the South West regarding the possibility of an elective surgery project in Phase 2. From its perspective it was aware of the impending procurement exercise for Phase 2 elective schemes when it was considering the request. It would therefore have had concerns that disclosure of the withheld information would have been likely to prejudice its own commercial interests.

98. The Trust argued that the disclosure of the withheld information would have placed in the public domain information about a previously successful bid. This would have prejudiced the commercial interests of the commissioning bodies by providing information about the pricing models applicable in a particular scheme.
99. In addition, it had concerns that disclosure would have prejudiced the commercial interests of the Service Provider. This was because it was foreseeable that the Service Provider would be bidding for contracts in the proposed procurement exercise. Disclosure would have allowed its competitors to see details of its successful bid for a Wave 1 contract.
100. The Commissioner therefore considered whether the Wave 1 and Phase 2 contracts were similar in nature and whether the disclosure of a Wave 1 contract could have had a prejudicial effect on the bids and negotiations for a Phase 2 contract.
101. Following its experience with the Wave 1 contracts, the Department introduced a number of changes for the Phase 2 contracts. These included:-
- reductions in the guaranteed payments to be made to providers;
  - reductions in the amounts payable to providers so that by the end of a contract the providers would be paid the equivalent amounts to that paid to NHS providers for equivalent procedures;
  - greater responsibility on the part of providers for patients' care, including rehabilitation and follow up work after procedures;
  - greater responsibility on the part of providers for staff training;
  - greater opportunity for providers to employ existing NHS staff;
  - greater degree of integration on the part of providers with other local NHS providers.
102. These changes would have meant that there would have been significant differences between the Wave 1 and Phase 2 contracts. It would therefore have been difficult to draw direct comparisons between the terms included in Wave 1 contracts and those which might be included in a Phase 2 contracts, particularly in relation to matters such as prices. This would consequently raise doubts about the extent to which prejudice to the commercial interests of any of the parties might have occurred from the disclosure of pricing information from a Wave 1 contract.

## **(ii) The nature of the information that was withheld**

103. A large amount of the information that it was claimed was exempt from disclosure related to pricing information and details of the numbers of procedures to be carried out by the Service Provider. The Trust argued that at the time of the request the Department of Health was involved in the preparation for the

tendering process for the development of Phase 2 treatment centres. During a tendering process matters such as prices and volume were of great sensitivity, particularly as the market for this type of work was highly competitive.

104. The Trust believed that disclosure of pricing and activity levels in respect of existing contracts, such as this one, would have created significant unfairness in the procurement process. Bidders for future contract would have been able to make reasonably accurate assumptions about the Department's value for money requirements. Previously, in the interests of fair and open competition, bidders had not had access to this information. It was argued that in order to avoid loss of confidence on the part of the service providers and potential bidders, and a diminution in the pool of bidders, it was essential that current and future procurements took place on terms that were consistent with the terms of earlier procurements.
105. It was contended that disclosure of this information would have been likely to discourage bidders from submitting their most competitive bids and would have encouraged bids falling just within the Department's acceptable value for money parameters. This would have resulted in a matching of prices and reduced competition between bidders. This in turn would have led to the inflating of the cost of the programme to the Department.
106. The Department of Health used a range of criteria in evaluating bids for the Phase 2 treatment centres. These are detailed in its submissions to the investigation into independent treatment centres carried out by the House of Commons Select Committee on Health in 2006.
107. The selection criteria used were a combination of clinical, financial and non-financial factors. The clinical factors included:-
- the ability to deliver clinical outcomes to a high standard;
  - the degree of innovation;
  - ensuring safety and quality for patients; and
  - the delivery of high levels of patient satisfaction.
108. The non-financial factors included:-
- the recruitment and retention of appropriately qualified staff;
  - the degree of commitment to the training of staff;
  - the quality of the facilities to be provided;
  - the quality of the proposed information management; and
  - the ability to integrate with local NHS and other providers.
109. The financial factors which were used for the assessment process were not restricted to the prices being proposed for the different elements of the contract. Consideration was given to:-

- whether the intended funding package could deliver the proposals within the appropriate timeframe, which included an examination of areas such as the bidder's proposed borrowing, equity and working capital;
  - assessment of the extent to which the bid shared risk with the Department over the contract period; and
  - whether the proposals for the ending of the contract were appropriate.
110. A wide range of factors were clearly taken into account in assessing bids in Phase 2. It is therefore difficult to conclude that the disclosure of details of pricing and the numbers of procedures to be carried out in a Wave 1 contract would have allowed bidders to draw any conclusions about what they would need to put in their bids for Phase 2 to be successful, even in relation to prices. The Commissioner is not therefore convinced that disclosure would have resulted in the prejudicial effect that was suggested.
111. Acceptance of the Trust's arguments that access to the withheld information would have allowed predictions to be made about the Department's value for money requirements for Phase 2 contracts, would have meant that successful bidders for Wave 1 contracts would have been in an advantageous position in bidding for Phase 2 contracts compared with those bidders which had not been awarded contracts under Wave 1. There would therefore have been strong public interest arguments in favour of disclosure in order to ensure open and fair competition in relation to Phase 2 contracts. This issue is considered later in assessing the public interest arguments in relation to section 43(2).
112. In addition, the Trust argued that the disclosure of the prices contained in the contract would have allowed the Service Provider's competitors to outbid it in future tendering exercises because they would have been able to predict its bids in future tendering exercises.
113. The Commissioner notes that at the time the request was made in January 2005, the contract had been in existence for approximately nine months. In addition, the procurement exercise for the Phase 2 treatment centres had not begun. It would have been clear that detailed bids would not need be submitted for some considerable time. It subsequently transpired that initial expressions of interest had to be submitted in May and June of 2005 and more detailed responses to the Pre Qualification Questionnaires in August and September 2005.
114. It is acknowledged that the market for this type of work is highly competitive and, therefore, it seemed likely that market prices for providing the services agreed in the contract would vary considerably with time.
115. In the period between the contract being agreed in May 2004 and the commencement of the Phase 2 procurement exercise it is likely that prices would have undergone considerable change. It would therefore have been difficult for other bidders to draw conclusions as to the pricing that might be adopted by the Service Provider in bidding for contracts under Phase 2, based on the prices contained in a Wave 1 contract agreed over a year earlier.

116. In addition, it is clear that a wide range of factors would have influenced the prices in the Service Provider's tender documents and, eventually, the prices contained in the contract for the Plymouth treatment centre. These would have included factors stipulated by the Department and the Trust, such as, the numbers and types of procedures to be carried out, levels of performance expected, duration of the contract and the location of the treatment centre.
117. There would also have been many factors which would have been specific to the Service Provider such as the type of facilities it intended to use to carry out the procedures, the care regime it intended to use to carry out those procedures, how it would generate the necessary capital for the contract, the returns it expected on its investment, and its projected costs, such as the numbers and salaries of staff and the cost of medical supplies. Only a limited number of these factors could have been ascertained from the information contained in the contract.
118. In order for the Service Provider's competitors to be able to ascertain the prices it might include in tenders for future contracts they would need to be able to identify the pricing mechanism or model that it was using, assuming that it was using the same, or similar, mechanism or model, for future tendering exercises.
119. The Commissioner understands that the financial model used by the Service Provider in relation to its bids for Phase 2 contracts was very similar to that used for its bids for Wave 1 contracts. He therefore felt that it was appropriate for the Trust not to disclose most of the information relating to its financial model contained in the contract. He has confirmed that this was correctly withheld under section 41.
120. However, the Commissioner is not convinced that the disclosure of the other pricing information in the contract would have allowed the Service Provider's competitors to identify the financial model it was using and so predict the prices in its bids for future contracts, thereby prejudicing its commercial interests.
121. As well as the contract itself, the Trust withheld a considerable amount of correspondence that it held that related to the contract. This mainly constituted records of discussions prior to the contract being agreed about the terms which should be included and how the contract should be managed. It also included discussions related to the implementation of the contract after it came into operation. In addition, there was a draft business plan which provided information related to the development of the proposal for the treatment centre and information on, and analysis of, the bids for the contract.
122. The Commissioner is satisfied that the disclosure of this information would not have put in the public domain any strategies that the Trust proposed to adopt in its negotiations with the Service Provider and so put the Trust at a disadvantage. He is not convinced that the disclosure of any of this information would have been likely to have prejudiced the commercial interests of any of the parties, with the exception of some of the information which was contained in the draft business case for the treatment centre.

123. The draft business case contains a considerable amount of information relating to the sponsorship of the scheme by the different PCTs, how the contract is to be managed and how the contract differs from the standard contract developed for the Wave 1 scheme. It also provides a general overview of the different bids for the contract and detailed analysis of financial aspects of those bids.
124. The Commissioner is not convinced that the disclosure of much of this information, given its nature, would be likely to prejudice the commercial interests of the Service Provider, other organisations which bid for the Plymouth contract, the Trust or the Department.
125. However, the draft business case contains some information on how the bidders for the contract calculated their bids. The complainant has confirmed that he does not wish to pursue his complaint in relation to this information and therefore the Commissioner has not considered this information any further.
126. The draft business case also includes some very detailed discussion of the financing strategy to be adopted by each of the bidders. This includes the amounts of money to be borrowed and the names of potential lenders. The Commissioner accepts that the disclosure of such detailed information on how bidders would have financed their bids could have been of advantage to their competitors when undertaking similar procurement exercises in relation to Phase 2. This is because similar strategies might have been employed. He is satisfied that the disclosure of this information would have been likely to prejudice the commercial interest of the bidders for the Plymouth contract. Having accepted that the exemption was engaged in relation to this information he went on to consider the application of the public interest test.
127. In relation to the plans of the treatment centre, the Trust argued that they contained the contractor's own designs which, if disclosed, would have assisted its competitors to prepare similar plans for use in tendering for similar contracts.
128. As was discussed in relation to the application of section 38, the Commissioner understands access to detailed plans was available to the public through the local council. He therefore believes that these plans contained information that was in the public domain and was relatively easy to obtain. In the circumstances he is not satisfied that disclosure of the information contained within the plans would have been likely to prejudice the commercial interests of the Service Provider.

**(iii) Additional arguments raised by the Trust relating to prejudicial effect of the disclosure of the withheld information**

**(a) Risk pricing**

129. The Trust was of the view that pricing information, and related risk pricing information, was disproportionately commercially sensitive from the Service Provider's perspective. In relation to contracts such as this one, price was a major determinant of risk pricing. This related to the extent to which a service provider would be prepared to compensate the commissioning body in the event that it

failed to comply with key performance indicators in the course of contract delivery.

130. It was argued that, if information related to prices had been disclosed, this would have informed the Service Provider's competitors about areas of risk which the Trust had required the Provider to address by means of risk pricing. This would therefore allow crude inferences to be drawn in relation to the Trust's assessment of the Service Provider's likely performance under the contract. This, in turn, would have been likely to have had an unwarranted negative impact on the Service Provider's reputation.
131. The Commissioner is not convinced that the disclosure of information concerning compensation payable for the provider's failure to meet key performance indicators in the contract would have had any significant impact on the Service Provider's reputation. Even if it is accepted that it was possible to draw some negative inferences about the Trust's assessment of the Service Provider's likely performance from these figures, they related to a period well before the request. It would therefore be reasonable to argue they no longer reflected the Service Provider's likely performance at the time the request was made. The Commissioner is therefore not convinced that the Service Provider would have been likely to suffer this form of prejudice to its commercial interests as a result of the disclosure of pricing information.

#### **(b) Innovation**

132. The Trust argued that disclosure of pricing information could have resulted in a stifling of one of the main objectives of the treatment centre programme which was to encourage innovative models of service delivery. In evaluating and awarding contracts, a wide range of factors were taken into account, not only price. It was contended that the disclosure of contract prices would have resulted in all bidders submitting bids at, or just below, previously agreed price levels. In doing so they would have only sought to meet basic requirements. They would not have gone further by trying to provide innovation, as this may have involved additional cost. This might have impacted detrimentally on the Trust, but would have particularly affected the Department of Health which had general responsibility for the programme.
133. This contract was over a year old when bids were being made for Phase 2 contracts. In a competitive environment the Commissioner, as previously indicated, is not convinced that the disclosure of pricing information from the contract would have resulted in similar prices being submitted by bidders over a year later for contracts of a similar nature. This is particularly the case where the procurement exercise was being assessed on a wide range of factors.
134. In addition, the bidders for new contracts would have been aware that those commissioning the services were not judging bids purely on price but were considering a wide range of factors, including innovative approaches. The Commissioner is not therefore convinced that the disclosure of prices in relation to previous contracts would, on its own, have lead to a stifling of innovation.

Bidders would still need to have demonstrated innovation to fulfil one of the main assessment criteria if they wished to be successful in the procurement exercise.

### **(c) Quality of service**

135. As a deliverer of healthcare services for the NHS, the Trust argued that it had to work to national standards within a highly regulated environment. It had minimal scope to modify any key features of the contracts it entered into, except for those related to price and performance. It was of the opinion that the disclosure of pricing information, where other elements of the contract were fixed, could have resulted in a reduction in the quality of services offered to it. The risk would have been in areas that were not as transparent as price, jeopardising both the standard of service provision to patients and the Trust's ability to secure value for money.
136. The Commissioner is of the view that when public authorities accept tenders it is incumbent on them to ensure that the contractor is suitable, that processes for the supervision of the contract are built into the contract and that appropriate standards of service are maintained by the contractor. It is for the public authority to ensure that the services provided by the contractor do not fall below agreed standards, particularly in an area such as this where patients' health is at risk.

### **(d) Reduction of pool of bidders**

137. The Trust argued that the disclosure of the type of information which had been requested could have had the effect of dissuading organisations from putting in bids for future contracts. This would have reduced the pool of potential bidders for similar procurement exercises. The consequence of this would have been a reduction in competition and weakening of the ability of the Trust and the Department of Health to secure contracts on best terms in future.
138. The provision of healthcare to the NHS by private organisations is regarded by many as a lucrative market in which contracts are awarded for very significant amounts of public money. Organisations which are competing within this market will have made large investments in order to do so. As a result, the Commissioner is not convinced that the disclosure of this information would have deterred them from bidding for future contracts of this type.
139. In addition, it would appear to be a contradictory argument to suggest that disclosing, what is considered to be, commercially sensitive information would assist rival bidders for contracts, and so increase competition, and, at the same time, suggest that the potential for such information to be disclosed would deter contractors from bidding and reduce competition.

### **(e) Renegotiation of contracts**

140. The Trust stated that the Department's view was that disclosure of the withheld information would have been likely to prejudice its commercial interests. It might have resulted in the Department having to renegotiate existing contracts. This was because if a service provider with whom the Department was negotiating



became aware of preferential financial terms enjoyed by another service provider it would have made it difficult for the Department to revise the contract payment arrangements in the way it wanted.

141. The Commissioner is not convinced that disclosure would have resulted in the consequences feared by the Department. A wide range of criteria were taken into account in awarding the contracts for the treatment centres. These included non financial criteria such as innovation, patient care, facilities and staffing. In addition there would be a wide range of other factors which could explain different pricing structures for different treatment centres. In the circumstances the Commissioner believes that the Department would have been able to resist arguments which sought to draw direct comparisons between the prices agreed for the provision of healthcare under different treatment centre contracts by pointing to relevant differentiating factors.
142. Having considered the arguments presented to him, the Commissioner is not satisfied that the commercial interests of the Trust, the Service Provider or the Department of Health were likely to have been prejudiced by the disclosure of the requested information at the time the request was made. The only exception to this is in relation to the disclosure of some of the information contained in the draft business case. He therefore does not believe that the exemption in section 43(2) was engaged, subject to the specified limited exception.
143. Although the Commissioner is not of the view that section 43(2) was applicable to most of the information for which it was claimed, he considered it prudent to examine the public interest arguments as to whether the public interest in maintaining the exemption outweighed the public interest in disclosure. He first considered the arguments applicable to most of the information that had been withheld. He then went on to consider separately the public interest arguments in relation to some of the information contained in the draft business case which he has determined engaged section 43(2).

### **Public interest test in relation to the withheld information (with the exception of the information relating to bidders' funding strategies)**

#### **Public interest arguments against disclosure of the information**

144. The Commissioner accepts that there is a strong public interest in ensuring that the Department, the Trust and the Service Provider do not suffer commercial harm as a result of the disclosure of the requested information. It was argued that the disclosure of some of the provisions of the contract, particularly those related to financial matters, could have put the Department, the Trust and the Service Provider at a disadvantage in future negotiations by allowing other service providers an insight into their likely negotiating positions. This would have adversely affected the NHS's ability to obtain the best value for money when procuring healthcare services from the private sector so that maximum benefit could be obtained from limited resources.
145. In addition, the withholding of the information would have reassured existing, and potential, service providers that the Trust would try to ensure that commercially

sensitive information related to a service provider would be protected where this was necessary. This would in turn make it more likely that the Trust, and other NHS bodies, would be able to find sufficient numbers of organisations willing to take part in similar processes in future to guarantee genuinely competitive procurement exercises. This would assist in obtaining value for money in relation to NHS spending.

146. The Commissioner's view, detailed in the earlier part of this notice, was that he was not convinced that the prejudicial effects claimed would have been likely to occur. However, if he is incorrect in this assessment, he has considered the extent of any prejudicial effect that might have resulted from disclosure.
147. As previously indicated, the Wave 1 contracts were unique in nature. As a result, it is difficult to draw conclusions about the pricing structure which a service provider might include in a future bid for a contract from what was contained within them.
148. In addition, with the exception of the information that the Commissioner has identified as falling within section 41, he does not believe that the disclosure of the other pricing information held by the Trust would have provided the Service Provider's competitors with details of how it had arrived at those prices.
149. There was also over twelve months between the date the contract was agreed and the time that bidders had to start to consider submitting bids for Phase 2 contracts. This would have meant that in such a highly competitive market it would have been difficult to draw conclusions from the Plymouth contract about the prices that the Service Provider might include in future bids.
150. Taking these factors into account the Commissioner does not believe that, even if there would have been likely to have been any prejudicial effect on the commercial interests to any of the parties to the contract, that this would have been significant.

### **Public interest arguments in favour of disclosure of the information**

151. The Commissioner recognises the general public interest in furthering the understanding of and participation in the public debate on issues of the day and the promotion of accountability and transparency in the spending of public money. He also notes that part of the rationale for the introduction of independent treatment centres was to obtain greater value for public money in relation to the provision of healthcare.
152. There has been considerable amount of public concern and debate over whether money in the NHS is being spent appropriately and effectively. The treatment centre programme has involved the spending of large amounts of public money. It also involves the implementation of a policy of using private sector organisations to deliver public services, again an area of considerable public debate, particularly in relation to the NHS.

153. The Commissioner recognises that the Trust has already disclosed a significant amount of the non financial information it holds in relation to the treatment centre in question. However, a lot of the debate concerning the treatment centre programme has revolved around issues related to whether it is providing good value for money.
154. The major difficulty in assessing the cost effectiveness of the programme has been the absence in the public domain of detailed financial information about the treatment centres. There has been considerable comment that due to a lack of available information, including details of the contracts, it has been impossible to assess whether the treatment centre programme has proved good value for money. Doubts have been raised about the wider benefits and costs of the programme and whether the new treatment centres provide better value for money than other options available to the NHS.
155. Disclosure of this information would therefore have allowed the public to make a more informed assessment as to whether the contract for this particular treatment centre was providing value for money. It would also have contributed to the information available which allowed a more general review of the cost effectiveness of the programme as a whole. In addition, it would have informed the public of the likely current and future financial implications for the Trust and other PCTs of using the treatment centre for the treatment of their patients.
156. If the information had been disclosed it would have allowed more detailed scrutiny of the Department of Health's and the Trust's role in procuring clinical services from private sector providers. Disclosure of performance information related to the treatment centre, once it had become operational, would have allowed the public to form a view as to how effectively the Service Provider was performing compared with other providers, particularly existing NHS hospitals and how effectively the Trust was using the centre and managing the contract with the Service Provider. This would all have contributed to the promotion of accountability and transparency for the decisions that had been taken.
157. The disclosure of the financial details related to this contract could have helped to promote the public interest in greater competition for the provision of healthcare. It would have allowed those private sector organisations which had been considering tendering for this type of work to make a more informed assessment of the basis on which contracts had been awarded in the past. This might have encouraged them to tender for contracts and so increase the competition in relation to similar procurement exercises in the future.
158. In relation to future procurement exercises, the Trust argued that access to the withheld information from a Wave 1 contract would have allowed predictions to be made about the Department's value for money requirements for Phase 2 contracts. If this argument were accepted, it would have meant that successful bidders for Wave 1 contracts would have been at a considerable advantage in bidding for Phase 2 contracts compared with those organisations which had not been awarded contracts under Wave 1. There would therefore have been a strong public interest argument in favour of disclosure in order to ensure open and fair competition in relation to Phase 2 contracts.

159. Having considered the relevant public interest arguments, the Commissioner is of the view that the public interest in maintaining the exemption would not have outweighed the public interest in disclosure in relation to the withheld information.

### **Public interest test in relation to bidders' funding strategies**

#### **Public interest arguments against disclosure**

160. The Commissioner recognises there is a public interest in a public authority not disclosing very detailed information concerning how organisations which are bidding for a contract intend to finance their proposals. Disclosure could lead to contractors in future being unwilling to provide information which may have been of assistance to a public authority in determining the outcome of a procurement exercise. This may result in public authorities taking decisions without being as fully informed as it might have been and, consequently, affect the quality of the decisions that are taken.
161. The Commissioner also accepts that the disclosure of very detailed information about the bidders' financial structuring of their proposals could have been harmful to their commercial interests. This information might have allowed competitors to draw conclusions about the proposals that might be contained in the bidders' tenders for future contracts, particularly where they were of a similar nature. If this were to happen, it could provide bidders' competitors with an unfair advantage. This could result in the procurement process for this type of contract operating unfairly and, as a consequence, the public not obtaining value for money.

#### **Public interest arguments in favour of disclosure**

162. The Commissioner recognises that there is a general public interest in furthering the understanding of and participation in the public debate on issues of the day and promoting accountability and transparency in the spending of public money. The independent treatment centre programme involves the spending of significant amounts of public money. It inevitably raises public concerns over value for money. In addition, the development of the treatment centres has highlighted the policy of using private sector organisations to deliver public services, again an area of considerable public debate, particularly in relation to the NHS.
163. The Commissioner acknowledges that the Trust has already disclosed a significant amount of the non financial information that it holds in relation to the Plymouth treatment centre. However, a lot of the debate concerning the treatment centres has revolved around issues related to whether they are providing good value for money. The major criticism of those who have tried to assess the cost effectiveness of the programme has been the lack of detailed financial information in the public domain.
164. Despite these concerns, the Commissioner is not convinced that the disclosure of detailed information about how the bidders for the contract proposed to finance their bids, if successful, would have been of great assistance to the public in

assessing whether public money was being spent wisely. Of much more significance in assessing whether value for money was being obtained would have been the disclosure of the overall pricing structures which were being proposed by each bidder.

165. In addition, the analysis in the business case of the successful bidders funding proposals does not highlight any significant areas of concern. This would also tend to suggest that there is no strong public interest in the disclosure of this information.
166. Whilst the disclosure of this information might have provided some assistance in assessing the appropriateness of the decision to award the contract to the Service Provider, the Commissioner is not convinced it would have made a significant contribution. The Commissioner is therefore of the view that the public interest in maintaining the exemption in relation to the information contained in the business case, which is specifically identified in the schedule attached to this notice, outweighs the public interest in disclosing that information. He has concluded that section 43(2) was correctly applied to this information.

## The Decision

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167. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- it correctly applied section 40(2) to some information, as identified in the schedule attached to this notice;
  - it correctly applied section 41 to some of the information in the contract, as identified in the schedule attached to this notice;
  - it correctly applied section 43(2) to some of the additional information related to the contract, specifically contained in the draft business case and identified in the schedule attached to this notice.
168. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- it breached section 17(1)(a) by failing to provide a refusal notice within 20 working days of the receipt of the request;
  - it incorrectly applied section 38 to information contained in the contract;
  - it incorrectly applied section 40(2) to some information, as identified in the schedule attached to this notice;
  - it incorrectly applied section 41 to some of the information contained in the contract, as identified in the schedule attached to this notice;

- it incorrectly applied section 43(1) to information contained in the contract;
- it incorrectly applied section 43(2) to information in the contract and some of the additional information related to the contract, as identified in the schedule attached to this notice.

## Steps Required

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169. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the information it holds in relation to the complainant's request which has not been determined to be exempt from disclosure, as detailed in the schedule attached to this notice.

170. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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171. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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172. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

173. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 5<sup>th</sup> day of *June* 2008

Signed .....

Gerrard Tracey  
Assistant Commissioner

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

**Schedule detailing the Commissioner's decision in relation to the application of exemptions to the requested information**

<b>Section of document</b>	<b>Description of information</b>	<b>Exemption claimed</b>	<b>Commissioner's decision</b>
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**The Contract and Schedules**

Schedule 1 part 1 (p75)	Default interest rate	Section 43(2)	Not exempt
Schedule 2 part 3 (p90)	Plans to hospital - numbered 2 and 3	Sections 38 and 43(2)	Not exempt
Schedule 3 part 1 annex A (p109)	Form for recording patient information	Section 43(1)	Not exempt
Schedule 3 part 1 annex B (p110)	Form for recording patient information	Section 43(1)	Not exempt
Schedule 3 part 1 annex C (p111)	Form for recording patient information	Section 43(1)	Not exempt
Schedule 3 part 1 annex E (p 113)	List of medical equipment and furniture	Section 43(2)	Not exempt
Schedule 4 part 2 (p153-6)	Numbers of different categories of staff and general human resource issues	Section 43(2)	Not exempt
Schedule 4 part 2 annex A (p157)	Organisation chart related to provider	Section 43(2)	Not exempt
Schedule 5 part 1 (p158)	Construction proposals for building	Section 43(2)	Not exempt
Schedule 5 part 1A (p159)	Construction proposals for building	Section 43(2)	Not exempt
Schedule 6 part 3 section 5 (p169)	Method of calculating payments to provider	Section 43(2)	Not exempt
Schedule 6 part 3 section 7 (p169)	Method of calculating payments to provider	Section 43(2)	Not exempt
Schedule 6 part 3 section 22 (p172)	Financial penalties payable by the provider for failure to meet performance indicators	Section 43(2)	Not exempt
Schedule 6 annex A (p191)	Prices to be paid to provider for procedures carried out and numbers of procedures	Section 43(2)	Not exempt
Schedule 6 annex B (p192)	Breakdown of prices for orthopaedic implants	Section 43(2)	Not exempt
Schedule 6 annex C (p193)	Prices to be paid to provider for procedures carried out – worked example	Section 43(2)	Not exempt
Schedule 7 part 1 (p194)	Scheme delivery plans	Section 43(2)	Not exempt
Schedule 9 (p197)	Financial models	Sections 41 and	Exempt from



		43(2)	disclosure under section 41 except for page headed "Procedure Pricing Table" which details prices and volume of procedures to be carried out by Service Provider.
Schedule 10 part 2 section 2.5 (p208)	Circumstances when financial model can be adjusted	Section 43(2)	Not exempt
Schedule 11 part 1 sections 1.7 and 1.8 (p210)	Insurance requirements during construction phase	Section 43(2)	Not exempt
Schedule 11 part 1 sections 2.4 and 2.5 (p212)	Insurance requirements during construction phase	Section 43(2)	Not exempt
Schedule 11 part 1 sections 3.1 and 4.1 (p213)	Insurance requirements during construction phase	Section 43(2)	Not exempt
Schedule 11 part 1 sections 5.4 and 5.5 (p214)	Insurance requirements during operational phase - limits	Section 43(2)	Not exempt
Schedule 11 part 1 sections 6.4 and 6.5 (p 215)	Insurance requirements during operational phase – medical malpractice	Section 43(2)	Not exempt
Schedule 11 part 1 section 7.5 and 7.6 (p216)	Insurance requirements during operational phase – property	Section 43(2)	Not exempt
Schedule 11 part 1 section 7.8 (217)	Insurance requirements during operational phase – property	Section 43(2)	Not exempt
Schedule 11 part 1 sections 8.3, 8.4, 8.6 and 8.7 (p217 and 218)	Insurance requirements during operational phase – business interruption	Section 43(2)	Not exempt
Schedule 12 annex A (p232)	Compensation payable on termination	Section 43(2)	Not exempt

### Emails and letters

Email with two attachments from DoH to PA dated 02/02/04	Comments on provider's business case – two attachments withheld in full.	Section 43(2)	Not exempt
Email with two attachments from DoH to PA dated 03/02/04	The number of procedures to be carried out at paras 2.4 and 7.6 of the attachment headed "Supplementary	Section 43(2)	Not exempt

	activity amendments” withheld.		
Email from DoH to PA dated 06/02/04	Discussion regarding provision of radiology at treatment centre – email withheld in full.	Section 43(2)	Not exempt
Email with two attachments from PA to DoH dated 12/02/04	Scheme delivery plan – two attachments withheld in full.	Section 43(2)	Not exempt
Email with one attachment from PA to DoH dated 16/02/04	Payment mechanism flow chart – email and attachment withheld in full.	Section 43(2)	Not exempt
Email from PA to DoH dated 18/02/04	Discussion regarding pricing and number of procedures to be carried out – email withheld in full.	Section 43(2)	Not exempt
Email with two attachments from DoH to PA dated 24/02/04	Discussion of structures and processes for contract management and draft proposals for contract management for two other treatment centres – email and two attachments withheld in full.	Section 43(2)	Not exempt
Email with one attachment from PA to DoH dated 26/02/04	Draft proposals for contract management of treatment centre – email withheld in part and attachment withheld in full.	Section 43(2)	Not exempt
Email from DoH to PA dated 03/03/04	Discussion regarding pricing and number of procedures to be carried out – email withheld in full.	Section 43(2)	Not exempt
Email with one attachment from PA to DoH dated 05/03/04	Draft proposals for contract management of treatment centre – attachment withheld in full.	Section 43(2)	Not exempt
Email with one attachment from DoH to PA dated 10/03/04	List of types of procedures to be carried out – attachment withheld in full.	Section 43(2)	Not exempt
Email with one attachment from DoH to PA dated 12/03/04	Schedule of outstanding issues related to the proposed contract and details of action to be taken – attachment withheld in part.	Section 43(2)	Not exempt
Email from PA to DoH dated	Discussion of impact of the treatment centre on local	Section 43(2)	Not exempt

07/05/04	waiting lists and times – withheld in full.		
Email from DoH to PA dated 11/05/04	Discussion regarding pricing and number of procedures to be carried out – withheld in full.	Section 43(2)	Not exempt
Email with one attachment from PA to DoH dated 12/05/04	Draft business case for treatment centre – email and attachment withheld in full.	Section 43(2)	Not exempt except for:- (i) paragraphs 7.1.6 to 7.1.11 on pages 36-38; (ii) first, third and sixth bullet points on page 57; (iii) paragraph 3.2 – information under the heading “Contingency /Standby facilities” on pages 66-67; (iv) bullet point on page 69; (v) pages 70-84.  Outside scope of complainant's request:- (i) table 2 on pages 62-64.
Email with one attachment from DoH to PA dated 14/05/04	Part of the draft business case for treatment centre – email and attachment withheld in full.	Section 43(2)	Not exempt except for paragraphs 7.6.1 to 7.6.7 on pages 38-42.
Email with two attachments from DoH to PA dated 18/06/04	Pricing and allocations for contract - email and two attachments (one is letter from DoH dated 17/06/04) withheld in full.	Section 43(2)	Not exempt
Email with one attachment from DoH to PA dated 02/07/04	Update on position regarding treatment centre – attachment withheld in full.	Section 43(2)	Not exempt
Email with two attachments from DoH to PA dated 10/08/04	Discussions regarding stakeholder and communications strategy – email and two attachments withheld in full.	Section 43(2)	Not exempt
Email with one attachment from	Discussion regarding monitoring of contract – email	Section 43(2)	Not exempt

DoH to PA dated 23/08/04	and attachment withheld in full.		
Email from DoH to PA dated 08/09/04	Discussion regarding contract management – withheld in full.	Section 43(2)	Not exempt
Email with one attachment from DoH to PA dated 16/09/04	Discussion regarding insurance provisions in contract – email and attachment withheld in full.	Section 43(2)	Not exempt
Email with two attachments from DoH to PA dated 20/09/04	Briefing and presentation slides regarding referral management – email and attachments withheld in full.	Section 43(2)	Not exempt
Email from DoH to PA dated 23/09/04 10:36	Discussion regarding contract terms. References to named individuals – withheld in part.	Sections 40 and 43(2)	Not exempt except for the names of the individual on leave and the individual about to take maternity leave under section 40(2).
Email with one attachment from DOH's solicitor dated 04/10/04	Email and attachment withheld in full.	Sections 42 and 43(2)	Outside scope of complainant's request
Email from DoH to PA dated 10/10/04	Discussions regarding contract management – withheld in full.	Section 43(2)	Not exempt
Email with one attachment from PA to DoH dated 15/10/04	Arrangements for Contract Management Board – email and attachment withheld in full.	Section 43(2)	Not exempt
Email from PA to DoH dated 18/10/04	Details of proposed meeting regarding the contract – withheld in full.	Section 43(2)	Not exempt
Emails to and from DoH's solicitor between 21/10/04 - 29/10/04	Requests for legal advice and details of legal advice provided – emails withheld in full	Sections 42 and 43(2)	Outside scope of complainant's request
Email from DoH's solicitor dated 04/11/04 Time - 14.54	Legal advice provided – email withheld in full.	Sections 42 and 43(2)	Outside scope of complainant's request
Email with one attachment from PA to DoH dated 04/11/04 Time - 15.49	Minutes of meeting concerning contract compliance issues – email and attachment withheld in full.	Section 43(2)	Not exempt
Email from officer of PA to others in	Issues regarding contract compliance – email withheld	Section 43(2)	Not exempt

PA and DoH dated 04/11/04 Time - 17.30	in full.		
Email from DoH's solicitor dated 05/11/07	Legal advice provided – email withheld in full.	Sections 42 and 43(2)	Outside scope of the complainant's request
Email with two attachments from DoH to PA dated 22/11/04	Draft action plan regarding construction of treatment centre – email and attachments withheld in full.	Section 43(2)	Not exempt
Email with attachment from DoH's solicitor dated 23/11/04	Legal advice provided – email and attachment withheld in full.	Section 42 and 43(2)	Outside scope of the complainant's request

## Legal Annex

### Refusal of Request

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

### Health and safety.

**Section 38(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

**Section 38(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

### Personal information.

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

### **Information provided in confidence.**

**Section 41(1)** provides that –  
"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

**Section 41(2)** provides that –  
"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

### **Legal Professional Privilege**

**Section 42(1)** provides that –  
"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

**Section 42(2)** provides that –  
"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."

### **Commercial interests.**

**Section 43(1)** provides that –  
"Information is exempt information if it constitutes a trade secret."

**Section 43(2)** provides that –

“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).”

**Section 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”