

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 February 2008

Public Authority: Somerset NHS Primary Care Trust
Address: Wynford House
Lufton Way
Yeovil
Somerset
BA22 8HR

Summary

The complainant requested a copy of a contract agreed by the Somerset NHS Primary Care Trust for the provision of an independent treatment centre. He also requested other additional documents related to the treatment centre. The public authority refused to disclose some of the requested information on the basis of the exemptions contained in sections 41 (confidential information) 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 in the additional documents was exempt under section 43(2), as it related to the public authority's contract management strategy. He ordered the remainder of the information that had been withheld to be disclosed.

The Commissioner's Role

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

2. On 6 July 2006, the complainant requested from Mendip NHS Primary Care Trust
"A copy of all contracts signed between Mendip PCT and UK Specialist Hospitals regarding the independent treatment centre in Shepton Mallet."

In addition he requested

“All the monthly reports so far submitted to the PCT board (and the SHA and DoH) regarding the treatment centre, which specifically include the centre’s activity levels vis-à-vis its contract.”

The Mendip NHS Primary Care Trust, the original recipient of the request, was subsequently replaced by the Somerset NHS Primary Care Trust (“the Trust”).

3. On 2 August 2006, the Trust wrote to the complainant providing him with some of the information he had requested but withholding other information on the basis that it was exempt from disclosure under the Act. It provided a detailed schedule identifying each piece of withheld information and explained which exemption it believed applied to each. It claimed that sections 40(2) (personal information), 41 (information provided in confidence) and 43(2) (prejudice to commercial interests) were applicable to the withheld information and stated why it believed this was the case.
4. On 4 August 2006, the complainant wrote to the Trust asking it to review its decision to refuse to disclose some of the information requested and provided arguments as to why this information should be released by the Trust.
5. On 23 August 2006, the Trust informed the complainant of the result of the review it had carried out. Whilst it released some additional information, it substantially upheld the initial decision which had been taken.

The Investigation

Scope of the case

6. On 16 November 2006, the complainant wrote to the Commissioner to complain about the Trust’s refusal to provide him with all of the information he had requested.

Chronology

7. There were a considerable number of communications between the Commissioner and the Trust with regard to the complaint, the most significant are outlined below.
8. On 16 January 2007, the Commissioner wrote to the Trust and asked for a copy of all of the requested information. He sought confirmation that the Trust still wished to rely on section 41 in relation to parts of the contract and details of further arguments it wished to raise in relation to the application of the exemptions it had previously cited.
9. On 7 February 2007, the Trust wrote to the Commissioner, providing him with a copy of the contract and other relevant information. In relation to the application of

section 43(2), it provided further explanation as to why it believed that disclosure of the withheld information would be prejudicial to the interests of UK Specialist Hospitals (“the Service Provider”), the Department of Health (“the Department”) and the Trust. It also confirmed that it no longer wished to claim that section 41 was applicable to some parts of the contract but still sought to rely on it in relation to the financial models which formed part of the contract and which had been provided to it by the Service Provider.

10. On 28 May 2007, the Commissioner, having reviewed the contract and the other information which had been provided, wrote to the Trust seeking further clarification as to why it believed the parts of the contract to which sections 41 had been applied had been provided to it by a third party, a necessary element for the section to be applicable. He also sought clarification as to why it was believed that section 43(2) was applicable to specific pieces of information.
11. On 18 July 2007, the Trust wrote to the Commissioner providing reasons as to why it believed the financial models in the contract had been provided by the Service Provider and why it believed they should be treated as subject to a duty of confidentiality under section 41. It provided further arguments in relation to the application of section 43(2) to particular information. The Trust accepted that some information that had previously been withheld could be disclosed and confirmed that it had provided the complainant with copies of this information.
12. On 26 September 2007, the Commissioner wrote to the Trust seeking further clarification about the working of the financial models in the contract. He also sought information about the procurement processes which were taking place at the time that the request was made and which it had been argued might have been prejudiced by disclosure of the requested information.
13. On 17 October 2007, the Trust provided further details regarding the financial models and confirmed that it was seeking further information from the Service Provider and the Department of Health as to the procurement exercises they were involved in at the time of the request.
14. On 26 October 2007, given the complexity of some of the issues involved, representatives from the Commissioner’s Office met with representatives from the Trust and the Department of Health to obtain further clarification as to why it was believed the withheld information was exempt from disclosure under sections 41 and 43.
15. On 6 November 2007, the Commissioner wrote to the Trust to clarify certain issues which had arisen at the meeting, including the point reached in different procurement exercises in which the Trust, the Service Provider and the Department of Health were involved at the time of the request and how the financial models contained in the contract were produced.
16. On 14 December 2007, the Trust wrote to the Commissioner providing him with further information related to the procurement exercises which had been proceeding at the time of the request and the operation of the financial model.

Analysis

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, however the relevant points are summarised below.

Exemptions

Background

17. 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.
18. The request related to the development of an independent treatment centre at Shepton Mallet for which the Trust was the lead commissioner. The contract for the treatment centre was agreed on 19 August 2004 and was signed by the Trust, the Department of Health and the Service Provider.
19. 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 41 – information provided in confidence

20. The Trust sought to rely on section 41 to withhold information in the financial models in Schedule 12 of the original contract and Schedule 5 of the Deed of Variation, the latter being entered into after the original contract had been agreed. It did so on the basis that both contained confidential information provided by the Service Provider. Both financial models consisted of very lengthy and detailed computer spreadsheets containing the financial projections of the Service Provider for the proposed five year duration of the contract.
21. 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 expenditure, revenue, investment, financing, taxation, profit and loss accounts and balance sheets. Also included were details of assumptions, calculations and methodologies used in compiling these various financial projections.
22. 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 to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

23. 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.

24. 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?

25. The Commissioner accepts that some 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. 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.

26. The Trust's claim that these specific 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?

27. 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?

28. There was no express confidentiality agreement in relation to the financial models. The Commissioner therefore had to consider whether an obligation of confidence could have been implied from the circumstances that existed at the time the information was provided to the Trust.

29. 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 be likely to have been of significant interest to its competitors and 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.

30. The Commissioner notes that this information was requested two years after the contract was agreed and that there may be an argument that the obligation of confidence, being implied, might only be expected to last for a particular period of time. However he has taken into account the views of the Information Tribunal in *Derry City Council v The Information Commissioner (EA/2006/0014)* where it stated, when commenting on the suggestion that an implied obligation of confidence would end after a limited time period, that

“In our view the effect of the obligation, however created, would last until the information in question had either passed into the public domain or had ceased to have commercial significance.” (para 34(d))

31. The Commissioner is satisfied that the information concerned would have still had commercial significance two years after it was provided to the Trust and, as already stated, was not in the public domain. He is, therefore, satisfied that it was 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?

32. 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?

33. 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. 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. Under the law of confidence the burden of proof is therefore the reverse of that under the Act.

34. In the Derry City Council 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

35. 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.

36. 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.

37. 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

38. 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.
39. 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, as a consequence, the public not obtaining value for money.
40. Having considered the public interest arguments, the Commissioner is not satisfied that the public interest in 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 there was some information identified in paragraph 25 that did not fall within section 41, the Trust was correct in its decision to withhold the remaining information that it claimed was exempt from disclosure under this section of the Act.

Section 43(2) – Prejudice to commercial interests

41. The Commissioner has considered the various pieces of information within the contract, and other documents, which the Trust claimed were exempt from disclosure under section 43(2), including the information in the financial models which he determined was not exempt under section 41.
42. The information which was withheld comprised a significant amount of financial information which fell into 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;
- the amounts of money actually paid to the Service Provider under the contract;
- charges applicable in relation to non NHS patients treated by the Service Provider;
- financial penalties for failure by the Service Provider to meet performance targets;
- costs related to medical malpractice insurance payable by the Service Provider;
- money payable on termination of the contract;
- maximum payable under performance bond by a specified bank if the Service Provider failed to pay any money owed;
- minimum amounts of payments to be held by the Service Provider before and after distribution of profits to its shareholders.

43. Other information related to:-

- the numbers of procedures to be carried out by the Service Provider under the contract;
- the numbers of procedures actually carried out by the Service Provider;
- discussions by the Trust of contract management strategies.

44. 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).

45. The Trust argued that disclosure of the information that had been withheld 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 be suffer from the disclosure of the information.

46. The Trust believed that, as it purchased treatment services from a variety of competing providers, 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.

47. At the time of the request the Trust and the Department of Health were involved in the procurement for similar services to those covered by the contract. The Trust was, therefore, of the view that disclosure of the withheld information would have prejudiced the commercial interests of both parties by allowing potential bidders in those procurements to know in advance what prices were acceptable or what concessions might be made as part of that procurement exercise.
48. 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.
49. The Trust stated that the Department of Health negotiated the central contracts on which the Trust's contract with the Service Provider was based and 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, particularly as the Department was at the time engaged in a tendering process for the next wave of treatment centres, described as Phase 2.
50. 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.
51. 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.
52. 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).

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

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

1. Degree of similarity between the contract and other negotiations ongoing at the time of the request

54. 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.

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

(i) Negotiations for contracts outside the treatment centre programme

56. The Trust believed that the disclosure of the prices for procedures from the contract for the Shepton Mallet treatment centre could influence the pricing for other contracts outside the treatment centre programme for similar procedures to those undertaken at Shepton Mallet. It was argued that the introduction of the treatment centres had led to a significant drop in the prices for these contracts. If the prices in the contract were disclosed it would lead to the service providers who were bidding for future contracts putting in bids which were just below those agreed for the current contract, rather than more competitive bids. This would prevent the Trust being able to obtain good value for money. Alternatively, it could lead to a squeeze on prices which could produce bids which were unrealistically low being entered in order to win contracts which, in turn, could lead to reductions in the quality of the services provided.

57. The Trust informed the Commissioner that, at the time of the request, it was negotiating with the Service Provider to provide a diagnostic service to GPs. It indicated that it was not aware of any further contracts that the Service Provider was bidding for or negotiating at the time of the request.

58. The Commissioner is of the view that the disclosure of the information withheld under section 43(2) would not have prejudiced the commercial interests of either the Trust or the Service Provider in relation to their negotiations at the time of the

request. These negotiations concerned the provision of diagnostic services, as opposed to the elective procedures being undertaken under the contract for the treatment centre, and were therefore different in nature and not comparable. In addition, neither the Trust nor the Service Provider would gain any advantage over the other in those negotiations from the disclosure of the information contained in the contract as they were already, as parties to that contract, fully aware of what was contained within it.

59. The Trust also indicated that, at the time of the request, it was involved in negotiations for some smaller, ad hoc contracts for similar procedures to those undertaken at the Shepton Mallet treatment centre. It believed that disclosure of the information in the contract would have been likely to have prejudiced these negotiations.
60. 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, including 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 were to be covered by the NHS scheme, provided a guaranteed income for providers for a five year period, allowed spare capacity could be used by Trusts other than the one with whom the contract has been agreed and provided that payments due to the providers were to be guaranteed by the Secretary of State.
61. 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 would have been involved in negotiating at the time of the request, with the exception of contracts for similar treatment centres in Phase 2. 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, for example, the leasing of a building and equipment, would not have been likely to have been on the same large scale and over such a long period of time and would not have incorporated many of the distinctive elements of a treatment centre contract.
62. The Trust could point to economies of scale and a range of other variables when negotiating ad hoc contracts 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 discussing.
63. 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 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 Shepton Mallet treatment centre.

(ii) Negotiations for new treatment centres

64. At the time of the request, the Trust, the Service Provider and the Department of Health were involved in the tendering processes for new treatment centres in Phase 2. Some of these treatment centres were intended to undertake similar procedures to those undertaken by the Shepton Mallet treatment centre. The Commissioner therefore considered the degree of similarity between the requested Wave 1 contract and the negotiations for the treatment centres under Phase 2, which were ongoing at the time of the request.

(a) Stage reached in treatment centre negotiations at the time of the request

65. 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. Once these were received by the Department of Health, Pre Qualification Questionnaires were issued and the responses assessed. 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.

66. At the time of the request the Trust, in conjunction with other Trusts, was involved in assessing tenders for a new treatment centre in Bristol which it was intended would carry out similar procedures to the treatment centre at Shepton Mallet. Responses to the Invitations to Negotiate had been submitted by all the organisations bidding for the contract.

67. In addition, the Service Provider had submitted Invitations to Negotiate in relation to four treatment centres in Phase 2 which it was intended would undertake similar procedures to those at the Shepton Mallet treatment centre. At the time of the request the Department of Health was involved in the procurement process for all fifteen elective treatment centres which had been proposed for Phase 2. The responses to the Invitations to Negotiate had been received from all potential service providers by the time of the request, with the exception of two schemes which were all received by mid August 2006.

68. The Trust, following consultations with the Department, accepted that once bids have been submitted at the Invitation to Negotiate stage of the procurement there were limited opportunities for the bidders to change those bids in the light of information subsequently made available. However, it pointed out that, whilst these opportunities might be limited, it was still a possibility that changes could be made to bids after this stage of the process because of the need for clarification of the procurement requirements or the need to accommodate information or events related to the procurement that have arisen following the original bid submission. Therefore the disclosure of the withheld information could result in

bids being changed by bidders to the detriment of the Department, the Trust and the Service Provider.

69. In addition, there was always the possibility that, even though a Preferred Bidder and Reserve Bidder had been appointed for a particular procurement, they might withdraw before a contract was agreed, resulting in the need for the fresh bids to be invited. If this were to happen, as it had on two previous occasions, it was argued that the disclosure of the withheld information would put into 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 other schemes.
70. The Commissioner's view is that at the time the request was made, given the stage the negotiations had reached for the development of the Phase 2 treatment centres, there would have been a possibility that bidders could have changed aspects of their bids in response to the disclosure of the information contained in the requested Wave 1 contract. He therefore went on to consider whether the Wave 1 and Phase 2 contracts were similar in nature and whether the disclosure of a Wave 1 contract could have a prejudicial effect on the negotiations for a Phase 2 contract.

(b) Similarity of treatment centre contracts in Wave 1 and Phase 2

71. 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.
72. 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.

2. The nature of the information that was withheld

73. 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 tendering process for the development of Phase 2 treatment centres. During a tendering process matters such as prices and volume are of great sensitivity, particularly as the market for this type of work was highly competitive.
74. The Trust believed that disclosure of pricing and activity levels in respect of existing contracts, such as this one, would create significant unfairness in the procurement process. Bidders for future contract would be able to make reasonably accurate assumptions about the Department's value for money requirements whereas previously, in the interests of fair and open competition, bidders had no 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.
75. It was contended that disclosure of this information would be likely to discourage bidders from submitting their most competitive bids and would encourage the delivery of bids falling just within the Department's acceptable value for money parameters. This would result in a matching of prices and reduced competition between bidders and the inflating of the cost to the Department of this programme.
76. 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.
77. The selection criteria used were a combination of clinical, financial and non-financial factors. These included clinical factors such as ability to deliver good clinical outcomes to a high standard, innovation, ensuring safety and quality for patients and the delivery of high levels of patient satisfaction. The non-financial factors included the recruitment and retention of appropriately qualified staff, commitment to 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.
78. 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 as to whether the funding package being put forward could deliver the proposals within the appropriate timeframe which involved an examination of areas such as the bidder's proposed borrowing, equity and working capital. Assessment was also made of the extent to which the bid shared risk with the Department over the contract period and whether the proposals for what would happen at the end of the contract were appropriate.

79. Given the wide ranging factors taken into account in assessing bids in Phase 2, it is 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 to be successful, even regarding prices. The Commissioner is not therefore convinced that disclosure would have resulted in the prejudicial effect that was suggested.
80. If the Trust's arguments were accepted with regard to access to the withheld information allowing predictions to be made about the Department's value for money requirements for Phase 2 contracts, this 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).
81. In addition, the Trust argued that the disclosure of the prices contained in the contract would allow the Service Provider's competitors to outbid it in future tendering exercises because they would be able to predict the prices it would put in future tenders.
82. The Commissioner notes that at the time the request was made, the contract had been in existence for two years. The Trust itself pointed out 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. In the space of two years 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 nearly two years earlier.
83. 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 Shepton Mallet 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. In addition, 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 be ascertained from the information contained in the contract.
84. 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.

85. 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 and has agreed it should have been withheld under section 41. However, he 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 therefore predict prices in its bids for future contracts, thereby prejudicing its commercial interests.

3. Additional arguments raised by the Trust relating to prejudicial effect of the disclosure of the withheld information

(i) Risk pricing

86. 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 the one under consideration, price was a major determinant of risk pricing which 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.
87. 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 which, in turn, would have been likely to have had an unwarranted negative impact on the Service Provider's reputation.
88. As regards the disclosure of information concerning compensation payable for the provider's failure to meet key performance indicators in the contract, the Commissioner is not convinced that this 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 more than two years prior to the request and it would, therefore, be reasonable to argue would no longer be reflective of the Service Provider's likely performance at the time the request was made.
89. In addition, the Trust argued that the disclosure of information relating to risk pricing would have been likely to have demonstrated areas of operational sensitivity to the Service Provider's competitors as they would have become aware of the circumstances in which non performance of contract obligations by the Service Provider would trigger adverse consequences for it under the contract. This could expose the Service Provider to the risk of being targeted by

competitors and others in those key areas. Those in a position to frustrate the Service Provider's effective delivery of services would be able to take deliberate steps that could precipitate contractual penalties for it for failure to meet key performance indicators.

90. The Trust was unable to provide any specific evidence of this having occurred and, as the Commissioner has indicated, it would be difficult to draw conclusions about the Service Provider's performance at the time of the request based on two year old information. 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.

(ii) Innovation

91. 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 and in doing so they would only seek to meet basic requirements but not go further by trying to provide innovation, as this may involve additional cost. This might impact in a detrimental way on the Trust, but would particularly affect the Department of Health which had general responsibility for the programme.
92. In an environment which it has been argued is very competitive, the Commissioner, as previously indicated, is not convinced that the disclosure of pricing information from a two year old contract would result in similar prices being submitted by bidders in a procurement exercise assessed on a wide range of factors. In addition, as the bidders for 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 convinced that the disclosure of prices in relation to previous contracts would, on its own, lead to a stifling of innovation. Bidders would still need to demonstrate innovation to fulfil one of the main assessment criteria if they wished to be successful in the procurement exercise.

(iii) Quality of service

93. The Trust argued that, as a deliverer of healthcare services for the NHS, 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 result in a reduction in the quality of services offered to it. The risk could be 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.
94. 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.

(iv) Contract management

95. The Trust believed that to ensure that best value for money was obtained from the contract for the treatment centre it needed to be able to persuade the Service Provider to be flexible in its implementation of the contract. A pre requisite for this was the need to maintain a good relationship with the Service Provider. The disclosure of the information that had been withheld could have damaged relations with the Service Provider and thus its willingness to be flexible in its dealings with the Trust. The good working relationship that operated at the time was exemplified by the fact that the Trust had been able to obtain agreement from the Service Provider to undertake unused referral work from the early part of the contract during the later part of the contract. The Trust was of the view that that such a flexible relationship would have been jeopardised by the disclosure of the requested information.

96. The Commissioner acknowledges there is a common concern amongst public authorities over the impact that the disclosure of information may have on their relationship with a contractor. However, he believes that those who wish to enter contracts with public sector organisations should now be aware and understand that, as a result of the Act, there will be a greater degree of scrutiny of publicly funded contracts than those in the private sector. He considers that the disclosure of information which is not commercially sensitive, or has lost its commercial sensitivity, should not unduly affect the relationships between a contractor and a public authority, particularly as the contractor would be aware that the public authority was releasing information as part of its statutory duties to the public.

(v) Reduction of pool of bidders

97. 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, thereby decreasing competition and weakening the ability of the Trust and the Department of Health to secure contracts on best terms in future.

98. 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.

(vi) Post contract information

99. Part of the withheld information related to the early stages of the operation of the contract. This comprised information on the numbers of procedures carried out, the amount of money paid to the Service Provider and contract management information.
100. The Trust contended that disclosure of information related to the Service Provider's income from the contract would have been prejudicial to it. It was argued that those seeking to negotiate to provide the goods and services to the Service Provider could use the information to strengthen their own bargaining positions.
101. The Commissioner is not convinced that the disclosure of details of the amounts of money received by the Service Provider would be likely to have a detrimental commercial impact on its negotiations with its suppliers. He does not believe that in a competitive environment that actual or possible suppliers would be able to use this information to the detriment of the Service Provider. If this were raised by a particular supplier in an attempt to increase prices the Service Provider would presumably be able to approach other suppliers for the provision of the goods or services required.
102. As regards the information recording discussions by the Trust as to how it should manage the contract, the Commissioner agrees that the disclosure of a limited amount of information, which is identified in Appendix 1 attached to this notice, would have been likely to prejudice the commercial interests of the Trust. This information outlines the strategies that the Trust proposed to adopt in its discussions with the Service Provider over the implementation of the contract. To put this information into the public domain would have clearly put the Trust at a disadvantage in its discussions with the Service Provider and have inhibited its ability to ensure that it obtained value for money from the contract. The Commissioner went on to consider the public interest test in relation to this information.
103. 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 contract management information identified in the previous paragraph. He therefore does not believe that the exemption in section 43(2) was engaged, subject to the specified limited exception.
104. 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 considers 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 and then went on to consider separately the public interest arguments in relation to the small amount of information concerning the Trust's contract management strategies, which he has determined engaged section 43(2).

Public interest test in relation to the withheld information (with the exception of a limited amount of contract management information)

Public interest arguments against disclosure of the information

105. 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.
106. 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.
107. The Commissioner's view, detailed in the earlier part of this notice, was that he was not convinced that the prejudicial effects that it was claimed might have happened as a result of the disclosure of the information 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 occurred from disclosure.
108. As previously indicated, the Wave 1 contracts were unique in nature and, 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. 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 provide the Service Provider's competitors with details of how it had arrived at those prices. The fact that there was nearly two year gap between the date the contract was agreed and the date of the request would have meant that in such a highly competitive market it would have been difficult to draw conclusions from the contract about the prices that the Service Provider might include in future bids.
109. 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

110. 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.
111. 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 and 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.
112. 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.
113. 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. In its report on independent treatment centres in 2006, the House of Commons Select Committee on Health stated that due to a lack of available information, including details of the contracts, it was "...impossible to assess whether Independent Sector Treatment Centres have in practice proved good value for money." (para 107). It went on to comment on the high degree of uncertainty about the wider benefits and costs of the programme. The Committee indicated that it was not convinced that they provide better value for money than other options available to the NHS.
114. 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 and also contribute to the information available which would have 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 of the contract for the Trust and the other Trusts which were using the treatment centre for the treatment of their patients.
115. 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.

116. 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 as 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.
117. 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.
118. 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 the contract management information

Public interest arguments against disclosure

119. The Commissioner acknowledges that there is a strong public interest in information relating to the strategies being adopted by the Trust in its negotiations with the Service Provider over the implementation of the contract not being placed in the public domain whilst those negotiations were still ongoing. If this information were to have been disclosed it would have potentially provided the Service Provider with a significant advantage in any discussions that took place and inhibited the Trust's ability to ensure that it obtained the best possible value for money in relation to the contract.

Public interest arguments in favour of disclosure

120. The disclosure of the withheld information would have allowed the public to form a view about the appropriateness of the Trust's strategy in relation to discussions with the Service Provider over the implementation of the contract. This would have been particularly relevant to promoting the public interest in accountability and transparency of public authorities for the decisions taken by them. It would have allowed the public to review the strategy that was intended to be used and form a view as to whether it was appropriate in the circumstances.
121. Having considered the relevant public interest arguments, the Commissioner is of the view that the public interest in maintaining the exemption in relation to the

limited amount of information concerning the Trust's contract management strategy, identified in Appendix 1, would have outweighed the public interest in disclosure. He therefore believes that it was exempt from disclosure under section 43(2).

The Decision

122. 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 41 to some of the information in the contract, as identified in Appendix 1;
- it correctly applied section 43(2) to some of the information related to its management of the contract, as identified in Appendix 1.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it incorrectly applied section 41 to some of the information in the contract, as identified in Appendix 1;
- it incorrectly applied section 43(2) to information in the contract and some of the information related to its management of the contract, as identified in Appendix 1.

Steps Required

123. 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 and which is detailed in Appendix 1.

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

Failure to comply

125. 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

126. 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@dca.gsi.gov.uk

127. 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 26th day of February 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Appendix 1

Schedule detailing the Commissioner's decision in relation to the application of exemptions to the contract and other documents

Section of contract	Description of information	Exemption claimed	Commissioner's decision
The Contract and Schedules			
Para 28.24	Cost of medical malpractice insurance.	Section 43(2)	Not exempt
Schedule 3 part 5 para 4	Percentage of national tariff chargeable by provider for non NHS patients.	Section 43(2)	Not exempt
Schedule 3 part 5 para 6	Percentage of revenue from non NHS patients payable by provider to Trust.	Section 43(2)	Not exempt
Schedule 6 part 5 table 3	Financial penalties payable by provider for failure to meet performance indicators.	Section 43(2)	Not exempt
Schedule 6 part 5 annex 1	Standard prices per procedure and minimum take values.	Section 43(2)	Not exempt
Schedule 7 part 1 para 5.2(i)	Restriction on changes to prices in the course of a calendar year.	Section 43(2)	Not exempt
Schedule 7 part 1 para 13.10(a) and (c)	Cost of medical malpractice insurance.	Section 43(2)	Not exempt
Schedule 7 part 1 para 13.10(c)(i) and (ii)	Amount of money to be recovered from provider if there is change to provision of medical malpractice insurance.	Section 43(2)	Not exempt
Schedule 9 part 6	Compensation payments on termination of the contract and residual value.	Section 43(2)	Not exempt
Schedule 10 part 3	Maximum total amount to be spent on transferable equipment.	Section 43(2)	Not exempt
Schedule 10 part 3	Amount to be spent on each item of transferable equipment.	Section 43(2)	Not exempt
Schedule 12	Financial model detailing the provider's profit and loss projections including	Section 41 and 43(2)	Exempt from disclosure under section 41 except

	tax liability and shareholder loans.		for information relating to :- (i) the volume of each type of procedure to be carried out by 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.
Schedule 13 part 4 appendix 2	Fee payable to independent tester of building work undertaken.	Section 43(2)	Not exempt
Schedule 15 para 3.7.3	Maximum payable for transferable equipment.	Section 43(2)	Not exempt
Schedule 15 part 1,2 and 3	Amounts payable on exercise of option to purchase or termination of lease.	Section 43(2)	Not exempt
Schedule 18	Maximum amounts payable by bank under performance bond.	Section 43(2)	Not exempt
Schedule 19 part 2 para 2.1(a) and 2.2(c)	Minimum amounts of payments to be held by provider before and after distribution of profits to shareholders.	Section 43(2)	Not exempt

The Deed of Variation

Schedule 2 – Revised Schedule 6 part 5 table 3 to the contract	Financial penalties payable by provider for failure to meet performance indicators.	Section 43(2)	Not exempt
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Schedule 5	Financial models produced by the provider.	Section 41 and 43(2)	<p>Exempt from disclosure under section 41 except for information relating to :-</p> <p>(i) the volume of each type of procedure to be carried out by provider in each of the five years of the contract;</p> <p>(ii) the price to be paid for each type of procedure in each of the five years of the contract; and</p> <p>(iii) the total amounts to be paid for each type of procedure in each of the five years of the contract.</p>
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Monthly performance reports

	<p>Details of the number and value of procedures carried out, or expected to be carried out, in different speciality areas and comparisons with targets set in the contract.</p> <p>Descriptions of contract mechanisms which have been excluded from the contract.</p> <p>Discussions by the Trust as to contract management strategies in relation to the provider.</p>	Section 43(2)	<p>Not exempt</p> <p>Not exempt</p> <p>Not exempt except for:-</p> <p>(i) August 2005 report – page 13 – paragraph 6.12 –</p>
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			<p>4th, 5th and 6th sentences</p> <p>(ii) March 2006 report – page 5 – sentence before start of paragraph 3.1</p> <p>(iii) April 2006 report – page 5 – paragraph 4.4</p> <p>(iv) May 2006 report – page 5 – last sentence of paragraph 4.</p>
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Presentations to Strategic Health Authority Board seminars

	Details of the value and numbers of procedures carried out and comparisons with targets set in the contract.	Section 43(2)	Not exempt
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Weekly numerical returns to Department of Health

	Cumulative number of referrals received by, and procedures carried out by, the provider in each speciality area.	Section 43(2)	Not exempt
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Legal Annex

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.”

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).”