

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 June 2013

**Public Authority:** Sussex Partnership NHS Foundation Trust

**Address:** Swandean  
Arundel Road  
Worthing  
West Sussex  
BN13 3EP

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to Sussex Partnership NHS Foundation Trust's ("the Trust") Consultant Pay Review. The Trust identified a report produced by an external party which had been commissioned for the Trust but considered this exempt under section 41 of the FOIA. The Trust also refused to provide the exact figure paid to the external company to produce the report but did offer to provide this within a banding of ten thousand pounds.
2. The Commissioner's decision is that the Trust has incorrectly applied the section 41 exemption in order to withhold the report and has incorrectly applied the section 43 exemption to refuse to provide the specific amount paid to the company who produced the report.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
  - Disclose the amount paid to KPMG for its services
  - Disclose the KPMG report
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 26 June 2012, the complainant wrote to the Trust and requested information in the following terms:

*"I am making this request under the FoI Act for information about the 'consultant pay review', being the process to investigate and rectify over- and under-payment of remuneration to its medical consultants.*

*I wish to receive copies of reports which:*

*1 examine the circumstances and scale of, and reasons for, the over- and under-payment of remuneration and the incorrect reporting to the NHS Pensions Agency;*

*2 identify the defects in systems (such as HR, payroll, ICT, in-year financial monitoring, financial planning and budgeting, internal and external auditing) which allowed these errors to continue for several years;*

*3 set out the management actions to rectify the past errors and the defects in systems, including the names of external organisations engaged to assist the Trust and the cost to public funds of that assistance."*

6. The Trust responded on 24 July 2012. It stated that it had commissioned KPMG to assist in identifying what had gone wrong and to work towards putting it right. KPMG produced a report and an action plan but the Trust considered the report exempt on the basis of section 41. A copy of the action plan was provided to the complainant. The Trust also stated it could not disclose the amount paid to KPMG to commission its services as this information was commercially sensitive and therefore exempt on the basis of section 43(2) of the FOIA.
7. The complainant requested an internal review of this decision on 29 September 2012 and following an internal review the Trust wrote to the complainant on 8 October 2012. It stated that it upheld its original decision to refuse the request and still considered the information exempt.

## Scope of the case

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8. The complainant contacted the Commissioner on 4 January 2013 to complain about the way his request for information had been handled.

9. The complainant raised particular concerns about the use of section 41 to withhold the report and the fact that the Trust appeared to consider the KPMG report to be the only information within the scope of the request (except for the amount paid to KPMG).
10. The Commissioner has considered these points and as the request was for *copies of reports* which specifically investigate and identify defects in remuneration payments, he is satisfied by the Trust's insistence that no other reports exist covering this information. As such he considers the scope of his investigation to be to determine if the Trust has correctly applied section 41 to withhold the KPMG report and section 43 to refuse to provide the amount paid to KPMG for their services.

## **Reasons for decision**

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

11. Section 41(1) of the FOIA states that information is exempt if it was obtained by the public authority from any other person and if disclosure of the information would constitute a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not subject to a public interest test.

*Was the information obtained from another person?*

12. The Trust identified that the KPMG report fell within the scope of the request as it contained a detailed review into over and under payments made to consultants and provided recommendations. This report was prepared by KPMG specifically for the use of the Trust internally.
13. The information contained within the report is therefore information obtained solely from a third party (KPMG) and the Commissioner therefore accepts that the first limb of section 41 is met and the Trust obtained the information from another person.

*Would disclosure constitute an actionable breach of confidence?*

14. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
  - Whether the information has the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence; and

- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
15. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. This report was commissioned after the Trust identified that over and under payments had been made to a number of consultants. The Trust recognised the need to establish the extent of the over and under payments to ensure the errors were corrected and controls put in place to prevent them recurring.
  16. The report itself contains assumptions and observations made by KPMG and contains detailed and complex information about internal processes and procedures at the Trust. The Trust therefore argues that the information should not be disclosed as it is not information which is normally accessible or in the public domain.
  17. The Commissioner has not found any evidence to suggest the report is in the public domain although the existence of the report is known and the management action plan has been made available. The Commissioner does accept that the report is important as the purpose of it was to identify where things had gone wrong to rectify errors and prevent them recurring in a situation involving the use of public money. He therefore accepts that the report has the necessary quality of confidence.
  18. When considering if the information was imparted in circumstances importing an obligation of confidence the Commissioner is aware that an obligation of confidentiality may be expressed explicitly or implicitly. The Trust has indicated that KPMG were commissioned to investigate consultant pay and produce the report and any information was gathered and presented in line with the NHS terms and conditions of procurement. These terms and conditions contain a section on confidentiality which are mostly concerned with ensuring that contractors collecting information are aware of their obligations to keep it confidential but also require the authority to consider the issue of disclosure of information it receives very carefully under the FOIA as there may be an implied duty of confidentiality to the contractor.
  19. The Commissioner wrote further to the Trust on this point and asked it to clarify whether confidentiality had been either explicitly or implicitly implied. The Trust pointed to the section of the NHS terms and

conditions for procurement<sup>1</sup> which contain the clauses relating to confidentiality. Section 35.1 is most relevant and states that:

*In respect of any Confidential Information it may receive from the other party ("the Discloser") and subject always to the remainder of this Clause 35, each party ("the Recipient") undertakes to keep secret and strictly confidential and shall not disclose any such Confidential Information to any third party, without the Discloser's prior written consent provided that:*

*35.1.1 the Recipient shall not be prevented from using any general knowledge, experience or skills which were in its possession prior to the commencement of the Contract;*

*35.1.2 the provisions of this Clause 35 shall not apply to any Confidential Information which:-*

*(a) is in or enters the public domain other than by breach of the Contract or other act or omissions of the Recipient;*

*(b) is obtained by a third party who is lawfully authorised to disclose such information; or*

*(c) is authorised for release by the prior written consent of the Discloser; or*

*(d) the disclosure of which is required to ensure the compliance of the Authority or (as the case may be) any Beneficiary with the Freedom of Information Act 2000 (the FOIA).*

20. The Commissioner therefore accepts that, as these are the general terms and conditions used by the NHS when procuring services, there was an obligation of confidence implied when the contract for services was entered into by KPMG. However, these terms and conditions do go on to prescribe a number of circumstances in which disclosure of information may be necessary, including where it is necessary for the public authority to fulfil its obligations under the FOIA.

21. The final test the Commissioner must consider is whether unauthorised use of the information would be to the detriment of the confider. In this respect the Trust has argued that the information contained in the

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<sup>1</sup> <https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services>

report is sensitive in nature in that it provides opinions on the effectiveness of teams, departments and individuals (who potentially could be identified with cross-referencing). The Trust overall considers that disclosure would be detrimental to its functions.

22. However, when considering this final point the Commissioner firstly must consider the nature of the information and determine if it is of a personal or commercial nature. In this case the information is clearly commercial in nature and therefore where information of this sort has been imparted in confidence the Commissioner considers there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged.
23. The Commissioner acknowledges that the report does contain detailed and, at times, complex descriptions of processes and does provide a depth of information on systems employed by the Trust which may not otherwise be available. That being said the Commissioner also considers that the disclosure of the Management Action Plan showing identified issues and how the Trust intends to address them has already released information on the inner workings of the Trust which may not otherwise have been known.
24. Regardless of this and whether the Commissioner considers there may be any detriment to the Trust as a result of disclosure of the report; his main focus is on the potential detriment to the *confider* which in this case is KPMG.
25. In its submissions to the Commissioner the Trust did not specifically make any reference to the potential detriment to KPMG that may occur from a disclosure of the information. The Commissioner asked the Trust to clarify if it had had any contact with KPMG to establish if it had any objections to the disclosure of the report and the Trust confirmed it had not contacted KPMG.
26. On this basis the Commissioner does not consider the Trust has sufficiently demonstrated there would be any detriment to the confider from a disclosure of the information and he has concluded that the exemption is therefore not engaged. As this is the only exemption the Trust were relying on to withhold the report the Commissioner now requires the Trust to disclose the requested information.

### **Section 43 – commercial interests**

27. The complainant had also asked for the "*cost to public funds*" of the assistance provided by external organisations in examining and identifying defects and rectifying errors in relation to the consultant pay review. The Trust has considered this to be the amount paid to KPMG for

its services in this case but has relied on section 43(2) of the FOIA as a basis for refusing to supply this figure.

28. The Commissioner has noted that the Trust has offered to provide this information to the complainant in a banding of within £10 thousand pounds rather than as an exact figure but this is not an option the complainant has chosen to accept. As such the Commissioner has gone on to consider whether the Trust has correctly refused to supply this information as commercially sensitive information.

29. Section 43(2) of the FOIA states 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)."*

30. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance<sup>2</sup> on the application of section 43 which states that:

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

31. The Commissioner has considered the withheld information in this case, that being an amount paid to KPMG for commissioning their services in identifying what went wrong and how to mitigate against future similar problems, and accepts that a contractual value is information relating to a commercial activity as it is the amount paid to render services.

32. However, the information will only fall within the scope of the exemption if its disclosure would, or would be likely to, prejudice a commercial interest. The Commissioner has therefore gone on to consider the nature of the prejudice which the Trust has argued that disclosure would create.

33. In order to demonstrate prejudice the Commissioner considers the prejudice should be seen to be real, actual or of substance and the

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

public authority should be able to show a causal link between the potential disclosure and the prejudice.

34. The Trust has not provided detailed arguments to support its view that the information, should it be disclosed, would or would be likely to prejudice the commercial interests of KPMG or the Trust. Nevertheless the Commissioner has considered the central question in this case to be whether the release of an amount paid would be prejudicial as it would provide competitors with information on how much KPMG charges for its services.
35. The Commissioner accepts that the release of the amount paid would clearly reveal some information to competitors but the likelihood of prejudice occurring would be dependent on several factors. In assisting with his consideration of the likelihood of prejudice the Commissioner has considered previous decisions he has made on this subject.
36. In particular in one case<sup>3</sup> a request made for the amounts spent on outside consultants. The Commissioner found the key question in this case was not 'what would happen if this sort of information were to be disclosed' but 'what would happen if this *particular* information were to be disclosed'. When considering the prejudice the Commissioner specifically highlighted that the request did not involve asking for the breakdown of spending, no details of contracts or individual services provided. The Commissioner considered the information to be of such a high level that it was not particularly commercially sensitive and was not persuaded that the information would be of use to competitors.
37. There are clear similarities between these cases, particularly in that the information requested in this case is also high level information. The Commissioner is mindful, however, that there is likely to be a general understanding in the consultancy world as to what is involved when a company is commissioned to look into an issue such as this and there could therefore be an argument that disclosure of just the fee paid would be enough for competitors to gain a firm idea of fee structures.
38. However, taking into account the Commissioner's previous decisions and the arguments presented he maintains that the necessary prejudice has not been demonstrated in this case. He recognises that within the consultancy world there is probably a general understanding of the sort of work that is required when commissioned to undertake this type of work. However, there are still a number of variables such as how long

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<sup>3</sup> ICO decision notice FS50178376



the contract was, how many people were working on the project, the services included within the aggregated amount, the seniority of the people involved and the nature of the work that is being managed. Without this information it is difficult to see how the total amount could be used to gain any competitive advantage. It is the breakdown and the lower level detail which is likely to carry the greater commercial sensitivity.

39. The Commissioner therefore considers that the Trust has not demonstrated the causal link between the specific withheld information and the alleged effects of disclosure. The Commissioner is not satisfied that disclosure would have a prejudicial effect as the disclosure of a single contractual value is unlikely to be useful in providing competitors with any commercial advantage without a more detailed breakdown of the services and work involved.
40. The Commissioner has therefore concluded that the Trust has failed to explain the nature of the implied prejudice and the causal link between any such prejudice and the disclosure of the information. As such he has concluded that the Trust has failed to demonstrate that the exemption is engaged and he has not gone on to consider the public interest test.
41. The Commissioner therefore requires the Trust to disclose the costs paid to KPMG to assist in the Consultant Pay Review.

## Right of appeal

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42. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
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SK9 5AF**