

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

### **Decision notice**

**Date:** 11 March 2015

**Public Authority:** Southern Health NHS Foundation Trust  
**Address:** Sterne 6  
Tatchbury Mount  
Calmore  
Southampton  
SO40 2RZ

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

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1. The complainant made a freedom of information request to the Southern Health NHS Foundation Trust "the Trust" for a copy of the user guide for "RiO" its electronic Patient Record System. The Trust refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### **Request and response**

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3. On 12 September 2014 the complainant made a freedom of information request to the Trust which asked for the document(s) entitled "RiO Standard Operating Procedures and Quick Reference Guides" which had been referred to on the Trust's website.
4. The Trust responded to the request on 30 September 2014 when it confirmed that the requested information was held but that it was considered to be exempt from disclosure under section 43(2) of FOIA (commercial interests).

5. On the same date, the complainant asked the Trust to carry out an internal review of its handling of the request. In doing so he challenged the Trust's grounds for applying the section 43(2) exemption and questioned the likelihood that disclosure would prejudice the commercial interests of any person.
6. The Trust presented the findings of the internal review on 27 October 2014. The review upheld the decision to withhold the requested information under section 43(2) and provided a further explanation in response to questions asked by the complainant.

### **Scope of the case**

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7. On 2 November 2014 the complainant contacted the Commissioner to complain about the Trust's refusal of his request.
8. The Commissioner subsequently agreed with the complainant that the scope of his investigation would be to consider whether the section 43(2) exemption had been correctly applied and whether or not the requested information ought to be disclosed.

### **Reasons for decision**

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#### Section 43(2) – Commercial interests

9. Section 43(2) provides that information is exempt if its disclosure would prejudice the commercial interests of any person, including the public authority holding it.
10. Section 43(2) is a prejudice based exemption which means that in order for the information to be withheld the Trust must be able to identify and explain the nature of the prejudice it envisages would be caused by disclosure. Following the test adopted by the Information Tribunal in *Hogan and Oxford City Council v the Information Commissioner*, this means that the public authority must be able to show that the prejudice claimed is "real, actual or of substance" and that there is some "causal link" between disclosure of the information and the prejudice claimed.
11. The withheld information in this case constitutes the User Guides and Standard Operating procedures for the Rio system. These are very comprehensive and lengthy documents. They include screen layouts as well as details of how the 'Rio' programme works and its functionality.

The public authority argues that disclosure would prejudice the commercial interests of Servelec, the company who it contracted to provide RiO (its electronic patient records system). This is because it would allow competitors in the same market to determine how the system operates and then copy and reproduce this for their own gain. In particular it said that disclosure would provide information on the:

- Layout design
  - Look and feel of the system
  - Process flow
  - What data items are captured in particular screens
12. It explained that a major factor in the success of a system such as RiO is user experience and this helps give it a competitive edge. Disclosure would allow a competitor to improve their own designs based on RiO.
  13. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns. In this case the Trust has provided the Commissioner with copies of communications with the company concerned and from this it is clear that the reasons for applying the section 43 exemption reflect the genuine concerns of the third party.
  14. The complainant challenged the reasons for applying the exemption and suggested that just because a competitor had a copy of the user manual would not allow them to develop a competing system. In the Commissioner's view this misses the point. The argument is not that disclosure would allow any person to produce a similar product from scratch. Clearly that is not possible with a very sophisticated piece of software which the Commissioner is told took a huge investment of time and money to develop. What it would do, however, is allow a competitor in what is a very small and competitive market the ability to improve on their own designs.
  15. The Trust explained that within the healthcare software market competing companies do not have the same visibility of each other's product capabilities as compared to say other mainstream markets. For example, Microsoft can buy copies of all Apple's products (together with user manuals etc) and vice versa but it explained that the same

dynamics are not true within a non-consumer software market like Healthcare IT.

16. The complainant also suggested that even if the information could be used by a competitor, any prejudice caused by disclosure could be protected by copyright. However, the Trust said that in its view copyright was limited as to the extent to which it can protect any software. It explained that it does not protect key elements of the investment Servelec makes in the development of the product, namely the features described above, which all contribute to give the user an experience which is intended to be unique to RiO. It said that whilst copyright protects the vehicle for delivering that experience (i.e. the computer code itself) it does not protect the "end user experience itself". Therefore, other companies could modify their existing products to replicate elements of RiO without infringing Servelec's copyright where it would have no legal recourse.
17. Finally, the complainant highlighted that a previous version of the requested information had been published online and this suggests that disclosure would be unlikely to cause any harm. However, the Commissioner would reject this argument as he understands that this was an unauthorised disclosure and he notes that on being informed of this by the Trust, Servelec arranged for it to be removed immediately. The Commissioner does not consider that this is proof of a lack of prejudice. Indeed, the Commissioner would agree with the Trust that "the damage caused by an unauthorised publication of confidential information is rarely immediate in nature and the full extent of any damage can be hard to ascertain".
18. The Commissioner has reviewed a sample of the withheld information and he is satisfied that it would be of use to a competitor by providing valuable insight into a rival product, how it is used and what makes it successful. A competitor would be able to use that information to improve its own product in such a way that the Trust would be unable to protect its copyright. The Commissioner is also mindful that the market in which this company operates is a small and competitive one in which information on other products is not freely available.
19. The timing of the request is also significant in this case as the Commissioner understands that all NHS Trusts are currently in the process of tendering for new electronic patient record systems. Therefore there is a greater likelihood of prejudicing Servelec's commercial interests if its competitors are given an unfair advantage in any negotiations. The Commissioner also notes that the Trust has signed a copyright licence with Servelec which includes a non-disclosure agreement. This is not in itself a reason not to disclose the information

under FOIA. However, it does indicate the importance that Servlec attached to this information and the prejudice that would be caused if it was disclosed.

20. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore he has now gone on to consider the public interest test.

### **Public interest test**

21. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

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

22. The complainant advanced the following arguments in favour of disclosure of the requested information:
- It would assist patients in making better and more detailed subject access requests under the Data Protection Act 1998.
  - Disclosure would promote transparency because it will provide the definitive extent of all the personal data they collect on patients.
  - Disclosure would promote accountability in the spending of public money by enabling informed debate on the merits of RiO and whether it is better or worse than competing systems.
  - Detailed information and process flows in the Standard Operating Procedures will aid patients in understanding the decisions taken by the Trust that affect their lives.
23. For its part, the Trust acknowledged that there was a legitimate public interest in releasing information on how technology is being used for service provision and how it can improve efficiencies in terms of budget and operationally. It also said that there was a public interest in how public money is being spent by the Trust and who it is being spent with.

### **Public interest arguments in favour of maintaining the exemption**

24. As regards the public interest in maintaining the exemption the Trust said that there was a public interest in ensuring that it operates in a fair and competitive market whilst securing contracts and licensing agreements. It also explained that it was entering a direct relationship with Servelec to provide a new version of Rio. It was also in the process of negotiating a related contract with Servelec to provide a data centre

to host the Rio application. Breaching the existing agreement would, it said, significantly prejudice this process.

25. The Trust also said that there would be heavy financial costs if it lost the contract with Servelec due to breaching the existing agreement as it would need to secure a new contract with local service providers to host the Rio application. It explained that all NHS Trusts are in the process of signing their own contracts with Local Service Providers (LSP's) and so it would be forced to sign up with a new LSP and be their sole customer. The Trust would then be liable for the significant costs of maintaining the programme which would severely impact on the financial viability of the Trust and its ability to maintain services.
26. The Trust also sought to argue that disclosure could prejudice its own commercial interests because the information could be used by other competing Trusts or private providers when tendering for Clinical Commissioning Group (CCG) contracts. The Commissioner has not considered these arguments as the Trust has not adequately explained how this might occur and, section 43 has been engaged on the basis that disclosure would prejudice the commercial interests of Servelec. Therefore, any public interest arguments must focus on the harm that would be caused to this particular party and how this would impact on the public interest.

### **Balance of the public interest arguments**

27. The Commissioner has considered first the public interest arguments in favour of disclosure and finds that these are limited. His view is that disclosure would not in any real sense help someone exercise their subject access rights under the Data Protection Act 1998 as suggested by the complainant. There does not appear to be any barrier to an applicant being able to request their information at present. For instance, an applicant would simply be able to request a copy of their medical records or 'any personal information you hold about me' to obtain full disclosure. Disclosure of the RiO user guides would not make this any easier for patients.
28. Similarly, disclosure would add little to public understanding as to the merits of RiO and accountability in the spending of public money. The requested information does not include any contractual information such as costs nor does it include any information on competing systems or the Trust's rationale for choosing this particular system over others. The Commissioner does accept that there is a general public interest in disclosure in the sense that any disclosure of public information promotes transparency and accountability, but he finds that on the

particular facts of this case the arguments for disclosure carry little weight.

29. As regards the public interest in maintaining the exemption the Commissioner's view is that there is a strong public interest in protecting the commercial interests of companies and ensuring that they are able to compete fairly. Companies should not be disadvantaged as a result of doing business with the public sector.
30. In particular, the public interest in protecting the commercial interests of the company concerned is especially strong given the timing of the requests. As explained above, the Trust and indeed all other NHS Trusts, are in the process, and were at the time of the request, of negotiating new contracts for electronic care records systems and hosting services and therefore disclosure would have had a greater impact on Servelec's commercial interests.
31. Given the limited public interest in disclosure and the sensitive timing of the request, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

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

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

33. 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.
34. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
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