

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2016

Public Authority: East Cheshire NHS Trust
Address: Silk House, Hope Drive
Macclesfield District General Hospital
Victoria Road
Macclesfield
Cheshire
SK10 3BL

Decision (including any steps ordered)

1. The complainant has requested information relating to a contract between East Cheshire NHS Trust and Parking Eye. The Trust provided the complainant with some of the information requested but refused to provide some information under section 40(2), 41 and 43(2) FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2), 41 and 43(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 30 December 2015 the complainant requested information of the following description:

"1. Could you please supply a dated UNREDACTED copy of the contract between East Cheshire NHS Trust and Parking Eye?
2. Can you please confirm whether any part of the Trust was in 'Special Measures' on 6th October 2014?
3. Can you please supply details of how the Trust incentivises their car park management by Parking Eye?"

5. On 6 January 2016 the Trust responded. It provided a response to part 2 of the request. It directed the complainant to a redacted version of the contract to respond to parts 1 and 3 of the request. It said the information had been redacted under section 43(2) FOIA.
6. On 14 January 2016 the complainant requested information of the following description:

"Please provide a breakdown by month, from the commencement date of the contract, the VAT charges issued to the Trust by Parking Eye in regard to parking charge notices issued by same on behalf of the Trust."
7. On 21 January 2016 the Trust responded. It refused to provide the requested information under section 43(2) FOIA.
8. The complainant requested an internal review as he was dissatisfied with the Trust's response. The Trust sent the outcome of its internal review. It upheld its original position and also applied section 41 FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 3 March 2016 to complain about the way his request for information had been handled.
10. In its response to the Commissioner, the Trust additionally applied section 40(2) to some of the redactions made to the contract.
11. The Trust withheld terms within the contract relating to pricing and details of the VAT charges issued to the Trust relating to car parking under section 43(2) FOIA. This is because the VAT charge information would enable competitors to work out Parking Eye's income from the contract. The Trust withheld terms within the contract which contained technical information received by the Trust from ParkingEye which is company specific information and which related to how the system is operated behind the scenes. Finally personal data within the contract was withheld under section 40(2) FOIA.
12. The Commissioner has considered whether the Trust was correct to apply section 40(2), 41 and 43(2) FOIA to the withheld information.

Reasons for decision

Section 43 – commercial interests

13. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
14. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹
15. Upon viewing the withheld information the Commissioner considers that it relates to the commercial arrangements in place between the Trust and ParkingEye, particularly in relation to pricing for services provided to the Trust and VAT payments which would enable Parking Eye's income from the contract to be calculated. This does therefore fall within the scope of the exemption.
16. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

The nature of the prejudice

17. The Trust is of the opinion that the commercial interests of Parking Eye would be prejudiced through disclosure of the information withheld under section 43(2) FOIA.
18. The Trust contacted Parking Eye to obtain their views as to the nature of the prejudice in this case. Parking Eye explained that it does not have a monopoly over the market and disclosure of the commercial arrangements, relating to pricing, currently in place with the Trust will

¹ See here:

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

have an impact on their ability to compete. It said that disclosure of this information would reveal details of their pricing which could be used by their competitors to undercut ParkingEye or to poach their clients. ParkingEye also confirmed that this information is not already known and would not be easily obtained by competitors; therefore disclosure would cause them harm that would not otherwise occur.

19. The Trust confirmed that Parking Eye is currently carrying out preliminary evaluation and assessment exercises as to whether to bid for car park management services for two other Trusts. It said that whilst the exact commercial model for these two Trusts is yet to be finalised, in the event that Parking Eye decides to submit a bid, this is likely to be based on a similar commercial basis as is in place with the Trust. It provided the Commissioner with a summary of the commercial pricing arrangements and VAT charges which any subsequent bids would be based upon. It explained that as it is anticipated that other car park management providers would also be submitting bids for the same services, disclosure of the commercial arrangements in place between Parking Eye and the Trust could enable a competitor of Parking Eye to submit a bid for the same services, but at a reduced rate.
20. It went on that Parking Eye is not privy to the commercial deals offered by other car park management companies as they are not privy to Parking Eye's, so Parking Eye considers that the consequence of disclosure of its commercial arrangements with the Trust would restrict its ability to compete in respect of these two tenders, any future tenders with the Trust and potentially any other business that Parking Eye wishes to submit a bid for in the future.
21. It went further and argued that if the basis of the commercial arrangements between Parking Eye and the Trust were to be disclosed, there is a real possibility that other car park management providers could use this as an opportunity to contact Parking Eye's existing client base and to encourage them to terminate the services provided by Parking Eye by offering such clients an improved commercial deal. It said that this would have a detrimental impact on its ability to carry out its business of car park management.

Likelihood of prejudice

22. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and

significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”

23. In this case the Trust has argued that disclosure would prejudice the commercial interests of Parking Eye.
24. To demonstrate that the prejudice would occur, the Trust must show that the prejudice occurring is more probable than not. This is a fairly high burden to meet. The Trust has argued that if this information were disclosed, it is more probable than not that potential competitors of Parking Eye would use this information within the two future procurements specified to gain a commercial advantage. The withheld information is contained within a live and ongoing contract and if Parking Eye were to submit bids in relation to the two procurements it is considering, it would be based upon similar commercial terms. In terms of the VAT payments, which would reveal how lucrative the contract with the Trust is to Parking Eye, this would provide insight to competitors to determine whether to compete in this area in the future. The Commissioner is therefore satisfied that this level of detail would be a commercial advantage to potential competitors within these upcoming procurement exercises and in terms of revealing how lucrative the current contract is to Parking Eye. Section 43(2) was therefore correctly engaged in this case.
25. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest in this case.

Public interest test

Public interest arguments in favour of disclosure

26. There is a general public interest in terms of openness and accountability as to how the Trust is contracting out its car parking management and upon what terms.

Public interest arguments in favour of maintaining the exemption

27. The Trust argued that there is a public interest in ensuring that companies such as ParkingEye can compete fairly so that the public sector is able to obtain best value for money.

Balance of the public interest arguments

28. The Commissioner considers that there is a public interest in disclosure of the withheld information as it promotes openness and transparency surrounding Trust operation and contracting out of services, as in this case car park management.

29. However, equally, the Commissioner does not consider that it would be in the public interest to damage Parking Eye's commercial position by disclosure of current commercially sensitive information which would be relied upon by their competitors to obtain a commercial advantage in upcoming procurements. This is because it is better to have competitive tenders so that public authorities such as the Trust can obtain best value for money when putting out tenders for procurement of services.
30. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly applied.

Section 41 – information provided in confidence

31. Section 41(1) of the FOIA states 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 that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Was the information obtained from another person?

32. The Trust has stated that the information redacted under this exemption was provided to it by Parking Eye. It said that whilst the information redacted under this exemption is contained within the agreed contract, it is technical information received by the Trust from Parking Eye which is company specific information and which related to how the system is operated behind the scenes e.g. details about cancellations of Parking Charges.
33. Whilst the Commissioner's position is that information within a contract are mutually agreed terms between the contracting parties and therefore not provided from one to another, his guidance does acknowledge that (paragraphs 19-20)²:

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

"However, we recognise that in some cases a contract will contain technical information, given to the authority by the other party to the contract, in addition to the mutually agreed terms and obligations. Sometimes the technical material will form part of main body of the contract, although more often than not it will feature in separate schedules.

Where technical information is included, it may, depending on the circumstances of the case, constitute information obtained by the authority from another person."

34. Upon viewing the information withheld under this exemption, the Commissioner is satisfied that it does constitute technical information provided to the Trust by Parking Eye. Much of it is contained in attached schedules however some of it is contained in the main body of the contract. The requirement of section 41(1)(a) is therefore satisfied.

Would disclosure constitute an actionable breach of confidence?

35. 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.

Does the information have the necessary quality of confidence?

36. 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.
37. The Commissioner does not consider that the parts of the contract that have been withheld under section 41 FOIA have been put into the public domain and furthermore he does not consider that technical information which is company specific information and which related to how the system is operated behind the scenes is trivial.
38. The information redacted from the contract under section 41 FOIA does therefore have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

39. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
40. The Commissioner considers that at the very least there was an implicit obligation of confidence as the technical information was shared by Parking Eye with the Trust for the purpose of entering into the contract with it. The Trust has already confirmed that Parking Eye would not want this information to be put into the public domain. When sharing technical information within this context, by its nature the Commissioner considers that this would attract an implicit obligation of confidence.

Detriment to the confider

41. The Trust has argued that the redacted information could be utilised by either competitors of Parking Eye or by motorists to avoid gaining a Parking Charge, to seek to receive a Parking Charge in bad faith, or to dishonestly request a cancellation. This would cause a detriment to Parking Eye.
42. On this basis the Commissioner is satisfied that disclosure would cause a detriment to Parking Eye.

Is there a public interest defence for disclosure?

43. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
44. The Commissioner acknowledges that there is a public interest in openness and accountability surrounding contracts within the NHS but the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
45. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong

since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

46. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant; and that the Trust would not have a public interest defence for breaching its duty of confidence.
47. Having considered all the circumstances of this case, and information withheld under section 41 FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
48. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Section 40(2)

49. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
50. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
51. The Trust has redacted the names and direct contact details of four individuals, either NHS staff or Parking Eye staff.
52. In order to reach a view on the Trust's arguments the Commissioner has first considered whether this would constitute the personal data of third parties.
53. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,

- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
54. The Commissioner does consider that the names and direct contact details of the four individuals would be information from which they would be identifiable. It does therefore constitute personal data.
 55. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure of this information would be fair.
 56. When considering whether the disclosure of this information under the FOIA would be fair, the Commissioner has to take into account the fact that FOIA is applicant blind and that disclosure should be considered in the widest sense – that is, to the public at large.
 57. The Commissioner does not consider that the four data subjects concerned are senior members of NHS staff or Parking Eye staff and nor do they occupy public facing roles. Some of the names/contact details appear as potential references relied upon by Parking Eye. The Commissioner does not consider that these individuals would have an expectation that their personal data would be disclosed in the context of this contract.
 58. The Commissioner has however gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subjects set out above.
 59. The Commissioner does not consider that there is any significant legitimate public interest in disclosure of the names and contact details of the four individuals named in the contract. It would not, to any significant extent, promote openness or transparency surrounding this contract.
 60. After considering the nature of the withheld information, and the reasonable expectation of the data subjects, the Commissioner believes that the disclosure under FOIA would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subjects in this case.
 61. Therefore the Commissioner believes that section 40(2) FOIA is engaged, and provides an exemption from disclosure.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. 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.
64. 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

Gemma Garvey
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SK9 5AF