

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2017

Public Authority: East of England Ambulance Service NHS Trust

Address: Whiting Way
Melbourn
Cambridgeshire
SG8 6EN

Decision (including any steps ordered)

1. The complainant requested a copy of the Trust's Remedial Action Plan (RAP). The Trust refused the request under section 43(2) – prejudice to commercial interests. During the course of the Commissioner's investigation the Trust disclosed the majority of the information but continued to withhold some information under section 43(2) and withheld other information under section 36(2)(c) – prejudice to the conduct of public affairs.
2. The Commissioner's decision is that section 43(2) is not engaged. The Commissioner is satisfied that section 36(2)(c) is engaged and, with the exception of one piece of information, the public interest favours maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to which it applied section 43(2)
 - Disclose the one piece of information, identified in the confidential annexe accompanying this notice, which although engaging section 36(2)(c) cannot be withheld under that exemption following application of the public interest test.
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

5. On 19 May 2016 the complainant requested information of the following description:
6. "Please can you provide me with a copy of the remedial action plan - as mentioned in [the Chief Executive's] message in NTK on 12th May."
7. On 9 June 2016 the Trust responded. It refused to provide the requested information, citing the exemption provided by section 43(2) – prejudice to commercial interests, as its basis for doing so.
8. The complainant requested an internal review on 14 June 2016. The Trust sent her the outcome of its internal review on 12 July 2016. It upheld its original position.
9. During the course of the Commissioner's investigation the Trust disclosed a redacted version of the report that had been held at the time of the request. However it continued to withhold some of the information under section 43(2) and now also applied section 36(2)(c) – prejudice to the conduct of public affairs, to other information contained within the report.

Scope of the case

10. The complainant contacted the Commissioner on 5 August 2016 to complain about the way her request for information had been handled. As well as disputing that the RAP was commercially sensitive, she argued that there was a significant public interest in releasing information which detailed how the Trust was proposing to address the challenges it faced.
11. The Commissioner considers the matters to be decided is whether any of the information which the Trust is continuing to withhold engages the exemptions cited ie section 43(2) and section 36(2)(c) and, if so whether the public interest favours maintaining those exemptions.
12. The Trust is relying on section 43(2) to withhold the majority of the information in question and therefore the Commissioner will start by looking at that exemption.

Reasons for decision

Section 43(2) – prejudice to commercial interests

13. Section 43(2) of FOIA provides that a public authority can refuse a request to the extent that its disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority itself.
14. From the wording of the exemption it is clear that the exemption can be applied on the basis that the prejudice either 'would' occur, or the lower threshold, that the prejudice would be 'likely' to occur. The Trust has said that it believes disclosing the withheld information 'would' prejudice commercial interests. The term 'would' is interpreted as meaning that the likelihood of the prejudice occurring is more probable than not, ie greater than 50%.
15. As explained in its responses to the complainant, the RAP discusses the problems faced by the Trust in meeting its targets for responding to emergency calls. These are identified as being a shortfall in the appropriately trained staff it has available to deal with such calls. Although it has proposals to recruit and train additional staff it will obviously take some time before new staff are ready to be deployed. During this interim period it will be necessary to buy additional capacity from the private sector ie agency staff and private ambulance services. From the redacted version that has now been disclosed it is evident that the RAP discusses the period over which the Trust will need to rely on private sector staff, the projected performance of the Trust, ie its ability to meet its performance targets, and the additional funding that it requires.
16. The Trust has argued that its own commercial interests would be prejudiced. The prejudice could occur in two ways. Firstly it says there is a risk that it could lose or fail to retain the contract it currently holds for the provision of ambulance services and secondly disclosure would place it at a disadvantage when procuring additional services from the private sector.
17. The Trust has also suggested that the commercial interests of private ambulance services would be prejudiced. However, in line with Tribunal decisions, the Commissioner will not consider claims that a third party's commercial interests would be harmed without some evidence that these reflect genuine concerns expressed by the third party involved. As the Trust has not provided the Commissioner such evidence the Commissioner will not consider this aspect any further.
18. Returning to the Trust's argument that disclosing the withheld information would harm its own commercial interests the Commissioner will start by looking at its argument that disclosure would prejudice its ability to procure ambulance services from the

private sector. The Commissioner understands that the Trust already buys in additional service from the private sector to fulfil its contractual obligations. There are regular tendering exercise and ad hoc exercises to meet fluctuations in capacity and demand. The Trust has advised the Commissioner that there are around nine private sector companies in the market for such contracts, although not all of them are in a position to bid for every contract. Nevertheless the Commissioner is satisfied that there is genuine competition for these contracts.

19. Based on telephone conversations with the Trust the Commissioner is also satisfied that at the time of the request there would still have been a need to conduct further procurement exercise during the period to which the report relates.
20. Having established that there would be a need to procure additional service and that there is competition for such contracts the remaining question is whether the information contained in the RAP would prejudice the Trust's ability to secure best value for money during such exercises. The Commissioner understands the basic argument to be that private ambulance services would be able to use the information contained in the RAP to inflate their bids and that its disclosure would strengthen their negotiating position when dealing with the Trust.
21. Having viewed the withheld information the Commissioner accepts that there is information within it that indicates the additional funding which the Trust hopes to have available to it. However these appear to the Commissioner to be headline figures and although they may be of some interest to private sector companies, it is not clear the extent they could be used in any meaningful way to shape bids during any particular procurement exercise. Furthermore the Trust has described a very competitive market for the provision of private ambulance services and the Commissioner considers that those bidding for such contracts would therefore still have an incentive to submit their best bid when faced with such competition.
22. Therefore the Commissioner is not satisfied that there is a more than 50% risk of the Trust being commercially disadvantaged when securing the service of private ambulance services if the withheld information was released.
23. Finally the Trust has argued that disclosing the information would prejudice its commercial interests in respect of its own ability to retain its current contract for providing emergency services or securing additional contracts for non-emergency services ie the routine transfer of patients. The Commissioner accepts that the Trust competes for contracts to provide non-emergency service for Clinical

Commissioning Groups (CCGs) on a commercial basis. Its rivals are other NHS ambulance service trusts and even private ambulance services. The Trust has provided a newspaper article which reports that a different ambulance service did lose its contract for providing non-emergency services.

24. The Commissioner is less convinced that there is a realistic prospect of the Trust actually losing its contract for the provision of emergency services with the CCGs in the East of England. The Trust has said that one Trust did lose its contract for emergency services, but it is understood that this dates back to the 1990s. It therefore appears that in practice there is a reluctance to remove emergency services from an NHS ambulance trust.
25. If it is the Trust's position that the RAP contains information that would assist those competing against it in any future procurement exercise the Commissioner is not convinced that this argument can be sustained. The RAP's focus is on the delivery of emergency services and therefore does not appear relevant to contracts for non-emergency services. In respect of emergency services the information is fairly high level and it is not clear what assistance it would be to a rival bidder considering that one might expect that any organisation in a realistic position to bid for such contracts would have a sound understanding of the issues around capacity, resources and costs.
26. The Trust has also raised concerns about the reputational damage that disclosing the report would have and the resulting loss of confidence in the Trust. Although the Commissioner accepts that an organisation's reputation can affect its commercial interests, the Commissioner has also had regard for the fact that, as far as the Trust's contract for the provision of emergency services is concerned, the contracting CCGs would have direct experience of the Trust's performance. Secondly, although some of the most detailed figures from the RAP have been withheld, the information already disclosed provides a candid assessment of the challenges faced by the Trust. Therefore the Commissioner is not satisfied that it is more likely than not that disclosing this additional information would increase the risk of the CCGs losing confidence in the Trust and thereby prejudicing the Trust's commercial interests.
27. The Commissioner is therefore not satisfied that section 43(2) is engaged in respect of the information to which it has been applied. The Trust is required to disclose this information.

Section 36 – prejudice to the conduct of public affairs

28. The Trust is relying on section 36 to withhold a very limited amount of information relating to what it describes as the "AQI changes trajectory and the uplift and degradation percentages". The Commissioner understands that 'AQI' stands for 'Ambulance Quality Indicator', a measurement of performance based on, amongst other things, ambulance response times. The method for calculating these were changed in 2016 with a subsequent impact on performance statistics for all ambulance trusts. The uplift and degradation percentages relate to impact of the changes which the Trust proposes to implement.
29. The Trust is relying on section 36(2)(c) to withhold this information.
30. So far as is relevant, section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (b) would or would be likely to inhibit:
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
31. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
32. The qualified person for the Trust is its Chief Executive. The Trust has advised the Commissioner that the qualified person's opinion was sought from its Chief Executive following verbal discussions in 2016 and again in January 2017. The Commissioner is therefore satisfied that at some time in January 2017 the qualified person did provide his opinion that the information in question was exempt under section 36(2)(c).

33. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the Trust has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
34. The Trust has advised the Commissioner during the verbal discussions with the qualified person he was made aware of how the exemption operated as well the arguments for and against its application. The Commissioner also anticipates that given the significance of the RAP itself the Chief Executive would have been involved in its production and would be well aware of its contents and the issues it raised.
35. It is now necessary to consider whether the qualified person's opinion was reasonable. To do so the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
36. In very broad terms, the withheld information provides estimates of the impact of the proposed changes and how long it will take for the Trust to resolve the challenges it faces. The Trust considers that the RAP sets out an open and honest assessment of these challenges so that they can be considered the CCGs commissioning its services and other stakeholders. This is a necessary part of the process of engaging with those bodies so that they can consider whether the Trust's proposals are acceptable and so negotiate an acceptable way forward. Without being able to produce such a candid RAP the Trust believes its ability to operate an effective emergency service would be prejudiced. It also believes that disclosing the information would be likely to cause the public to lose confidence in it. This would be likely to prejudice the Trust's ability to implement the necessary changes. In reaching this opinion the qualified person has had regard for the fact that it was known that the RAP would be subject to change. The Commissioner understands that since the request was made the RAP has indeed been amended.
37. Having viewed the withheld information the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information. The RAP is a means of setting out to the Trust's stakeholders the problems its faces and persuading them

that it has a viable plan to remedy the situation. The Commissioner accepts that in order to do so the Trust has to provide a candid analysis of the issues it faces, and that it would not necessarily be helpful share that analysis with a wider audience while the plans were subject to change.

38. The Commissioner finds that the exemption provided by section 36(2)(c) is engaged in respect of all the information to which it has been applied.

Public interest test

39. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
40. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
41. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.
42. In respect of one redaction the Commissioner is not satisfied that the severity or extent of the prejudice would be significant due to the fact that the same statistic is contained in the information already disclosed from the RAP. The Commissioner has produced a short confidential annexe which will identify this information. The annexe will be made available exclusively to the Trust. The Trust is required to release this information.
43. The Commissioner will now look at the public interest arguments in favour of disclosing the remainder of the information withheld under section 36. The Trust has recognised that there is a public interest in promoting understanding of its performance situation. Disclosure could increase understanding of the decision making processes not

¹ EA/2006/0011; EA/2006/0013

only of itself but also other stakeholders such as NHS England, NHS Improvement and the CCGs.

44. The Trust also noted that disclosure could generate public confidence in the integrity of the procedures being adopted and followed.
45. The complainant has argued that there is a significant public interest in disclosure. She has argued that trials of different ways to increase capacity have put patient safety at risk. The Commissioner notes that the information being withheld under section 36 does not discuss the actual working practices or how they could be changed to increase capacity. This limits the public interest in its disclosure. Also the Commissioner has to be very cautious when considering arguments around a public authority's performance which have not been fully substantiated. Nevertheless it is clear from the information already released that the Trust has not met all of its performance targets and while this remains the case it is understandable that some may have concerns over patient safety. The withheld information would inform the public on how long the Trust anticipated it would take to recover its position and how long any risks that did exist were likely to continue.
46. The Trust presented a number of public interest arguments in favour of continuing to withhold all the information it had redacted from the report ie arguments in favour of withholding information under both section 43(2) and 36. Having considered those arguments the Commissioner finds that the majority are concerned solely with upholding its application of section 43(2) and are not relevant to the information being withheld under section 36. The Trust's main remaining argument in respect of section 36 is that it is not appropriate to disclose information on plans which are still under development and therefore subject to change where to do so could undermine public confidence and potentially distress the patient population.
47. The Commissioner would add to this her view that there is a significant public interest in the Trust being feeling free to provide CCGs with a completely honest assessment of its likely, short term, future performance so that they themselves can make informed decisions on whether to support the proposals which includes the provision of additional funding. The Commissioner also recognises the value in allowing the Trust safe space in which to develop its proposals and notes that at the time of the request the RAP was a draft document which was subsequently amended. Both the need for candour and the value of safe space are important if the Trust is to have the best opportunity to overcome the challenges it faces and to provide high quality clinical care for patients. The Commissioner also notes that it is conceivable that the Trust may need to continue to provide candid reports on its performance to the CCGs as it

implements any plans that are agreed. To disclose the information withheld under section 36 at the time of the request could have a chilling effect on the Trust's willingness to do so.

48. In light of the above the Commissioner finds that although there is a significant and important public interest in the public understanding how long it was anticipated the Trust would need to address its problems, there is a greater public interest in allowing the Trust the safe space in which to enter in to negotiations with the CCGs, based on a candid assessment of the issues, in order to ensure the Trust has the best opportunity to provide the required level of clinical care as quickly as possible. The public interest favours withholding this information. The Commissioner finds that the Trust is entitled to withhold the remaining information to which it applied section 36(2)(c).

Right of appeal

49. 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

50. 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.
51. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF