

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 16 October 2019

Public Authority: East Kent Hospitals University NHS Foundation Trust

Address: Kent and Canterbury Hospital
Ethelbert Road
Canterbury
Kent CT1 3NG

Decision (including any steps ordered)

1. The complainant has requested from East Kent Hospitals University NHS Foundation Trust ('the Trust') information associated with any due diligence it carried out on a particular developer. The Trust initially said it did not hold any information falling within the scope of the request. It subsequently accepted that it holds some information that is broadly relevant. The Trust has confirmed that it will release some of the information but that the remainder is exempt information under section 41 of the FOIA (information provided in confidence) and section 43(2)(commercial interests), with the public interest favouring maintaining the latter exemption.
2. The Commissioner's decision is as follows:
 - The requested information is environmental information which should be handled under the EIR.
 - The Trust can rely on the exception at regulation 12(5)(e) of the EIR (commercial information) to withhold the information that falls within the scope of part 2 of the request. The public interest favours maintaining this exception.

- The Trust is in breach of regulation 5(1) and 5(2) with regard to the information requested in part 1, as it has not made this information available to the complainant within the required timescale.
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
 - Release the information that it holds that falls within part 1 of the complainant's request.
 4. The Trust must take this step 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.

Background

5. The Trust has explained that it was approached by a firm, Quinn Estates (QE), with a draft proposal to build the shell of a new hospital for the Trust and to construct 2,000 homes in east Kent. The Trust says that the draft proposal and matters associated with it have subsequently been the subject of a number of information requests from the complainant.

Request and response

6. On 7 November 2018 the complainant wrote to the Trust and requested information in the following terms:

"Please could you provide me

1 The costs of any due diligence paid to any consultant company for any due diligence undertaken on Quinn Estates.

2 Any report/document prepared by the consultant for EKHUFT with regards to Quinn Estates.

If my request is denied in whole or in part, I ask that you justify any redaction or blanket refusal by reference to specific exemptions of the act. I will also [sic] expect all non -exempt material to be released."

7. The Trust responded on 15 November 2018 – its reference RF345-18. It addressed parts 1 and 2 of the request to the effect that it holds no relevant information.

8. On 11 January 2019 the Trust provided an internal review of what it described as its response both to a previous request from the complainant and to RF345. The internal review does not appear, however, to address the Trust's response to the request that is the subject of this notice.
9. In correspondence with the Commissioner during the course of this investigation the Trust at first argued that the information that it holds cannot fall within the scope of the complainant's request as it did not carry out a formal due diligence process on QE.
10. After discussion and a review of the request and the information that the Trust holds, and in the interests of resolving this complaint, the Trust accepted that the information it holds is relevant to the request but that it is exempt information. The Trust considered that the information was exempt under section 41(1) and section 43(2), with the balance of the public interest favouring maintaining the section 43 exemption. It communicated this new position to the complainant in correspondence dated 25 September 2019.
11. On 7 October 2019 the Trust confirmed that it would release to the complainant the information that it holds that is relevant to part (1) of the request.

Scope of the case

12. The complainant first contacted the Commissioner on 18 January 2019 to complain about the way his request for information had been handled. He confirmed he remained dissatisfied following the Trust's fresh response of 25 September 2019.
13. The Commissioner has first considered whether the requested information is environmental information which should be managed under the EIR rather than the FOIA.
14. Her investigation has then focussed on whether the Trust can rely on section 43(2) and/or section 41(1) of the FOIA – or their EIR equivalents - to withhold information falling within the scope of part 2 of the request, and the balance of the public interest. She has also considered whether the Trust has complied with section 10(1) or its EIR equivalent with regard to the first part of the request.

Reasons for decision

Is the requested information environmental information?

15. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
16. Regulation 2(1)(a) defines environmental information as information that concerns the state of the elements of the environment, including: water, soil, land, landscape and natural sites. Regulation 2(1)(b) gives a definition of environmental information as factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).
17. Regulation 2(1)(c) defines environmental information as information that concerns measures (including administrative measures) such as policies, legislation, plans, programmes and activities affecting or likely to affect the elements referred to in (a) and (b) as well as measures or activities designed to protect those elements.
18. The information requested in this case concerns a review of a firm proposing to build the shell of a hospital and also to construct 2,000 homes in East Kent, and a review of that proposal. While the review does contain financial information, which is not generally considered to be environmental information, it also describes and discusses QE and its proposal and the proposal's feasibility. As such the Commissioner is satisfied that the information can be categorised as environmental information under regulation 2(1) of the EIR; it concerns a plan or activity affecting or likely to affect land and landscape.

Regulation 12(5)(e) – confidentiality of commercial information

19. The EIR equivalent of section 43 of the FOIA is regulation 12(5)(e) and the Commissioner has considered this first.
20. Regulation 12(5)(e) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate commercial interest. Regulation 12(5)(e) is subject to the public interest test.
21. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She

has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

22. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
23. In the second part of the request the complainant has requested any resulting (due diligence) report on QE that a consultant may have prepared.
24. With regard to this, the Trust is withholding a review that Deloitte prepared that concerns QE – 'the Deloitte review'. It has provided the Commissioner with a copy of that review. The review gives: a background, a financial commentary on QE and a commentary of QE's proposal. It discusses experience of other planning permissions in return for infrastructure, provides interim conclusions, recommendations and updates, and a final conclusion.
25. The Commissioner is satisfied that the disputed information is commercial in nature and that the first condition above has been met.

Is the information subject to confidentiality provided by law?

26. In her published guidance on regulation 12(5)(e) the Commissioner advises that, in this context, this will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
27. In assessing whether the information has the necessary quality of confidence, the Commissioner has considered whether the information is more than trivial, whether or not it is in the public domain and whether it has been shared in circumstances creating an obligation of confidence. A useful test to consider with regard to the latter is to consider whether

a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.

28. The Commissioner is satisfied that the disputed information is more than trivial, concerning as it does a draft proposal to build the shell of a hospital and to construct 2,000 homes.
29. With regard to whether the information has been shared, the Trust says that, although the broad nature of QE's proposal is already in the public domain, the Deloitte review is not.
30. Finally, the Trust has told the Commissioner that the Deloitte review was shared with it in circumstances that created an obligation of confidence. In its response to the complainant of 25 September 2019, which it has advised also constitutes its submission to the Commissioner, the Trust says that disclosing the Deloitte review will affect QE on the grounds set out in its letter to the Commissioner of 21 August 2019.
31. In that 21 August 2019 letter QE discusses its own development proposal. However, the Trust considers that the same arguments are relevant to the Deloitte review. QE noted that the draft proposal [and the Deloitte review to some extent] sets out its bespoke approach to the delivery of the project and details of its intended promotion arrangements with landowners, all of which QE says are extremely commercially sensitive. QE states that releasing this information would be detrimental to its commercial interests if details of its proposal were known to its competitors. QE goes on to say that, in addition, detail in relation to build costs and project specific costings are, again, commercially sensitive and that it would be extremely detrimental to its ongoing commercial interests were this information to be released to its competitors.
32. In its submission the Trust says that the document – ie the Deloitte review - is still in draft form and subject to change; it sets out negotiations and investigations which are incomplete, particulars of the financial funding structures and associated indemnities to enable the Trust to engage in the assessment and viability considerations of the QE proposal. Disclosure would, the Trust says, impact those terms and interests.
33. The Commissioner notes that the Deloitte review is headed '**Commercial in confidence and to be released only with Deloitte permission**'.
34. Because of the above factors the Commissioner considers that a reasonable person who was provided with the requested information would consider that the information had been provided to him or her in

confidence. She is therefore satisfied that the Deloitte review is subject to confidentiality provided by law and that the second condition has been met.

Is the confidentiality provided to protect a legitimate economic interest?

35. In her related published guidance, the Commissioner advises that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.
36. In addition to its reasoning above, the Trust says that the direct economic interests of QE, with regards to the land costs, planning and the structured funding financial arrangements (and thereby its confidentiality) would be adversely affected by the disclosure of the Deloitte review. Negotiations with QE are as yet not final and will be impacted by competitors should the Deloitte review, which addresses the viability of the QE proposal, be disclosed. This would, according to the Trust, be highly detrimental to the terms as yet to be finalised, which would have a direct and consequential loss both with regards to the actual delivery of the project and the costs spent to date within the proposal, and costs incurred thus far.
37. In the correspondence to the complainant/submission, the Trust also explains that the QE proposal and all the associated documents created as a result are part of a greater picture of redevelopment / reconfiguration of hospital sites / services in east Kent. It says that the Clinical Commissioning Group lead evaluation of options is a crucial element of taking the large scale clinical reconfiguration of services in east Kent through appropriate governance and engagement before being consulted on with the public. Reconfiguring of acute services at the Trust directly supports whole system reconfiguration including local care plans.
38. The Trust says previous attempts to enter into joint ventures with development partners have not been viable due to the lack of value of the Trust's estate and the limited supply of surplus land (for housing) that would be released.
39. The QE proposal is different, the Trust says, from these previous approaches because the shell and core building outlined in the QE proposal will be provided back to the Trust at no cost, meaning the Trust does not have to fund the provision of the equivalent facility and is not required to release any of its land. The Trust confirmed that this information is already in the public domain.

40. The Commissioner has considered the Trust's position and she is satisfied the third condition has been met. She considers that disclosing the requested information – the Deloitte review - would have the effect that is identified in the exemption; namely, disclosure would adversely affect a third party's legitimate commercial interests. This is because details about the overall state of QE as judged by Deloitte and QE's specific proposal would become available to potential competitors.
41. It appears to the Commissioner that disclosing the Deloitte review could also adversely affect the Trust's commercial interests. It appears QE's proposal is unusual and addresses a problem the Trust has had in the past with other partners. Disclosing the disputed information – which the Trust says that Deloitte did not supply to it in circumstances which would entitle the Trust to disclose it – could damage the Trust's relationship with QE and jeopardize the development project. QE has, the Trust says, clearly stated that it does not consent to the disclosure of its commercial interests.
42. Furthermore, in its 25 September 2019 letter/submission the Trust points out that disclosing the review would also put Deloitte at risk vis a vis market competitors, as it would make public Deloitte's approach to this type of high level review.

Would the confidentiality be adversely affected by disclosure?

43. As the Commissioner has concluded that disclosure would adversely affect QE's and Deloitte's legitimate economic interests, it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.

Conclusion

44. Since the necessary four conditions at paragraph 21 have been met the Commissioner is satisfied that the Trust is entitled not to disclose the information requested in part 2 of the request under regulation 12(5)(e). She has gone on to consider the public interest arguments.

Public interest in releasing the information

45. The Commissioner has reviewed the public interest arguments that the complainant provided in his submissions to her. Those that are of some relevance to regulation 12(5)(e) can be summarised as follows:
 - There is a public interest in accountability and how the Trust is [potentially] spending public funds.
 - QE is a local developer based in Canterbury that has, says the complainant, donated considerable sums to the local and national

Conservative Party and to the Labour Party. The complainant considers that companies do not give their money away for nothing. He says there is an understanding (rarely made explicit) that large campaign donations buy political access and favourable consideration in policy development and legislation. Disclosure of all the requested information would promote public debate and meaningful participation in the redesign of East Kent's health services. It would ensure that the democratic process is being adhered to and that any donations will not have any effect on any decision.

Public interest in withholding the information

46. The Trust says that confidence and trust were placed in it by the third parties who provided documents to it. Disclosure would impact the willingness of third parties to engage with the Trust now or in the future. The Trust has also noted the assertion of legal rights by all the parties subject to the Deloitte review regarding their commercially sensitive material; an actionable claim and damage to the project if disclosed at this current stage.
47. The Trust argues that privately run companies who operate on the basis that their business activities are commercially confidential will be reluctant to approach the Trust with draft business propositions, particularly if disclosure results in commercial information about their own operations being disclosed to commercial rivals. Equally, the Trust says, it will result in the Trust not being able to assess the viability of proposals in a way that maximises its own negotiating position.
48. According to the Trust, QE is in negotiations with private and public landowners and this would be undermined by the release of aspects of the QE proposal through release of the Deloitte review. Furthermore, QE has secondary partners who would equally be unwilling to expose their commercial plans. This would further limit the number of potential partners that would be willing to enter in joint ventures or large scale complex proposals with them or the Trust.
49. Finally, the Trust has explained that there will be a full public consultation, together with a detailed planning application process with publication of the finalised proposal and terms, if the proposal moves forward. The limited amount of information currently within the public domain has been qualified with a more detailed expectation in due course.

Balance of the public interest

50. As he has said in his submission to the Commissioner, there is no suggestion that any party has committed any offence. And although the complainant has discussed the general matter of organisations making political donations, he has not provided the Commissioner with evidence of any kind of impropriety related to the matter of QE's proposal or Deloitte's review.
51. QE's draft proposal is one of a number of propositions for East Kent's A&E service and consultation on the future of the service appears to have been suspended in May 2018 ie before the complainant had submitted his requests in October and November 2018. However, the Trust's final response to the complainant suggests that the matter will be put out to consultation in the future and that relevant material will be published as part of the planning process.
52. In addition, the broad nature of QE's proposal were already in the public domain at the time of the request (for example in an article on the BBC regional news website in November 2017). The published information is, in the Commissioner's view, enough to generate debate and participation in the matter of east Kent's future A&E service. And while QE's draft proposal may be controversial given its nature and scale, the Commissioner does not consider it to be unusually so. At the time of the request, the matter of east Kent's A&E service and any associated development was still a 'live' matter and the Commissioner understands that it remains so.
53. On this occasion, and taking account of all the arguments presented to her, the Commissioner does not find the public interest factors for disclosing Deloitte's review to be sufficiently strong to override the detriment to QE's and Deloitte's commercial interests through disclosing the information at the time of the request.
54. The Commissioner is satisfied that the information being withheld under regulation 12(5)(e) is exempt information as disclosure would adversely affect the commercial interests of a third party. The Commissioner finds that the balance of the public interest favours maintaining this exemption.
55. Since the Commissioner finds that this information engages regulation 12(5)(e) and that the public interest favours maintaining the exemption it has not been necessary to consider whether the information engages the exception under regulation 12(5)(f) which is the EIR equivalent of section 41(1) of the FOIA.

Regulation 5(2) – duty to make environmental information available on request

56. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request, if it is not exempt information.
57. Regulation 5(2) requires a public authority to comply with regulation 5(1) as soon as possible and within 20 working days following the date of receipt of a request.
58. During the investigation the Trust confirmed to the complainant that it holds information falling within the scope of part 1 of his request. It subsequently advised the Commissioner that it would release this to him.
59. The complainant submitted his request on 7 November 2018 and has not received the information falling within the scope of part 1 of his request. The Trust is therefore in breach of regulation 5(1) and 5(2).

Other matters

60. The Commissioner is grateful for the constructive approach the Trust adopted, which cooperated fully with her investigation.

Right of appeal

61. 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@justice.gov.uk

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

62. 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.
63. 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

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