

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

### **Decision notice**

**Date:** 21 March 2019

**Public Authority:** NHS Ealing Clinical Commissioning Group  
**Address:** Perceval House  
14/16 Uxbridge Road  
London  
W5 2HL

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

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1. The complainant has requested papers, agendas, minutes and documents relating to a tender by NHS Ealing CCG for community services. The CCG confirmed it held a business case, agenda, additional considerations paper and minutes but refused to provide these on the basis of section 43(2) of the FOIA. The CCG later sought to also apply section 22 to the business case and additional considerations paper.
2. The Commissioner's decision is that section 22 has not been correctly applied by the CCG. In relation to section 43, the Commissioner finds that only limited information in the requested documents engages this exemption but the information that does engage the exemption has been correctly withheld under section 43(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose all information in the requested documents which does not engage section 43(2). The information that engages section 43(2) as identified by the CCG and in the confidential annex provided to the public authority can be withheld.
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 9 April 2018, the complainant wrote to NHS Ealing Clinical Commissioning Group ("the CCG") and requested information in the following terms:

*"Please can I have agenda, papers and minutes regarding the Ealing CCG tender for community services that has been discussed in private (non-public) sessions of Ealing CCG governing body."*

6. North West London Clinical Commissioning Group responded on behalf of the CCG on 9 May 2018 providing the relevant parts of the agenda for Part II of this meeting i.e. the parts where the tender for community services was discussed. This was the following agenda points:

*4) Single Contract – Prospectus*

*5) Single Contract – Business Casework Manager*

*6) Single Contract – Additional Considerations*

7. It was stated that the minutes had not been ratified and were still in draft format so could not be disclosed. However, the CCG went on to state that in Part I of the meeting item 4 was presented and the documents could be accessed online<sup>1</sup>. For items 5 and 6 the CCG stated this information (the Business Case and Additional Considerations Paper) would be exempt from disclosure on the basis of section 43(2) of the FOIA.
8. The complainant asked for an internal review on 10 May 2018 of the decision to withhold the Business Case and Additional Considerations Paper. He sent a follow-up email the same day to address the draft minutes; stating that they should now have been ratified and therefore could be provided. The CCG confirmed the minutes had still not been ratified and were still in draft format.
9. Following an internal review the CCG wrote to the complainant on 8 June 2018. It upheld its decision to withhold the papers on the basis of section 43(2) as they contained financial information including modelling and forecasting.

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<http://www.ealingccg.nhs.uk/news,-publications-and-policies/publications.aspx?n=6423>

## Scope of the case

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10. The complainant contacted the Commissioner on 10 June 2018 to complain about the way his request for information had been handled.
11. During the course of the investigation, the CCG sought to apply a new exemption – section 22 of the FOIA – to refuse to provide the Impact Papers (the Business Case and additional considerations paper) as it stated that it had always intended to publish this information in February 2019.
12. The Commissioner also confirmed with the CCG that the draft nature of the minutes did not exclude them from consideration under the FOIA and the CCG clarified that it would withhold them on the basis of the section 43(2) exemption.
13. The Commissioner considers the scope of her investigation to be to determine if the CCG has correctly applied the section 43(2) exemption applies to the Business Case, Papers and minutes and, if so, where the balance of the public interest lies. The Commissioner will also consider, as an alternative, if section 22 applied to the Impact Papers (the Business case and additional considerations, but not the minutes).

## Reasons for decision

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### Section 43 – prejudice to commercial interests

14. As background to this issue, the CCG has been seeking a single provider to run adult and child community services and had put this out to tender, with no decision having been reached or expected at the time of the request.
15. For the Business Case document the CCG has now acknowledged the whole document is not exempt under the section 43(2) exemption and has specifically highlighted to the Commissioner the sections it considers commercially sensitive. These are primarily concerned with financial projections and modelling.
16. The Additional Considerations Paper which has been withheld by the CCG discussed the potential costs from the single contract approach, the impact of the single contract approach on the viability of providers, draft clauses for contract termination and discussions of the implications of different delivery models on VAT and pension arrangements.

17. In addition to this there is also a cover sheet for the Business Case which has been partially redacted under section 43(2). This was provided to the Governing Body to summarise the report and outline what was needed from the Governing Body. The information that has been redacted is specific financial figures and projections.

18. For the minutes of the meeting of 28 February 2018 the CCG has advised the Commissioner it considers the entire minutes should be withheld on the basis of section 43(2).

19. Section 43 FOIA states:

*"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)."*

20. 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."<sup>2</sup>*

21. For the Business Case, Additional Considerations Paper and cover sheet the Commissioner is satisfied that the information identified by the CCG is commercial in nature as the CCG has highlighted only the information on financial projections, modelling, the financial impact on the CCG of the proposed single contract in terms of profits and the value of pensions etc.

22. For the minutes the Commissioner is not minded to accept the majority of the information is commercial in nature. The minutes discuss the Business Case in general terms, talking about the aims and purpose. The Commissioner notes that there is some discussion about commercial matters, specifically discussions on contract clauses, VAT costs and transformation funds and this is commercial in nature. The Commissioner has identified this in a confidential annex provided to the public authority. For all of the other information in the minutes the Commissioner does not accept this is commercial in nature and she

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<sup>2</sup> 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](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)

therefore does not consider it engages the section 43(2) exemption and requires the CCG to disclose this.

23. Having determined that the remaining information that has been withheld from the various documents is commercial in nature the Commissioner has gone on to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

*The nature and likelihood of the prejudice occurring*

24. The CCG argues that its own commercial interests would be prejudiced if the Business Case and other documents containing commercial information were to be disclosed before the single contract is signed.
25. This argument is based on the fact that the information, which includes detailed financial modelling explaining the needs of the CCG, prices previously charged to suppliers and the financial position of the CCG, is information that has not been released to the preferential bidder for the contract. It is therefore argued that disclosing the commercial information before the contract is signed could cause difficulties in finalising the procurement to the detriment of the CCG.
26. It is also argued that disclosure would impact on the CCG more widely than just in relation to the current procurement. If the information were to be published suppliers to the CCG would be given an advantage by having access to information that would enable them to inflate their prices to the financial detriment of the CCG. Consequently the CCG would be less well able to participate competitively in commissioning activity in the market.
27. The Commissioner has been guided in her thinking by the approach of the Information Tribunal in *London Borough of Southwark v Information Commissioner and Lend Lease and Glasspool*<sup>3</sup>. This case related to a viability report produced in relation to a proposed redevelopment of an estate. The Information Tribunal found that regulation 12(5)(e) (the equivalent exception in the EIR to section 43 in the FOIA) was engaged and the operating model and commercial projections in particular should be withheld. In explaining its thinking, the Tribunal commented that financial models are used as analytical tools on large projects and allow for different scenarios to be run and tested.

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<sup>3</sup> EA/2013/0162

28. In this case, the information that has been withheld is financial models and figures which explain the financial viability of going ahead with the single contract, including (at the time) current pricings charged by suppliers and details of the CCG's financial position. The primary argument presented by the Trust is around the idea that disclosing the withheld information would hinder the CCG from finalising the procurement on the most favourable terms.
29. The Commissioner has carefully reviewed all of the withheld information to ascertain if this argument has merit.
30. The remaining withheld information discusses the financial benefits and cost analysis of the establishing a longer-term single integrated contract for the provision of community-based services; as such much of the financial information relates to costs analysis, some of which relates to staffing costs, operational efficiencies and expenditure of (?) the CCG.
31. The Commissioner is of the view that the information that has been withheld is information that has been used to justify the decision to move to a longer term single contract.
32. This further cements the fact that the remaining withheld information all relates to the financial analysis of this decision and the impact on the finances of the CCG and the service delivery.
33. Damaging future relationships and avoiding disclosure which would result in loss of revenue or income are general arguments and in order to be convinced that such an effect would occur, the Commissioner considers that the commercial significance of such information needs to be identified. Simply identifying information as commercial information does not explain why the information is particularly sensitive or why disclosing it would be likely to have a prejudicial effect.
34. However, in this case the CCG has been able to provide a more specific argument in that it has identified that, at the time of the request, a preferred bidder had been selected but the procurement had not been completed. The CCG has clearly stated to the Commissioner that the withheld information was not known to the bidder and it therefore stands to reason that disclosing this financial information at the time of the request may have been prejudicial to the CCG finalising the procurement on the most favourable financial terms. The bidder would be privy to information on current supplier charges and the current financial situation at the CCG which would undermine the CCG's negotiating position with its preferred bidder.
35. Having considered the available evidence the Commissioner finds she can support the CCG's application of the exemption. The arguments

provided do show a causal link between the disclosure of the specific information and the prejudice that has been argued.

36. The CCG considers it has demonstrated that the prejudice 'would' occur. For the higher threshold to apply there must be a more than 50% probability of prejudice occurring even if it is not certain that the prejudice would occur. For the lower threshold there must be more than a hypothetical possibility of prejudice occurring.
37. The Commissioner recognises there is a real and significant risk of the prejudice occurring if the withheld information were disclosed as there was an ongoing procurement exercise at the time of the request. Whilst it is always difficult to predict whether the stated prejudice would occur the Commissioner is minded to accept that due to the timing of the request the possibility of prejudice was more probable than not and she therefore accepts that the higher threshold of 'would' prejudice has been met.
38. For the reasons described above, the Commissioner has concluded that the CCG has demonstrated that section 43(2) is engaged.

*Public interest arguments in favour of disclosure*

39. The CCG accepted there is a general public interest in openness and transparency and in the importance of accountability in matter of public spending and ensuring clarity around the CCG's processes.

*Public interest arguments in favour of maintaining the exemption*

40. The CCG notes the importance of competition and ensuring that its ability to negotiate or compete in a commercial environment is not reduced, particularly given the sensitive circumstances when the request was made as this was in the period between awarding the contract and the contract being signed.
41. The CCG also considered the reputational impact and the impact on its future negotiations. It was of the view that revealing pricing mechanisms and other detailed financial information would be detrimental to the CCG's negotiations in relation to other contracts and procurements because other parties could exploit the information for their own gain.

*Balance of the public interest arguments*

42. In considering whether there is an overriding public interest in providing the requested information, the Commissioner has considered the arguments put forward by both the complainant and the CCG. She must consider whether in all the circumstances of the case the public interest

in maintaining the exemption outweighs the public interest in disclosing the information.

43. In forming a conclusion here, the Commissioner has taken into account the general public interest in the transparency of the CCG, as well as specific factors that apply in relation to the information in question.
44. The Commissioner accepts that there is a strong public interest in the CCG being able to carry out procurement exercises effectively and without prejudice to its financial interests. She also accepts that there is little public interest in disclosure of the details of the financial models. For the information which reveals some detail about the CCG's spending and contracted rates with suppliers; the Commissioner considers there is a more compelling public interest argument for disclosure as this would show how the CCG manages its finances and provide some transparency on the use of its funds.
45. However, this information is limited and the majority of the information that has been disclosed is information which is likely to be detrimental to the CCG more than of wider public interest. The Commissioner has not been provided with any compelling argument to suggest that disclosing the withheld information would increase debate on the decision to move to a single contract.
46. In conclusion, as the Commissioner has accepted the exemption is engaged on the basis of the higher threshold that disclosure 'would' prejudice the CCG's commercial interests and taking into account the timing of the request and the lack of obvious public interest arguments in favour of disclosure; she has concluded that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
47. However, whilst the Commissioner has found that the section 43 exemption has been correctly engaged there remains information in the Business Case, additional considerations papers and the minutes which does not engage the exemption. This information has been identified by the CCG (in the case of the Impact Papers) and by the Commissioner (in the case of the minutes). For the minutes, the Commissioner now expects the CCG to disclose the information which does not engage the exemption and refers the CCG to the confidential annex for details of the commercial information which can be correctly withheld.
48. For the Impact Papers; whilst the commercial information can be withheld there is a significant amount of information identified by the CCG which does not engage section 43 but that the CCG has now applied section 22 to withhold. The Commissioner has therefore now



gone on to consider the application of section 22 to withhold the Impact Papers in their entirety.

## **Section 22 – information intended for future publication**

49. Section 22(1) of FOIA states that information is exempt information if –
- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
  - (b) the information was already held with a view to such publication at the time when the request for information was made, and
  - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
50. The exemption will only be engaged if, and only if, the three conditions listed at (a) – (c) are satisfied. As a qualified exemption, section 22 of FOIA is also subject to the public interest test.
51. The Commissioner's guidance<sup>1</sup> on the exemption explains that for section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that the public authority must have a settled expectation that the information will be published at some future date (paragraph 5). Later on in the guidance (paragraph 9), the Commissioner explains that a general intention to publish some information is not sufficient to engage the exemption - it is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.
52. It is not disputed that the information was held by the CCG at the time of the request. However, the Commissioner does not accept that it was reasonable for the CCG to conclude there was a settled intention that the information would be published.
53. The CCG informed the Commissioner that before the request was received it had intended to publish the board papers (of which the Impact papers were a part) with relevant redactions for legally privileged and commercially sensitive information.
54. The Commissioner's understanding is that the CCG, at the time of the request, had the intention to publish the Impact Papers (the Business case and additional considerations paper) subject to redactions for commercially sensitive and legally privileged information. However, it

does not seem to be the case that the information that would be redacted had been identified by the CCG when the request was received.

55. In view of the above, the Commissioner does not consider that all three conditions (a)-(c) above were satisfied as, although the CCG held the information at the time of the request, it had not identified the information that would be redacted so did not have a settled intention to publish the remaining information at the time of the request. In addition to this, in neither its refusal notice nor internal review response did the CCG make any reference to this intention to publish once the procurement was completed and no evidence has been provided to the Commissioner of this intent to publish having been noted prior to the request being received.
56. Therefore, the Commissioner does not consider that section 22 of FOIA is engaged in relation to the requested information.

### **Conclusion**

57. As the Commissioner has not found section 22 to be engaged she now requires the CCG to disclose the Impact papers with the information found to engage section 43 redacted.

## Right of appeal

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58. 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)

59. 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.
60. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**