

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

**Date:** 15 June 2022

**Public Authority:** Liverpool University Hospitals NHS Foundation Trust

**Address:** Prescot Street  
Liverpool  
Merseyside  
L7 8XP

**Decision (including any steps ordered)**

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1. The complainant made several requests for a variety of information, largely relating to the construction of a new hospital. Liverpool University Hospitals NHS Foundation Trust ("The Trust") provided some information but relied on section 42 of FOIA (Legal Professional Privilege) to withhold the remainder.
2. The Commissioner's decision is that most of the request sought environmental information and therefore should have been dealt with under the EIR. However, he considers that the Trust is entitled to rely on Regulation 12(5)(b) of the EIR (course of justice) and that the balance of the public interest favours maintaining the exception. He is also satisfied that the Trust has now either provided or withheld all the information it holds within the scope of the requests. However, as the Trust did disclose some information outside of the 20 working day timeframe, it breached Regulation 5(2) of the EIR.
3. The Commissioner does not require further steps.

## Request and response

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4. On 12 May 2021 the complainant requested information of the following description:

"[1] What civil, criminal or other litigation is the Trust involved with in regard to the New Build in the city centre?

"[2] Also more specifically from your January 2021 Transparency data - what exactly are these payments for:  
[list of payments]

"[3] What is the latest projected costs of the completion of the New Build - including the demolition of the old building?

"[4] When is the new build expected to be completed?

"[5] How many SHOs took time off sick in the two months prior to any exams they took? How much time off did they take?"

5. On 22 June 2021, the Trust responded. It provided some information in respect of each element apart from element [5] which it dealt with as a separate request.

6. On 23 June 2021, the complainant contacted the Trust again in the following terms:

"[6] First why, in my previous FOI request, was the fact that the Trust is pursuing legal avenues not disclosed? I would also like details of what actions the Trust is actually taking, obviously, and also the timeframe otherwise delays will just result in nothing being achieved. It is shameful that no actions have already been finalized.

"[7] I would also like details re. the laing O'Rourke [sic] invoices - i.e. what was actually purchased - likewise re. the NHS litigation authority, an explanation as to why this information wasn't released in the FOI release? Also why aren't the details released in the monthly releases?

"[8] Finally a new request - can you please provide me with all the information the Trust possesses in relation to the compensation given to Liverpool University re. the Duncan building; I recall c. £17.5 million."

Later the same day, he also added:

"[9] further to the points below re. the costs of the new build: Is there no estimate or budget? If not why not?"

"[10] Has there been any analysis of what could be done with the old building other than expensive demolition?"

7. The Trust responded on 30 June 2021. It provided some information in respect of element [6] and dealt with the remaining four elements as two separate requests.

8. On 5 July 2021, referring to the previous response the complainant made two further requests:

"[11] If the Trust is not pursuing legal avenues what exactly does 'continue to work with our legal advisors' actually mean and can you please disclose all material relating to this? Thanks.

"[12] What legal or other action is the Trust taking in relation to the following referred to decision:

'The Department of Health & Social Care (DHSC) paid £42 million compensation to Royal Liverpool's investors to terminate the PFI contract. The contract required the Trust to pay compensation to the PFI company's lenders, based largely on the estimated cost to complete the hospital, before the actual cost to complete the hospital was known. Had the Department and Trust better understood the cost to complete the hospital, they may not have paid anything to the lender'"

9. The Trust responded to this request on 7 July 2021. It confirmed that it held some information but was withholding it. It relied on section 42 of FOIA (legal professional privilege) in order to do so.

10. The complainant requested an internal review on 7 July 2021.

11. Prior to completing its internal review, the Trust responded to elements [8], [9] and [10]. It provided some information.

12. The Trust sent the outcome of its internal review on 13 August 2021, covering all twelve elements. It largely upheld its original position, but provided a small amount of information within the scope of element [7] and explained that it held no further information within the scope of [10].

## Scope of the case

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13. The complainant contacted the Commissioner on 14 August 2021 to complain about the way his request for information had been handled.
14. On 28 April 2022, the Commissioner wrote to the complainant to ask him to clarify the outstanding elements of the request and to clarify why he (the complainant) believed further information would be held. The complainant did not object to the Commissioner's proposed scope.
15. During the course of the investigation, the Commissioner reached the view that the information in question was environmental. Whilst this did not affect the extent to which information was held, the Trust confirmed that it now wished to rely on Regulation 12(5)(b) of the EIR to withhold the information it considered to be privileged.
16. The Commissioner considers that the scope of his investigation will be to determine which information access regime the request should have been dealt with under, whether the Trust holds further information within the scope of elements [7], [8] and [9] and whether it is entitled to withhold the information within the scope of elements [11] and [12].

## Reasons for decision

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### Is the requested information environmental?

17. Regulation 2(1) of the EIR defines environmental information as being information on:
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) 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);
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
18. The information all relates (to a greater or lesser extent) to the construction of a new hospital. The Trust originally had a contract with construction giant Carillion plc to build a hospital under a Private Finance Initiative (PFI) scheme. Carillion plc went into compulsory liquidation in January 2018.
  19. The construction project is a "measure" affecting or likely to affect the elements of the environment.
  20. Both the information that has been withheld and the information that the Trust says it has either already provided or does not hold relates either to the build itself or to the contract.
  21. As the Court of Appeal ruled in *DBEIS v Information Commissioner & Henney* [2017] EWCA Civ 844, information does not necessarily have to relate directly to the elements of the environment in order to be environmental. Information will be environmental if it is information "on" a measure affecting the elements of the environment.
  22. The Court of Appeal also noted that the EIR should be approached purposively when deciding whether information is or is not environmental – that means that account should be taken of the purpose of the Aarhus convention (from which the EIR derive): to increase access to information used in environmental decision-making. Account should also be taken of the purpose for which the information was produced, how important the information is to that purpose, how it is to be used and whether access to it would enable the public to be better-informed about, or to better participate in, environmental decision-making.
  23. The Commissioner is satisfied that the information falling within the scope of elements [7] and [9] (to the extent that the Trust holds it) relates to the construction and is therefore environmental.

24. The information to which the Trust has applied Regulation 12(5)(b) relates to the Trust's legal strategy for recovering monies paid under the contractual terms. This information is information on that contract (it could not exist if the contract did not exist) and therefore on that measure.
25. The Commissioner is therefore of the view that the request seeks environmental information and should have been dealt with under the EIR.

### **Held/Not held**

26. Regulation 5(1) states that: "a public authority that holds environmental information shall make it available on request."
27. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
28. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

### **Element [7]**

29. During the course of the investigation, the Trust decided to disclose copies of the original invoices with the bank details redacted. The complainant does not appear to have objected to this redaction.
30. The complainant argued that the Trust should provide more detailed information about each payment in its transparency disclosures (public authorities are required to publish details of items of spend that exceed a specific amount). He is entitled to that view, but the Commissioner is not responsible for what the Trust publishes.
31. The original request related to specific invoices that the Trust had paid. The complainant now has copies of those invoices and it is difficult to see what further information the Trust would hold in recorded form.
32. On the balance of probabilities, the Commissioner is satisfied that the Trust has disclosed the information it holds.

### **Element [8]**

33. The complainant disputed that the Trust had provided all the information it held because, although the Trust had informed him that the payment in question was related to the Trust "surrendering its interest" in several buildings, it was not clear to him what that interest was.
34. During the course of the investigation, the Trust disclosed an extract from an "aide memoire" agreed between the Trust and the University of Liverpool. The extract stated that:

"The Trust and the University intend to enter into a binding agreement (Agreement to Surrender) whereby the University surrender their entire interests in the numerous buildings which they currently occupy at the Trust site at The Royal Liverpool University Hospital (Embedded Accommodation) under various leases in return for a surrender premium to be paid by the Trust to the University. The Agreement to Surrender will represent a full and final settlement in relation to the Embedded Accommodation".
35. The Commissioner is satisfied that the remainder of the document does not fall within the scope of the request.
36. Having viewed the wording of the request, the Commissioner is unclear as to what further information the Trust is likely to hold and is therefore satisfied that, on the balance of probabilities, the Trust has disclosed all the information it holds in recorded form.

### **Element [9]**

37. This element of the request seeks an "estimate or budget" for the new build costs. The Commissioner considers that the only objective reading of such a request is that the requestor is seeking an overall figure.
38. The Trust informed the complainant, when it responded on 21 July 2021, that it had agreed a budget of £357.5m to complete construction.
39. If the complainant wishes to seek a more detailed analysis of this figure it is open to him to make a request for one. However, on the basis of the wording of the request, the Commissioner is satisfied that the Trust has provided all the information it holds that falls within scope.

### **Regulation 12(5)(b) – course of justice**

40. Regulation 12(5) of the EIR states that:

a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature

41. The Commissioner's guidance on this particular exception states that the phrase "course of justice" should be interpreted fairly broadly.<sup>1</sup> Legal Professional Privilege forms part of the foundation of our justice system, because of the importance of a person being able to communicate with their legal advisor in confidence.
42. Because privilege is such an important concept, the Commissioner accepts that breaching that privilege would have an adverse effect on the course of justice.
43. There are two types of legal privilege: legal advice privilege and litigation privilege. Litigation privilege will, as the name implies, cover correspondence between a professional legal advisor and their client when there is a realistic prospect of some form of litigation. Legal advice privilege will apply where litigation is either not contemplated or a distant prospect.
44. The information that the Trust has relied upon this exception to withhold comprise a series of memos from a firm of solicitors which, in broad terms advises the Trust on the available options for seeking to recover some of its monies. There are also some drafts of letters that were intended to be sent to various parties involved in the litigation.
45. The Trust considered that the information attracted legal advice privilege at the point at which the request was refused because it had not, at that point entered into formal pre-action protocol proceedings.
46. The Commissioner does not consider that a public authority must already have engaged in litigation in order to engage litigation privilege. Having viewed the withheld information it is clear that litigation was contemplated from a very early stage. The memos map a transition from litigation being a mere possibility to something that was imminent. In the Commissioner's view, although the more recent memos would be covered by litigation privilege, it is difficult to identify the exact point at which litigation privilege would come into play – however he does not consider it necessary to draw a dividing line as the earlier memos clearly

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<sup>1</sup> [https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/#125b\\_cover](https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/#125b_cover)



attract legal advice privilege, even if they are not covered by litigation privilege.

47. The memos discuss various options the Trust could take, the advantages of each option and the potential pitfalls. The Commissioner considers that disclosing this information would place the Trust at a considerable disadvantage in litigation because it would highlight, to opposing parties, the strengths and weaknesses of the Trust's case.
48. The memos are not in the public domain and the Commissioner does not consider that privilege has been lost.
49. It would be unfair to the Trust to have to disclose its full legal position, including any weaknesses in its case, prior to any litigation taking place – especially when the other parties to that litigation would not and could not be required to make a similar disclosure. By injecting unfairness into any formal proceedings, disclosure would have an adverse effect on the course of justice.
50. The Commissioner is therefore satisfied that the information that the Trust has withheld is privileged and that its disclosure would adversely affect the course of justice.

### **Public interest test**

51. As with most EIR exceptions, Regulation 12(5)(b) is subject to a public interest test. That means that, even if the information is capable of adversely affecting the course of justice, it must still be disclosed unless the balance of the public interest favours disclosure.
52. The Commissioner agrees with the complainant that the project to which the information relates is a significant one and will cost a large amount of public money.
53. The Trust is not responsible for the collapse of Carillion, but there is a significant public interest in understanding how effective the Trust has been and is being in clawing back monies that it has spent.
54. However, on the other hand, the Commissioner also recognises that there is a very strong public interest in the Trust being able to have candid conversations with its legal advisors, to seek high quality professional legal advice, properly weigh the risks and benefits and reach a considered decision.
55. As the Commissioner has noted above, disclosure of the withheld information would reveal the strengths and weaknesses of any legal case the Trust wished to bring in such a way as to make it more difficult

for the Trust to be successful in such claims. It is not in the public interest to make it more difficult to recoup monies that it is due.

56. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining this exception.
57. Finally, the Commissioner has considered the presumption in favour of disclosure. In the Commissioner's view, the public interest is not evenly balanced and therefore the exception has been applied correctly.

### **Procedural Matters**

58. Regulation 5(2) states that such information shall be made available "as soon as possible and no later than 20 working days after the date of receipt of the request."
59. The Commissioner notes that the Trust identified some relevant information during the course of the investigation and, though this information has already been provided to the complaint, this was done outside the 20 working day timeframe.
60. The Commissioner therefore finds that the Trust breached Regulation 5(2) of the EIR as it did not communicate all the non-exempt information that it held within 20 working days.

## Right of appeal

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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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

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