



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0042**  
**Information Commissioner's Ref: FS50129653**

**Heard at Procession House, London, EC4**  
**On 15<sup>th</sup> September 2008**

**Decision Promulgated**  
**22 September 2008**

**BEFORE**

**CHAIRWOMAN**

**Melanie Carter**

**and**

**LAY MEMBERS**

**Anne Chafer**  
**Anthony Stoller**

**Between**

**ROBIN WILLIAMS**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**CARDIFF & VALE NHS TRUST**

**Additional Party**

**HEARING ON THE PAPERS**

## **Decision**

The Tribunal dismisses the appeal save in relation to certain information and substitutes the following Decision Notice.

**Information Tribunal**

**Appeal Number: EA/2007/0042**

**SUBSTITUTED DECISION NOTICE**

**Dated 15 September 2008**

**Public authority: Cardiff & Vale NHS Trust**

**Address of Public authority: Heath Park, Cardiff, CF14 4XW**

**Name of Complainant: Robin Williams**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal upholds the Decision Notice dated 2 April 2008 other than:

- a) with regard to information contained in a signed copy of the sale agreement for the Sully hospital site and a version of the Sully Update document as amended by Mr Ian Walker. The substituted decision in this regard is that the Trust does hold this information.
  
- b) with regard to item 72 of the information requested in the letter of request. The substituted decision is that the Trust was entitled to rely upon section 12 of FOIA.

**Action Required**

As the Trust has already disclosed the information at paragraph a) to the Appellant no further steps are required.

Dated this 22 day of September 2008

Signed:

Melanie Carter  
Deputy Chairwoman, Information Tribunal

## **Reasons for Decision**

### **Introduction**

1. This case concerns the sale of Sully Hospital by Cardiff & Vale NHS Trust (“the Trust”) in February 2004 to a developer. It is the Appellant’s, Mr Williams, strongly held belief that this site was sold at an undervalue and that the tender process was deeply flawed. His letter of request under the Freedom of Information Act 2000 (FOIA), which is the subject of this appeal, sought a wide range of information in relation to the sale.

### **The request for information**

2. Mr Williams had made a number of requests for information which pre-dated the introduction of FOIA. The Trust had supplied certain information but insufficient to satisfy Mr Williams who, at the suggestion of the Information Commissioner (“IC”) made a comprehensive fresh request for information in a letter dated 12 June 2006. This post-dated the introduction of FOIA and therefore both created legal obligations for the Trust and also jurisdiction for the IC to investigate the Trust’s compliance. The request covered a broad range of information concerning the tender process for the sale of the hospital, the choice of the preferred bidder and the negotiations for sale. The Tribunal’s decision will refer to the information requested using the numbers allocated to the particular items in the Annex to the Decision Notice.
3. The Trust wrote back to Mr Williams on 10 August 2006 stating that particular information was not held and refusing to provide certain other information under sections 12 (excessive cost of compliance) and 43(2) (commercial interests) of FOIA.

### **The complaint to the Information Commissioner**

4. Mr Williams in turn complained to the IC who investigated the matter. His Decision Notice dated 2 April 2008 found that the Trust had breached sections 1(1), 10(1), 17(1) and (5) but upheld the Trust's findings on the application of sections 12 and 43(2).

#### The appeal to the Tribunal

5. Mr Williams appealed to the Tribunal on 19 April 2008. His grounds of appeal were in essence that the IC ought not to have accepted that the Trust was entitled to rely upon section 12(1) and 43(2) in not disclosing certain of the information requested. He argued moreover that certain of the information requested was indeed held by the Trust.
6. Mr Williams sought to raise before the Tribunal arguments and evidence which went to show that the Trust had failed to follow normal commercial practices and tender requirements in relation to the sale. Whilst these were matters which were taken into account in determining specifically whether information was held and the application of the public interest test under section 43(2), the Tribunal did not seek to determine whether any of these allegations were well founded. This fell outside of the jurisdiction of the Tribunal as did Mr William's complaints as to the way in which the IC conducted its investigation. The Tribunal's sole task in this appeal is to consider whether the Decision Notice is in accordance with law.
7. The Tribunal was unhappy that all parties to this Tribunal failed to adhere to the timetable in the directions as originally issued and that there had been a flurry of last minute submissions and additional documents. The Tribunal noted moreover that the Appellant had not had an opportunity to respond to correspondence and a limited number of documents submitted by the IC and the Additional Party in the last few days before the hearing. It considered carefully the contents of these documents and satisfied itself that insofar as they raised new matters they did not have a material bearing on its decision. As such, albeit the process had not been run as smoothly as it might, the Tribunal was satisfied that there had not been any substantive unfairness to any party.

#### The questions for the Tribunal

8. The Tribunal considered:

- a. Whether certain requested information was held by the Trust, including in particular a signed version of the final contract for sale;
- b. Whether the Trust was entitled to rely upon section 12(1) in relation to items 22b), 31(b), 34(a) and (b), 39 and 72; and
- c. Whether the Trust was entitled to rely upon the exemption at section 43(2) in relation to items 79 & 82.

Evidence

9. The Tribunal was provided with a large bundle of documents in an open bundle. This covered the tender process, the negotiations for sale and draft and final contracts. It also contained information as to the IC's investigation.

10. The open bundle included redacted versions of reports known as the Sully Update 25 September 2003 and the Sully draft report 17 October 2003. The Tribunal had sight of a bundle of closed documents which were essentially these reports unredacted. It was common knowledge that the redacted information was the names of certain of the bidders for the hospital site. This was the information in relation to which section 43(2) was claimed (items 79 & 82).

Legal submissions and analysis

*Section 1 – information held*

11. Section 1 provides:

*“Any person making a request for information to a public authority is entitled-*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request; and*

*(b) if that is the case to have that information communicated to him.”.*

12. Mr Williams challenges the finding of the IC that certain of the information requested was not held by the Trust. This related to certain of the information items listed in paragraphs 32 – 33 of the Decision Notice.
13. The Tribunal reminded itself that in order to satisfy itself that particular information is not held, it is not necessary for the public authority to prove to a point of certainty that this is so, rather the matter is to be determined on the balance of probabilities (*Linda Bromley v ICO & the Environment Agency EA/2006/0072*). Thus, the Tribunal must ask itself is it more likely than not that the information is held? The Tribunal had regard to the evidence before it of the efforts of the Trust to locate the particular information (particularly that set out in a schedule explaining the costs incurred for the purposes of section 12) and, with the exception of the matters set out in paragraphs 14-18 below, the Tribunal was satisfied that it was more likely than not that the information was not held. The Tribunal accepted that the Trust had analysed the request carefully and then conducted a reasonably thorough search for the information in question.
14. In the grounds of appeal and during the proceedings, a particular point of contention had been the sale agreement between the Trust and the developer. Initially the Trust had refused to disclose a copy of the final sale agreement, relying upon the exemption at section 43(2). Over the passage of time of the IC investigation, the Trust considered that any commercial confidentiality obligations had effectively expired and decided to disclose a version of the sale agreement that had already been sent to the IC. This version which was unsigned was mistakenly said to be a copy of the final contract. The IC accepted in its Decision Notice that Mr Williams had been sent what was said to be a copy of the final contract.
15. As Mr Williams correctly pointed out, the version provided to him in response to the letter of request could not be a copy of the final sale agreement as it was not signed. To add to the confusion, this document gave the agreement date as 10 February 2003 when in fact the sale had been concluded on 10 February 2004. It



was subsequently clarified that this was a typographical error. Mr Williams appears to have concluded two things from having had sight of the incorrectly dated contract: first, that this represented a formal legal document concluded mid-negotiations in 2003 and second, that being only signed by one party, this could not constitute a final version.

16. Sometime after Mr Williams had lodged his appeal, the Trust's solicitors located a further copy, this time signed by the Trust. This was sent to the Appellant during the course of the proceedings. As this copy had handwritten annotations and was not signed by both parties, Mr Williams remained unconvinced that this was indeed a true copy of the final contract. The Tribunal accepted the evidence of the Trust however that the parties to the agreement only signed one copy each such that a copy with two signatures did not exist. Mr Williams had not adduced any evidence to show that such a copy did exist.

17. The Tribunal found that given the existence of the signed copy of the final agreement, the Decision Notice had in this respect been incorrect. As the Trust had now supplied Mr Williams with this particular version, the Tribunal did not order any further steps to be taken. It noted moreover that given the confusion over the dates of the contract, the fact that the IC had followed up the lack of a signature with the Trust and that the IC had been told categorically in writing that this was a copy of the final contract, it had been reasonable for the IC to have come to this conclusion. The Tribunal accepted moreover that the Trust and its solicitors had not set out to mislead and the confusion over the version of the sale agreement had been inadvertent.

18. The second document which came to light during the proceedings was a version of the Sully Update as amended by a Mr Walker of the Trust. It appeared that the original version had been created by King Sturges, the property agents for the Trust. It was sent hard copy and electronically to the Trust. The hard copy had been disclosed in part in response to the letter of request and the electronic copy

had been overlooked. It came to light that Mr Walker had slightly amended the electronic version by adding two sentences and his own name to the document. The Decision Notice was incorrect therefore in that it did not find that this document existed and should have been disclosed in part. The IC could not however be criticised for this and the Tribunal noted that Mr Williams had now been provided with a redacted copy of this further version of the Sully Update report.

19. Finally, in relation to what information was held by the Trust, the Tribunal was of the view that the Decision Notice was not clear with regard to item 72 of the letter of request. Mr Williams thereby asked for:

*“All of the documentation surrounding the announcement that Galliard would not be bidding again to their re-emergence as the developer of choice.”*

20. The Decision Notice referred to the Trust having claimed that this information was not held. This was a matter of some concern to Mr Williams who believed that there had been some misconduct with regard to the successful developer's bid. The IC, in the body of the Decision Notice stated that he did not unequivocally accept the Trusts version of events in relation to item 72. He was of the view that, given the *“considerable amount of time the Trust has expended in endeavouring to comply with the request he does not require it to continue to search for information around this specific time frame.”* The summary decision paragraphs at the end of the Decision Notice however were silent in relation to item 72 – most notably, this was not included in the items in relation to which the IC was of the view that section 12 may be applied. It was unclear therefore whether the IC upheld the Trust's refusal on the grounds that the information was not held or whether the exception in section 12 might be relied upon.

21. The Tribunal considered that the Decision Notice could be criticised for not being clear on this point and to that extent was defective. However, the Tribunal was of the view that section 12 would apply (for the reasons given below) such that the Trust was not required to take any further steps in this regard.

## Section 12 – costs limit

22. Section 12 provides an exception to the duty to provide information held under section 1(1) of FOIA. This provides:

*“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

*(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”.*

23. For the purposes of section 12, the “appropriate limit” is prescribed in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”). Regulation 3 provides so far as relevant:

*“(1) This regulation has effect to prescribe..... the appropriate limit referred to in section 12(1) and (2) of the 2000 Act....*

*(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.*

*(3) In the case of any other public authority the appropriate limit is £450.”.*

24. This costs limit is thus prescribed in legislation. It is not, in this case, a limit arbitrarily applied by the Trust. It was entitled to rely upon section 12 subject to satisfying the IC and the Tribunal in turn that it had already, as claimed, exceeded the costs limit. This was not a matter of discretion for the IC or one that could be approached in terms of ‘reasonableness’.

25. The IC concluded that the Trust was entitled to rely upon the exception in section 12 in relation to items 22(b), 31(b), 34(a & b) and 39. Mr Williams, in his grounds of

appeal to the Tribunal argued that the IC had wrongly ignored inconsistencies and deliberate misrepresentations by the Trust and that therefore the Trust ought to be made to make disclosure of the particular information. The IC did not however “unequivocally accept the Trust’s version of events”. He made his decision on the basis of section 12 and the time taken already in complying with the letter of request. It was not incumbent therefore on the Tribunal to consider the alleged inconsistencies and misrepresentations as these, even if proved, had no bearing on the basis upon which the Trust had refused to make disclosure.

26. The Trust provided the IC with a schedule of time spent in complying with the letter of request, said to be 26 hours. Only certain activities may however be taken into account when determining an estimate for the costs of compliance. Thus regulation 4 provides:

*“(3) In the case in which this regulation has effect, a public authority may, for the purposes of this estimate, take account only of the costs it reasonably expects to incur in relation to the request in-*

*(a) determining whether it holds the information;*

*(b) locating the information, or a document which may contain the information*

*(c) retrieving the information, or a document which may contain the information; and*

*(d) extracting the information from a document containing it.”*

The IC queried certain of the items in the schedule of costs and determined that the Trust could be said to have in fact spent 5/6 hours less. As this was still above the 18 hours limit (at £25 per hour) set down in legislation, the IC found that the Trust could rely upon section 12 and was not required to spend anymore time on complying with the request. The Tribunal agreed with the IC that he could properly take into account *“the manner in which the information is held; the fact that it is held*

*in various physical locations by the Trust and its appointed agents (the property agent and solicitor advising in respect of the sale) and also the fact that very little information is available by electronic means” (paragraph 41 of the Decision Notice).*

27. Mr William's main argument in relation to section 12 was that given that he had been provided with significant amounts of information previously, in six batches, the Trust ought not to be allowed any further time for compliance with the latest letter of request. He also argued that since he had received some of the information three times, the Trust ought not to be able to include any time for the locating and providing of the third set in compliance with the letter of request. Finally, he argued that the Trust must have one master file for all documents such that compliance would not have required liaison with and the involvement of the Trust's agents. To allow the Trust to rely upon section 12 would in effect be sanctioning incompetence. He maintained that a public authority of the Trust's nature ought to have organised records such that his request could have been easily complied with within the costs limit.
28. The Tribunal agreed with the IC that the fact that information had been sent to Mr Williams prior to this FOIA letter of request was not relevant. The time taken by the Trust in complying with the previous requests was not, under the terms of section 12 and the Regulations, to be taken into account. Mr Williams did not provide any evidence to contradict that of the Director of Developments that whilst the Trust did have a master file holding most relevant information, this was an incomplete set and there existed further files in different locations that needed to be searched. It was not open to the Tribunal to disallow reliance upon section 12 on the basis that the Trust could have organised its records more effectively. The question was whether the information was held by the Trust or its agents and if so the time taken in compliance with the letter of request.
29. The Tribunal found that the evidence from the Trust as to time taken was credible and that the IC had therefore been correct in accepting reliance upon section 12.

*Section 43(2) – commercial interests*

30. Section 43(2) provides a qualified exemption to the duty to provide information under section 1(1). This provision states:

*“Information is exempt 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).”*

31. The first step for the Tribunal was to assess whether there was likely to be prejudice to any person if the Sully Update and Sully draft report were to be disclosed in an unredacted form. These two documents comprised appraisals of companies which were bidding for the hospital and individuals associated with those companies. The appraisals were as to the financial health of the companies and their intentions in making the bids. The reports were prepared by King Sturges and were provided to assist the Trust in deciding how to progress the sale of the hospital.

32. The IC and the Trust both argued that there was a real and significant likelihood of prejudice to not only the Trust, but also the property agent and the developers named in the documents if the redacted names were to become public (*John Connor Press Associates v Information Commissioner 9EA/2005/005*) and *Hogan v Information Commissioner (EA/2005/0026)*. This was on the basis that the combination of the names of the developers with the commentary would be likely to damage their commercial interests. In relation to the bidders, it was submitted that the particular comments could have an adverse effect on their reputation and therefore commercial interests. It was argued that the property agents would likely lose the trust of those working in the property development field on the basis that it would become known that information shared with it could eventually be made public. The IC drew the Tribunal's attention to a letter from King Sturges, stating that the two documents were provided to the Trust in confidence and contained *“commercially sensitive commentary on the companies bidding [for the hospital] and the individual associated with them at the time”*. Finally in this regard, it was

argued that the Trust would lose the confidence of the property market on the grounds that it could not maintain the integrity of any particular transaction.

33. Mr Williams on the other hand argued that the IC had failed to take into account the information items 2 and 38 (District Valuer's report and handwritten list of tenderers) of the letter of request which included the names of the bidders such that Mr Williams was already privy to this information. The Tribunal had regard to paragraph 14 of the Decision Notice which referred to information which the IC had taken into account and concluded, consistent with the submissions of the IC that, items 2 and 38 had been considered by the IC prior to coming to his conclusions. In any event, if Mr Williams was able to link up the company names to the commentary in the two documents this was on the basis of information he had received outside of FOIA. As such it was not information that was publically available. The Tribunal reminded itself that disclosure under FOIA was disclosure to the world such that it had to consider the application of section 43(2) regardless of what information Mr Williams already privately had.

34. The Tribunal agreed with the submissions of the IC and the Trust in paragraph 32. It was satisfied that the exemption in section 43(2) was engaged on the basis that there was a real and significant risk of prejudice to certain companies and the Trust itself. For instance in relation to one company it was said, on the basis of hearsay, that it had submitted spoiling bids then sought to renegotiate when contracts were due for exchange. It was clear to the Tribunal that release of information such as this along with the identity of the company in question would be likely to prejudice commercial interests.

35. The Tribunal was not persuaded that simply because the name of the successful bidder had been revealed in the particular documents that the remaining redacted names could also be revealed without prejudice. It was of the view that a successful bidder would expect a greater degree of public scrutiny and accountability in relation to its dealings with the Trust. Any prejudice moreover would be offset against the fact that the company had been successful in securing

the agreement.

36. The next step for the Tribunal was to consider the so-called public interest test. It would only be where the public interest in maintaining the exemption outweighed the public interest in disclosure that the Trust should be allowed to rely upon section 43(2). In this sense there was a presumption in favour of disclosure.

37. The Tribunal considered first the factors in favour of disclosure. Mr Williams argued that the Trust's failures to achieve a best price, its breaches of normal procurement processes and maladministration created a compelling public interest in favour of disclosure. This he argued would expose the shortcomings of the Trust and thereby provide accountability in the use of public funds. The Tribunal noted however that Mr William's evidence on this appeared to come primarily from newspaper reports which the Tribunal considered inherently unreliable. Beyond this, his arguments were based upon assertions that the Trust could not be believed to be telling the truth and that their responses were a 'cover-up' for malpractice.

38. The IC and the Trust both pointed to the investigation by the Auditor General for Wales which it was said exonerated the Trust from any wrongdoing in relation to the sale of Sully hospital. The position on this was perhaps not as clear as asserted but the Tribunal did note the letter of 28 October 2004 in which the National Assembly for Wales Audit Committee stated that in their view there was no evidence that the site was originally valued at £10 million. One of the main planks of Mr William's complaints was that he asserted the hospital site had been sold for £3 million when in fact it was worth £10 million.

39. The Tribunal considered more generally whether disclosure of the information might aid transparency in the Trust's public procurement affairs. It noted however that there had been disclosure of the body of the two reports and that it was solely the names of the companies that had been withheld. The Tribunal agreed with the IC



that release of the names would not substantially inform public debate or indeed any greater understanding of the Trust's decision to sell the site to the particular developer.

40. The Tribunal considered the factors weighing against disclosure. First, it took account of the likely prejudice as set out above. There was a strong public interest in the Trust being able to obtain and rely upon the professional opinions of property agent's in their private sector transactions. Without this there was less chance of a public authority achieving best price and therefore the most efficient use of public resources. Equally, there was a public interest in there being private sector companies prepared to do business with public sector entities without fear of disclosure of the kind of information which could damage their commercial interests.

41. Finally, the Tribunal considered whether the passage of time was such that the arguments against disclosure had been weakened. It was of the view however that since the sale was in 2004, this was still a relatively recent event.

42. In all the circumstances the Tribunal was satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosure. As such, it agreed with the IC that the Trust had been entitled to rely upon the section 43(2) exemption in relation to the redacted names in the two documents.

### Conclusion and remedy

43. The Tribunal upheld the Decision Notice in most respects. It concluded that the IC had not been correct in concluding that Mr Williams had received a copy of the final contract for sale and had also omitted to find that the second version of the Sully Update had been held. Neither of these matters had however been the fault of the IC and indeed, the Tribunal accepted that insofar as the Trust or its solicitors had overlooked these documents, this had been an inadvertent mistake.

44. Finally, the Tribunal considered that the Decision Notice could have been clearer with regard to item 72 of the letter of request and the Substituted Decision Notice specified that section 12 may be relied upon.

45. No further steps are required of the Trust.

46. Our decision is unanimous.

Signed:

Melanie Carter

Deputy Chairwoman

Date 22 September 2008