



**IN THE FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]**

EA/2015/0161

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50565255

Dated: 1 July 2015

Appellant: RICHARD BOURNE

Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 10 November 2015

Date of Decision: 24 November 2015

Date of Promulgation: 7 December 2015

**Before
Suzanne Cosgrave
Narendra Makanji
Annabel Pilling (Judge)**

Subject matter:

FOIA – Qualified exemptions – Inhibition of free and frank provision of advice
s.36(2)(b)(i)

FOIA – Qualified exemptions – Inhibition of free and frank exchange of views
for purposes of deliberation s.36(2)(b)(ii)

Representation:

For the Appellant: Julianne Morrison

For the Respondent: Rupert Paines

Decision

For the reasons given below, the Tribunal allows the Appeal and issues a

Substituted Decision Notice.

Substituted Decision Notice

Dated XX November 2015

Public Authority:

Dorset County Hospital NHS Foundation Trust

Address:

Williams Avenue

Dorchester

Dorset

DT1 2JY

Dorset County Hospital NHS Foundation Trust did not deal with the request for information in accordance with the requirements of the Freedom of Information Act 2000. It was not entitled to refuse to disclose the "*Transforming Pathology Services Outline Business Case*" of June 2013 under the exemptions in section 36(2)(b)(i) or section 36(2)(b)(ii).

It must now disclose the information within 35 days.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 1 July 2015.
2. The Decision Notice relates to a request for information made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Dorset County Hospital NHS Foundation Trust ('the Trust') following a lengthy procurement process in respect of its pathology services.

3. On 8 October 2014, the Trust announced that it would not be entering into a contract with any of the companies which had submitted a tender, but would, instead, invest in its in-house pathology service.
4. On 9 October 2014, the Appellant made a request for information to the Trust referring to the fact that the procurement process had now ended:

“...please accept this as a formal FOI request for the following:-

(1) The Options Appraisal – referred to in various papers as having gone to a private session of the Trust Board in August/September 2013

(2) The Business Case for the Pathology “project”

(3) The Procurement Plan for the Pathology procurement

(4) The Tender Evaluation Report

(5) The report on the benchmarking /best value appraisal of the in-house service compared to the preferred bidder (Board Paper for 8 October)

(6) The information supplied to the Council Task and Finish Group (I assume redaction will no longer be applied)

(7) Copies of the legal advice obtained in relation to the tender process – the Board Chair told visitors to the Board meeting that such advice had been obtained.

[Numbering added]

5. The Trust disclosed some information and withheld the remainder relying on a number of different exemptions under FOIA. During the Commissioner’s investigation it provided further information to the Appellant.

6. This appeal is concerned with items (1) and (2) of the Request, which are, in fact, contained within the same document, "*Transforming Pathology Services Outline Business Case*" from June 2013. The Trust withheld this, and items (4) and (5) under section 36(2)(b)(i) and (ii) (free and frank exchange of views/provision of advice). Investigating the Appellant's complaint in respect of that decision, the Commissioner concluded that the exemption was correctly applied in respect of this and the other items and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
7. The Tribunal was provided in advance of the hearing with an agreed bundle of material. The Trust did not seek to be joined as a party or participate any further in this appeal. The Commissioner chose not to attend the hearing. We heard from the Appellant in person and oral submissions from Miss Morrison.
8. The Tribunal was also provided with a small closed bundle which was not seen by the Appellant and which contains the withheld material. It also contains a short Closed Response from the Commissioner which quotes directly from that material.
9. The Appellant did not contest that a closed material procedure is appropriate in the circumstances of this Appeal. There is recent guidance for the approach to be taken by courts and tribunals in such circumstances; *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, and *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) in which the Upper Tribunal issued guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context.
10. We kept under review whether information about closed material should be provided to an excluded party, and informed the Appellant that the withheld document was ten pages in length.

11. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

The Issues for the Tribunal

12. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

13. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

14. Section 36 is a qualified exemption and provides as follows:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act_

(a)

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation...”

15. The qualified person is the person authorised as such by a Minister of the Crown; for an NHS Trust, that person is its Chief Executive.

16. When considering whether the exemption is engaged, the Commissioner is making a decision not on whether he agrees with that

opinion, but whether it was reasonable for the qualified person to reach that opinion. It is well established that the test for reasonableness is not a high hurdle; there is no requirement for the opinion of the qualified person to be the only reasonable opinion, or the most reasonable opinion.

17. The Commissioner was considering the reasonableness of the opinion in respect of a number of items of the Request, although this appeal is confined to a consideration in respect of one document alone. In his Closed Submissions to us he did specifically address the reasonableness of the opinion in respect of "*Transforming Pathology Services Outline Business Case*" however in the Decision Notice he does not make a distinction between the three reports under consideration.

18. The Commissioner reaches his conclusion at paragraph 19 of the Decision Notice. In reaching his decision, he "*notes*" that:

"the qualified person was provided with copies of the withheld information, as well as counter arguments to applying the exemption and that this material should have allowed her to reach a balanced decision."

19. We have seen a copy of Record of the qualified person's opinion. This appears in the agreed hearing bundle and is dated 24 October 2014. It is unsigned as the opinion was given verbally. This clearly states, contrary to that which the Commissioner "*notes*", that the information was not provided to the qualified person. The form records that the information was "*described to qualified person (already aware of the contents of these documents)*". It does not differentiate between the items under consideration. "*Transforming Pathology Services Outline Business Case*" is a document from June 2013. This document is only ten pages long and could have been provided with ease. The qualified person may have been aware of its contents generally, but in light of the passage of time and the number of other documents this person

would have read or of which she would have been made aware in the intervening period it was unreasonable not to at least re-familiarise herself with its actual contents.

20. The “*Counter arguments put forward*” section has been left blank. This is contrary to the Commissioner’s finding that the qualified person was provided with the counter arguments. In light of this, the Commissioner erred in concluding that the qualified person did, or even could, have reached a balanced opinion.
21. The Appellant submits that the information provided in the section headed “*Arguments put forward as to why prejudice/inhibition would/would be likely to occur*” is generic and appears to be on the basis that there should be blanket confidentiality as opposed to a consideration of each particular item. There is no information before us in respect of to what information “correspondence between the Consortium and the Trust” refers. It is not part of the “*Transforming Pathology Services Outline Business Case*” document and we do not see that this has any bearing on the reasonableness of the opinion in respect of this document.
22. The Commissioner also erred in regarding the Trust to be in the process of reaching a decision in respect of pathology services. He relies upon submissions from the Trust that the information contained discussion of options which had not been pursued but “*which may be considered again in the future*”, and that the Trust considered the tender process to still be “*in phase*” at the time of the request. In its written representations to the Commissioner, the Trust suggested that there is a need to maintain confidentiality of these documents at least until such times as a long-term solution for pathology has been agreed by the Board. The Commissioner asked for elaboration of this and the Trust replied on 23 April 2015 to indicate that “*a long-term solution for pathology services at the Trust is yet to be agreed by the Board and as such the process for examining the best service options has not yet ended*”, that it is “*currently*” looking at the possibility of partnership

working with other Trusts regarding pathology services and that it had “*not ruled out the possibility of putting part or all of the pathology services out to tender again in the future.*” This was its stated position in April 2015, having concluded six months earlier the procurement process which had lasted approximately a year and having announced in October 2014 that its decision was not to award a contract to a private provider of pathology services, but that it would invest in its in-house service. This being the case, it was wrong to suggest that at the time the qualified person gave her opinion, there was any decision currently under consideration; a decision had been made and that decision announced publicly. There can never be certainty that decisions of public authorities will not be revisited in the future, but in the circumstances of this case with the Trust publicly committing on 8 October 2014 to spending a substantial sum of public money in-house rather than awarding a contract to the private sector, it was not reasonable to suggest that the matter was likely to be considered again in the foreseeable future.

23. The Commissioner appears to have misused or misunderstood the significance of the phrase “*in phase.*” The Appellant referred in his submissions to the OGC FOI (Civil Procurement) Policy and Guidance. Despite this, this document had not been included in the hearing bundle and we were provided with a copy at the hearing. It is not clear whether the Trust or the Commissioner had sight of this document. We consider that they should have done. If the Commissioner had considered this document, he may have come to a different conclusion in respect of the withheld information.

24. This document sets out Guidance to provide public authorities with a starting point when making disclosure decisions in respect of procurement information. There are six “*phases*” to the procurement process. The “*Transforming Pathology Services Outline Business Case*” would fall within phase 2, “*Initiation information (start of procurement planning up to readiness to issue bid documentation)*”.

Phase 3 is “*Tender information*” (*release of tender documents up to selection of preferred bidder*). The Guidance is clear that documents falling within Phase 2 should not be disclosed while “*in phase*” but should be disclosed when bid documentation is issued. Phase 3 commenced in around December 2013. The Commissioner was therefore wrong to conclude that the “*Transforming Pathology Services Outline Business Case*” document was “*in phase*” at the time of the request in October 2014. We do note, however, that the Commissioner, and the qualified person, considered whether the exemption applied to this in conjunction with a consideration of items (4) and (5) of the Request and that these are documents relevant to Phase 3.

25. The Commissioner has also not taken into account that the opinion of the qualified person related to a significantly larger amount of information than simply the *Transforming Pathology Services Outline Business Case*” document. He has also failed to consider the significance of the Trust’s subsequent decision to disclose some of that other information and whether the disclosure of this document could have an impact envisaged by section 36. In our opinion this is relevant as this subsequent disclosure, which formed the substantial part of the hearing bundle, considerably “waters down” any envisaged impact of disclosure of this single document.

26. For all these reasons, it is our unanimous opinion that the Commissioner made a number of errors in his consideration of whether the opinion of the qualified person was a reasonable opinion in respect of the “*Transforming Pathology Services Outline Business Case*” document. We are satisfied that his errors resulted in him wrongly concluding that this was a reasonable opinion.

27. We therefore conclude that the exemption in neither section 36(2)(b)(i) nor section 36(2)(b)(ii) is engaged in respect of the “*Transforming Pathology Services Outline Business Case*” document.

28. We therefore allow this appeal.

29. The Trust has also purported to rely on the qualified exemption provided for in section 43(2) FOIA (commercial interests) in respect of the "*Transforming Pathology Services Outline Business Case*" document. The Commissioner did not consider this in his Decision Notice in light of his conclusion in respect of section 36(2)(b)(i) and (ii). The Trust is aware of this appeal and its limited scope; it has not provided us with any further submissions in respect of section 43(2) or made any effort to attempt to develop its argument.

30. On closer examination of the submissions of the Trust, it is clear that its concerns are in respect of revealing the names of organisations only. It is not possible without more evidence to understand whether there is any significance to those named after the conclusion of what was a publicly conducted procurement process. However, we have been able to see the withheld information and are satisfied that commercial sensitivity and therefore the exemption provided for in section 43(2) have no relevance to this document, rather the arguments of the Trust relate to items (4) and (5) of the original request.

31. We therefore issue a substitute Decision Notice requiring the Trust to disclose the "*Transforming Pathology Services Outline Business Case*" document.

32. Our decision is unanimous.

24 November 2015