

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 April 2008

Public Authority: Cardiff and Vale NHS Trust
Address: Heath Park
Cardiff
CF14 4XW

Summary

The complainant requested information surrounding the disposal of Sully Hospital. The public authority disclosed some of the information and refused some by relying on sections 12(1) and 43(2) of the Act and advised the complainant that it did not hold the remainder. The Commissioner found that the public authority did not initially respond to every aspect of the request, however following the Commissioner's investigation further information has been released to the complainant. The Commissioner's decision is that the public authority did breach sections 1(1), 10(1), 17(1) and 17(5) of the Act; however has cited sections 12(1) and 43(2) appropriately in relation to certain information requested by the complainant.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant originally formally requested from the public authority (the Trust) on 2 December 2004 information relating to the sale of Sully Hospital. This request was responded to by the Trust who supplied the complainant with certain information in connection with the request.
3. Although the complainant contacted the Commissioner to complain about the way the Trust handled the request and also supplied the Commissioner with a great deal of material disclosed by the Trust in response to the request, because the complainant had submitted the request prior to 1 January 2005 (which is when the rights conferred by the Act came into force), he was advised to submit a new request to the Trust for any information that had not been released to avoid any doubt about whether it was caught by the Act. This would also prevent any questions arising as to whether the Commissioner would be acting outside of his powers if he investigated a complaint

about the request. The complainant agreed to this, which led to the making of the request which is the subject of this Notice.

4. To prevent the complainant suffering any further delay in respect of his second request, the Commissioner advised that should he remain dissatisfied with the response issued by the Trust with regards the new request, he would not be required to seek an internal review from the Trust, but could contact the Commissioner so that the handling of the later request could be investigated. The Trust was made aware of this.

The Request

5. On 12 June 2006 the complainant submitted the new request to the Trust for a number of items surrounding the disposal of Sully Hospital, which remained outstanding from his 2 December 2004 request, and which included correspondence referred to in the previous disclosure by the Trust. The items sought within this request are set out in annex 1. For ease of reference the Commissioner has used the same numbering used in the complainant's request and will continue throughout this Notice to refer to the specific items on the request using the numbering on the request.
6. The Trust acknowledged the request on 20 June 2006 and advised the complainant on 12 July 2006 that there would be a delay in issuing a substantive response to the request.
7. The Trust responded substantively to this request on 10 August 2006 providing some information (items numbered 17, 21, 22(a), 32(a) and 39 in part) as well as a schedule of its response to the complainant's specific itemised request. In its letter of 10 August 2006 the Trust advised the complainant that it had spent in excess of 2.5 days locating and retrieving the requested information from its files as well as files held by its solicitors and the property agent involved in the disposal of the land; and that to continue to search for 'generalised requests would exceed the fees limit set out by the Act' (items numbered 22(b) and 34(a & b) on the request). The Trust applied section 43(2) of the Act to items numbered 47, 79 and 82 on the request as it felt that disclosure would prejudice its commercial interests as well as that of third parties and the public interest favoured maintaining the exemption. The Trust also endeavoured to provide the complainant with some explanation in respect of his concerns about the valuation of Sully Hospital and the final sale price for the piece of land.
8. The Trust also disclosed a letter to the complainant (dated 11 February 2003 from their solicitors) in response to item 19 of the request; however, this was not the correct letter that was requested by the complainant. In relation to item 39 of the request the Trust provided the complainant with the template letter which was used by the property agent together with the attachments (revised sale particulars and plans) referred to in that letter. However the Trust advised the complainant that to provide details of the firms who simply requested a copy of the revised prospectus and supporting literature would prejudice its commercial interests, and that this information was exempt by virtue of section 43(2).
9. With regard to item 29 of the request, the Trust advised the complainant that the item sought was a letter from the buyer's solicitor addressed to the property agent dated 18 September 2003, and this letter was previously disclosed to the complainant in

connection with the 2 December 2004 request. This letter is also listed by the complainant (at paragraph 27 and 28 of his list) as one of the items disclosed by the Trust in respect of the previous request. The Trust also advised the complainant that it did not hold the information numbered 27, 31(a), and 32(b), on the request.

The Investigation

Scope of the case

10. The complainant initially contacted the Commissioner on 13 July 2006 to report that no response had been forthcoming from the Trust in respect of his 12 June 2006 request.
11. Following receipt of the Trust's response of 10 August 2006, the complainant contacted the Commissioner on 21 August 2006 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The delay he experienced prior to receiving a substantive response,
 - That he had not been provided with all of the information requested, and
 - That he did not accept the Trust's explanation for citing sections 12(1) and 43(2) of Act for refusing some of the requested information.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
13. The Commissioner has considered whether the Trust applied the Act correctly in seeking to rely on sections 12(1) and 43(2) of the Act for not disclosing some of the requested information. In addition the Commissioner has considered whether the Trust has disclosed all of the information caught by the request which it is able to supply within the appropriate limit.
14. The Commissioner has also given regard to the evidence supplied by the complainant in support of his views, which comprises of over 70 separate documents relating to the sale of Sully Hospital (most of which were disclosed to the complainant by the Trust in response to his 2 December 2004 request), and includes the following:
 - Correspondence between the Trust and interested bidders concerning the sale of Sully Hospital.
 - Correspondence between the solicitors acting for the Trust and solicitors for the buyer.
 - Correspondence between the property agent and the Trust relating to the marketing of the site.
 - A copy of the letter dated 18 September 2003 from Galliard to the property agent.
 - A copy of an 'Agreement for sale' dated 10 February 2003 between the Trust and the buyer.
 - Internal memos and extracts from minutes of meetings at the Trust relating to the sale of Sully Hospital.

- Newspaper articles from the Western Mail and South Wales Echo relating to the disposal of NHS buildings and also specifically concerning the sale of Sully Hospital.
- A copy of completed Land Registry 'Transfer of part of registered title' TP1 forms (the TP1 form).
- Report on marketing of Sully Hospital produced by the property agent involved in the marketing and assessment of the bidders.

Chronology

15. The Commissioner wrote to the Trust on 3 October 2006 setting out details of the complainant's case. In this letter the Commissioner listed all of the information which had been requested by the complainant which either had not been responded to, not disclosed or withheld by the Trust and sought clarification together with evidence on why all of the items listed could not be released. The Commissioner identified 18 items which remained undisclosed from the complainant's 12 June 2006 request for information. These items are numbered 3, 8, 19, 22(b), 23, 25, 27, 30, 31(a & b), 32(b), 34(a & b), 39(in part), 47, 68, 69, 72, 79 and 82 on the request. (Please see annex 1 for what each item refers to).
16. As there were a number of items which remained from the complainant's request that had not been supplied by the Trust, and due to the complex nature of the request the Commissioner agreed to meet with the Trust to get a better understanding of how the records and correspondence relating to the disposal of the Hospital are held. The Commissioner met with the Trust on 21 November 2006, the outcome of which led to a greater understanding of the manner in which the sale records are held, the various searches necessary to locate certain information and the different agencies involved in the property transaction.
17. Following the meeting, the Trust provided the Commissioner with its written submissions on 8 January 2007 in respect of the complaint. The Commissioner wrote to the Trust on 28 February 2007 seeking clarification of its use of section 12 (1) of the Act and requiring evidence in respect of the information withheld under section 43(2) of the Act.
18. On 26 April 2007 the Trust wrote to the Commissioner with its evidence for engaging sections 12(1) and 43(2) of the Act for refusing some of the requested information. The Commissioner, although satisfied with the information supplied in relation to section 12(1), wrote to the Trust on 10 July 2007 requiring further evidence in connection with the information refused under section 43(2) of the Act.
19. On 6 August 2007 the Trust provided the Commissioner with additional information to support its use of section 43(2) of the Act. However in relation to one item that was refused under this section (the final sale contract), the Trust informed the Commissioner that as the sale of Sully Hospital was completed over two years previously it no longer considered that there would be commercial prejudice to any party if it was disclosed.
20. Although the Commissioner had been provided with a copy of the final contract for the sale of Sully Hospital, because the copy supplied was not signed and dated the Commissioner contacted the Trust to confirm that no other copy was held, queried the lack of a signature and enquired into the date on which the contract was signed. The

Trust confirmed in writing that it did not hold any information which confirms the date the final contract was signed, and that the copy provided to the Commissioner represents the final contract. The Trust also stated that the sale was completed in May 2004 and a search at the Land Registry would also confirm the exact date of completion.

21. On the 11 October 2007 the Commissioner provided the complainant with preliminary views on the outcome of the complaint together with a copy of the letter dated 30 January 2003 (item 19 on the request, see paragraph 7 above) as well as a copy of the final contract provided by the Trust. The complainant contacted the Commissioner to express his dissatisfaction with the outcome of the investigation, he also advised that he did not believe he had in fact been provided with a copy of the final contract as it was not signed and dated and he did not accept that the copy provided contained the final terms of the agreement.

Findings of fact

22. The Commissioner notes from the completed Land Registry TP1 form supplied by the complainant that the transfer of title for the sale of Sully Hospital took place on 28 May 2004 and was sold for £3 million to Galliards.
23. During the course of this investigation the Commissioner has explored how the information requested is held and stored by the Trust. The Trust has explained that given the nature of the transaction in question (the disposal of a large public piece of land), and the different departments involved in the sale, the requested information is held in various locations, in various filing systems.
24. A master file of the most relevant information relating to the decision making process is held by the Director of Development at the Trust. This file contains letters and printed copies of the most relevant e-mails. There are files also held by the Trust's appointed independent professional advisors, namely the property agent and its legal advisors. These are held in paper form and relate to those aspects of the marketing, negotiation and conveyancing of the site as would normally be undertaken by such advisors.
25. The Trust has explained that the nature of the process means that some discussions and meetings will not be recorded due to the work involved in such a process, and that it is not the policy of the Trust to make transcripts of every meeting it holds, other than specific fraud investigations.
26. The documentation held by the property agent amounts to approximately 4 very large storage boxes of papers. The legal advisors hold one large box which comprises of around three volumes of files. The documentation held by the Director of Development (the master file) is approximately 1.5 box files.
27. In addition to these files the Trust has explained that files are held by various individuals within the Trust, related to some of the more specific issues. For example, the Estates Department hold files concerning the ownership of the Hospital; the Facilities Department hold files on the waste management contract, and its re-negotiation; the Finance Department hold files on the accounting arrangements of the sale with the Corporate Management Department holding information on the receipt of bids and tenders.

28. Much of the information requested has been placed into archive by the agents who were acting on behalf of the Trust in respect of the sale of Sully Hospital as the transaction was completed over three years ago. This is in line with the Trust's policy on the retention and deletion of records.

Analysis

Procedural matters

Section 1(1) and 10(1) (see annex 2)

29. Section 1 of the Act provides a general right of access to information held by public authorities. In responding to requests for information, a public authority is required by section 1(1) to inform the applicant whether or not the information is held and, if it is, to have the information communicated to the applicant.
30. The Commissioner has considered the Trust's response of 10 August 2006 to the complainant's request for information, as well as its submissions in respect of this enquiry. The Commissioner considers that the Trust's response of 10 August 2006 did not address all of the items on the complainant's request (it did not respond to items numbered 3, 8, 23, 25, 30, 31(b), 68, 69 and 72 on the request) and therefore failed to comply with the provisions of section 1 (1) of the Act.
31. The complainant's request was made to the Trust on 12 June 2006 but did not receive a substantive response until 10 August 2006. The Trust failed to provide the complainant with a substantive response to the request within twenty working days and therefore breached the requirement in section 10(1) of the Act.
32. Following the Commissioner's investigation, the Trust has advised of the following in respect of the specific items requested which remained undisclosed:
- In relation to items numbered 3, 68, 69, and 72 on the request, no further information is held beyond what has already been disclosed to the complainant. (referring to the numerous items disclosed to the complainant in relation to the 2 December 2004 request, see paragraph 13 above).
 - Items numbered 27, 30, 31(a) and 32(b) are not held.
 - Items numbered 8, 23, 25, and 47 are contained in the final contract for the sale of the land, which has now been disclosed to the complainant.
 - In relation to item numbered 19, the wrong letter was sent to the complainant with the Trust's response of 10 August 2006; however the Trust has now disclosed the correct letter to the complainant.
 - Items numbered 22(b), 31(b), 34(a & b) on the request are exempt by virtue of section 12(1) of the Act. In relation to the information which remained outstanding from item 39 (see paragraph 7 above) the Trust originally relied on section 43(2) for its refusal, however during the Commissioner's investigation of this complaint, the Trust decided to cite section 12(1) of the Act instead for withholding the information outstanding from item 39.

33. In terms of items numbered 27, 30, 31(a) and 32(b) on the request, the Commissioner is satisfied that the Trust has endeavoured to locate these documents and also liaised with the property agent and solicitors who assisted with the sale, but has been unable to trace any of the items. In the absence of clear evidence, the Commissioner is unable to conclude that there has been a failure by the Trust to comply with the requirement of section 1(1) in relation to items 27, 30, 31(a) and 32(b) of the request.
34. In respect of items numbered 22(b) and 72 on the request the Trust has provided the Commissioner with the following commentary:
- ‘There was no legal agreement with Galliards in place in April 2003. The property was put back on the market because of a delay in the negotiations between Galliards and Dalkia but once a conclusion was reached then the transaction with Galliards continued’, ‘The Trust did not compensate Dalkia for leaving the site and did not consider or propose such an action, and does not have any documentation’ regarding this.
35. The complainant however argues that a legal agreement was in place between the Trust and Galliards on 10 February 2003 and this is evidenced by a copy of the agreement dated 10 February 2003 signed by Galliards which was disclosed to the complainant by the Trust. The complainant also refers to newspaper articles to support his contention that Galliards did renege on the agreement dated 10 February 2003 and therefore there must be further information surrounding Galliards’ pull out of the 10 February 2003 agreement to then becoming the preferred buyer in May 2004.
36. The Commissioner has given regard to the complainant’s views, particularly in relation to the 10 February 2003 agreement which although is not necessarily conclusive evidence that a contract had been entered into by Galliards and the Trust, however, it does strongly suggest that draft terms and conditions had been established by both parties. The Trust has explained that a delay in Galliards exchanging on this agreement led to the property being put back on the market.
37. Whilst the Commissioner cannot unequivocally accept the Trust’s version of events in relation to items 22 and 72 of the request, due to 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.

Section 12 (1) (see annex 2)

38. Having exceeded the total time public authorities are expected to spend on complying with a request, the Trust applied section 12 (1) of the Act to items numbered 22(b), 31(b), 34(a & b) and 39 of the request. Section 12 (1) of the Act allows public authorities to refuse to comply with requests for information if the cost of complying would exceed the “appropriate limit” which is £450 for all public authorities except central government and Parliament. The hourly rate is set at £25 per person, so the limit is set therefore at 18 hours work. In estimating whether the appropriate limit will be exceeded a public authority may take into account the cost of locating, retrieving and extracting the requested information when performing its calculation. The appropriate limit is set by the Freedom of Information and Data Protection (Appropriate Limit Fees) Regulations 2004 (the “Regulations”) (see annex 2).

39. Following receipt of the 12 June 2006 request, the Trust advised the Commissioner that it maintained an accurate record of the time taken to locate and retrieve the requested information from its storage and archive. It has supplied the Commissioner with a schedule, which illustrates the various activities undertaken by it in endeavouring to comply with the request.
40. The running total on the schedule for the amount of time spent by the Trust on providing a response to the request came to 26 hours. The Commissioner has considered the various searches and activities conducted by the Trust, and its appointed agents (solicitor and property agent), in order to determine, locate, retrieve and extract the information requested. The Commissioner has discounted some of the exercises described in the schedule, as they do not fall within one of the four tasks set out in Regulation 4(3) (see annex 2).
41. The Commissioner's view is that the total time spent by the Trust in endeavouring to comply with the complainant's 12 June 2006 request is some six to seven hours less than the Trust's running total of 26 hours. However, it still exceeds the 'appropriate limit' which is prescribed by Regulation 3 (1) and is set at 18 hours. In reaching this view the Commissioner took 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.
42. The complainant has argued that information from all of these different locations has already been voluntarily supplied in relation to the 2 December 2004 request with no apparent problem. Therefore there is no logical reason for withholding information available within the same locations. The Commissioner notes the points made by the complainant, however he believes the fact that the request is quite specific on the information being sought would require the Trust to conduct a thorough search of information previously disclosed to the complainant (in connection with the 2 December 2004 request), so that any items which remained could be assessed to ascertain whether they came within the scope of the request. The Commissioner considers that this would be a lengthy exercise.
43. The Commissioner therefore does not require the Trust to continue to search for the outstanding information it has been unable to easily retrieve, namely information described within paragraphs 22(b), 31(b), 34(a & b) and 39 (in part) of the request. In relation to item 39 of the request the Trust in its response of 10 August 2006 did provide the complainant with the template letter which was used by the property agent together with the attachments (revised sale particulars and plans) referred to in that letter (see paragraph 7 and 31 above).

Section 17(1) and 17(5) (see annex 2)

44. The Trust failed to issue the complainant with a refusal notice in relation to the withheld information (items numbered 22(b), 31(b), 34(a & b), 39 (in part), 79 and 82 of the request) within the timescale (twenty working days) allowed for complying with section 1 of the Act and has therefore breached the requirements in sections 17(1) and 17 (5) of the Act.

Exemption

Section 43 (2) – Commercial Interests

45. The Trust initially withheld three items of information, namely the final contract for the sale of the land (item 47 on the request), and two unredacted reports titled 'Sully Update 25 September 2003' (item 79 on the request) and 'Sully Draft Report 17 October 2003' (item 82 of the request) citing section 43(2) of the Act for its refusal (see annex 2). Redacted versions of the two reports were disclosed to the complainant.
46. During the course of the Commissioner's investigation, the Trust came to the view that as the disposal of the land was completed two years ago, the 'risk of prejudice to commercial interests is now diminished' and that the final sale contract could be released to the complainant. To expedite matters in this regard, and with the agreement of the Trust the Commissioner provided the complainant with a copy of the final contract, although the complainant continues to dispute that it is a final version of the contract that was signed on 28 May 2004 (see paragraph 19 above). Accordingly, the Commissioner has not considered the application of the section 43 exemption in relation to this document.

Sully Update 25 September 2003

47. The Trust has redacted from this document the names of those who decided to place competitive bids for the land prior to acceptance of the bid which led to the property sale (apart from the selected buyer's identity). The Trust has argued that in comparison to the 103 firms who simply registered an interest in the sale of Sully Hospital, only a few organisations decided to put in a competitive bid and that to release the identity of these businesses would constitute a prejudice to the commercial interests of both those unsuccessful bidders and also of the Trust, especially as they would have no expectation that their interest in the sale would be made public in terms of how much they were prepared to pay and that their bid was not successful.
48. The Trust also believes that the disclosure of the names within this document would prejudice its own commercial interest as it would not be able to secure confidence in the integrity of any property transaction in which it was involved, if organisations were put off from bidding because 'of awareness that any action they may take will be placed into the public domain'.

Sully Draft Report 17 October 2003

49. Similarly, the Trust has redacted from this document the names of those who decided to place bids for the property prior to acceptance of the bid which led to the property sale.
50. It is worth noting that this report represents an appraisal of the individual bidders and it provides a candid professional assessment of the competitive bids received in respect of the sale of Sully Hospital, with the preferred bidder highlighted. The Trust has argued that it would prejudice the commercial interests of the Trust, and the unsuccessful bidders if details of the legitimacy and validity of their bids were made public by attaching their identity to their appraisal.

51. To clarify, the Trust has disclosed to the complainant a copy of the two reports 'Sully Update dated 25 September 2003' and 'Sully Draft report dated 17 October 2003', but redacted the names of those that placed competitive bids in respect of the sale (apart from the selected buyer's identity). The Trust considers that the full disclosure of the two reports would likely have a detrimental affect on the commercial interests of the property agent.
52. The Trust has asserted that these documents were produced by the property agent, with the intent of providing a confidential, professional opinion not only on the relative financial implications of each tender, but also on the relative merits or risks of proceeding with each bidder. As well as assessing the potential sale value within each tender offer, the property agent was expressing a confidential professional opinion on the likelihood of each bidder being able to proceed, or actually intending to proceed on the basis of a tender.
53. The Trust believes that the public disclosure of such opinion together with the names of the parties referred to, is likely to cause significant damage to the commercial interests of the property agent, given that many of the bidders were property developers, conducting ongoing business, which would be likely to bring them back into contact with the property agent for future business opportunities.
54. The Trust has also provided the Commissioner with a statement from the property agent expressing that it strongly objects to the disclosure of the names of the bidders within the two reports. The Commissioner notes that one of the reasons put forward for the objection is that:

[In relation to the assessment of the bids] "...some of those comments have the caveat that they are hearsay based upon enquiries made in the market. Such commentary was not...material to the decision to proceed with a sale to Galliard but related to late or ineffective bids. It could be potentially damaging to those companies and individuals if such advice or commentary were to be repeated out of context..."

The' likelihood' of prejudice with regard to the disclosure of 'Sully Update 25 September 2003' and 'Sully Draft Report 17 October 2003'

55. The complainant has argued that 'there is no basis for redacting out names...when these already appear in earlier documents' and that 'precedent [is] set by information already given, [and] therefore redacting [is] not justified and clean copies should be supplied'. Although the Commissioner appreciates the complainant's reasoning in that previous disclosures by the Trust have revealed the names of the bidders in these two reports, he has assessed whether or not disclosure of the names of the bidders together with their appraisal to the general public would in any way prejudice the commercial interests of the Trust or any third party, regardless of what may or may not already be in the complainant's possession.
56. The complainant has not been provided with confirmation of which analysis within the two reports refers to precisely which organisation that placed a formal bid (apart from the preferred bidder's assessment) and this lack of certainty as to which appraisal refers to which company reinforces the argument that, no party is currently disadvantaged by the redacted copy which has been supplied to the complainant.

57. While it is not quantifiable the Commissioner does believe that there is a significant risk of commercial prejudice not only to the Trust but also to the property agent, as well as the individual organisations that placed bids, if an analysis of their bids together with their names were placed into the public domain. It is arguable whether the views of the property agent in its assessment of the formal bids would be the same as that of another agent acting in a similar capacity; or whether the outcome would still be the same if another appraisal was conducted today. However, it is widely acknowledged that the reputation of a business is linked to its commercial success and that any negative press can severely reduce its commercial viability in the open market.
58. The Commissioner has examined the two reports and it is clear that they were produced by an estate agent acting in a professional capacity providing an expert opinion on the viability of the respective bidders. Its views are explicit within the redacted copy released to the complainant and the release of the names of the organisations each assessment refers to could lead to commercial detriment to those companies as well as the property agent. In turn the disclosure of the names could also result in reduced confidence by private organisations seeking to enter into business with the public sector, thereby prejudicing the commercial interests of the Trust also.
59. The Commissioner therefore concludes that the section 43(2) exemption is engaged in the case of the names of the bidders in these two documents (items numbered 79 and 82 of the request).

Public Interest Test in relation to the information withheld under section 43(2)

60. Once the 'prejudice' risk has been established, in order for the two documents in question to be appropriately redacted, section 43(2) also requires public authorities to demonstrate that the public interest in withholding the information outweighs that of disclosure. Therefore, whilst the Commissioner has reached the view that there is a significant risk of commercial prejudice to the Trust and that of third parties were the names of the bidders within the two reports to be released under the Act, he also has to be satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
61. The Commissioner has considered all of the public interest arguments put forward by the Trust for maintaining this exemption in respect of the names of the bidders, in particular the point that it is in the public interest that the Trust in any major property transaction can rely on the advice and guidance of professional agents and can make commercial decisions on the basis of a full appraisal of the issues and adequate risk assessment of the bids and that there should not be fear or concern from the agent at the possibility of their appraisal being made public.
62. Very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made. The complainant's request was made on 12 June 2006 two years after the completion of the sale of Sully Hospital. Therefore, whilst it would be correct not to disclose details of bids submitted in respect of the sale during the negotiation period, on the other hand the degree of commercial prejudice to the respective parties will lessen considerably over the years, as the organisations concerned would not necessarily operate on similar terms as they did two years ago, particularly with the fluctuating property market.

63. There is a need for openness, transparency and public consultancy in respect of large transactions concerning public assets. Increasing access to contracts for transactions of this scale may in fact encourage more organisations to enter the market. However, there is also the requirement to ensure that the integrity of any commercial contract is not undermined unnecessarily at a cost to future dealings with public sector organisations and public authorities are able to secure the best price and value for a public asset.
64. However, notwithstanding the above, the Trust has disclosed to the complainant what the Commissioner considers to be the most significant part of the two reports, the actual analysis provided by the property agent, redacting only the names of bidders (apart from the preferred buyer's identity). The Commissioner does not believe that the release of the names would further any public debate on this matter or provide any greater understanding on why the Trust arrived at the decision it did. The assessment of the bidders is essentially what was taken into account by the Trust prior to deciding on the developer of choice, and that has been disclosed to the complainant. There is also a prevailing argument that to release the names of the bidders within the two reports would prejudice the commercial interests of the bidders, the property agent and also that of the Trust. To illustrate, in respect of one bidder 'Sully Update 25 September 2003' makes the following points:

"He has been asked to evidence that they have the resources to complete a transaction at this level. Some additional information has been provided. Through informal enquiry hearsay suggests thathave submitted 'spoiling bids' elsewhere then sought to renegotiate when contracts are due for exchange".

With regard to another bidder 'Sully Draft report 17 October 2003' states:

"As noted above we do not have the confidence in the ... offer to recommend it above the Galliard bid."

65. Taking all of the above into account the Commissioner has concluded that the public interest in maintaining the exemption for the names of the bidders outweighs the public interest in disclosing them.

The Decision

66. The Commissioner's decision is that the Trust has dealt with the following elements of the request in accordance with the requirements of the Act:
- Withholding items numbered 22(b), 31(b), 34(a & b) and 39 of the request by relying on section 12(1) of the Act.
 - Withholding items numbered 79 and 82 of the request by relying on section 43(2) of the Act.
67. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Trust in its letter of 10 August 2006 failed to provide the complainant with any response in respect of items 3, 8, 23, 25, 30, 31(b), 68, 69, and 72 of the request and therefore did not comply with section 1(1) of the Act.
- The Trust failed to respond to all items listed on the request within 20 working days and has therefore breached section 10 (1) of the Act.
- The Trust failed to issue a refusal notice in respect of items numbered 22(b), 31(b), 34(a & b), 39(in part), 79 and 82 of the request within 20 working days and has therefore breached sections 17(1) and 17(5) of the Act.

Steps Required

68. The Commissioner requires no steps to be taken.

Other matters

69. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
- Throughout the investigation the complainant has stated that the Trust undersold Sully Hospital and that it did not follow accepted commercial practices during its handling of the property sale. It is the complainant's belief that the site on which the Hospital was situated at the time of the sale was worth in the region of £10 million.
 - The complainant also believes that the Trust gave preferential treatment to a particular developer who was allowed to negotiate on different terms to that of other bidders.
 - Investigations conducted by the District Valuer and the Auditor General's Office found no basis for the claims made by the complainant.
 - The Commissioner has not assessed whether the process and procedure followed and practised by the Trust during the sale of the land was correct or whether it obtained the best value for the sale of Sully Hospital as this is outside his remit.

Right of Appeal

70. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 2nd day of April 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex 1

The Request – 12 June 2006 (as numbered by the complainant)

The complainant listed in his letter of 12 June 2006 all of the information which had been disclosed by the Trust in relation to his earlier request of 2 December 2004, which comprised of 82 items relating to the sale of Sully Hospital. Within the list the complainant highlighted in bold further documentation referred to within the correspondence he had received from Trust which had not been provided in connection with the 2 December 2004 request, as well as other information he believed the Trust held in relation to the sale. The highlighted text represents the complainant's 12 June 2006 request for information and is set out below using the same numbering that appears on the complainant's letter of 12 June 2006.

3. The original prospectus from ____ (the property agent). The prospectus previously sent 'appears incomplete'.
8. Letter dated 29th July 2003 to ____ (the property agent) refers to 'the matter of overage... is a condition that is under discussion. Was overage made a condition? If so where is this shown e.g. in letters to clients &/or prospectus'.
17. Fax letter from ____ (Trust's solicitor) to ____ (bidder's solicitor), referred to in ____ (bidder's solicitor's) letter to ____ (Trust's solicitor) of 19 August 2003.
19. Fax letter dated 11th February 2003 from ____ (Trust's solicitor) to ____ (buyer's solicitor) quotes a letter from (Trust's solicitor) of 30th January not supplied, but required.
21. Letter from ____ (buyer's solicitor) to ____ (Trust's solicitor) dated 20 February 2003, referred to in ____ (Trust's solicitor's) letter of 28 February 2003.
- 22(a). Letter from ____ (Trust's solicitor) to ____ (buyer's solicitor) dated 3 March 2003, referred to in ____ (buyer's solicitor's) letter of 5 March 2003.
- 22(b). Correspondence, extent and results of re-marketing, records of meetings, new Heads of Term, Conditions/Caveats attached to the agreement (from both sides), new legal sale agreement, etc surrounding this pull-out and sudden re-emergence of Galliard as the developer of choice.
23. What was the final sale price and overage?
25. Clarification on how overage for the proposed development was calculated, and how did the Trust 'come to terms with Dalkia to compensate them for leaving the site'?
27. Transcripts/details of the meeting of 23 September 2003.
29. E-mail from ____ (property agent), dated 22 September attaching a letter from Galliard. Please send a copy of the attached letter.
30. "Letter dated 6th October 2003 from Galliard to ____ (the property agent) ... quotes 'look forward to hearing from you after your meeting tomorrow'. What was the result of that meeting?"

31(a). "Please supply letters, as well as a transcript of this decisive meeting and the results as communicated to the bidders..." – referring to the reference in ____ (the property agent) e-mail of 7 October 2003 to a client meeting on 16 October 2003.

31(b). Evidence that bid of £2,787,000 was made by ____ (bidder) as stated in 'Sullydrafts 7th October'.

32(a). Letter from ____ (Trust's solicitor) to ____ (buyer's solicitor) dated 15 April 2004 referred to in a letter from ____ (buyer's solicitor) to ____ (Trust's solicitor) dated 20 April 2004.

32(b). Letter from the Trust (unspecified date) referred to in ____ (buyer's solicitor) letter to ____ (Trust's solicitor) dated 20th April 2004.

34(a). All correspondence relating to the matter to be supplied, including that held by ____ (the property agent) and ____ (Trust's solicitor).

34(b). Three items of correspondence withheld because 'they don't have a material bearing on the final conditions of sale; and don't have direct relevance to your apparent line of enquiry'. Copies required.

39. "Copies of the letters sent, along with any supporting literature, e.g. revised prospectus, terms and conditions of tender etc should have been supplied. Please supply"

47. "The final contract/agreement is required, detailing all terms and conditions, including price paid on completion and terms for any overage payment with Galliards"

68. What were the results of implementing the following action plan? i) Galliards to be reminded their offer was unconditional ii) Galliard given until 19th March to exchange contracts iii) ____ (the property agent) to update particulars for remarketing (Please supply).

69. What happened at the meeting of 14th March 2003 which was scheduled with Dalkia?

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

79. Sully Update memo dated 25 September 2003, from _____. Please supply clean copy, as all bidders have been 'shown' in previous correspondence.

82. Sully Draft report dated 17th October 2003. Pages with names redacted. Please supply the finished report with the names plainly visible.

Annex 2 – Legal annex

Section 1(1) provides that -

"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.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 12(1) provides that –

“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.”

Section 12(2) provides that –

“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.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 43(2) provides that –

“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).”

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

“The appropriate limit

Regulation 3. - (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and 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”.

“Estimating the cost of complying with a request - general

Regulation 4. – (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its 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.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour”.