

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 4 May 2010**

**Public Authority:** The Mid Yorkshire Hospitals NHS Trust  
**Address:** Pinderfields General Hospital  
Trust Headquarters  
Rowan House  
Aberford Road  
Wakefield WF1 4EE

### Summary

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The complainant requested a specific Project Agreement including the Financial Model. The public authority disclosed some of the information and withheld some under the sections 41 and 43 exemptions. Subsequently, the complainant explained that he would be satisfied if he could have the cash-flows which related to published Internal Rates of Return. The public authority withheld these cash-flows under the section 41 and 43 exemptions. The Commissioner is satisfied that the public authority has applied the section 41 appropriately to both the Financial Model and the cash-flows.

### The Commissioner's Role

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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.

### The Request

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2. On 21 November 2008 the complainant submitted the following request: *'Please could you send, under FOI, the Project Agreement for the Mid Yorkshire PFI Project, including the financial model. To clarify the second element, I am not asking for the 'live' financial model,*

*which I believe would be commercial in confidence, but the spreadsheet provided to the Trust prior to financial close for the purposes of checking the rigour of the financial structure of the SPV.'*

3. On 17 December 2008 the public authority disclosed information to the complainant.
4. On 17 December 2008 the complainant requested an internal review. He reiterated that he wanted the spreadsheet provided to the public authority prior to financial close for the purposes of checking the rigour of the financial structure.
5. On 31 December 2008 the public authority confirmed it had carried out an internal review. It explained that the project agreement was summarised in the full business case. However the full project agreement would be considered as commercially sensitive and would not be disclosed in full. It applied the section 43 exemption.

## **The Investigation**

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### **Scope of the case**

6. On 19 February 2009 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The financial model should be disclosed so that it could be assessed whether the scheme has delivered value for money.
  - The complainant explained that he had made requests for information of a similar nature to other Trusts and it had been disclosed.
  - The cash-flows contained in the financial model would enable an understanding of the meaning of the Internal Rates of Return (IRRs).
7. During the course of the Commissioner's investigation the public authority published the Project Agreement and Schedules, withholding the financial information requested by the complainant.
8. By way of a compromise the complainant explained to the Commissioner that if he could have the cash-flows used to arrive at the published IRRs he would be satisfied. These cash-flows form part of the financial model requested. However the public authority refused to disclose the cash-flows and the complainant asked the Commissioner

to consider whether the financial model at financial close should be disclosed or not.

## **Chronology**

9. On 18 August 2009 the Commissioner contacted the complainant about his complaint. The complainant sent an email to the Commissioner explaining that he wanted the whole project agreement including the financial model contained in it. He also made reference to Chapter 12 of the full business case. On 19 August 2009 the Commissioner contacted the complainant and asked him could he forward his email of 18 August to the public authority. The complainant agreed that the Commissioner could do this.
10. There was some confusion about how the financial model was held. The complainant reiterated that he wanted the spreadsheet that contained the financial model that would have been available at financial close. He accepted that the final financial model would be regarded as commercially sensitive.
11. The public authority explained that it did not hold the financial model in this way. Instead, its financial model was continually being updated as necessary but copies of it at financial close would be held although not in the format of a spreadsheet.
12. During the course of the Commissioner's investigation the public authority routinely disclosed information about the PFI but not the information the complainant wanted. The complainant also explained that he had received similar information from other public authorities but that the latest information he had received had been from 2003.
13. On 19 November 2009 the complainant explained that the public authority had already published the IRRs which related to the profit margins; therefore by way of a compromise, he explained that if he was provided with the cash-flows that were used to arrive at the published IRRs he would be satisfied.
14. On 11 December 2008 the public authority wrote to the Commissioner confirming that it had looked at whether it could disclose the cash-flows used in the IRRs. It confirmed that it was withholding the cash-flows under the sections 41 and 43 exemptions.

## Analysis

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### Exemptions

#### Section 41

15. Section 41(1) provides that information is exempt from disclosure if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

16. In order for the exemption to be engaged the Commissioner considers that in this case the appropriate test is that it must be shown that the information:

- was provided to the authority by another person, and
- that a disclosure of the information would give rise to an actionable breach of confidence. To decide whether there would be an actionable breach of confidence the Commissioner must consider whether:
  - the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial or otherwise accessible
  - the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;
  - disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
  - the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, that disclosure would be protected by a public interest defence.

17. The Commissioner accepts that the above does not constitute the only test of confidence; however he considers it appropriate to use in this case.

18. However, the Commissioner does not accept that information is held in confidence merely because the parties decided together that that will be the case. Allowing this would essentially allow parties to contract their way out of their obligations under the Act. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.
19. The Commissioner has firstly considered whether the information was obtained from a third party as required under section 41(1).

**Was the information provided to the public authority by another person?**

20. The public authority confirmed that the information in the financial model and the cash-flows used for the IRRs was obtained from the private company (Consort) involved in the PFI scheme. Therefore the Commissioner is satisfied that the first element of the section 41 exemption has been met as the reports were obtained from other persons.
21. The Commissioner then considered whether the requirements for an actionable breach of confidence were present.

**Quality of confidence**

22. In order to decide whether the information has the necessary quality of confidence the Commissioner must consider whether the information is otherwise accessible and/or whether the information is more than trivial.
23. Although the public authority had already published its full business case the requested information had been withheld. Therefore the Commissioner is satisfied that the requested information was not accessible at the time of the request and that the necessary quality of confidence was retained.
24. The information relates to the financial aspects of the PFI scheme including the cash flows used by the Service Provider with regard to its profit. The Commissioner considers this to be information of a sensitive nature and is therefore satisfied that the information is not trivial in nature.
25. For these reasons the Commissioner has concluded that the information retains the necessary quality of confidence.

## **Obligation of confidence**

26. The Commissioner then considered whether the information was imparted in circumstances giving rise to an obligation of confidence.
27. The Commissioner noted that the project agreement between the public authority and the Service Provider contained a confidentiality clause. The financial model and cash-flows provide detailed information about how the Service Provider arrived at the published IRRs.
28. The Commissioner notes that there is an agreement between the public authority and the Service Provider about the custody of the financial model. The Commissioner also notes that at the time of the request, the information requested was still in use, as the project had not been completed.
29. The Commissioner is therefore satisfied that the information was provided to the public authority with an expectation of confidentiality and is therefore satisfied that the Service Provider would have had an expectation of confidence when it provided this information.
30. The Commissioner is satisfied that due to the nature of the information and the circumstances in which it was provided to the public authority, that an obligation of confidence exists.

## **Detriment to the confider**

31. Having considered the information the Commissioner is satisfied that the Service Provider has not consented to the disclosure of the financial model or the cash-flows.
32. Given the sensitive nature of the financial information in question and the fact that it was still being used at the time of the request the Commissioner is satisfied that disclosure of this information would have a detrimental impact on the Service Provider's commercial interest. This is because the financial model at close (and the cash-flows contained within it) bears a close resemblance to the actual budget forecasts of the business and at the time of the request the Mid Yorkshire PFI Project had not been completed therefore the information was still commercially sensitive. Disclosure could therefore prejudice the Service Provider's commercial interests as competitors may adjust their own prices and projected rates of return in future public sector contracts.

### **Public interest defence**

33. The Commissioner went on to consider whether there would be a defence to a claim for breach of confidence if the information was disclosed. As section 41 is an absolute exemption it is not subject to the public interest test. However under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in disclosing the information concerned.
34. Under the Act, the public interest starts from the assumption that the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure. However under the law of confidence the test is different; it starts from the assumption that the information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining confidence.
35. In *Derry City Council (EA/2006/0014)* the Information Tribunal found that there did not have to be an exceptional case to override the duty of confidence. Instead, disclosure would be lawful if the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

### **Public interest arguments in favour of disclosing the requested information**

36. The Commissioner recognises that there is a general public interest in furthering the understanding of and participation in the public debate on issues of the day. He also recognises the importance of promoting accountability and transparency with regard to the spending of public money.
37. The development of sites of hospitals and the provision of services involves the spending of very large amounts of public money allocated to the NHS. This inevitably raises concerns about whether value for money has been obtained especially in cases like this which involved the use of a private sector organisation. The validity of these private finance schemes has been the subject of public debate particularly with relation to the NHS.
38. The Commissioner notes that the complainant is only interested in the financial model at financial close and the cash flows used to arrive at the published IRRs. He also notes that the complainant confirmed that he has received similar information in the past although the latest information the complainant had received was from 2003.

39. Further, he also notes the complainant's argument that is necessary to disclose the requested financial information in order to assess whether this PFI scheme represents best value for money.

### **Public interest arguments in favour of maintaining the confidence**

40. The Commissioner recognises the strong public interest in maintaining a duty of confidence where information is provided to a public authority; he also recognises that a duty of confidence is owed to the provider of the information. If the duty of confidence is overridden often it may lead to a situation where contractors would be reluctant to provide information which may be of assistance to a public authority in determining the outcome of a procurement process. It is the Commissioner's view that this would not be in the public interest.

41. The Information Tribunal has endorsed this view in the case of *Bluck v IC & Epsom & St Helier University NHS Trust (EA/2006/0090)* where it quoted from the Lords decision of *Attorney General v Guardian Newspapers [199] 1AC109*:

*" ... as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence ... ."*

42. The Commissioner accepts that disclosure of very detailed information about the Service Provider's financial calculations, which are linked to the prices in the contract, could have been harmful to its commercial interests. This is particularly relevant in this case as, at the time of the request, the provision of sites and services had not been completed. Further the Commissioner notes the argument that the financial model as at financial close bears an extremely close resemblance to the actual budget forecasts of the business.
43. The Commissioner also notes the explanation provided by the Service Provider to the public authority about the cash-flows in question; they would not differ materially from the forecast information and that this information was valid, current and as relevant as at financial close.
44. Further the Commissioner notes two decisions reached by the Scottish Information Commissioner in similar cases. Although the Scottish Information Commissioner's decisions are not binding upon the Commissioner, both of these cases involved requests for information for financial models connected with private funding initiatives. In the first case (Decision 104/2009) the public authority withheld the information under the Freedom of Information (Scotland) Act (2002) citing the section 33 (commercial interest and the economy)



exemption. In the second case (Decision 122/2009) the public authority withheld a financial model under section 36 (confidentiality) and section 33 (commercial interest and the economy) exemptions.

45. Although the information in the first case was withheld under section 33 (commercial interest and the economy) as opposed to section 36 (confidentiality), the Commissioner considers that the considerations are relevant.
46. In this case, there was a PFI scheme between a private company and the Scottish Prison Service regarding Kilmarnock Prison. The Scottish Information Commissioner found that the private company in question still had a commercial interest in the information. However the financial model in question had been in existence for 9 years following financial close and conclusion of the contract. The Scottish Information Commissioner considered that the PFI regime would have matured considerably from the date of the financial model and that the requirements and expectations of a procuring authority for this type of contract: *"...will have changed considerably over that period ... that market prices for providing services of this nature will vary considerably over time ..."* (paragraphs 32 - 33).
47. However in the second case the Scottish Information Commissioner found that the information could not be disclosed. He noted that the information in question was requested 2 years after the contract had been concluded and went on to consider whether the obligation of confidence remained. He took into account the Information Tribunal's comments in *Derry City Council v The Information Commissioner (EA/2006/0014)*: *"In our view the effect of the obligation, however created, would last until the information in question had either passed into the public domain or had ceased to have commercial significance."* (paragraph 34 (d)).

### **Balance of the public interest arguments**

48. The Commissioner considered whether the disclosure of information showing how the Service Provider arrived at prices contained in the contract or the cash flows used to arrive at the published IRRs would be of great assistance to the public in assessing whether public money has been spent wisely.
49. He has considered this question in his decision in *Somerset NHS Primary Care Trust (FS50142318)*:

*"... it is the overall pricing structure rather than how those prices were arrived at, that would be of the most significance in assessing the value for money of what was proposed. Although*

*the disclosure of the requested information might have provided some assistance in assessing whether the contract for this particular project was providing value for money, the Commissioner is not convinced it would have made a significant contribution.” (paragraph 37).*

50. It is the Commissioner's view that the reasoning in the above decision applies in this case as the issues are similar. Therefore he is satisfied that information showing how the Service Provider arrived at prices contained in the contract or the cash flows used to arrive at the published IRRs would not be of great assistance to the public in assessing whether public money had been spent wisely.
51. The Commissioner also notes the Scottish Information Commissioner's decisions as discussed in paragraphs 44 – 47. He notes that although the Scottish Information Commissioner ordered disclosure of a financial model, the age of the information was a relevant factor in deciding it should be disclosed. This was because at the time of the request there had been financial close and the financial model had been in existence for 9 years after this. Subsequently however the Scottish Information Commissioner also held a financial model was correctly withheld. He noted that there was no question of any wrong-doing related to the decision made or any specific concern over the awarding of the contract. The Commissioner notes that there has been no question of any wrong-doing in this case either.
52. Having considered the public interest arguments, the Commissioner is not satisfied that the public interest in disclosure would outweigh the public interest in maintaining the duty of confidence. Therefore he is of the view that the public authority has applied the section 41 exemption appropriately to the withheld financial information.
53. The public authority also applied the section 43 exemption. However the Commissioner will not be considering this exemption as he has found that the section 41 exemption applies to all of the requested information.

## **The Decision**

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54. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## Other matters

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55. Although this does not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

- It was clear from the request for information that the complainant was requesting the financial model at financial close; he asked for the spreadsheet that this would be contained in. However it was not until the Commissioner's investigation that the public authority explained that it did not hold the financial model in this format. Under these circumstances and as a matter of good practice the Commissioner would have expected the public authority to explain to the complainant that it did not hold the financial model in the format asked for so as to avoid any confusion.

## Right of Appeal

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56. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 4<sup>th</sup> day of May 2010**

**Signed .....**

**Lisa Adshead  
Group Manager**

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

## Legal Annex

### Section 41

**Section 41(1)** provides that –  
Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

**Section 41(2)** provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."