

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2017

Public Authority: NHS Improvement
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested communications between NHS Improvement, SSG Health and East of England Ambulance Service NHS Trust as well as any recorded information held by NHSI on SSG's engagement with the Trust. NHSI disclosed some information but withheld information contained in various emails and documents on the basis of section 31, 33, 43 and 40 of the FOIA.
2. The Commissioner's decision is that NHSI has correctly applied sections 31(1)(g) with 31(2)(c), 43(2) and 40(2) to the information it has withheld and the public interest favours withholding the information. She requires no steps to be taken.

Request and response

3. On 22 December 2016, the complainant wrote to NHS Improvement ("NHSI") and requested information in the following terms:

"Please can you provide, under the freedom of information act, any recorded information held over the past 3 months relating to the East of England Ambulance Service and SSG Health.

I am particularly interested in any recorded information to/from SSG and/or the East of England Ambulance Service over the past 3 months.

Please also include, but not limit this search to any recorded information where NHSI has instructed, discussed or encouraged SSGs engagement with the East of England Ambulance Service."

4. Due to an administrative error NHSI did not pick up this request initially and NHSI as a result agreed to extend the scope of the request to cover information held up until 30 January 2017.
5. NHS Improvement provided its response on 14 March 2017. It confirmed it held emails and letters within the scope of the request and disclosed some of this to the complainant. However, the remaining information was withheld on the basis of sections 31, 33, 40 and 43 of the FOIA.
6. The complainant considered she had already asked for an internal review when she had chased up the late response to her request and as such did not request an internal review of this decision despite being dissatisfied with the outcome. Instead her complaint was referred to the Commissioner for consideration. Due to the time that had passed since the refusal notice the Commissioner agreed to accept the case for investigation without an internal review.

Scope of the case

7. The complainant contacted the Commissioner on 16 May 2017 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if NHSI has correctly applied any of the provisions of sections 31, 33, 40 and 43 of the FOIA to withhold the information it holds within the scope of the complainant's request.
9. NHSI has provided a list of documents in which the information has been withheld in full or in part and the exemptions it is seeking to rely on. This is as follows:

DATE	INFORMATION WITHHELD	EXEMPTIONS APPLIED
15 September 2016 – 20:29	Email regarding FIP procurement process	Sections 31(1)(g) and 33(1)(b)
13 October 2016 – 17:22	Email regarding updates to the FIP Board	Sections 31(1)(g) and 33(1)(b)

13 October 2016 – 17:26	Email regarding updates to the FIP Board	Sections 31(1)(g) and 33(1)(b)
14 October 2016 – 07:45	Email regarding participation in FIP programme	Sections 31(1)(g) and 33(1)(b)
21 October 2016 – 17:32	Email regarding FIP update	Section 43(2)
21 November 2016 – 18:30	Email attaching draft letter to trust regarding financial escalation	Sections 31(1)(g) and 33(1)(b)
1 December 2016 – 09:36	Email forwarding SSG FIP quote	Section 43(2)
1 December 2016 – 09:43	Email attaching SSG FIP quote	Section 43(2)
5 December 2016 – 09:55	Email attaching amended draft letter to trust regarding financial escalation	Sections 31(1)(g) and 33(1)(b)
8 December 2016 – 16:07	Email regarding FIP approval process	Sections 31(1)(g), 33(1)(b) and 43(2)
23 December 2016 – 12:06	Email attaching letter of engagement for the trust FIP programme with SSG	Sections 40(2) and 43(2)
6 January 2017 – 16:16	Email regarding management of trust FIP programme	Section 40(2)
19 January 2017 – 11:37	Email regarding consultancy expenditure case template	Section 40(2)

Reasons for decision

10. As NHSI has applied a number of exemptions the Commissioner has first considered the section 31 exemption as this has been applied (along

with section 33) to withhold information from the majority of the emails identified.

Section 31 – law enforcement

11. NHSI stated it considered that information identified in the emails as set out in the above table was exempt on the basis of section 31(1)(g) in conjunction with subsections (2)(c) of the FOIA.

12. Section 31 of the FOIA states that –

“Information which is not exempt by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice - ...

(1)(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).”

13. The purposes specified at subsection 2(c) is:

“(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.”

14. The Commissioner finds that the use of the word “ascertaining”, i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority to which the prejudice is being claimed, has the power to formally ascertain compliance with the law or has a regulatory role in determining if regulatory action should be pursued.

15. In order to show that it exercises the appropriate functions to rely on subsection 2(c), NHSI has explained that it regulates NHS trusts pursuant to powers conferred by the National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 (“the NHS TDA Directions”)¹.

16. NHSI points to paragraph 6a of this as of particular relevant to this request as it provides that NHSI must exercise its functions with the objective of ensuring that NHS trusts are able to comply with their duty

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/511610/Directions_2016.pdf

under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively. Paragraph 6(c) of the NHS TDA Directions requires that the TDA ensure NHS trusts comply with conditions which are equivalent to the conditions of the Monitor provider licence. NHSI therefore regulates NHS trusts against the equivalent licence conditions². In the event of non-compliance with these conditions, NHSI can take enforcement action, for example seeking enforcement undertakings from a trust or issuing directions pursuant to paragraph 6(a) of the NHS TDA Directions.

17. On the basis of this explanation from NHSI the Commissioner is satisfied that it does have the appropriate functions to rely on subsections 2(c) as it clearly has statutory obligations to ascertain if circumstances exist which justify regulatory action.
18. However, the Commissioner must be satisfied the information in question relates to the exercise of these functions by NHSI.
19. In this case, NHSI has explained that SSG is a private consultancy firm appointed by East of England Ambulance Service NHS Trust ("EEAS NHS Trust") as part of NHSI's Financial Improvement Programme ("FIP") (wave 1). Under this programme NHSI procures firms to be appointed to trusts to help them identify and implement financial savings. NHSI announced the first sixteen trusts to be selected in wave 1 of the FIP in May 2016³. Further detail on this is included in a confidential annex.
20. The Commissioner is therefore satisfied that the information that has been withheld under this exemption relates to the exercise of NHSI's regulatory functions. The information is all contained within emails discussing the Trust's financial performance and financial management standards and the issues under discussion in the various emails were being used to inform any regulatory action NHSI may take. The Commissioner has therefore gone on to consider whether the prejudice claimed is likely to occur.
21. NHSI considers there would be a real and significant risk of prejudice if this information was disclosed. In explaining this point NHSI has explained that in order to effectively regulate NHS trusts, including

² <https://www.gov.uk/government/publications/the-nhs-provider-licence>

³ <https://improvement.nhs.uk/news-alerts/fip-helping-save-nhs-tens-millions-pounds/>

assessing whether they are financially sustainable, it relies on those trusts voluntarily sharing information.

22. NHSI argues that trusts have a reasonable expectation that it will treat sensitive information that is provided to it as confidential. Disclosing sensitive financial information and, in particular, information provided voluntarily, would be likely to prejudice its ability to investigate any potential concerns about finances, and in particular would inhibit free and frank discussions. Releasing this information would give NHS trusts reason to believe that it may disclose sensitive information about their finances prematurely and may reduce the amount and quality of information that they are prepared to voluntarily share with it in the future. This would have a detrimental impact on the open relationship of trusts that NHSI has built with the sector, and its ability to efficiently assess their finances without recourse to its statutory powers to obtain information by compulsion.
23. The Commissioner accepts the general argument that disclosure of information which has been voluntarily provided to assess financial viability could have a prejudicial effect on future determinations of regulatory action as it may lead to an unwillingness to provide information on a voluntary basis. However, in determining whether the likelihood of this prejudice occurring is real and of substance she has considered whether if Trust's cease to provide information willingly NHSI would be able to obtain this more formally and if so what the impact of this would be on its ability to carry out its functions.
24. Although this point has not been specifically addressed by NHSI in its submissions to the Commissioner, she notes that section 104 of the Health and Social Care Act 2012⁴ provides Monitor with statutory powers to gain information or documents it needs to assist with its regulatory functions. NHSI is the organisation set up to bring together Monitor and the NHS Trust Development Authority (amongst other bodies) and therefore the powers granted to Monitor will apply to NHSI.
25. That being said, NHSI puts significant emphasis on the importance of the effective relationships it has with trusts and how vital it is to maintain trust's cooperation and openness in providing wide ranges of information when asked to do so by NHSI so that they can be effectively monitored and regulated.

⁴ <http://www.legislation.gov.uk/ukpga/2012/7/section/104/enacted>

26. It stands to reason that if the information was disclosed in this case it may require NHSI to exercise its formal regulatory powers more frequently to obtain information it requires from trusts. If this were to occur, the Commissioner accepts it would be likely to lead to delays and inefficiency in the regulatory process as it would require NHSI to justify each piece of information it was requesting and the quality of the information provided by the Trust may be reduced, again undermining the efficiency and effectiveness of the regulatory decision making process.
27. The Commissioner has considered these arguments from NHSI and accepts that it has sufficiently demonstrated that prejudice to its regulatory functions would be likely to occur if the information were to be disclosed. She accepts there is a real risk that disclosure may make it more difficult for NHSI to obtain the information it requires to make decisions and monitor performance with a view to regulatory action. She also recognises that the wide ranging and large amounts of information currently provided on a voluntary basis by trusts may not be attainable if NHSI were to rely on its formal powers to request only the information absolutely necessary from trust's to assess their performance. This in turn may hinder the quality and efficiency of NHSI's decisions. More specifically in this case, the FIP is a voluntary scheme aimed at helping Trust's and disclosing the requested information in this case is likely to make trust's more reluctant to want to participate if it exposes them to increased scrutiny at a time when they are attempting to engage with a regulator to discuss sensitive financial issues.
28. The Commissioner also considers it important to recognise that the issue is still 'live', in that NHSI is continuing to monitor the Trust's performance and the open and frank relationship between the Trust and NHSI allows the performance of the Trust to be assessed on an ongoing basis. This has been discussed more in the confidential annex.
29. As section 31 is a qualified exemption the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

30. NHSI recognises there is a public interest in transparency and accountability in relation to the expenditure of public money, particularly in relation to decisions by NHS trusts to engage external consultancy firms to assist them in identifying and implementing potential cost savings.
31. The complainant argues that the use of a private consultant (SSG) to work with trusts is of great public interest and believes the details and

communications should be disclosed. The Trust in question is facing financial difficulties and the costs and scope of engaging a private consultancy, with the encouragement of NHSI, should be disclosed openly, as this is public money.

Public interest arguments in favour of maintaining the exemption

32. NHSI considers the arguments it presented with regards to the potential prejudice are also relevant considerations for the public interest test. It has highlighted the importance of being able to carry out its functions efficiently and effectively and to have the space to consider issues without undue public scrutiny.
33. NHSI argues there is a strong public interest in preserving the relationship of trust and confidence and the free flow of information from NHS trusts to NHSI and this is vital for NHSI's regulatory work. In particular, there is a strong public interest in allowing the regulator of NHS trusts to be able to carry out its functions efficiently and effectively, and to have the space and freedom to consider, without concern as to publication, whatever information it requires in such circumstances. Any disclosure that would cause NHSI to have to reconsider requesting sensitive information which is necessary to carry out its function of regulating NHS trusts would be detrimental to the process of regulation.
34. NHSI further argues it is also in the public interest for it to be able to outline and discuss the options for planned regulatory action without concern that the detail of these discussions will enter the public domain.

Balance of the public interest arguments

35. The Commissioner gives weight to the argument that there is a need for accountability within NHS Trusts to ensure they are being appropriately and effectively run. However, the information in question is information held by NHSI for the purposes of assessing the financial sustainability and viability of the Trust and the Commissioner must therefore weigh the need for transparency and accountability in NHS bodies against the public interest in maintaining the integrity of regulators abilities to fulfil their statutory obligations.
36. NHSI has argued that the Trust in this case has published details of SSG's work on the FIP on its website⁵ and this goes some way to

⁵ <http://www.eastamb.nhs.uk/about-us/financial-improvement-programme.htm>

satisfying the public interest in understanding the Trust's finances and SSG's involvement.

37. The information which has been withheld in this case is information contained in emails which falls within the scope of the request as it is recorded information either to or from SSG or the Trust or discusses SSG's engagement with the Trust. However, the information does not necessarily reveal much about SSG's involvement in the FIP but details broader financial issues NHSI were looking into and possible regulatory action that might be needed. As such the Commissioner does not consider disclosing this information will offer any increased insight into the relationship between the Trust and SSG (beyond that already in the public domain) as the information is not directly relevant to this.
38. However, the Commissioner has already acknowledged the potential prejudice argued by NHSI to be real and significant. As such she has taken account of the very strong public interest in not undermining the regulatory functions and process of NHSI. NHSI has placed a great deal of emphasis on the trust it has with NHS Trusts and how important this is to allowing it to make fast, efficient and quality decisions. The public interest in this is still strong as NHSI continues to monitor the Trust's by the free and frank sharing of information.
39. Taking all of this into account, the Commissioner has concluded that the public interest in this case favours maintaining the exemption. She does not consider the arguments for disclosure to be compelling and she is satisfied that disclosure would be likely to impact on engagement with the Trust and therefore the ability of NHSI to effectively carry out its regulatory responsibilities which would not be in the public interest.
40. As such the Commissioner accepts that the section 31 exemption is engaged and the public interest favours withholding the information. As section 33 was only applied to the same information that section 31 covered the Commissioner has not gone on to consider this. The Commissioner has gone on to consider the remaining information withheld on the basis of section 43(2) or 40(2) of the FOIA.

Section 43 – prejudice to commercial interests

41. For the Commissioner to agree that section 43 of the FOIA applies to any information, a public authority must demonstrate that disclosure of the information would or would be likely to prejudice the commercial interests of the public authority itself or a third party.
42. The exemption is also subject to the public interest test. So, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party, it must

consider the arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.

43. The information withheld under this exemption is cost and pricing information – information on SSG's fees, fee structure and its business approach. NHSI has confirmed that disclosure at the time of the request would have been likely to prejudice its own commercial interests as well as those of SSG and the Trust. It argued that the information would be likely to prejudice SSG's ability to negotiate the price for its services and would also give competitors an unfair advantage as parties seeking to negotiate with SSG could use the information to strengthen their bargaining position.
44. For its own commercial interests; NHSI explained it was continuing to run the FIP and subsequent procurement exercises for firms to participate in, what it described as, a highly commercially valuable contracting opportunity. It argued that the release of the prices agreed for SSG's services could affect the success of future procurements from NHSI's perspective. Whilst this argument was not expanded on by NHSI the Commissioner has accepted in other cases that future tendering and procurement exercises can be prejudiced by the disclosure of costs agreed in other exercises.
45. However, in order to accept the exemption is engaged the Commissioner must be convinced there is a causal link between the disclosure of the specific information in this case and the prejudice cited by the public authority.
46. In terms of the prejudice to its own commercial interests; as NHSI has not provided any further detail to demonstrate how the disclosure of SSG's fees, fee structure or business case would specifically prejudice NHSI's commercial interests the Commissioner does not accept the exemption can be engaged on this basis.
47. Turning to the prejudice to SSG's commercial interests; NHSI has explained that it contacted SSG to establish its concerns with the disclosure of this information and SSG confirmed it considered the information would be prejudicial to its commercial interests as it continues to negotiate for other contracts. Disclosing its pricing structure would put SSG at a competitive disadvantage both in terms of negotiating contracts and providing quotes competitive with its rivals.
48. The Commissioner notes the circumstances at the time of the request. Wave 1 of the FIP was still underway. To reiterate; the FIP programme requires NHSI to procure firms (in this case SSG) to be appointed to trusts to help them identify and implement financial savings. She accepts that it is possible SSG would, having been successfully appointed

to work with one Trust, respond to procurement exercises to assist other Trust's in wave 1 or later waves of the FIP.

49. The Commissioner consequently accepts that had information on SSG fees, structure and its business case which led to it being awarded the contract been disclosed it would have revealed to others interested in bidding for upcoming work what SSG were appointed for and what their business case stated they would do for the cost.
50. This would have allowed those interested in the FIP programme to tailor their bids accordingly potentially disadvantaging SSG. Therefore disclosure at the time of the request would have been likely to prejudice SSG's commercial interests.
51. For the above reasons the Commissioner is satisfied that section 43 of the FOIA applies in this case. She will therefore now go on to consider the public interest test.

Public interest arguments in favour of disclosure

52. NHSI acknowledges the public interest in transparency and accountability in relation to the expenditure of public money, including decisions in relation to the use of consultancy firms by NHS trusts.
53. The complainant argues that the use of a private consultant (SSG) to work with trusts is of great public interest and believes the details and communications should be disclosed. The Trust in question is facing financial difficulties and the costs and scope of engaging a private consultancy, with the encouragement of NHSI, should be disclosed openly, as this is public money.

Public interest arguments in favour of maintaining the exemption

54. However, NHSI advised that it felt there were stronger public interest arguments in favour of maintaining the exemption. It specifically considered the strong public interest in maintaining commercial confidentiality and enabling parties to negotiate contracts without such information being made public.
55. NHSI also highlighted that NHS trusts are required to publish details of their spending and their suppliers⁶ and considered this demonstrated

⁶ www.eastamb.nhs.uk/about-us/what-we-spend-and-how-we-spend-it.htm

the public interest in relation to the Trust's expenditure on consultancy firms is already met by information which is in the public domain.

Balance of the public interest arguments

56. The Commissioner has considered the arguments for and against disclosure. She accepts that disclosure would promote openness and transparency and enable members of the public to understand more closely how this public money has been spent on a private consultant.
57. However, the Commissioner considers the circumstances at the time of the request tip the public interest in favour of maintaining this exemption. At the time of the request wave 1 of the FIP was ongoing with further procurement exercises likely to be run. Disclosing information on one company's fees and the parts of its winning business case which were unique to it and assisted in it successfully securing the contract would be likely to have been prejudicial to SSG. This in turn may have led to less competitive tendering exercises in the future as bidders would know what NHSI and trusts were prepared to accept. If this had occurred NHSI may not have been able to achieve value for money which would not have been in the wider interests of the public. This is particularly pertinent in this case given the purpose of the FIP is to assist trusts in managing their finances.
58. In reaching a conclusion the Commissioner does not find the arguments for either side particularly compelling. Nevertheless as there does not appear to be any substantial argument for disclosure that would outweigh the potential prejudice caused to SSG and the consequent impact on NHSI achieving best value outcomes the Commissioner has to conclude that the public interest favours maintaining the exemption in this case and that the section 43(2) exemption has been correctly engaged and the public interest correctly balanced.

Section 40(2) – personal data

59. Section 40 of the FOIA states that a public authority may refuse to disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data protection principles outlined in the Data Protection Act (DPA).

60. Personal data is defined as:

..."data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual..."

61. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

62. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the requested information personal data?

63. To clarify, the names of some members of staff at both NHSI and the Trust have been withheld under section 40 of the FOIA.

64. The name of an individual is quite obviously information from which that individual can be easily identified. The Commissioner is therefore satisfied that the withheld information constitutes the personal data of a number of third parties.

Would disclosure be unfair?

65. NHSI has explained that the members of staff concerned worked on the FIP and the Business Case but were not engaged in external or public facing roles and nor were they of sufficient seniority within their organisations to expect their names to be publicly known. NHSI considered they would have no reasonable expectation that their names would be disclosed. For this reason, it considers that it would be unfair to disclose the names and therefore in breach of the first data protection principle.

66. The Commissioner considers any objections to disclosure should be carefully considered. However, just because an individual objects does not automatically mean that disclosure would be unfair and therefore in breach of the first data protection principle outlined in the DPA. The individual's objections must be reasonable based on the particular circumstances of a case.
67. NHSI acknowledges that members of staff with sufficient seniority or roles of a public facing nature should expect their personal data to be disclosure on request in relation to their public role. To support this, on reviewing the request it identified the name of one senior member of staff that had been incorrectly withheld and informed the Commissioner this would now be provided to the complainant. That being said NHSI makes a clear distinction between staff at junior and senior levels and at junior levels there is a clear expectation personal data should be withheld.
68. The Commissioner accepts that the members of staff concerned held junior roles within NHSI at the time of the request. Considering this, she accepts that these individuals would hold the reasonable expectation that their personal data would remain confidential and private even in a work related context. The Commissioner agrees these individuals do not hold roles of sufficient seniority or public facing roles which would generally warrant the transparency and openness the FOIA provides. The Commissioner is of the view that junior members of staff carry out more routine administrative tasks within an organisation and do not make important high level decisions which will affect the general public. More senior members of staff have these responsibilities and so should expect more public scrutiny and accountability.
69. For the reasons explained above, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle.
70. The Commissioner accepts that there is a legitimate public interest in the disclosure of information relating to the regulation of NHS Trust's and the spending of public money and there is a legitimate interest in knowing who makes important decisions on behalf of the public and why. However, the Commissioner considers these interests are already met by the information that has already been disclosed and the personal data of senior staff. She does not consider the disclosure of the personal data of junior staff, considering the roles and tasks they generally undertake, would assist the public in understanding more clearly why certain decisions were made. She also considers that disclosure would cause the data subjects distress and upset and there is no overwhelming legitimate public interest in this case that would override that.

71. The Commissioner accepts section 40(2) has been correctly applied in this case.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

73. 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.
74. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jill Hulley
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