

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2022

Public Authority: NHS England
Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed formation of a wholly-owned subsidiary company by South Warwickshire Foundation Trust. NHS England (NHSE) provided some redacted information but withheld the documents making up the business case on the basis of section 41 of the FOIA.
2. The Commissioner's decision is that NHSE has correctly applied the exemption and the public interest lies in withholding the information.
3. The Commissioner does not require any steps to be taken.

Request and response

4. This request was made to NHS Improvement, however on 1 July 2022 NHS England and NHS Improvement merged in statute to become one single organisation known as NHS England. Any reference within the request or correspondence to NHS Improvement preserves the original text whilst the decision notice refers to 'NHSE'.
5. On 8 November 2021 the complainant made a request to NHSE for information in the following terms:

"Please provide me with any information held by NHS Improvement (including any local parts) relating to the proposed formation of, or significant change to, a wholly owned subsidiary company by South

- Warwickshire Foundation Trust. This should include any correspondence between NHS Improvement and SWFT by letter or electronic means, in relation to the proposed transaction relating to the subsidiary”
6. NHSE responded on 23 November 2021 confirming South Warwickshire NHS Foundation Trust (SWFT) had reported the proposal under the addendum to the transaction guidance. NHSE stated the information it held was exempt under section 43(2) of the FOIA.
 7. The complainant requested an internal review on 26 November 2021. They stated that in a previous request for the same information relating to Bradford Teaching Hospitals NHS Foundation Trust NHSE provided information and did not apply exemptions.
 8. NHSE conducted an internal review and concluded that section 43(2) had been incorrectly applied to withhold information. NHSE instead stated that sections 33 and 41 of the FOIA were applicable.
 9. NHSE confirmed it held the following information in scope of the request:
 - A business case submitted by SWFT to NHSE;
 - A letter sent from NHSE to SWFT dated 13 October 2021;
 - Further information submitted by SWFT in support of its application to form a wholly owned subsidiary; and
 - A letter from NHSE to SWFT dated 16 November 2021.
 10. NHSE disclosed the two letters sent by NHSE but withheld the names of junior employees under section 40(2).
 11. The business case and further information submitted by SWFT continued to be withheld in full under sections 33 and 41 of the FOIA.

Reasons for decision

12. Section 41(1) of the FOIA states that information is exempt from disclosure if it was obtained from any other person and its disclosure by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
13. NHSE argues the test in section 41(1) is met as the information that continues to be withheld was provided to NHSE by a third-party organisation (SWFT). The Commissioner agrees with this.

14. For disclosure to constitute an actionable breach of confidence the information must have the necessary quality of confidence, have been communicated in circumstances importing an obligation of confidence and the disclosure of such information would cause a detriment to any party.
15. NHSE considers the information has the necessary quality of confidence as it has not been previously published into the public domain and the information was shared with NHSE for the sole purpose of considering SWFT's application to form a wholly owned subsidiary.
16. Having viewed the withheld information the Commissioner accepts that this is not information that has previously been made public and it was provided to allow NHSE to consider the application – as such it has the necessary quality of confidence.
17. The next point to consider is whether the information was provided in circumstances importing an obligation of confidence. NHSE states that its role as regulator of NHS trusts and foundation trusts requires a safe space to be able to obtain information from trusts as it has in this case.
18. NHSE states SWFT provided the information to NHSE to enable it to conduct its regulatory business and there is an expectation that this information would not be shared more widely. It therefore considered there was an implicit obligation of confidence when SWFT shared information with NHSE.
19. The complainant argued that the process by which information is supplied to NHSE is set out in the [transaction guidance](#) which NHSE is required to follow. They argue this sets out how proposals for change should be subject to review and consultation and that previous FOI request responses have resulted in the disclosure of information. The complainant further argued that the business cases would contain lots of different types of information and it is not likely that all information would need to be withheld but rather only limited information might be redacted.
20. However, NHSE explained the business case and its supplementary information is sensitive to SWFT and it contains information and analysis on its operational and financial risks, system risks, quality risks, governance risks, potential benefits, potential detriments, recommendations, legal agreements and other sensitive details. The Commissioner has viewed the withheld information and confirms the documents making up the business case do contain information of the type described by NHSE.

21. The Commissioner must consider the facts of each case individually and whilst he notes the complainant's statement that they have obtained other complete business cases this is not something he takes into account here. The Commissioner considers the information was provided in circumstances importing an obligation of confidence – the transaction guidance does not suggest that information provided to NHSE to approve statutory transactions will be made public so the Commissioner considers there is an implied duty of confidence.
22. The final issue to consider is whether there could be an actionable breach of confidence by any party if the information was to be disclosed. NHSE considers the nature of the information demonstrates that disclosure would cause detriment to SWFT.
23. The Commissioner notes that the wholly-owned subsidiary in this case did not become operational until 2021 so at the time the request was made the approval was still in process. There is a possibility that disclosing the business case at this stage may have had a detrimental effect on SWFT but NHSE has not expanded on this argument further. However, the Commissioner considers there is an argument that disclosing the information would damage the trust placed by Trusts in the transaction approval process – there is an implicit duty of confidence surrounding information provided to support approval and disclosure of information, particularly before the subsidiary has even become operational that is likely to be lead to an actionable breach of confidence.
24. As such the Commissioner considers the exemption is engaged.
25. Turning to the public interest test, neither party has raised particularly specific points regarding why the specific information in this case should be withheld or disclosed. Arguments have been made that there is a public interest in openness and accountability of public authorities decision making and the use of public funds but these are countered by the public interest in maintaining the obligation of confidence.
26. The Commissioner places significance on the common law duty of confidence and the assumption that the confidence should be maintained unless the public interest in disclosure is exceptional. In this case, the Commissioner accepts that there is a real possibility that disclosing information obtained during a transaction approval process could undermine trust in the process. Clearly, Trusts will still have to submit information to NHSE if they want to gain approval for any transactions and this will not change if the information in this case is disclosed but there is a possibility that the level of detail and candidness of submissions may be affected.

27. The Commissioner does not consider that the arguments are compelling on either side. However, taking into account the inherent public interest in preserving the principle of confidentiality, specifically where it relates to information obtained in a process that carries an assumption of confidentiality, the Commissioner considers the balance of the public interest lies in withholding the information.
28. Therefore, the Commissioner concludes that section 41(1) provides a basis for withholding the requested information.
29. As the Commissioner has decided that section 41(1) has been correctly cited he has not gone on to consider section 33.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF