

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2019

Public Authority: University Hospitals Birmingham NHS Foundation Trust

Address: Mendelsohn Way
Edgbaston
Birmingham
B15 2GW

Decision (including any steps ordered)

1. The complainant has requested information on all financial transactions over £25,000. The University Hospitals Birmingham NHS Foundation Trust (the Trust) refused the request on the basis of section 31(1)(a) exemption, the prevention and detection of crime and section 43(2), commercial interests.
2. The Commissioner's decision is that the Trust has demonstrated that sections 31 and 43 are engaged but that the public interest does not favour maintaining the exemptions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 September 2018 the complainant requested the following information:

'I'm making a request under the Freedom of Information Act (2000) for information on all transactions over £25,000 from April 2014 to August 2018 for University Hospitals Birmingham NHS Foundation Trust. Please provide:

- a) the date of transaction*
- b) the value of transaction*
- c) the recipient*
- d) category of the transaction (As a minimum)'*

6. On 22 October 2018 the Trust responded. It cited section 43 (commercial interests) to refuse the request.
7. The complainant requested an internal review on the same day. She referred to government guidance that applies to the NHS on publishing this data:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216668/dh_119742.pdf
8. The Trust sent the outcome of its internal review on 22 November 2018 upholding the decision.

Scope of the case

9. The complainant contacted the Commissioner on 21 December 2018 to complain about the way the request for information had been handled.
10. During the investigation the Trust informed the Commissioner and the complainant that it now applied an additional exemption - section 31 - law enforcement, prevention and detection of crime.
11. Therefore the Commissioner considers the scope of her investigation to be to determine if the Trust was entitled to rely upon the exemptions at sections 31 and 43 and if so to determine where the balance of the public interest lies.

Reasons for decision

Section 31 – law enforcement

12. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.

13. The Trust has applied section 31(1)(a):

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime,'

14. The Trust is concerned that disclosing the requested information increases the risk to the Trust of being targeted for bank mandate fraud (where fraudsters persuade someone in the finance team to change bank account details prior to a payment) and provided the following arguments to the Commissioner.

- Publishing the requested information (date, value and category of the transaction, as well as details about the recipient) provides an ideal opportunity for fraudsters to replicate such information on a forged invoice in an attempt to defraud the Trust.
- These fraudulent schemes have been successful in other Trusts, despite staff being trained on data protection and cyber security.
- The Trust is responsible for some £1.5 billion of public finance and as one of the largest trusts in the country, fraudsters are likely to take a particular interest in the information that is published.
- Whilst the Trust has suitable control mechanisms (e.g. policies and procedures) in place to prevent any potential fraud, it knows that these cannot provide full protection and believes that the disclosure of the requested information will ultimately increase the prospects of becoming subject to fraudulent attempts.

15. The Trust went on to provide 2 examples of bank mandate fraud in the NHS:

- A Trust was defrauded of £900k via bank mandate fraud. A number of Trusts were targeted at the time and each had published details about a significant capital project with the same commercial organisation in the public domain, allowing the fraudsters to pretend to be employees of said organisation, using their letter template, logo and office address details
- A Trust was defrauded of £157k. The defrauded Trust completed its approved pre-account change checks before initiating the payment. The potential fraud was eventually identified when the change of bank details was noticed by the bank and returned as potentially fraudulent activity. This was confirmed by the supplier and the payment stopped.

Is the exemption engaged?

16. The Commissioner has first considered whether the exemption at section 31(1)(a) was engaged.

17. In order for a prejudice based exemption such as that contained within section 31(1)(a) to be engaged, the Commissioner considers that three criteria must be met.

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With relation to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

18. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority generally relates to the interests which the exemption contained at section 31(1)(a) is designed to protect. Specifically, disclosing this sort of information would provide an easily accessible list of suppliers and payments that could be replicated by fraudsters in attempted bank mandate fraud, and hence would be likely to prejudice the prevention of crime.
19. In providing support for the second and third criteria, the Trust provided links to national crime agencies showing an increase in one year of 123% in mandate fraud; how fraudsters use *'the drive towards transparency, improved online information and poor social media security...to assume false identities to conduct bank mandate fraud'*; and advice that access to sensitive financial information should be carefully controlled. (<https://www.actionfraud.police.uk/a-z-of-fraud/mandate-fraud>; [https://nbcc.police.uk/attachments/bank-mandate-fraud-July-2018%20FINAL\[1777\].pdf](https://nbcc.police.uk/attachments/bank-mandate-fraud-July-2018%20FINAL[1777].pdf) and <https://www.rsmuk.com/news/business-losses-from-mandate-fraud-double-to-77-million-pounds>)
20. The Trust also said that its NHS counter fraud specialist (Deloitte) *'advised that the NHS has lost at least £12 million in recent years due to bank mandate fraud.'*
21. The Trust stated that this demonstrates that there is a real and significant risk of becoming subject to mandate fraud following disclosure of financial information.
22. The Trust accepted that there is a difficulty in 'proving' that it was the published information which caused the fraudster to target particular organisations, *'the views by the police and national crime agency are clear in their message: The NHS is a target for potential fraudulent activity and all safeguards should be taken to prevent this. 'Proof' of a causal link would only come in the form of a fraudster being caught and admitting it, which has not yet occurred.'*
23. Having viewed the withheld information and considered the 2 examples of bank mandate fraud in the NHS (see paragraph 15 above), the Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and is prepared to accept that there is a causal relationship between the disclosure of the requested information and an increased risk to the Trust of being targeted for bank mandate fraud, the prejudice which the exemption is designed to protect.
24. She must however establish whether disclosure would be likely to result in the prejudice alleged (ie the third criterion).

25. The Trust has stated that disclosure of this information would be likely to prejudice the prevention or detection of crime, i.e. the lower threshold.
26. The Trust explained that *'the price/value is not the key factor...as the risk of criminal activity such as this (fraud) exists for all contracts regardless of their value. We have also reason to believe that some criminals will specifically focus on multiple small transactions in the hope that existing controls are less rigorously deployed.'*
27. The Trust also explained that the difficulty in 'proving' something that may happen in the future, if the information were disclosed. *'As an organisation we cannot state a definite 'would' in relation to prejudicial effect as this would mean we had evidence of a crime having been committed based on the information we disclosed, something we could only prove if the criminals were caught and disclosed their strategy to the police or in court.'*
28. However, the Trust believes *'there to be clear logical connection between the disclosure and the prejudice in order to engage the exemption.'*
29. The Commissioner has examined the withheld information and she accepts it would give a useful indication of the types, frequencies and patterns of financial payments, as well as the details of the individual transactions - financial values, dates, suppliers/recipients and category of product/service. She is satisfied that fraudsters could use this withheld information to attempt bank mandate fraud by forging invoices and diverting payments to their own bank details. She also accepts that the information might be useful to fraudsters when combined with other intelligence (e.g. social media, website information) gathered lawfully or not.
30. Consequently, she has concluded that disclosing the withheld information would be likely to pose a real and significant risk of prejudice to the prevention or detection of bank mandate fraud in particular, and crimes more generally.
31. Therefore, the public authority was entitled to engage the exemption at section 31(1)(a).

Public interest test

32. Section 31(1)(a) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

33. The Trust recognises that there is a legitimate public interest in promoting the accountability and transparency of public authorities and to increase the understanding by the public of how public money is spent.
34. The complainant argued that *'this information is provided by every other trust and public organisation'* and *'that invoices with sensitive information are usually redacted'*.
35. The Commissioner has made her own searches online using the search term 'NHS transactions over £25,000' and found that NHS England and a number of NHS Trusts including the East Cheshire NHS Trust provide monthly lists of financial expenditure over £25,000 that include similar details (date, value, category and recipient) to the FOIA request in this case. (<https://www.england.nhs.uk/contact-us/pub-scheme/spend/> and <http://www.eastcheshire.nhs.uk/Downloads/over%2025k%20FOI/Expenditure%20Over%2025K%20March%202018.xlsx>)

Public interest arguments in favour of maintaining the exemption

36. As regards the public interest in maintaining the exemption the Trust said that there was a public interest in ensuring that it does not lose public money:
 - Disclosure of information into the public domain could result in the loss of public money which could affect the public function of the Trust and limit the services offered to patients.
 - Disclosure of the information could reduce the Trust's ability to negotiate future contracts if commercially sensitive information of suppliers are disclosed or compromised.
 - The Trust were to be the victim of fraud, even on one occasion, this could lead to an increase in attacks.

Balance of the public interest arguments

37. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
38. The Commissioner also understands that the Trust wishes to use public funds in the most efficient and safe manner and that there is a

significant public interest in withholding information that may pose an increased risk of fraudulent activity.

39. However, the Commissioner notes from the links provided by the Trust that there is considerable awareness and advice on preventing such fraudulent activity. Even with a list of suppliers, the fraudster would need to successfully pretend to be an existing supplier with a new banking facility with a new account number and sort code for the payments.
40. The Trust believes that *'the interest in obtaining value for money in its tenders, ...and the interest in taking pre-cautionary steps to avoid fraudulent activity outweighs the public interest in promoting accountability and transparency by public authorities for decisions taken by them.'*
41. However, the Commissioner considers that the complainant has made a strong case for releasing the information in the public interest, as other NHS Trusts have already done so for a number of years in line with the government's guidance in 2010.
42. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information and the representations from both parties.
43. The Commissioner accepts there is a legitimate public interest in informing the public about financial transactions over £25,000 and that there is government guidance on how to do this. Balanced against this is the Trust's legitimate concerns over the potential risk to the funds of fraudulent activity if the withheld information is disclosed. The Commissioner considers that this is a clearly reasonable judgement to make. However, as there is already similar information in the public domain and much advice on procedures and policies to avoid the risk of fraudulent activity, the Commissioner concludes that the public interest favours disclosure, even though the exemption at section 31(1)(a) is engaged.
44. The Commissioner has gone on to consider the application of section 43.

Section 43(2) - Commercial interests

45. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.

46. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
47. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the Trust alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the Trust must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

48. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."¹

49. The Trust has explained that it operates in an extremely competitive environment. It engages in the purchases of goods and services to effectively carry out public duties and functions. *'Various suppliers are sourced in order to ensure public money is being spent adequately. It is important to add that the procurement exercise is a cost to both supplier and public authority. The overall transaction value (even without a breakdown) constitutes commercially sensitive information, which if disclosed, is likely to have a significant impact on the Trust's ability to operate in the relevant marketplace.'*

¹ See here: https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

50. The Commissioner is satisfied that the actual harm alleged by the Trust relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

51. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
52. The Trust has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information:
- It is believed that there is a causal relationship between any potential disclosure and the highlighted prejudice to the commercial interests in running competitive tenders to obtain value for public money and safeguarding/protecting the Trust from fraudulent activities and using public funds in the most efficient and safe manner
53. The Commissioner is satisfied that the Trust has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

Likelihood of prejudice

54. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:
- "there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)
55. In this case, the Trust has confirmed that it is relying on the lower threshold to engage the exemption. The Trust has argued that disclosure would be likely to prejudice its own commercial interests and its competitiveness in the commercial environment.
56. The Commissioner's view is that "would be likely to" places an evidential burden on the public authority to show that the risk of prejudice is real and significant.

57. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a competitor by providing valuable insight into the values of goods supplied to the Trust.
58. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the Trust attaches to this information and the prejudice that would be caused if it was disclosed.
59. For all of these reasons the Commissioner is prepared to accept that the section 43(2) exemption is engaged and therefore has gone on to consider the public interest test.
60. As the Trust provided the same public interest arguments for its application of section 43 and section 31(1)(a) the Commissioner will not repeat them here.
61. The Commissioner accepts that there is a strong public interest in protecting the commercial interests of companies and ensuring that they are able to compete fairly. Companies should not be disadvantaged as a result of doing business with the public sector. However, the Commissioner is not persuaded by the Trust's arguments that disclosure would result in a real and significant risk of its commercial interests being prejudiced. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption does not outweigh the public interest in disclosure.

Right of appeal

62. 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@justice.gov.uk

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

63. 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.
64. 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

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