

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision Notice**

Date: 2 February 2012

Public Authority: Northumberland Care Trust
Address: C/o NHS North of Tyne
Bevan House
1 Esh Plaza
Sir Bobby Robson Way
Great Park
Newcastle Upon Tyne
NE13 9BA

Decision (including any steps ordered)

1. The complainant requested information relating to a proposal to build an emergency care hospital. Northumberland Care Trust (NCT) refused the request in reliance on the exceptions at regulations 12(5)(d) and 12(5)(e) of the EIR.
2. The Commissioner finds that some of the information was correctly withheld but requires that the remainder be disclosed to the complainant. That is, all of the information withheld listed in Annex 1, see paragraph 6 below, with the exception of that information classed as 'Financial Risk' and the financial information redacted from the addendum.

Background

3. NCT is a primary health, community health and social care trust. NHS North of Tyne is the management organisation for NCT, Newcastle Primary Care Trust and North Tyneside Primary Care Trust.
4. Northumbria Healthcare NHS Foundation Trust (the Trust) has a contract with NCT to deliver healthcare services. This complaint relates to the Trust's proposal to build an emergency care hospital in Cramlington,

Newcastle upon Tyne, known as the Emergency Care Centre (the ECC). As the ECC involved a major reconfiguration of services provided by the Trust, the proposal required approval from NCT before it could go ahead.

5. As part of the approval process the Trust submitted a business case to NCT. Approval was given in October 2009.
6. The complainant made a previous request for the same information in February 2010, which was refused under the Act. The complainant complained to the Commissioner and during his investigation, on 18 February 2011, NCT wrote to the Commissioner enclosing an Annex setting out 4 categories, namely, 'pricing', 'negotiations', 'lobbying', and 'financial risks' with some explanation of why this information should not be disclosed. Some of the requested information was provided to the complainant by NCT.
7. Ultimately, the Commissioner reached the view that the request should have been handled under the EIR. It was agreed that the complainant would submit a fresh request to NCT, who would consider it under the EIR and respond accordingly.

Request and response

8. On 22 June 2011 the complainant repeated his request to NCT for the information contained in the outline business case and addendum which had been withheld in response to the previous request.
9. On 20 July 2011 NCT refused the new request under regulations 12(4)(e), 12(5)(d) and 12(5)(e) of the EIR. The complainant requested an internal review on 22 July 2011.
10. On 2 August 2011 NCT advised the complainant that it had conducted an internal review. NCT advised that it was no longer relying on the exception at regulation 12(4)(e), and therefore some further information could be disclosed. However NCT upheld its reliance on the exceptions at regulations 12(5)(d) and 12(5)(e) in relation to the remainder of the information.

Scope of the case

11. On 5 August 2011 the complainant asked the Commissioner to make a decision as to whether his request had been correctly refused by NCT.

Reasons for decision

Exceptions

Regulation 12(5)(d)

12. Information is exempt under regulation 12(5)(d) if its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
13. The EIR contains no definition of “proceedings”, but the Commissioner considers that it will include a range of investigative, regulatory or other activities carried out according to a statutory scheme. The Commissioner does not, however, believe that the term is as wide in its meaning as to include any business conducted by a public authority or its officials. The Commissioner interprets “proceedings” as possessing a certain level of formality, and will include (but may not be limited to):
 - legal proceedings;
 - formal meetings at which deliberations take place on matters within the public authority’s jurisdiction; and
 - where a public authority exercises its statutory decision making powers.
14. NCT advised the Commissioner that it had interpreted “proceedings” in this case to include formal meetings, held in private, at which NCT discussed whether to approve the Trust’s business case. The Commissioner is minded in this case, with regard to the particular circumstances, to accept the Trust’s interpretation; therefore the next step is to consider whether disclosure of the withheld information would adversely affect those proceedings.
15. The Commissioner notes that NCT’s arguments in relation to adverse effect relate solely to the ability of the Trust to progress the ECC project. NCT did not provide any arguments relating to its own ability to decide whether to approve the ECC, which were the proceedings identified by NCT. Nor is this apparent from the refusal notice or internal review. Therefore the Commissioner can only conclude that NCT has failed to demonstrate how disclosure of the withheld information would have an adverse effect on its proceedings.
16. In light of the above the Commissioner finds that the exception at regulation 12(5)(d) is not engaged, and he is not required to consider the public interest in relation to this exception.

Regulation 12(5)(e)

17. Information is exempt under regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
18. In deciding whether this exception is engaged, the Commissioner has considered the following questions:
- Is the withheld information commercial or industrial in nature?
 - Is the withheld information subject to confidentiality provided by law?
 - Is this confidentiality provided to protect a legitimate economic interest?
 - Would confidentiality be adversely affected by disclosure?

Is the withheld information commercial or industrial in nature?

19. The Commissioner understands that NHS foundation trusts, such as the Trust in this case, are not-for-profit organisations, but they operate on a broadly commercial basis. Primary care trusts commission healthcare from various service providers, including foundation trusts, who must then compete for this activity. The ECC project was initiated to enhance the Trust's ability to compete for healthcare activity. Therefore the Commissioner is minded to accept that the withheld information, contained within the proposal to build the ECC, is commercial in nature.

Is the disputed information subject to confidentiality provided by law?

20. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. The Commissioner is not aware of any statutory or contractual obligation of confidence, so went on to consider the common law of confidence.
21. NCT argued that:

"... a statutory right for the public to have access to any information must have an exception read into it to exempt the disclosure of confidential information in order to give effect ECHR [European Convention on Human Rights] rights".

22. In support of its position NCT referred the Commissioner to the Information Tribunal's decision in the case of *Staffordshire County Council and Sibelco v ICO*¹, and the Court of Appeal's decision in the *Veolia* case². NCT argued that these cases had established that any release of confidential information would engage ECHR rights, which created an effective bar to disclosure.
23. The Commissioner has considered both the Sibelco case and the Veolia case referred to in the preceding paragraph. The Commissioner has also considered the later First-Tier Tribunal case *Nottinghamshire County Council v IC* (EA/2010/0142), 29 December 2010, which makes specific reference to the cited Veolia case. In particular, the Commissioner refers to paragraphs 70 (3), 73 and 74, these paragraphs accurately reflect his view in relation to ECHR rights and confidential information and the application of the public interest test under the EIR and FOIA. For these reasons the Commissioner considers that even if it was accepted that ECHR rights arose in this case the application of the public interest test would meet the provisions of Article 8(2) of the ECHR. Consequently, he does not accept NCT's argument that in this case ECHR rights create an effective bar to disclosure.
24. In considering the common law of confidence the Commissioner has asked two key questions:
- Does the information have the necessary quality of confidence?
 - Was the information imparted in circumstances creating an obligation of confidence?
25. NCT stated that the withheld information was marked "commercial in confidence", and had clearly been provided in confidence by the Trust. The Commissioner does not consider protective markings to be conclusive evidence of the nature or sensitivity of information, and authorities need to ensure that they provide a clear explanation to requesters as to why information is considered exempt. In this case the Commissioner has carefully considered the withheld information, and notes that it comprises commercial information which the Trust has created to explore various options it had identified in terms of building a new ECC. The Commissioner acknowledges that the information is

¹ Appeal no EA/2010/0015

²

Veolia ES Nottinghamshire Limited v Nottinghamshire County Council [2010] EWCA Civ 1214

clearly not trivial and is not in the public domain. The Commissioner also notes that the information was provided to NCT for the sole purpose of seeking approval for the ECC, and the Commissioner accepts that it was provided in confidence. The Commissioner accepts that the information has the necessary quality of confidence and therefore finds that the information is confidential.

Is this confidentiality provided to protect a legitimate economic interest?

26. As noted above the Commissioner has accepted that the Trust operates on a broadly commercial basis, and it follows that the Trust has a legitimate economic interest in competing to deliver healthcare services. Therefore the Commissioner finds that this test is also met, and has gone on to consider whether disclosure of the withheld information would adversely affect this confidentiality.

Adverse effect

27. The exception at regulation 12(5)(e) is engaged if disclosure of the information in question would adversely affect the confidentiality of that information. The Commissioner notes that he has already found that the withheld information is confidential in nature and was provided in confidence. Consequently the Commissioner is satisfied that the disclosure of confidential information would adversely affect that confidentiality.

Public interest test

28. The public interest test is set out at regulation 12(1) of the EIR. This states that a public authority can only rely on an exception contained within regulation 12(4) or 12(5) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. In addition, regulation 12(2) requires that the public authority apply an explicit presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

29. When asked by the Commissioner to demonstrate that it had considered arguments in favour of disclosing the information, NCT advised that it had taken into account:

“the public interests of transparency and accountability at public authorities, particularly where the spending of public money is concerned”.

30. The complainant argued to the Commissioner that there was a strong public interest in favour of disclosure of the withheld information. The complainant pointed out that the proposed ECC was approximately eight miles away from an existing facility providing similar services. Therefore the complainant was of the view that the public should be able to scrutinise the financial viability of building the ECC in the proposed location.
31. The complainant also argued that, as the Trust's competitors were other NHS organisations the importance of protecting commercial interests was weakened in favour of demonstrating value for money and making the best use of local resources.

Public interest arguments in favour of maintaining the exception

32. NCT provided a little additional comment but relied largely on the arguments set out in its letter and Annex of 18 February 2011, in relation to the four broad categories of information, referred to in paragraph 6 above, the Commissioner has considered these in turn.

Pricing

33. The withheld information which falls under this category comprises actual activity levels in 2008/2009, and anticipated activity levels subject to approval of the ECC. It includes pricing information relating to both sets of activity figures.
34. NCT argued that the public interest lay in protecting the confidentiality of this information as disclosure would help the Trust's competitors (other NHS Trusts) to undercut its prices, which would have an adverse impact on the Trust's own activity. NCT was of the view that the public interest lay in protecting the Trust's ability to compete effectively.
35. NCT further argued that disclosure of this information would make the Trust and other organisations reluctant to take similar initiatives in the future, or to include detailed information in their business cases. NCT was of the view that this would not be in the public interest, although it did recognise that the public interest would shift over time and the information would become less sensitive.

Negotiations with contractors

36. The withheld information which falls under this category includes anticipated costs of purchasing land and equipment, as well as building costs. It also includes information as to how these costs could be funded, including the sale of Trust-owned land.

37. NCT argued that disclosure of this information would damage the Trust's negotiating ability with suppliers and contractors. This is because these parties would have prior knowledge of the Trust's intentions, and could use this to secure higher prices.
38. NCT also argued that the public interest lay in the Trust being able to secure land, buildings and equipment at the best possible price, rather than suppliers and contractors being given an unfair advantage which could enable them to charge more.

Lobbying by competitors

39. NCT argued that the disclosure of this category of information would encourage and enable the Trust's competitors to lobby more successfully against any decision to approve the ECC. NCT was of the view that this was not in the public interest as it would make it more difficult for the Trust to proceed with the ECC.

Financial risks

40. The withheld information which falls under this category includes information relating to the financial stability of the Trust and the level of financial risk accepted by the Trust in proposing the ECC project, this includes the financial information redacted from the addendum.
41. NCT made a number of detailed arguments in favour of maintaining the exception, which are not reproduced here to avoid inadvertently disclosing exempt information.

Balance of the public interest arguments

Pricing

42. The Commissioner appreciates the unique position of NHS Trusts in that they are public authorities, but are required to operate in a competitive environment. Therefore the Commissioner understands that the Trust in this case would prefer to control disclosure of activity and pricing information so as to minimise any assistance this might afford its competitors. The Commissioner also notes that some information relating to activity levels and income is regularly published by the Trust in its annual report and accounts.
43. The Commissioner accepts that disclosure of anticipated activity and pricing levels could assist the Trust's competitors, but is mindful that competition has been actively encouraged in the establishment and structure of NHS Trusts. Therefore disclosure of this information could also increase opportunities for efficiencies and cost savings, which would be in the public interest.

44. In light of the above the Commissioner finds that the public interest in maintaining the exception in relation to this category of information does not outweigh the public interest in disclosure.

Negotiations with contractors

45. The Commissioner agrees with NCT's argument that there is a strong public interest in the Trust being able to secure land, buildings and equipment at the best possible price, given the public money involved. The Commissioner is also inclined to accept that the disclosure of anticipated costs and sale income could potentially make it more difficult for the Trust to secure best value. The Commissioner does however consider that potential prejudice is limited by the general nature of the withheld information (for example, with regard to breakdowns of costs).
46. The Commissioner is also mindful that NCT has accepted that sensitivity attached to this information will diminish over time. The withheld information was generated in 2008/2009, and the complainant's request was submitted in 2011. The Commissioner notes that the costs and income were anticipated values and considers that any estimate would be affected by the passage of time, and thus can only provide an indication of estimated costs.
47. In any event, the Commissioner considers that disclosure of this information may assist the public in that publicising estimated costs would remind contractors that they will be scrutinised and made accountable to the public. The Commissioner is of the view that this would encourage value for money, and would serve the public interest.
48. Therefore the Commissioner finds that the public interest in maintaining the exception does not outweigh the public interest in disclosing this category of information.

Lobbying by competitors

49. NCT argued that the disclosure of this category of information would encourage and enable the Trust's competitors to lobby more successfully against any decision to approve the ECC. NCT reminded the Commissioner that it had carried out a public consultation on the ECC proposal before it had approved the project.
50. However, the Commissioner considers it reasonable to expect competitors, as well as those objecting to any particular project, to seek to lobby and put their own views forward. In any event, the Commissioner does not accept that disclosure of the withheld information would have given competitors an unfair advantage. The decision on approving the ECC fell to NCT to make and the existence or

not of lobbying ought not to have affected NCT's ability to reach a reasoned decision in that case.

51. In light of the above the Commissioner finds that the public interest in maintaining the exception in relation to this category of information does not outweigh the public interest in disclosure.

Financial risks

52. The Commissioner accepts that disclosure of details of the financial risk associated with the ECC would harm the Trust's position in terms of progressing the project. There is a strong public interest in protecting the ability of public authorities to present and discuss sensitive financial information when considering options, as in this case. The Commissioner is of the view that the public interest in maintaining the exception, and thus the confidentiality, outweighs the public interest in disclosing the withheld information in this category.

Right of appeal

53. 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: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. 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.
55. 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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