

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 August 2017

**Public Authority:** George Eliot Hospital NHS Trust  
**Address:** George Eliot Hospital  
College Street  
Nuneaton  
CV10 7DJ

#### Decision (including any steps ordered)

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1. The complainant requested emails and other information relating to the Sustainability and Transformation Planning (STP) process.
2. The public authority refused to provide the complainant with the requested emails, citing section 12 of the FOIA (Cost) as its basis for doing so. In relation to other STP related information the public authority refused the request citing sections 43(2) (commercial interests), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) as its reason for refusal.
3. The Commissioner's decision is that the public authority has correctly applied section 12 of the FOIA to the request for emails. In respect of other STP related information the Commissioner finds that sections 36(2)(b)(i) and (ii) of the FOIA are engaged and that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.
4. The Commissioner requires no steps to be taken.

#### Background

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5. By way of background and in terms of context, in December 2015 NHS England published a document "Delivering the Forward View: NHS Planning Guidance 2016/17 – 2020/21" which sets out what a STP is intended to do. Effectively, health bodies and social care partners within

an STP footprint were asked to come together to jointly plan services for the period October 2016 to March 2021, in order to meet the triple challenge set out in the 5 Year Forward View, which is a public document.

6. The triple challenge is as follows:
  - How will we close the health and well-being gap?
  - How will we drive transformation to close the care and quality gap?
  - How will we close the finance and efficiency gap?
7. It was recognised from the outset that in order to meet the triple challenge, there would need to be changes to the way that healthcare is delivered across the Coventry and Warwickshire STP and as a forerunner, it would be necessary for partners to share information in the way that would not ordinarily be in, or reasonably expected to be in the public domain and to this end members of the STP signed an agreement for mutual exchange of confidential information for use regarding the development of the STP.
8. The STP was very high level and embryonic and had no status in terms of this not being effectively 'signed off' by the regulator. Prior to any plans being enacted, each constituent body would need to follow internal governance processes and take a decision through their respective Board or Governing Body as the STP is a meeting of partners; it is not entity in its own right and has no legal status.
9. There was always an intention to publish the STP once it had been through due process with NHS England as the regulator for the sector and the STP plan was published by each member organisation on 6 December 2016:

<http://www.uhcv.nhs.uk/about-us/stp>

## Request and response

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10. On 2 December 2016, the complainant, on behalf of the Trinity Mirror Newspaper, wrote to George Eliot Hospital NHS Trust ('GEH') and requested information in the following terms:

*Please could you provide copies of the following for the past 24 months (Jan 1, 2015 to Dec 2, 2016):*

*Any emails sent and received by [Director of Operations] in relation to the STP*

*Any emails sent and received by [name redacted] in relation to the STP*

*Any emails sent and received by any other member of the press team in relation to the STP or in relation to press enquiries about the STP*

*Any minutes / notes taken during meetings in relation to the STP planning process*

*Specifically: Any minutes / notes taken during meetings in relation to A&E in Coventry and Warwickshire and the STP **AND** Any minutes / notes taken during in relation to forward planning for maternity services / paediatrics in the region.*

*Please also provide any documents (presentations, powerpoint slideshows, graphics, charts etc) produced as part of the STP process relating specifically to A&E, maternity or paediatrics care in Coventry / Warwickshire.*

11. GEH responded on 5 January 2017 in which it refused to provide the complainant with the requested emails, citing section 12 of the FOIA (cost) as its basis for doing so. In relation to STP paperwork, GEH refused the complainant's request citing sections 43(2) (commercial interests), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) as the reason for its refusal.
12. On 5 January 2017 the complainant wrote to GEH requesting an internal review of its decision to refuse his request.
13. In its internal review outcome GEH upheld its decision to refuse to provide the requested emails on the basis of section 12 of the FOIA. In relation to STP paperwork SWFT upheld its decision to refuse the request on the basis of sections 43(2) and 41 and 36 of the FOIA.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 20 February 2017 to complain about the way his request for information had been handled and asked the Commissioner to encourage GEH to provide him with the requested information.
15. The Commissioner considers that the scope of the case is whether section 12 has been appropriately applied to the requested emails, and whether GEH was correct to rely upon the exemptions contained in sections 43(2), 41 and 36 of the FOIA in refusing the request for other SPT related information.

## Reasons for decision

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### Emails

#### Section 12 (cost)

16. Section 12(1) provides that:

*"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."*

17. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
18. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
- Determining whether it holds the information;
  - Locating the information, or a document which may contain the information;
  - Retrieving the information, or a document which may contain the information;
  - Extracting the information from a document containing it.
19. In its response to the complainant GEH informed him that to respond to his request would require a search for emails for a 24 month period from two individuals plus one team comprising 5 individuals. It would be required to examine each sent and received item from each day during the period of the request to extract any STP related information and clearly that would quickly exceed the appropriate limit.
20. GEH considered whether the request could be pared back to bring it within the appropriate limit on the basis that the requirement for STPs was not announced until December 2015 which would restrict the period of his request to 12 months, however that too would exceed the appropriate limit.
21. In his request for an internal review, the complainant considered that email searches for keywords would eliminate the need to inspect each

email individually and rejected the notion that this would be an overly time-consuming process.

22. During the course of her enquiries the Commissioner asked a number of questions to enable her to consider whether GEH has correctly applied section 12 of the FOIA, to which it responded on 28 July 2017.
23. In estimating the time for compliance, GEH informed the Commissioner that the complainant had requested emails from its Director of Operations, Head of Midwifery and five individuals from its communications team. It was identified that those individuals collectively receive on average 180 emails per day and searching for emails that are STP related for a period of 24 months, spanning the period requested, would exceed the appropriate limit.
24. GEH conducted a sampling exercise and has estimated the cost/time factor. In this exercise it searched two individual emails which identified 629 and 425 emails respectively that have STP in the title. GEH pointed out that there may be many more emails related to STP which do not appear in this search. For GEH to confirm the relevance to STP the emails would need to be printed, reviewed and the information extracted. An estimated time for locating, retrieving and extracting information is 2 minutes per email:

1054 emails x 2 mins = 35 hours or £875.

This would exceed the appropriate limit of £450. GEH would also have to complete this exercise for the remaining five individuals to reach an overall total cost.

25. Having considered the nature of the project to which this request relates, and having viewed the information GEH has withheld from this request using exemptions under the FOIA (which is covered later in this decision) the Commissioner considers that that all emails in each individuals account would need to be examined as the search term 'STP' or its full unabbreviated form would not necessarily reveal all emails falling within the scope of the complainant's request.
26. On the basis of the sampling exercise conducted by GEH she accepts that the estimated time for compliance with this part of the request would exceed the appropriate limit, particularly as the sample considered included only those with STP in the title and therefore the actual number of emails per individual falling within the scope of the request is likely to be higher. Furthermore, based upon the average total time for two individuals, to perform this exercise for seven individual's emails with STP in the title would take 122.5 hours at a cost

of £3,062.50. Accordingly she is satisfied that GEH has appropriately applied section 12 to this part of the request.

### **SPT related information**

#### **Section 36 (prejudice to effective conduct of public affairs)**

27. The Commissioner has been informed by GEH that it has applied section 36 to the entirety of the withheld information, which consists of a series of meeting minutes. In particular, the withheld information falls to be considered under sections 36(2)(b)(i) and (ii) of the FOIA.

28. Sections 36(2)(b)(i) and (ii) of FOIA state that:

*2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –*

*(b) would, or would be likely to, inhibit-*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation.*

29. Sections 36(2)(b)(i) and (ii) can only be engaged if, in the reasonable opinion of the qualified person, disclosure would, or would be likely to result in any of the effects set out.

30. In the present case, GEH's Chief Executive Officer, Ms Kath Kelly, provided the opinion. The Commissioner is satisfied that she is the qualified person for the purposes of section 36. As a fully participating STP Board member the qualified person is well versed in the content of the withheld information and the discussions that take place at STP Board. GEH has provided the Commissioner with a copy of the qualified person's opinion dated 5 January 2017.

#### **Is section 36 engaged?**

31. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. When making her determination, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd – that is, if it is an opinion that a reasonable person could hold – then it is reasonable.

32. However, this is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion will not be deemed unreasonable simply because other people may have

come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Therefore, the qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

33. The Commissioner has considered the relevant factors including:

- Whether the prejudice relates to the specific subsections of section 36(2) that are being claimed. If the prejudice or inhibition is not related to the specific subsections, the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

34. GEH confirmed that there was always intent to publish the STP once it had been through due process with NHS England, and indeed, it was published on 6 December 2016. However GEH's position was that there had to be a process of dialogue amongst partners to develop the plan and members needed to be assured that they were free to discuss difficult issues without fear of the discussion or rationale becoming public knowledge.

35. GEH advised the Commissioner that whilst the STP document has been published the plan is expected to develop over time from high level planning to more solid proposals that will be subject to governance processes and public consultation as required.

36. The qualified person confirmed that the initial development of ideas and views prior to public involvement was 'in train' with a view to imminent publication of the public facing and mutually agreed Coventry and Warwickshire Plan. She advised that for this process to be effective would require senior officers of GEH to be able to engage in the provision of advice based upon GEH's specific data relating to its performance and initial strategic thinking and also the free and frank exchange of view for the purpose of deliberation.

37. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank provision of advice and the exchange of views either 'would' occur or would only be 'likely' to occur. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is



interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.

38. In the qualified person's opinion, she stated that disclosure 'would' inhibit the matters set out in section 36(2)(b)(i) on the basis that members will be reluctant to provide their information if they are concerned that it would become a matter of public knowledge. She stated that disclosure 'would be likely to' inhibit the matters set out in section 36(2)(b)(ii) for the reason that members will be reluctant to provide their views and to deliberate if they are mindful that these views and deliberations might be a matter of public record.
39. The complainant pointed out that the minuted conversations have led to the production of a publicly available document dealing with the expenditure of millions of pounds of public funds and healthcare provision for millions of people. With the document already released he felt there was little justification for continuing to keep those conversations private.
40. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would be likely to inhibit the processes of providing advice or exchanging views.
41. Having reviewed the information withheld under this section of the FOIA, which comprise a series of meeting minutes, the Commissioner considers it was reasonable for the qualified person to conclude that sections 36(2)(b)(i) and (ii) applied.
42. This is because she considers that GEH needed to provide advice and deliberate sensitive and high profile issues in a 'safe space' and away from the public domain. She agrees that if each and every step of these processes is put into the public domain then senior officials and others are likely to be inhibited from providing open and honest advice and exchanging free and frank views for the purposes of deliberation in the future. This in turn would affect the ability of GEH to make effective and fully informed decisions in the future in relation to its core function of providing value for public money and high quality public healthcare.
43. Whilst the Commissioner is of the view that senior officials should be sufficiently robust to make decisions without being deterred by concerns about advice and deliberations being publicly available, this view does not outweigh the need to deliberate and provide advice in a 'safe space' in relation to important and large scale issues, as was involved in the particular circumstances of this case.



44. In forming her view the Commissioner took into account that at the time of the request, the STP process was live and ongoing; the STP document had not been published at that time. She understands that publication of the STP was only the initial high level planning stage of a longer term project which is expected to be further developed over time from high level planning to more solid proposals and eventual implementation and so was only part of an ongoing process. She is aware that the STP was published four days after the request, arguably when initial ideas and discussions had been concluded, however the scope of the request would encapsulate all information over the whole period since announcement of the requirement for STPs was made, and would therefore include the very early discussions and 'blue sky' thinking.

### **Public interest test**

45. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition would be likely to result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of this case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.
46. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable, she will consider the weight of that opinion in applying the public interest test.

### **Public interest arguments in favour of disclosure of the information**

47. The complainant considered that transparency of decisions on how public funds are spent will generate confidence in the integrity of the procedures involved. He felt there was a clear public interest in the scrutiny of how decision on public spending and healthcare provision are made.
48. GEH accepts that the wider public has an interest in local health services and their development.

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

49. GEH finds it difficult to see how release of this information would benefit the public interest given that a full engagement plan and publication was intended at the time of the request, and has since taken place.

It also stated that in the absence of full and frank exchanges the STP is unlikely to deliver the stated requirements to develop plans that will ensure the sustainability of local health economies, and failure to achieve this, given the current financial position in the NHS and social

care would not only be contrary to the public interest but prejudicial to it.

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

50. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
51. When attributing weight to the 'chilling effect' arguments ie. that disclosure of information would inhibit free and frank provision of advice and discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making, the Commissioner recognises that the members are expected to be robust and impartial when providing advice and deliberating.
52. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure. However, she also considers that chilling effect arguments cannot be dismissed out of hand. In this case, she accepts that GEH should be able to hold free and frank discussions which include the provision of advice and the exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made.
53. With regard to GEH's 'thinking space' argument, the Commissioner considers that there is a need for any public authority to have a safe space in which to develop ideas or make decisions.
54. The Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability, however she considers that the publication of the STP document is sufficient to achieve these ends. The Commissioner does not consider that the wider public interest would be better served by disclosure of the withheld information.
55. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and exchange of views for the purposes of deliberation, against the public interest in openness and transparency. In particular, in accepting the qualified person's opinion that disclosure 'would' inhibit the matters set out in section 36(2)(b)(i) and 'would be likely' to inhibit the matters set out in section 36(2)(b)(ii), she has had due regard to the inherent weight of that opinion when applying the public interest test. In her deliberations

she has also considered GEH's and the complainant's arguments regarding disclosure and has paid particular attention to the timing of the request which occurred at a time when the issue was very much live and formed only a part of an ongoing longer term planning process.

56. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in GEH's ability to conduct its affairs effectively and in a 'safe space'. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Conclusion**

57. Taking all of the above into account, the Commissioner is satisfied that sections 36(2)(i) and (ii) have been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
58. As the Commissioner has concluded that section 36 has been correctly applied to all of the withheld information she has not gone on to consider GEH's application of sections 41 and 43(2).

### **Other matters**

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59. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to someone making an information request, including helping an applicant refine a request so that it can be answered within the appropriate costs limit. In this case the Commissioner notes that in line with this duty GEH considered reducing the period of the request to include only the time post December 2015 when the requirement for STPs was announced, however this would not take the request within the appropriate limit. The Commissioner has considered whether GEH could reasonably offer any other advice and assistance to the complainant, however given the estimated cost of providing emails from two individual's accounts where SPT appeared in the title she feels there is limited scope for doing so, as any refined search would be unlikely to provide the complainant with a sufficiently meaningful response. The Commissioner therefore considers that GEH has complied with its duty under section 16.

## Right of appeal

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60. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

61. 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.
62. 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** .....

**Pamela Clements**  
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