

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

Date: 20 October 2022

Public Authority: Liverpool University Hospitals NHS Foundation Trust

Address: Prescot Street
Liverpool
Merseyside
L7 8XP

Decision (including any steps ordered)

1. The complainant has made a series of requests for a variety of information. Liverpool University Hospitals NHS Foundation Trust's ("the Trust's") final position was that it wished to rely on section 14 to refuse one request and to rely on regulation 12(5)(b) – course of justice – and regulation 12(5)(e) – commercial confidentiality – of the EIR in order to withhold the remaining information.
2. The Commissioner's decision is that requests 1, 2 and 4 should have been dealt with under the EIR. However, having done so, the Trust was entitled to rely on regulation 12(5)(b) of the EIR in the manner that it has done and the balance of the public interest favours withholding the information. The Trust was also entitled to rely on regulation 12(5)(e) of the EIR to withhold some, but not all of the information it initially withheld. The Commissioner finds that request 3 was vexatious and therefore the Trust was entitled to rely on section 14(1) of FOIA and Regulation 12(4)(b) of the EIR to refuse it. Finally, for the reasons set out below, the Trust breached regulations 5(2) and 14 of the EIR as well as section 17(5) of FOIA in responding to the requests.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation – if it has not already done so at the date of this notice.

- Disclose to the complainant, copies of the documents it identified to the Commissioner as documents 20, 22 and 23. The Trust may make the redactions to these documents that it has suggested to the Commissioner.
4. The Trust 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

Request 1

5. On 17 August 2021, the complainant contacted the Trust and requested information in the following terms:

“As you are not clear as to what ‘legal’ enquiries are ongoing can you please clarify whether this includes any insurance claims in relation to the new build? To be clear has the Trust or any organisations working for the Trust made any insurance claims re. the new build?”

Request 2

6. On 18 August 2021, the complainant contacted the Trust again and requested information in the following terms:

“[1] I point out that the Trust has given two contrary and different responses to the issue of new build costs. So I am to understand that the costs below are fixed and will not be subject to change?”

“[2] What warranties/guarantees does this include?”

“[3] Has there been any consideration/plans including -demolition to the old building and have costs been estimated/budgeted for?”

Request 3

7. On 17 August 2021 the complainant contacted the Trust to complain that its transparency data had not been updated for around 18 months. The Trust responded to him and pointed out that he was looking at the wrong website and indicated where the more recent data could be found. The complainant then responded on 20 August 2021 by requesting information of the following description:

"Financial Transparency - simply the excel spreadsheets do not provide transparency - again I request details/description for the items on the spreadsheet and that they be published in future. I am clearly asking for the details as an FOI request as well as that the information is provided in the transparency releases as a matter of course (i.e. both future and past ones). Is it possible to add in a description on the Transparency Reports?"

Request 4

8. On 20 August, the complainant contacted the Trust again and sought information in the following terms:

"[4] Is there a document itemising the costs of the new build of c. £357 million on the website? If not can one be put on website? Or provided?"

"[5] Does this cost include installation of all equipment and the podium as described in this article:
<https://www.liverpoolecho.co.uk/news/liverpool-news/striking-images-show-plans-long-21266448>
Likewise can this information be put on the website or provided?"

"[6] If not otherwise included in the above requests what are the estimated costs of opening the new hospital in addition to construction costs? What are these composed of? Likewise can this information be put on the website or provided?"

"[7] Other than the £20 million previously identified payment to Liverpool University has the Trust or its previous entities made any other payments in respect of similar "interests" to other parties or any compensation to other parties? Again can this information be put on the website or provided?"

9. On 16 September 2021, the Trust responded to all four requests as follows

- Request 1 – The Trust responded to say that any information it held would be covered by section 42 of FOIA. It did not confirm explicitly whether or not such information was held.
- Request 2 – The Trust provided the information it held in respect of element [1]. It provided some information in respect of elements [2] and [3], but relied on section 43 of FOIA to withhold the remainder.
- Request 3 – the Trust refused this request as the cost of compliance would exceed the appropriate limit.

- Request 4 – The Trust denied holding information within the scope of elements [6] and [7] but admitted that it held information within the scope of elements [4] and [5]. However, it withheld this information and relied on section 43 of FOIA in order to do so.
10. The complainant requested an internal review on 17 September 2021, challenging the Trust's reliance on the stated exemptions. The Trust sent the outcome of its internal review on 11 November 2021. It upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner on 12 November 2021 to complain about the way his request for information had been handled.
12. The Commissioner wrote to the Trust on 22 July 2022. He noted that, in his view (and in line with similar decisions), he considered that the information falling within the scope of requests 1, 2 and 4 was likely to be environmental. Rather than prolong the investigation unnecessarily, he set out his standard questions relating to regulations 12(5)(b) and 12(5)(e) of the EIR (these being the equivalent EIR exceptions to sections 42 and 43 of FOIA) so that, if the Trust accepted the information was environmental, it could provide appropriate arguments without delay.
13. The Trust responded on 18 August 2022. It accepted that the information was environmental and confirmed that it did wish to rely on regulations 12(5)(b) and 12(5)(e) of the EIR instead of sections 42 and 43 of FOIA respectively. It also maintained its reliance on section 12 of FOIA or, to the extent that the information was environmental, regulation 12(4)(b) of the EIR, in order to refuse request 3.
14. The Commissioner responded to the Trust on 5 September 2022. He noted that the Trust's estimate included a number of activities (such as separating exempt and non-exempt information) that were not permissible under section 12. However, the Commissioner accepted that complying with request 3 would impose a considerable burden on the Trust and asked whether it wished to rely on section 14(1) of FOIA instead. On 15 September 2022, the Trust confirmed that it did wish to rely on section 14.
15. Finally, the Commissioner wrote to the Trust on 4 October 2022 to explain that, in his view, the Trust had over-relied on regulation 12(5)(e) of the EIR to withhold information and that it should either disclose some of the information or provide further arguments explaining why the information should be withheld in its entirety. The

Trust responded on 18 October 2022 to say that it was now content to disclose most of this information. However, at the date of this notice it was unclear whether or not it had done so.

16. The Commissioner considers that the scope of his investigation is to determine whether the Trust was entitled to rely on either of the EIR exceptions in the manner that it has done and whether it was entitled to rely on section 14 of FOIA to refuse request 3

Reasons for decision

Is the requested information environmental?

17. In decision notice IC-123838-W7L2¹, the Commissioner set out why he considered very similar information to that covered by requests 1, 2 and 4 to be environmental. He relies on the analysis set out in paragraphs 17-25 of that decision notice to explain why these requests should also be dealt with under the EIR.

Regulation 12(5)(b) – course of justice

18. In decision notice IC-123838-W7L2, the Commissioner set out why he considered particular information engaged this exception. The information the Trust is withholding in the present case is the exact same information it withheld in respect of IC-123838-W7L2.
19. The Commissioner therefore relies on the same analysis as set out in paragraphs 40 to 57 of decision notice IC-123838-W7L2 to explain why this exception is engaged in the present case and why the balance of the public interest favours maintaining the exception.

Regulation 12(5)(e) – commercial confidentiality

20. As has been referred to above, the Trust initially relied on this exception to withhold four documents in their entirety. However, following the Commissioner's intervention, the Trust agreed that redacted versions of three of the four documents could be disclosed. The remaining redactions cover, in broad terms, specific items of spend or budget for forthcoming phases of the site development.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020790/ic-123838-w7l2.pdf>

21. The Commissioner accepts that the redacted information engages this exception. The information is commercial (as it relates to the purchasing of goods and services), clearly not trivial and the granular information about budgets is not in the public domain.
22. The Trust has marked the information as "confidential" and, whilst this is not in itself determinative, the Commissioner accepts that, due to the nature of the information, Trust employees would be under a common law, if not a contractual, duty to maintain the confidentiality.
23. Finally, the Commissioner accepts that breaching the Trust's confidentiality would prejudice its legitimate economic interests. The Trust is entitled (if not required) to obtain best value for any public money it spends. It will be less able to do that if those it is negotiating with already know, in advance, the maximum amount of money the Trust is prepared, or has available, to spend on a particular item.
24. The Commissioner is therefore satisfied that disclosure would have an adverse effect on commercial confidentiality and thus Regulation 12(5)(e) of the EIR is engaged.

Public interest test

25. The Commissioner is satisfied that the balance of the public interest favours maintaining the exception.
26. The Trust's overall budget figure for the works is in the public domain. The amount that it has spent already has been or will be published in annual accounts – as will future spending items. That allows the public to exercise meaningful scrutiny over the Trust's spending. That scrutiny is enhanced by the scrutiny the Trust will receive from its own internal audit team as well as its external auditors.
27. Disclosure of the non-financial parts of the information would meet the public interest in understanding the wider project and its aims.
28. The Commissioner is therefore satisfied that disclosure of the withheld information would do relatively little to improve scrutiny of the Trust whilst, on the other hand, it would hamper the Trust's ability to extract value for money in its negotiations with suppliers – which is not in the public interest.
29. The Commissioner notes that the Trust has (or is prepared to) disclosed redacted versions of three documents, but wishes to withhold the fourth in its entirety. Having viewed the fourth document, the Commissioner notes that it is largely made up of financial information and, were this to be redacted, the remaining information would be incomprehensible. He is therefore satisfied that this document can be withheld in its entirety.

Section 14 – vexatious request/Regulation 12(4)(b) – manifestly unreasonable request

30. The Trust agreed with the Commissioner that request 3 sought both environmental and non-environmental information. To the extent that the request sought environmental information, the Trust considered that the request was manifestly unreasonable. To the extent that the information was non-environmental, it was vexatious.
31. The Trust then explained that it would need to carry out a manual review of the raw data for each item in its current published spending returns. It would need to carry out this review in order to identify any personal data and to remove invoice numbers – which could be used for fraud. It noted that most of this information was contained within a free text box so it could not be easily sifted or sorted to produce information suitable for publication.
32. Finally, the Trust noted that, where the free text box had been left blank, it would need to review what the payment had been made for by matching it to the original invoice, so as to be able to provide a description.
33. Once all this had been done, the Trust estimated that it would take around 15 minutes to review each line of data, therefore to review all the 3,630 items within the time parameters of the request would take in excess of nine hundred hours.
34. The Commissioner has some reservations about the Trust's estimate. The request specifically requires the creation of new information that the Trust does not already hold. Whilst the Trust is not required to create information to satisfy an information request, the Commissioner recognises that, in this case, where no description of a particular payment has been entered, the Trust will want to provide appropriate contextual information to explain what the payment is for.
35. Having viewed a sample of the raw data, the Commissioner also recognises that there is a considerable amount of information that would need to be redacted and that there is no set pattern that would allow for this information to be easily isolated – even via electronic means.
36. Even if the Commissioner were to accept that 15 minutes per line was an unreasonable estimate, he notes that each line would need to be reviewed in under a minute, just for complying with the request not to exceed 50 hours of staff time. The Commissioner is therefore satisfied that this request would impose a grossly oppressive burden if the Trust were to comply.

37. The Commissioner has considered whether there are mitigating factors that would require this request to be complied with, despite the burden. He considers that there are no such factors.
38. The Trust is a medium-sized public authority and, as such could not comply with such a burdensome request without incurring a disproportionate diversion of resources. Given its functions, the Commissioner would be particularly wary of making it comply with burdensome requests.
39. Finally, the Commissioner sees little public value in the request. The Trust already publishes details in accordance with national guidelines. The value of the additional information that would be revealed is disproportionate to the burden that would be incurred. He is therefore satisfied that the request was vexatious.
40. To the extent that this request sought environmental information, the Commissioner considers it to be manifestly unreasonable as, in order to comply with its EIR obligations, the Trust would not only have to perform the steps outlined above, but would also need to separate out the environmental and non-environmental information.
41. For the reasons set out above, the Commissioner is satisfied that the public interest favours protecting the Trust's resources from such a burdensome request and, whilst the has considered the presumption in favour of disclosure, he does not consider this sufficient to justify disclosure in this case.

Procedural matters

42. The Commissioner finds that the Trust breached regulation 5(2) of the EIR as it disclosed some of the environmental information that it held outside of the 20 working day timeframe.
43. The Commissioner finds that the Trust breached regulation 14 of the EIR as it failed to deal with requests 1, 2 and 4 under the EIR and issue a refusal notice citing a valid EIR exception within the 20 working day timeframe.
44. The Commissioner finds that the Trust breached section 17(5) of FOIA as it failed to issue a refusal notice, stating that it was relying on section (1) of FOIA to refuse request 3, within the 20 working day timeframe.

Right of appeal

45. 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

46. 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.
47. 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

Roger Cawthorne
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