

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

Date: 7 November 2023

Public Authority: Kingston Hospital NHS Foundation Trust
Address: Kingston Hospital
Galsworthy Road
Kingston upon Thames
Surrey KT2 7QB

Decision (including any steps ordered)

1. The complainant has requested information relating to the sale of land by Kingston Hospital NHS Foundation Trust (“the public authority”).
2. The Commissioner’s decision is that the commercial confidentiality exception under regulation 12(5)(e) of the EIR is engaged for the withheld information and that the public interest favours maintaining the exception.
3. However, as the public authority failed to issue any refusal notice within 20 working days, and also incorrectly considered the request under the FOIA rather than the EIR, the Commissioner has found a breach of regulation 14 of the EIR.
4. In addition, as the public authority failed to provide an internal review within the statutory time limit, the Commissioner has found a breach of regulation 11(4) of the EIR.
5. The Commissioner does not require further steps.

Request and response

6. On 14 March 2023, the complainant wrote to the public authority and requested information in the following terms:
 - “1. Sale of the Regent Wing to Advanced Living in March 2019: Please confirm the full sale price of £8.5 million that was agreed in 2019 has now been paid in full by Advanced Living. Has the agreed Deferment Payment Plan been fulfilled.
 2. Sale of the Regent Wing to Advanced Living in March 2019: If the sale has still not been paid for in full, please advise how this is properly reflected and recorded in the Hospital Trust's Annual accounts and advise the total amount outstanding and owed to Kingston Hospital NHS Foundation Trust.
 3. Sale of the Regent Wing to Advanced Living in March 2019: please confirm Advanced Living are not now marketing the site with full planning permission granted for onward sale without full payment to the Kingston Hospital Trust”.
7. The public authority responded on 26 April 2023 providing most of the information requested but refused to provide information in relation to the second part of question 2, namely: “advise the total amount outstanding and owed to Kingston Hospital NHS Foundation Trust” (the “withheld information”), citing section 43 (commercial interests) of FOIA as its basis for doing so.
8. Following an internal review, the public authority wrote to the complainant on 14 July 2023 upholding its position as regards section 43 of FOIA.

Reasons for decision

9. This reasoning covers first, whether the public authority handled the request under the correct legislation and second, whether the withheld information was commercially sensitive.
10. The requested information relates the sale of land for development, and as such relates to activities affecting or likely to affect the state of elements of the environment. The Commissioner is therefore satisfied that the information is environmental information under regulation

2(1)(a) of the EIR¹. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

11. Regulation 12(5)(e) states that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

12. The Commissioner’s published guidance on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

13. The public authority explained to the Commissioner that the withheld information was commercial information as it related to the sale of land for property development.

14. In his investigation letter to the public authority, the Commissioner focussed on the withheld information and what the complainant had actually requested. The Commissioner queried whether the withheld information could be deduced from information which was already in the public domain, namely, the total sale price and the instalments already paid which would be in the public authority’s annual accounts.

15. The public authority explained that whilst the total amount owed would be published in its annual report and accounts, the figure would not be

¹ <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

broken down into the constituent elements. The public authority explained that as interest is being charged on the revised payment terms, it would not be possible to calculate the remaining balance from information already in the public domain.

16. The public authority explained the circumstances in which the variation of the payment terms and the interest payable was negotiated and agreed. The negotiation took place between the Chief Finance Officer and Director of Estates and Facilities on behalf of the public authority and the solicitor and structural engineer on behalf of AL. The outcome of the negotiation was then discussed and approved by the Financial Investment Committee which is a private committee.
17. The public authority explained that as the withheld information included interest payments which had been negotiated and agreed in a confidential manner, and would not be published in its annual report and accounts, it was not trivial and was not in the public domain, and that it therefore met the threshold for the common law duty of confidence.
18. The public authority considered that disclosing the interest payments would adversely affect its own commercial interests, and those of Advanced Living ("AL"). In particular, it would compromise the ability of AL to negotiate contracts in future if the details of their payment arrangements were disclosed.
19. The public authority also argued that disclosure of the withheld information could have the effect of discouraging other contractors from entering into contracts with it for fear of disclosure of contractual details, thus limiting the public authority's ability to contract with the most suitable contractors and provide the best value for money.
20. The Commissioner has considered four tests. First, he is satisfied that the requested information is commercial in nature. Second, he is satisfied that the information is subject to confidentiality by law because it is not trivial, was negotiated in confidence, and is not otherwise accessible, and so has the necessary quality of confidence.
21. Third, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest. The Commissioner considers that disclosing the withheld information could undermine the public authority's position in a competitive marketplace – as other debtors are likely to demand similar terms. Furthermore, disclosing the withheld information would undermine AL's commercial interests as it would provide AL's competitors with an insight into its commercial operations.

22. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the public authority disclosed the withheld information.
23. Since the four tests have been satisfied, the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the withheld information would adversely affect the public authority's and AL's commercial interests. He has therefore gone on to consider the associated public interest test.

Public interest in disclosure

24. The public authority argued that it was very much in favour of openness and transparency, as it had demonstrated by publishing the overall situation as regards the sale of Regent Wing to AL. The public authority also provided the Commissioner with copies of two previous information requests made by the complainant in respect of the sale since 2020, which demonstrated that it had already provided the complainant with a good deal of information to date.
25. The public authority recognised that there was a public interest in the sale of land belonging to a public body, but that this had been met by the relevant due diligence having been carried out prior to the sale, and the necessary financial details having been published in its annual report and accounts.
26. The complainant is concerned that the public authority did not carry out sufficient due diligence prior to the sale of Regent Wing to AL and is not being properly remunerated for the sale as a result. The complainant is concerned that, rather than developing the Regent Wing site, AL is now advertising the site for sale with planning permission, without having paid the full sale price to the public authority.
27. The complainant believes that disclosure of the withheld information is necessary for the public to be assured that the public authority has not mismanaged public funds.
28. The Commissioner recognises that the public needs to be assured that public authorities undertake commercial transactions on a competitive, commercial basis and manage public funds in a proper manner. In this case, disclosure of the withheld information would enable the public to better scrutinise how the public authority is being remunerated for the sale of land.

Public interest in maintaining the exception

29. Regarding the public interest in withholding the information, the public authority's argument is the position described at paragraphs 18 and 19

of this notice. The Commissioner considers that there is a public interest in the public authority being able to achieve the best value for money that it can, and in there being a pool of well-performing organisations with which the public authority can contract.

30. The public authority argued that disclosure of AL's current contractual position as regards the payment schedule would advantage third parties looking to negotiate with AL and thereby negatively affect AL's negotiating position with other parties. Any negative impact on AL's negotiating position in the short term could have a detrimental effect on the Trust's finances if it affected AL's ability to repay the monies owed to the public authority – which would not be in the public interest.
31. Furthermore, the public authority has explained to the complainant that an appropriate rate of interest is being charged to AL, and that the public authority will benefit from any uplift in value as a result of the onward sale of the site by AL with planning permission.

Balance of public interest

32. The Commissioner acknowledges there is always some public interest in disclosure, for example, to promote transparency, accountability and greater public awareness and understanding of decisions surrounding the sale of land owned by public bodies.
33. He acknowledges the complainant's concerns about the way in which the sale and development of the Regent Wing site has been handled.
34. However, he considers that significant weight should be given to the public interest in protecting the commercial confidentiality of the public authority's contractual negotiations. He also notes that, if interest is being charged, that is likely to result in the public authority ultimately achieving a higher, not a lower, price for the land (albeit that it will take longer to recoup the sale fee) – that lowers the public interest in transparency.
35. Furthermore, the Commissioner notes that as the public authority's annual accounts have been internally and externally audited, the public authority's commercial activity has already been subject to an appropriate level of scrutiny in line with proper accounting principles such that public scrutiny would not be considered necessary.
36. This means that the Commissioner's decision, whilst informed by the "presumption in favour of disclosure" under the EIR (Regulation 12(2)), is that the exception provided by Regulation 12(5)(e) was applied correctly to the withheld information.

Procedural matters

37. The complainant submitted their information request on 14 March 2023. However, it was not until 26 April 2023 that the public authority responded. Furthermore, the public authority incorrectly dealt with the request under FOIA. The Commissioner has therefore found a breach of regulation 14 of the EIR.
38. Regulation 11(4) states: "A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."
39. In this case the complainant requested an internal review on 26 May 2023 and the council sent its internal review response on 26 July 2023. The Commissioner has, therefore, concluded that the council breached regulation 11(4) of the EIR.

Right of appeal

40. 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

41. 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.
42. 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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