

1 November 2019

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Ally Tibbitt

By email: request-606537-30dc896f@whatdotheyknow.com

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Dear Mr Tibbitt

REQUEST FOR INFORMATION DATED 22 SEPTEMBER 2019

I refer to your request for information dated 22 September 2019 ("Your Request") which stated:

"Dear Scottish Futures Trust Limited,

Please send me copies of all correspondence and communications with NHS Lothian and Scottish Government Ministers, and senior civil servants, on the construction of the Royal Hospital for Sick Children in Edinburgh.

I am interested in all recorded communications sent or received within the last 24 months. These should include, but not be limited to, emails, meeting minutes, presentations or other electronic messages such as WhatsApp messages.

I would like to receive the requested information in an electronic format, to this email address.

I look forward to hearing from you in due course.

Yours faithfully,

Ally Tibbitt"

For information, see the undernoted link (1) to information which is already in the public domain and which may be relevant to Your Request, being minutes of meetings of the Royal Hospital for Children and Young People & Department of Clinical Neurosciences ("RHCYP & DCN") Programme Board.

By way of background information, RHCYP & DCN was procured using the SFT Non-Profit Distributing contract for the design, build, finance and maintenance of the hospital. SFT's primary involvement was during procurement process, which included undertaking reviews of and reporting against the progress of the procurement exercise and providing assurance that each stage of the exercise is completed before the next stage is progressed, as well as representation on the Programme Board. Recently, SFT has been invited to sit on the Oversight Board (discussed further below). SFT also provides operational contract management support to NHS Lothian as procuring authority. SFT does not have a direct role in the construction element of the delivery of the RHCYP & DCN project.

As Your Request relates to the built environment we have treated the request as falling under regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 ("the EIRs").

On this basis, we have applied s. 39(2) of the Freedom of Information (Scotland) Act ("FOISA") to Your Request. SFT considers that the public interest in upholding the exemption in s. 39(2) of FOISA outweighs the public interest in disclosure of the information under FOISA. This is on the basis that the EIRs represent a freestanding regime for access to environmental information and it is in the public interest that requests for environmental information are dealt with consistently under that regime.

Attached to this response is various information relevant to Your Request. Information has been redacted or withheld because:

1. Relevant information is already in the public domain, and accessible at the undernoted link (1);
2. It falls outwith the scope of Your Request;
3. The exemption contained in Regulation 10(4)(e) (Internal Communications) applies;
4. The exemption contained in Regulation 10(5)(e) (Confidentiality of Commercial or Industrial Information) applies; and / or
5. The exemption contained in Regulation 11(1) (Personal Data) applies.

Regulation 10(4)(e) (Internal Communications)

An Oversight Board was established by Scottish Ministers and is attended by senior representatives of NHS Lothian, NHS National Services Scotland, senior Scottish Government Officials and SFT. The Board works together to provide advice to Ministers in relation to a small number of specialist matters including:

- phased occupation of RHCYP & DCN;
- the proposed solution for ventilation in critical care areas and on any other areas that require rectification works;
- facility and operational readiness to migrate;
- commercial arrangements with Integrated Health Solutions Lothian (“IHSL”) for completion of works; and
- the approach to NPD contract management.

On the basis of the role of the Oversight Board, and the close interaction of all public sector bodies involved, SFT takes the view that the information requested comprises internal communications for the purposes of Regulation 10(4)(e) of the EIRs. Regulation 10(4)(e) is an exemption from the duty to disclose where disclosure would involve making available internal communications.

The Commissioner’s Guidance on the application of the EIRs notes that this exception may apply to communications between public authorities rather than solely to communications within a single public authority. We would not necessarily accept that to enjoy the benefit of the exception it is necessary to show that there are particular aspects of the relationship between Scottish Ministers and SFT which would justify classifying this information as internal communications, but nevertheless we believe those aspects do exist and describe them below. Quite separately, we consider that Regulation 10(4)(e) can apply to communications between different public authorities because the reference in the EIRs to Scottish public authority can and should be read both as singular and plural in line with the normal rules on statutory interpretation. We would argue that, particularly in this case, the circumstances, namely the mixture of representatives from each of SFT, NHS Lothian, NHS Services Scotland, Health Facilities Scotland and senior Scottish Government Officials, bring the information produced by the panel within the ambit of that regulation.

The relevant information was the subject of private deliberations carried out jointly by senior SFT, NHS Lothian, Health Facilities Scotland and NHS Services Scotland staff and senior Scottish Government officials, the output of which was to provide advice to Ministers. That collaboration involved input from the representatives of the bodies represented, including Scottish Futures Trust, and in practical terms involved the exchange of views amongst all of those concerned. So far as the particular relationship between SFT and Scottish Ministers is concerned, SFT was established by Scottish Ministers specifically to provide Ministers with the kind of additional expert input which is currently being provided to support the delivery of the RHCYP & DCN via the Oversight Board. That input was given in this case as part of a joint exercise with Scottish Ministers and other public-sector

stakeholders and is in SFT's view clearly internal communications for the purposes of Regulation 10(4)(e).

So far as the public interest is concerned, the existence of the Oversight Board has been publicly reported. However, the detail of the deliberations of the Oversight Board and the confidential papers informing those deliberations are only one element in the wider scheme of oversight and governance of the delivery of the RHCYP & DCN. SFT has no role in the business of the Oversight Board (being distinct from other roles SFT has in connection with the procurement of the RHCYP & DCN through the Non-Profit Distributing Model for the procurement of privately financed infrastructure projects ("NPD")) beyond its role in the internal communication. Although there is clearly a public interest in the role of ministerial oversight of the delivery of the RHCYP & DCN, the release of the Oversight Board Papers in isolation would be inappropriate and misleading. It is for this reason that we consider that the public interest in withholding the information sought outweighs the public interest in releasing it.

However, please note that in recognition of the importance of ensuring appropriate public scrutiny of the work of the Oversight Board, we have been advised by Scottish Government that the Oversight Board Papers will be released into the public domain (via the Scottish Government website) at an appropriate time, being within the next 3 months.

Regulation 10(5)(e) (Confidentiality of Commercial or Industrial Information)

As noted above, RHCYP & DCN was procured using the SFT NPD contract for the design, build, finance and maintenance of the hospital. Certain information relative to the financing and delivery of the RHCYP DCN contained in the Oversight Board Papers has been withheld under Regulation 10(5)(e) of the EIRs. Regulation 10(5)(e) is an exemption from the duty to disclose where disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.

In terms of the specific requirements for this exemption, these are satisfied on the following basis:

- I. The information contained in the Oversight Board Papers are not publicly available.
- II. The relevant information is pertaining to the confidential and commercially sensitive aspects of the Project Agreement and ancillary contract terms between NHS Lothian and IHSL, including information relating to aspects of the delivery of the RHCYP & DCN and financial information.
- III. There is an implied duty of confidence between the members of the Oversight Board which is demonstrated through the membership of the Board being limited to key representatives from NHS Lothian and other public-sector stakeholders, and the relevant papers presented to the Board being marked as confidential. Information contained in the Oversight Board Papers pertaining to the Project Agreement is, in terms of that Agreement, to be treated as commercially sensitive for two years from the date of completion of RHCYP DCN.
- IV. This implied duty of confidence protects a legitimate economic interest, being the interest of NHS Lothian in ensuring performance of the relevant Project Agreement and ancillary contract terms, and the occupation of the RHCYP & DCN.

The Oversight Board Papers contain certain financial information taken from the Project Agreement. Given that the Scottish Government meets the majority of the cost to the procuring authority (in this case NHS Lothian) of the project, Scottish Government also have a legitimate economic interest which would be adversely affected.

- V. Disclosure of the information would be likely to cause substantial harm to those legitimate economic interests. This is on the basis that should confidential deliberations among the members of the Oversight Board, and confidential papers presented to the Oversight Board to inform those deliberations be released into the public domain this would be likely to prejudice future discussions with IHSL in connection with performance of the relevant Project Agreement and ancillary contract terms, and the occupation of the RHCYP & DCN.

From Scottish Government's perspective, given that there are significant constraints on the amounts that can be spent on infrastructure projects in Scotland, the issue of value for money is of crucial importance not only for the Scottish Government but also for public sector stakeholders' seeking commercially attractive finance and tenders from the private sector. Disclosure of financial information would impact on the ability of procuring authorities to secure competitive project finance, which in turn could impact on the number of projects that can be delivered.

Regulation 10(5)(e) is subject to the public interest test under Regulation 10(1)(b) of the EIRs.

We agree that the taxpayer has an interest in the delivery of the RHCYP & DCN. As noted above Scottish Government have advised us that the Oversight Board Papers will be released into the public domain (via the Scottish Government website) at an appropriate time, being within the next 3 months ensuring a degree of transparency around the workings of the Oversight Board. However, in our view the withholding of the Oversight Board Papers at the present time serves a greater public interest, being the ability of NHS Lothian to engage in meaningful dialogue with Integrated Health Solutions Lothian to ensure delivery of the RHCYP & DCN for the ultimate benefit of the public it will serve. This ability to meaningfully engage in commercial discussions is likely to be severely impeded if the confidential dialogue between the members of the Oversight Board and confidential papers informing that dialogue was released into the public domain, particularly prior to the final delivery of the project. In addition, there is a public interest in protecting public sector stakeholders' commercial interests in order to enable those stakeholders to continue to secure commercially attractive finance and tenders from the private sector, and therefore good value infrastructure for the benefit of the wider Scottish economy. As discussed above, disclosure of the commercially sensitive information is likely to have a direct impact on stakeholders' ability to achieve this and the public interest would be prejudiced.

In addition, certain information which is relevant to matters which were in dispute between NHS Lothian and IHSL and which were ultimately incorporated in the Settlement Agreement between those parties signed in February 2019 ("the Settlement Agreement"), and which may be relevant to any future dispute resolution process ("the Dispute Information") has been withheld under Regulation 10(5)(e) of the EIRs. The Dispute Information is essentially "the workings" which stand behind the outcome of discussions about disputed matters, the outcome being what appears in the Settlement Agreement. SFT holds the Dispute Information by virtue of its role providing operational contract management support to NHS Lothian as procuring authority. We do not hold a copy of the Settlement Agreement.

In terms of the specific requirements for this exemption, these are satisfied on the following basis:

- I. The Dispute Information is not publicly available.
- II. The Dispute Information is pertaining to the confidential and commercially sensitive aspects of the delivery of the RHCYP & DCN, which informed the Settlement Agreement.
- III. There is an implied duty of confidence between the parties who hold the Dispute Information in recognition of the fact that it may be relevant to any future dispute process arising between NHS Lothian and IHSL.
- IV. This implied duty of confidence protects a legitimate economic interest, being the interest of NHS Lothian to pursue a commercial outcome from any future dispute resolution process in connection with securing the performance of certain Project Agreement and Settlement Agreement obligations.
- V. Disclosure of the information would be likely to cause substantial harm to that legitimate economic interest. This is on the basis that the Dispute Information is essentially "the workings" which stand behind the outcome of discussions about disputed matters, the

outcome being what appears in the Settlement Agreement. Given that it is the Settlement Agreement which represents the final position in terms of the disputed matters, the release of the Dispute Information would be detrimental to NHS Lothian who would have their commercial position in respect of the relevant matters disclosed into the public domain notwithstanding that, following normal commercial negotiations between it and IHSL the final position represented in the Settlement Agreement may be different from the positions represented in the Dispute Information. The released of the Dispute Information may therefore adversely affect NHS Lothian's position in future disputes. .

It is our view that the public interest lies with the Dispute Information being withheld. Again, we agree that the taxpayer has an interest in the delivery of the RHCYP & DCN, and in matters which have been disputed between NHS Lothian and IHSL. However, there is a significant degree of transparency around the matters which have been in dispute between NHS Lothian and IHSL and the terms of the Settlement Agreement which are discussed in the published paper "Independent Assessment of Governance Arrangements, NHS Lothian Royal Hospital for Children and Young People", which is available to view at the undernoted link (2), and in the "NHS Lothian 2018/19 Annual Audit Report to the Board and the Auditor General for Scotland", which is available to view at the undernoted link (3). Given the level of information which is already in the public domain, the public interest in understanding issues connected with the delivery of the RHCYP & DCN and those matters which have been in dispute in connection with the delivery of it is substantially satisfied. The distinct public interest in avoiding prejudice to NHS Lothian's ability to pursue a commercial outcome from any future dispute resolution process in connection with the performance of the relevant Project Agreement and Settlement Agreement which in turn would ensure value for money delivery of the RHCYP & DCN for the benefit of all public sector stakeholders, including the public, is best served by the retention of the Dispute Information.

Regulation 11(1) (Personal Data)

Personal information relating to junior officials has been redacted because its release would be a breach of the data protection principles narrated in Article 5 of the General Data Protection Regulation ("GDPR"), particularly Article 5(1)(c) being the data minimisation principle. This is on the basis that this information is not relevant to Your Request. The information is therefore exempt information in terms of Regulation 11(1) of the EIRs. Note that the information relating to senior officials has not been withheld. This is in accordance with the Information Commissioner's guidance that the personal data of senior officials with roles involving significant levels of personal judgement and individual responsibility should not generally be withheld, notwithstanding that the information constitutes personal data and would otherwise be exempt information in terms of Regulation 11(1) of the EIRs.

Regulation 11(1) of the EIRs is an absolute exemption where, as in this case, disclosure would breach any of the data protection principles contained in Article 5(1) of the GDPR and is not subject to the public interest test.

We have also withheld information relative to Your Request which has been sent or received in connection with the expert Oversight Board established by Scottish Ministers to oversee the progress towards full occupation of the RHCYP & DCN ("the Oversight Board Papers"). This is on the basis that exemptions contained in:

1. Regulation 10(4)(e) (Internal Communications), whereby a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications, and
2. Regulation 10(5)(e) (Confidentiality of Commercial or Industrial Information) whereby a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the

confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest,

apply, and that in all the circumstances, the public interest in making the information available is outweighed by that in maintaining these exceptions.

If you are unhappy with this response, you may ask that Scottish Futures Trust carry out an internal review by writing to Caroline Whyteside, Corporate Services Director, at 1st Floor, 11-15 Thistle Street, Edinburgh, EH2 1DF. Your request should explain why you wish a review to be carried out and should be made within 40 working days of receipt. The review will be undertaken by staff not involved with your original request. If you are not satisfied with the result of the review you then have the right to make a formal complaint to the Scottish Information Commissioner.

Yours sincerely

Jenna Monteith

Associate Director

Undernote

1. <https://org.nhslothian.scot/FOI/RequestAndResponseRegister/FOIs/3799.pdf>
2. <https://www.gov.scot/publications/independent-assessment-governance-arrangements-nhs-lothian-royal-hospital-children-young-people/>
3. https://www.audit-scotland.gov.uk/uploads/docs/report/2019/aar_1819_nhs_lothian.pdf