

Decision Notice



Decision 044/2013 Mr and Mrs Jim and Margaret Cuthbert and Forth Valley
NHS Board

Financial Model for Forth Valley Royal Hospital PFI Contract

Reference No: 201102281
Decision Date: 14 March 2013

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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Summary

On 16 August 2011, Mr Jim Cuthbert and Mrs Margaret Cuthbert (Mr and Mrs Cuthbert) asked Forth Valley NHS Board (NHS Forth Valley) for the Financial Model it held in connection with NHS Forth Valley's Private Finance Initiative (PFI) Contract for the new Forth Valley Royal Hospital. NHS Forth Valley refused to disclose the Financial Model on the grounds that it was confidential, and exempt under section 36(2) of FOISA.

Following an investigation, the Commissioner found that NHS Forth Valley had partially failed to deal with Mr and Mrs Cuthbert's request for information in accordance with Part 1 of FOISA. She found that NHS Forth Valley had been correct in withholding parts of the Financial Model, but incorrect in withholding other parts.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions) and 36(2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. In May 2007, a PFI contract was signed between NHS Forth Valley and a private consortium called ProjectCo for the construction and running of the new Forth Valley Hospital in Stirlingshire, which opened to the public in August 2010.
2. On 16 August 2011, Mr and Mrs Cuthbert, who (by way of background) are researchers looking to access and analyse Financial Models as part of their work, wrote to NHS Forth Valley requesting the Financial Model in place at the time of signing the contract for the new Forth Valley Royal Hospital.
3. NHS Forth Valley responded on 30 August 2011, but refused to disclose the Financial Model, on the basis that it was exempt from disclosure under section 36(2) of FOISA (Confidentiality).



4. On 29 September 2011, Mr and Mrs Cuthbert wrote to NHS Forth Valley requesting a review of its decision. Mr and Mrs Cuthbert commented that the type of detail they had asked for had already been made available for some other hospitals in the UK (for example, Edinburgh Royal Infirmary) and said it believed that disclosure of the Financial Model would be in the interest of tax payers.
5. NHS Forth Valley notified Mr and Mrs Cuthbert of the outcome of its review on 27 October 2011 and upheld its reliance on section 36(2) of FOISA. NHS Forth Valley commented that it recognised the public interest in the project and, as a result, had already published key information on its website, including the Annual Service Payment (Unitary Payment) and Net Present Value (NPV).
6. On 5 December 2011, Mr and Mrs Cuthbert wrote to the Commissioner, stating that they were dissatisfied with the outcome of NHS Forth Valley's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr and Mrs Cuthbert had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 20 December 2011, NHS Forth Valley was notified in writing that an application had been received from Mr and Mrs Cuthbert and was asked to provide the Commissioner with the Financial Model. The case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted NHS Forth Valley, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
10. Mr and Mrs Cuthbert were also given an opportunity to provide further submissions on why they believed the Financial Model should be disclosed.
11. In the course of further correspondence with NHS Forth Valley, during which the investigating officer sought and was provided with more detailed submissions, NHS Forth Valley indicated it was willing to disclose certain parts of the Financial Model, which it considered to be "less sensitive", but stated that it still wished to withhold the most sensitive parts under section 36(2) of FOISA. These were indicated to the Commissioner by way of colour coding on a paper copy of the Financial Model provided to her.
12. Those additional submissions were obtained by NHS Forth Valley from ProjectCo, representing the stakeholders with commercial interests in the Financial Model and containing their views on disclosure of the information. ProjectCo highlighted which information within the Financial Model it felt would be particularly detrimental should it be disclosed and why.



13. Mr and Mrs Cuthbert were also asked for, and provided, more detailed submissions to the investigating officer. They also confirmed they would be content to receive a copy of the Financial Model in any permanent format – although an electronic copy would be more convenient, a paper copy would suffice.
14. The relevant submissions received from both NHS Forth Valley and Mr and Mrs Cuthbert will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr and Mrs Cuthbert and NHS Forth Valley and is satisfied that no matter of relevance has been overlooked.

The information not colour-coded

16. NHS Forth Valley told the Commissioner that it is willing to disclose the information which it did not colour-code (indicating that ProjectCo considered that this information was not sufficiently sensitive to engage the exemption at section 36(2) of FOISA). NHS Forth Valley applied no additional exemptions to this information.
17. In the absence of an explanation as to why this information was not disclosed to Mr and Mrs Cuthbert in response to their request, the Commissioner must conclude that NHS Forth Valley incorrectly applied the exemption in section 36(2) of FOISA to this information. NHS Forth Valley must now disclose this information to Mr and Mrs Cuthbert.

The colour-coded information

18. The colour-coded information is made up of information falling within the following categories, disclosure of which would, in the view of NHS Forth Valley, cause detriment to various stakeholders in the project:



<i>Category of information</i>	<i>Stakeholders who would suffer detriment</i>
<ul style="list-style-type: none"> • Pricing – debt margins • Treasury products – swap margins • Debt structuring – repayment profile • Cover ratios • Fees 	<ul style="list-style-type: none"> • ProjectCo's Lending Group
<ul style="list-style-type: none"> • Sub-debt level • Bidding strategy 	<ul style="list-style-type: none"> • ProjectCo's shareholders
<ul style="list-style-type: none"> • Construction costs • Payment cash flows 	<ul style="list-style-type: none"> • Design and Build Contractor
<ul style="list-style-type: none"> • Services costs • Payment cash flows 	<ul style="list-style-type: none"> • Financial Model Provider
<ul style="list-style-type: none"> • Formulae contained in the Financial Model 	<ul style="list-style-type: none"> • Financial Model builder

19. NHS Forth Valley withheld all of this information under the exemption contained in section 36(2) of FOISA.

Section 36(2) - Confidentiality

20. The exemption in section 36(2) (which is set out in full in the Appendix) contains two tests, both which must be met before it can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
21. In support of its application of section 36(2), NHS Forth Valley stated that the Financial Model had been supplied to it by another person, namely its private partner consortium ProjectCo. NHS Forth Valley informed the Commissioner that it had played no role in the preparation of the Financial Model.
22. The Commissioner accepts this and is therefore satisfied that the first of the two tests in section 36(2) has been fulfilled.
23. The second test is that the disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.



24. There are three main requirements which generally must be met before a claim for breach of confidence can be established to satisfy the second test in section 36(2). These are:
- (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it.

(i) Necessary quality of confidence

25. For information to have "the necessary quality of confidence", it must be information which is not a matter of public knowledge. The information must have the basic attribute of inaccessibility. Having considered NHS Forth Valley's submissions, and the content of the Financial Model, the Commissioner is satisfied that the colour-coded information is not common knowledge and could not readily be obtained through any other means. Consequently, she is satisfied that it has the necessary quality of confidence.

(ii) Obligation to maintain confidentiality

26. The second part of this test is whether the public authority is subject to an obligation to maintain confidentiality in respect of the information. This obligation can either be "express" or "implied". An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which information was obtained. NHS Forth Valley claimed an express obligation on the basis of a written agreement.
27. NHS Forth Valley referred the Commissioner to its confidentiality obligations set out in Part 34 of the Project Agreement; these also state the timeframe (the later of the Project Term or 10 years from the effective date) during which ProjectCo expects information to remain confidential. NHS Forth Valley also directed the Commissioner to Part 3 of the Schedule to the Project Agreement which states,

"[NHS Forth Valley] and ProjectCo agree that the Financial Model shall remain the confidential property of Project Co. and all copyright and Intellectual Property Rights in the Financial Model will remain with Project Co".

28. Having taken account of all relevant provisions of the Agreement, the Commissioner is satisfied that the Financial Model was subject to an obligation of confidentiality when NHS Forth Valley concluded the PFI Contract. She must now consider whether that obligation of confidentiality remains in place.
29. Approximately four years passed between the signing of the contract and Mr and Mrs Cuthbert's request. Mr and Mrs Cuthbert believe that the passage of time means that the Financial Model is no longer commercially sensitive.



30. While this argument is perhaps more relevant to whether detriment will occur as a result of the disclosure of the information in the model, the Commissioner notes that NHS Forth Valley is expected to keep the information confidential until the end of the project, or for 10 years, whichever is later. The Commissioner has also noted the views of the Information Tribunal in the case of *Derry City Council v The Information Commissioner (EA/2006/0014)*¹, where it stated, when commenting on the suggestion that an implied obligation of confidence would end after a limited time period,

"In our view the effect of the obligation, however created, would last until the information in question had either passed into the public domain or had ceased to have commercial significance." (para 34(d)).

31. As indicated above, the Commissioner is satisfied that the information had not passed into the public domain by the time NHS Forth Valley dealt with Mr and Mrs Cuthbert's request.
32. The Commissioner accepts that the information is the subject of a clear obligation of confidentiality in the PFI Contract Agreement and is satisfied that the information would have retained commercial significance at the time of Mr and Mrs Cuthbert's request and review requirement. The Commissioner can see no basis for concluding that the provisions of Part 34 of the Agreement should not continue to apply.
33. The Commissioner is therefore satisfied that the information was communicated in circumstances that created an obligation of confidence which was still in existence at the relevant time.

(iii) Unauthorised disclosure which would cause detriment

34. The third part of the test is that unauthorised disclosure of the information must be to the detriment of the person(s) who communicated it. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.

Submissions on detriment from NHS Forth Valley and ProjectCo

35. NHS Forth Valley, after consulting with ProjectCo, provided detailed submissions to the Commissioner. These submissions, while not reproduced in full here, have been fully considered in her deliberations.
36. NHS Forth Valley informed the Commissioner that consultations had taken place with the stakeholders whose businesses would be affected by the consequences of any release of the information (see the table at paragraph 18 above); a summary was provided for each stakeholder group, outlining the particular issues which would jeopardise their position and allow competitors to better understand their commercial relationships and core costings, with an explanation of how and where such jeopardy might arise.

¹ <http://www.informationtribunal.gov.uk/Documents/decisions/DerryCityCouncilvInfoComm11Dec06v9307.pdf>



The Lending Group

37. NHS Forth Valley submitted that the debt margins are a key aspect of debt structuring negotiations at Financial Close. Whilst the debt margins are no longer representative of current pricing levels, disclosure would allow competitors, based on their knowledge of the market at the relevant time, to understand the pricing strategy used and use it to their advantage when competing in future projects. NHS Forth Valley submitted that disclosure of swap margins and the repayment profile would jeopardise the position of the Lending Group by allowing competitors to understand the debt restructuring strategy.
38. It was further submitted that cover ratios, which are used by the Lending Group as a method to assess the performance of the Project on an ongoing and forecast basis, are only determined after significant financial analysis of the project and its cash-flows, and directly reflect perceived strength of ProjectCo and their approach to the Project. It was also argued that the various fees (including bank fees) are determined via a number of factors and may give an indication of the relationship between the respective parties.
39. When asked by the Commissioner to explain more clearly what factors determine the fee levels, and to give examples of how disclosing the fees information could affect the relationships with the third parties in this case, NHS Forth Valley provided further submissions which addressed the Commissioner's queries.
40. NHS Forth Valley gave the example of a Lender (or another service provider such as a legal adviser) to ProjectCo lending or providing services to several different parties at any one time. If these other parties ascertain (through reviewing information from the Financial Model, were it to be released) that ProjectCo receives a more preferential fee structure than that which they receive from these lender/service providers, then their relationship with the lender/service provider would deteriorate. This would be to the detriment of the lender/service provider who as a consequence may lose that party's business and suffer loss of business and financial loss. It would also be to the detriment of ProjectCo, who would lose the confidence of their lenders/service providers and may as a result become less competitive in the market with a consequential loss of business.

The Shareholders

41. Similar to the concerns expressed by the Lending Group, the Shareholders also indicated concern about the disclosure of debt information, with the level of sub-debt (the cash investment of the shareholders into the Project) reflecting their view of the Project and the risks associated with it.
42. ProjectCo submitted that information in Financial Models is capable of interpretation to allow competitors to understand, and use to their advantage and to its detriment, the strategy it may use in preparing its bids or a particular bid including ways that it structures projects, prices risk, manages liabilities and applies margins to the work it does. An example was also provided to the Commissioner as to how disclosure of a bidding strategy could impact upon a shareholder's position in bidding for other projects.



The Design and Build Contractor

43. The Design and Build Contractor, ProjectCo submitted, provides construction costs and payment cash flows into the Financial Model. The disclosure of construction costs and payment cash flows into the public domain, combined with knowledge of the Project, which all competitors will have due to the fact that it is there for all to see, would allow consultants and competitors to back-analyse (with some incorporated assumptions) the Project's base construction value per square metre and the Contractor's, and their supply chain's, cost base and margin. It was submitted that this data is still current and relevant to the Design and Build Contractor's business today.

The Financial Model Provider

44. It was explained that the Financial Model Provider provides services costs and payment cash flows into the Financial Model. As with the design and construction information, disclosing this information into the public domain, combined with knowledge of the Project, would allow the Financial Model Provider's competitors to back-analyse and obtain an insight into their productivity rates.
45. ProjectCo submitted that the Financial Model Provider operates in a very competitive marketplace, where these production rates are key to securing future business growth and maintaining business retention. The service costs and payment cash flows are, in ProjectCo's view, commercially confidential and their release into the public domain would jeopardise the Financial Model Provider's competitive position.

The Financial Model Builder

46. Additionally, ProjectCo argued that the formulae contained in the Financial Model represent a significant piece of intellectual property belonging to its financial advisors "much like the computer code that goes into creating a video game" and that disclosing this would allow competitors to analyse and copy the best features of this Model and hence jeopardise commercially the Financial Model Builder.

Submissions on detriment from Mr and Mrs Cuthbert

47. Mr and Mrs Cuthbert, on the other hand, took the view that disclosure of the information in the Financial Model would *not* cause detriment to the relevant parties (as with the submissions from NHS Forth Valley, they are not reproduced in full here).
48. In their submissions, Mr and Mrs Cuthbert referred to a work by Ibrahim Hasan and Hazel Moffat in their paper on Freedom of Information and Procurement in "*Information Law Training and Resources for the Public Sector*" in 2004, in which the authors stated that, in their view, it would be very rare for a public authority to be able to claim that disclosing information about a tender/contract will be an actionable breach of confidence.



49. Mr and Mrs Cuthbert believe it is important to distinguish clearly between the detriment that might befall a contractor in relation to the specific contract in question, as distinct to a more generalised impact that might occur in future cases.
50. Mr and Mrs Cuthbert also sent the Commissioner a copy of the financial projections they had been able to access for the Castle Hill Hospital in Hull, and informed the Commissioner that this information was similar to that which they were asking NHS Forth Valley to disclose. However, Mr and Mrs Cuthbert did not direct the Commissioner to the locations of any other Models available online or provide her with copies of any other Financial Models not online which they had received in response to other information requests, despite being asked to do so.

The Commissioner's findings on detriment

51. The Commissioner has considered carefully the Financial Model provided to her by NHS Forth Valley. As expected, it consists of lengthy and detailed computer spreadsheets, which include details of assumptions, calculations, methodologies and projections applicable over the term of the contract. She has also taken account of the submissions noted in paragraphs 35 – 46 above in which Forth Valley NHS explains the level of detriment that third parties would be likely to suffer if the colour-coded information should be disclosed.
52. She notes that the detriment described in relation to the Financial Model Builder would only apply if an electronic working version of the Financial Model were to be disclosed. Given that Mr and Mrs Cuthbert have indicated that a paper copy would be sufficient for their needs, the Commissioner is of the view that this detriment would not apply to the Financial Model Builder in the circumstances.
53. However, in having regard to the detriment which may be caused to the other third parties, the Commissioner accepts the Financial Model is a tool which is being used by ProjectCo to make significant financial calculations in relation to the contract, and that release of the colour-coded information to the public, including competitors, would be detrimental to the other third parties with a stake in the contract. Consequently, that the third requirement of an actionable breach of confidence is met.
54. In reaching this view, the Commissioner has taken account of the fact that she has not been provided with any concrete evidence of information similar to that being withheld by NHS Forth Valley being available in the public domain. She has considered the financial projections provided to her by Mr and Mrs Cuthbert in relation to the Castle Hill Hospital in Hull, but notes that this information is different from that being withheld by NHS Forth Valley. The information provided in the Castle Hill Hospital example consists solely of financial figures in £s, listing income and expenditure, balance sheets, cash flow and capital. It does not contain any of the percentage figures relating to the inputs and assumptions underlying the Castle Hill Financial Model.
55. The Commissioner notes the comments from Mr and Mrs Cuthbert on the importance of distinguishing between the detriment that might befall a contractor in relation to the specific contract in question, as distinct to a more generalised impact that might occur in future cases.



56. She agrees that it cannot be assumed that, just because information from one particular Financial Model may have been disclosed, that information from other Financial Models must also be disclosed; similarly, the specific content of any Financial Model needs to be scrutinised. As noted in paragraph 54, while some types of information may be put into the public domain (e.g. the monetary figures), other information may be of a greater degree of sensitivity (e.g. the inputs and assumptions).
57. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence above are met in relation to the withheld information in this particular Financial Model.

Public interest defence

58. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and is not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. This is generally known as the public interest defence. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure.
59. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.

Public interest defence submissions from Mr and Mrs Cuthbert

60. Mr and Mrs Cuthbert submitted that there is “clear evidence” that the PFI market is not very competitive. They asserted that, based on their previous analysis of financial projections, there was evidence of excessive cost to the public sector, and that in most of the schemes they had analysed the additional cost to the public sector far outweighed the amount of risk transferred to the PFI consortium, along with evidence of very high returns to the shareholders.
61. It was the view of Mr and Mrs Cuthbert that the public sector client side in the relevant PFI contract negotiations had not detected the excess costs and profit implicit in the deals which they were signing.
62. Mr and Mrs Cuthbert argued that there is a fundamental public interest that the public should be able to know the detail of how money is spent on their behalf. Access to the kind of information they were requesting, they argued, would enable the public sector to negotiate better terms in future deals. They were of the view that normal processes of competition were not going to deliver good value for money for the public in PFI projects.



63. They also argued that there was a strong public interest in making financial projection data publicly available, so that it could be analysed and scrutinised by researchers such as themselves. Publication of the data would, they submitted, contribute to informing both the public and public sector negotiators in future capital investment projects, as to how the process was performing and as to how it could be improved if necessary.

Public interest defence submissions from NHS Forth Valley

64. NHS Forth Valley argued there is no relevant public interest defence which would justify the release of the information under consideration.
65. NHS Forth Valley said it had recognised that there was some public interest in the Project; to address this, it had published key information derived from the Financial Model (such as the Annual Service Payment (Unitary Payment) and the Net Present Value) to contribute to the effective oversight of expenditure of public funds and to demonstrate value for money. Similarly, they have also published the Full Business Case.

Commissioner's findings on public interest defence

66. While it is clear that Mr and Mrs Cuthbert feel strongly that PFI contracts are not competitive and that the public is not getting value for money in the way such contracts are negotiated, in the absence of evidence as to malpractice, or of specific concerns over matters such as the awarding of the contract in question or the price being paid by NHS Forth Valley, the Commissioner has concluded that no public interest defence would apply.

Further comment by the Commissioner

67. Having reached her decision, the Commissioner would like to comment about the standard of submissions provided to her in this case, and in Financial Model cases more generally. She would begin by emphasising that the final submissions received in this case, sought by NHS Forth Valley from ProjectCo, were thorough and case specific and served to illuminate the more generalised submissions that had been provided by NHS Forth Valley in the first instance.
68. She notes that the first set of submissions received from NHS Forth Valley on 14 February 2012 were sparse in their description of the precise types and levels of detriment which NHS Forth Valley was claiming would be caused by disclosure of the information, and in their explanation of who would suffer detriment if the information was disclosed. It was only after being asked again by the Commissioner, on 14 August 2012 and on 19 December 2012, for more robust submissions, that NHS Forth Valley provided her with the fullest information in support of their detriment claims.
69. The Commissioner would underline that the onus is on public authorities to satisfy her that the level of detriment claimed by them can be justified.



70. In future cases involving Financial Models, she will expect public authorities to provide, *in the first instance*, full and case specific arguments as to the detriment they claim would be caused by disclosure of the Financial Model, and how such detriment would apply to each specific party with an interest in the Financial Model. Public authorities should note that such detailed submissions will add weight to their claims of detriment. In the absence of such detailed submissions, the Commissioner may decide to contact the relevant third parties directly to seek their views, or order disclosure on the basis that the initial submissions provided are insufficient to convince her of the impact of the detriment claimed.

DECISION

The Commissioner finds that Forth Valley NHS Board (NHS Forth Valley) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr and Mrs Cuthbert.

The Commissioner finds that NHS Forth Valley was entitled to withhold those parts of the Financial Model described in the decision as “the colour-coded information.”

However, the remaining information in the Financial Model is not exempt from disclosure under section 36(2). In withholding this, NHS Forth Valley failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires NHS Forth Valley to disclose to Mr and Mrs Cuthbert a paper copy or PDF copy of the Financial Model with the colour-coded parts redacted, by 30 April 2013.

Appeal

Should either Mr and Mrs Cuthbert or Forth Valley NHS Board wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Rosemary Agnew
Scottish Information Commissioner
14 March 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...



36 Confidentiality

...

- (2) Information is exempt information if-
- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.