

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2011

Public Authority: NHS Surrey
Address: Cedar Court
Guildford Road
Leatherhead
Surrey
KT22 9AE

Decision (including any steps ordered)

1. The complainant requested the identities of any dental contracts that had their Unit of Dental Activity ("UDA") increased since 2007 and whether they were child-only contracts. NHS Surrey disclosed the number of contracts that had their UDA increased and the value they had been increased to but withheld the identities under section 43(2).
2. The Commissioner's decision is that NHS Surrey has incorrectly applied this exemption to the requested information.
3. The Commissioner requires NHS Surrey to take the following steps to ensure compliance with the legislation:
 - Disclose the identities of the dental contracts that were increased in 2007 and those which were child-only contracts.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as contempt of court.

Request and response

5. On 22 February 2011, the complainant wrote to NHS Surrey (formerly Surrey PCT) and requested information in the following terms:

"which dental contracts since 2007 have had their UDA (Unit of Dental Activity) values increased and whether they are 'child-only' contracts".

6. NHS Surrey responded on 15 April 2011. It stated that 50 general dental contracts had been raised to £20 in 2007 and 17 of these were child-only contracts. NHS Surrey withheld the identity of the contracts as disclosure would prejudice the commercial interests of NHS Surrey (section 43(2) of the FOIA).
7. Following an internal review NHS Surrey wrote to the complainant on 22 April 2011. It stated that it had reviewed its response to the complainant's request and maintained that the identities should be withheld under the commercial interests exemption.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, the complainant argued there was a strong public interest argument in knowing how public money was being spent.
9. During the course of the investigation, the Commissioner has clarified the scope of the request with the complainant and is satisfied the information the complainant was seeking was the names of the practices whose dental contracts had their UDA increased in 2007 and which of these were child-only contracts. Whilst the request was worded to ask for the identities of all contracts increased *since* 2007 the complainant has clarified he is seeking to obtain the names of those contracts increased *in* 2007.

Reasons for decision

10. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

11. In determining whether this exemption has been applied correctly the Commissioner has first considered whether the potential prejudice argued by NHS Surrey relates to the interest identified in the exemption. When considering this the Commissioner has looked at whether, if the prejudice occurred, it would relate to NHS Surrey's commercial interests.

12. NHS Surrey has argued that as it already provided the number of contracts that had their UDA values increased (along with the value they were raised to), disclosure of the identities in conjunction with this information would now prejudice its ability to negotiate contracts with dental practices in the future.
13. The Commissioner is satisfied that the potential prejudice relates to the interest identified in the exemption and has now considered the nature of the prejudice and whether NHS Surrey has sufficiently demonstrated a causal link between the potential disclosure and the prejudice. When evidencing a causal link between the potential disclosure and the prejudice a public authority should be able to demonstrate that the prejudice would be “real, actual or of substance”¹.
14. The Commissioner has also taken into account the view of the Tribunal² that “the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction”. However, the Tribunal noted that certain factors should be considered in such cases, stating that whether or not prejudice was likely “would depend on the nature of the information and the degree of similarity between the two transactions”.
15. The Commissioner, taking into account the above, has gone on to consider the potential prejudice to NHS Surrey and the arguments put forward by the public authority to support the view that disclosure, in this case, “would” prejudice NHS Surrey’s commercial interests. Therefore whilst it is not necessary to prove that prejudice would occur beyond any doubt, the likelihood of prejudice must be more probable than not and it is on this basis that the Commissioner has considered the arguments put forward by the public authority.
16. NHS Surrey’s main argument is that disclosure of the withheld information would prejudice its ability to performance manage and negotiate contracts in the future, prejudicing NHS Surrey’s ability to achieve efficiency savings.
17. The Commissioner asked NHS Surrey to provide specific examples as to how the release of the identities of the practices whose contracts had been increased would prejudice its commercial interests. NHS Surrey

¹ Hansard HL (VOL. 162, April 20, 2000, col. 827)

² *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*

explained that as information on the value of the contracts had already been provided to the complainant should the identities of the practices now be disclosed this would undermine NHS Surrey's ability to renegotiate contracts and put it at a disadvantage in trying to obtain cost and efficiency savings in the future.

18. The Commissioner, whilst recognising the general argument that if information about how much one practice was receiving could prejudice a public authority's ability to negotiate with another practice, has had to consider how current and relevant the withheld information is before determining how likely prejudice would be to occur. In this case the complainant is seeking information from 2007. The Commissioner understands from information provided by NHS Surrey that it is unlikely of the 50 dental practices whose UDA was raised to £20 in 2007 that these practices will still have the same basic UDA value as they did in 2007.
19. The Commissioner has therefore determined that as the information is not likely to still be current or up to date any potential prejudice to NHS Surrey's commercial interests from disclosure is likely to be greatly reduced as if the values are not up to date there is likely to be little or no negative impact for the public authority on contract negotiations.
20. One of the key points put forward by NHS Surrey is that as it had already provided values and numbers the release of names in conjunction with this information would add to the likelihood of prejudice to NHS Surrey's commercial interests occurring.
21. The Commissioner, taking into account the above, has considered whether prejudice would occur if the information was disclosed to a practice who might seek to use it for their commercial advantage. In considering this he was mindful of the fact that UDA values are generally calculated based on a variety of factors including the type and age of the contract, activities being undertaken by the practice and levels of activity under previous contracts. The UDA figure itself is therefore of little assistance to anyone seeking to identify the UDA value the public authority might accept in future current negotiations.
22. However, the Commissioner does accept the general point that releasing the identities of the practices as well as the UDA may increase the likelihood of a public authority's commercial interests being prejudiced as it could lead to situations where one practice is aware it has a lower UDA value than a neighbouring practice; thus leading to a stronger renegotiating position when its contract is due to be reconsidered.
23. In this case however the UDA values already released, as set out above, are unlikely to still remain at £20 and therefore the Commissioner does

not accept that there would be any significant prejudicial impact on NHS Surrey should the identities of the practices be released as it is unlikely this information would still be current and therefore useful in any contract negotiations.

24. NHS Surrey has raised concerns that to now release the identities of the practices that had their UDA values increased could set a precedent for this information to be routinely disclosed. The Commissioner recognises the public authority's concerns but considers there is clear distinction in this case as the information dates back four years and the request was specifically for the identities of the practices not the values which NHS Surrey voluntarily provided. If NHS Surrey were to receive similar requests for identities or values of contracts the Commissioner would expect NHS Surrey to consider these requests based on the specific nature of the information requested.
25. In view of the above, the Commissioner does not accept that the disclosure of the identities of the practices whose UDA values were raised and whether they were child-only contracts would affect future contract negotiations as the information is not current. The Commissioner therefore considers that NHS Surrey's arguments fail on this point and NHS Surrey has not convincingly demonstrated how the disclosure would prejudice its commercial interests.
26. However the commercial interests prejudice test is not restricted to 'would prejudice'. It provides an alternative limb of 'would be likely to prejudice'.
27. This second limb of the test places a less evidential burden on the public authority to discharge and the Commissioner has gone on to consider whether in this case, the lower threshold is met.
28. Where the issue is that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision³ "*the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk*".
29. As NHS Surrey has not put forward any discrete arguments specifically in relation to the test of 'would be likely to prejudice' the Commissioner has considered its arguments in relation to the 'would prejudice' test (described above) when determining whether the lower prejudice threshold is met.

³*John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*

30. Having considered the arguments against the lower threshold, the Commissioner is not satisfied that NHS Surrey has demonstrated a real and significant risk of prejudice to its commercial interests through the disclosure of the information in question.
31. In summary, the Commissioner finds that the commercial interests exemption was not engaged and therefore the information was not correctly withheld on the basis of this exemption. The Commissioner has therefore not gone on to consider the public interest test.
32. The Commissioner's decision is that NHS Surrey did not deal with the request for information in accordance with the FOIA and NHS Surrey should disclose the requested information.

Right of appeal

33. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF