

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2012

Public Authority: Department of Health
Address: Room 317
Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant requested information concerning the relationship between the Department of Health (DOH) and Steria in relation to NHS Shared Business Services (NHS SBS).
2. The Commissioner's decision is that section 43(1) of the FOIA is not engaged in relation to any of the withheld information. The Commissioner considers that section 43(2) of the FOIA is engaged in relation to some of the withheld information as outlined in the confidential annex. He considers that the public interest in maintaining the exemption outweighs the public interest in disclosing this information. He does not consider that section 43(2) of the FOIA is engaged in relation to the remaining information withheld under section 43(2) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information contained within the shareholders' agreement, excluding the information identified in the confidential annex, which the Commissioner considers is exempt from disclosure under section 43(2) of the FOIA.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 November 2011, the complainant wrote to the DOH and requested information in the following terms:

'Please provide me with details (including copies of any relevant documents such as contracts, service agreements, memorandums of understanding, policies or similar) of the formal relationship between the Department of Health and NHS Shared Business Services/Steria, including information describing how the 'profit sharing' arrangement between the Department and NHS SBS/Steria works.

Please also provide details of the Department of Health's policy on promoting, encouraging or supporting the use of NHS SBS by NHS organisations, and provide copies of anything sent by the Department to NHS organisations to promote, encourage or support the use of NHS SBS by those organisations. (I am already aware of the letter from Peter Coates, DH Commercial Director and member of the board of NHS SBS, which is published on the Department's website at <http://www.dh.gov.uk/en/Publicationsands...>)

Finally, please clarify why the Department believe that (as stated in Peter Coates's letter) NHS organisations do not need to undertake a competitive tendering exercise before transferring work to NHS SBS.'

6. The DOH responded on 7 December 2011. It disclosed some information to the complainant and referred him to information that it considered was exempt under section 21 of the FOIA. The DOH refused to provide the shareholders' agreement between the DOH and Steria through which NHS SBS is operated.
7. The complainant requested an internal review on 8 January 2012.
8. Following an internal review the DOH wrote to the complainant on 27 January 2012. It upheld the original decision in relation to the shareholders' agreement between the DOH and Steria.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the DOH was entitled to withhold the shareholders' agreement between the DOH and Steria.

10. In the course of the Commissioner's investigation the DOH decided that some of the information in the shareholders' agreement could be disclosed to the complainant. However, to date it has not disclosed this information to the complainant.
11. The DOH maintained that the remaining information was exempt under section 43(1) of the FOIA and some of the information was also exempt under section 43(2) of the FOIA. The Commissioner has therefore considered whether the DOH was entitled to rely on section 43(1) and, where relevant, section 43(2) of the FOIA to withhold the remaining information contained within the shareholders' agreement between the DOH and Steria. The information that the DOH considers is exempt under section 43(1) and section 43(2) of the FOIA is described in the confidential annex.
12. In the course of his investigation the Commissioner has considered all of the arguments made by the complainant and the DOH including those not specifically referenced within this decision notice.

Reasons for decision

Section 43(1) of the FOIA – trade secrets

13. Section 43(1) of the FOIA states that information is exempt if it constitutes a trade secret. Section 43(1) of the FOIA is a qualified exemption and is therefore subject to a public interest test.
14. The DOH has explained that the shareholder agreement details the formal relationship between the DOH and Steria and sets out the way in which NHS SBS is operated. It has stated that certain terms within the shareholders' agreement and the way in which they interact are considered to be a trade secret as the unique corporate and costing structure of the joint venture between the two parties remains an innovative structure in the marketplace. The DOH has explained that the corporate and costing structure finalised in the shareholders' agreement was a result of two years of negotiations, it is still considered to be unique after a number of years of operation and, if the information was to be disclosed, the loss of the trade secret would cause real and significant harm to NHS SBS and its shareholders.
15. The complainant is of the view that there is considerable public interest in information about the relationship between the DOH and Steria concerning NHS SBS being disclosed.

16. The Commissioner considers that the following factors should be considered when determining whether information constitutes a trade secret:

- Is the information used for the purpose of trade?
- Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals?
- Is the information already known?
- How easy would it be for competitors to discover or reproduce the information for themselves?

17. The Commissioner has considered each of these questions in turn.

Is the information used for the purpose of trade?

18. The DOH has argued that the bespoke nature of the clauses in the shareholders' agreement and the way they interact constitute the 'design' of the company, which aims to give it a competitive edge in the marketplace.

19. The Commissioner considers that the information in the shareholders' agreement outlines the organisational structure of NHS SBS and how it operates in the marketplace for the provision of back office functions. Therefore, he considers that the information is used for the purposes of trade.

Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals?

20. The DOH considers that the disclosure of the withheld information would be advantageous to competitors and would significantly harm the competitive advantage that it considers it has in the marketplace. The DOH has consulted with Steria and they firmly contend that the disclosure of the information would result in significant harm to their ability to compete within the marketplace for the provision of back office functions.

21. The Commissioner considers that the DOH and Steria have made it clear that the loss of the trade secret would be harmful to NHS SBS and its shareholders (DOH and Steria). This is because giving NHS SBS's competitors an insight into its operations and decision making processes, in addition to its financial makeup, would allow

competitors to replicate these provisions and set up in competition with NHS SBS. In turn this could affect the value of NHS SBS and its ability to operate successfully in a competitive market.

Is the information already known?

22. If the information that constitutes a trade secret is known beyond a narrow circle, it is unlikely to constitute a trade secret. The DOH has argued that the withheld information is definitely not already known.
23. In 2005 the Chief Executive of the NHS sent a letter regarding NHS SBS to a wide range of people within the NHS.¹ This was sent to Chairs, Chief Executives and Finance Directors of NHS Trusts, customers of NHS SBS and potential customers of NHS SBS. The nature of this letter was to promote NHS SBS services to NHS organisations. This letter is available in the public domain. It includes information about the following:
- the distribution of profit from NHS SBS;
 - the makeup of the Board of Directors;
 - the investment in a 10 year Oracle license;
 - the nomination process for NHS Executive and Non-Executive Directors; and
 - why NHS SBS is considered to offer best value for money.
24. In its letter to the Information Commissioner of 24 August 2012 the DOH has now agreed to disclose the information that it has previously withheld that was included within this letter. It has also noted that some of the information included in the letter is not included within the shareholders' agreement. However, the Commissioner considers that the disclosure of some information about NHS SBS's corporate structure, profit sharing, distribution of profits, nomination process for Directors and capital investments has an impact on the level of secrecy that the DOH has deemed necessary to prevent what it considers to be the harm associated with disclosure of the withheld information. It is clear that the DOH has to some extent actively disseminated some information about NHS SBS's organisational structure, the distribution of its profits and its capital investments in order to 'sell' its services to customers or potential customers within the NHS.

¹ Department of Health,
http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_4109466,2005.

25. NHS SBS's website also includes the following information:

'Established in 2005 as a unique joint venture between Steria and the Department of Health, we are now the UK's leading provider of business services to the NHS. Using a shared services business model, we're achieving huge economies of scale and demonstrating both innovation and best practice and are on target to deliver around £224 million savings over 10 years. [...]

We get results: in June 2011 we presented a cheque for £1.2m to the NHS. This was the second of a series of 'royalty payments' earmarked for distribution amongst our clients over the next few years. [...]

Over 1,200 NHS SBS people, including 550 in India, work as a fully integrated team to ensure our NHS clients benefit from our strength in process industrialisation and service innovation.'

26. The Commissioner has considered to what extent the information available in the public domain impacts upon whether the information contained within the agreement is already known.

27. The Commissioner considers that information in the shareholder's agreement is much more detailed than the information available in the public domain. However, the information available in the public domain does have an impact on whether the corporate and costing structure of the joint venture can be considered a trade secret. In the Commissioner's view, the effect of this information being available in the public domain is that the basic details of NHS SBS's corporate structure and the relationship between its shareholders are already publically available.

28. In *Department for Work and Pensions v Information Commissioner EA/2010/0073* the Tribunal quoted two relevant cases which it found helpful in seeking a definition of 'trade secret'.

29. It quoted the following definition from *Lansing Linde v Kerr* [1991] 1 WLR 251:

"information, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret" provided it was used in a trade or business and the owner had either limited the dissemination of the

*information or at least not encouraged or permitted widespread publication.*²

30. It also quoted the Tribunal case of *Department of Health v Information Commissioner* EA/2008/0018:

'the concept of a "trade secret" was one that related to a particular kind and quality of information. As regards kind, it stated that "[t]he ordinary understanding of the phrase usually suggests something technical, unique and achieved with a degree of difficulty and investment." As regards quality, the Tribunal indicated that the term "trade secret" suggested the "highest level of secrecy".'³

31. The Commissioner has considered whether the withheld information meets these criteria in light of the information already available in the public domain. He considers that the withheld information contained within the agreement has the necessary quality and is something technical, unique and achieved with a great degree of difficulty. It was the result of two years of negotiations. However, he considers that the information which is already in the public domain has had the effect of making the basic details of NHS SBS's corporate structure and the relationship between its shareholders publically available. Whilst the detail is not publically known the Commissioner considers that the disclosure of the basic information means that information about NHS SBS's corporate structure and the relationship between its shareholders has not been treated with the highest level of secrecy.
32. The Commissioner asked the DOH to provide a legal precedent where a court has determined that an organisation's corporate structure and the relationship between its shareholders should be protected as a trade secret. The DOH provided no such precedent. In light of this, the Commissioner has considered whether NHS SBS's corporate structure and the relationship between its shareholders is so unique to attract protection as a trade secret under intellectual property law. In the absence of any clear precedent the Commissioner does not consider that the DOH has provided sufficient evidence to establish that this is the case.
33. Therefore, the Commissioner does not consider that the overall corporate and costing structure of the joint venture including the details of the relationship between the shareholders can be

² *Department for Work and Pensions v Information Commissioner* EA/2010/0073, para 67.

³ *Department for Work and Pensions v Information Commissioner* EA/2010/0073, para 68.

considered to be a trade secret protected by intellectual property law. Consequently he does not consider that section 43(1) of the FOIA is engaged and it is not necessary to go to consider the public interest test.

34. The Commissioner has gone on to consider the DOH's application of section 43(2) of the FOIA to some of the withheld information. The information that was only withheld under section 43(1) of the FOIA should be disclosed to the complainant.

Section 43(2) of the FOIA

35. Section 43(2) of the FOIA states that information is exempt if its disclosure under the FOIA would, or would be likely, to prejudice the commercial interests of any person. Section 43(2) of the FOIA is a qualified exemption and is therefore subject to a public interest test.
36. The DOH has argued that some of the withheld information, as outlined in the confidential annex, is commercially sensitive because it outlines in significant detail what it considers to be the unique and innovative structure of NHS SBS which was the result of two years of negotiations and development. It has argued that the company's value is affected by the rights and powers provisions and the way they interact with each other for trade restrictions, the way in which India is used, the way in which the company is capitalised, ratchet rates paid to the DOH over and above dividends, and the management of decision making.
37. In addition to the above the DOH considers that the information contained within clauses relating to profit sharing, loan arrangements and similar provisions all affect the value of NHS SBS. It has argued that, in turn, this affects the share price of NHS SBS and its cost base and overheads which affects the rates of bids it can put forward in the market. The DOH considers that the shareholders agreement contains provisions that are included by NHS SBS in the calculation of their bid cost models. It has argued that:

"If known to the market this might distort competition, for example enabling competitors to adjust their pricing accordingly."

38. The DOH has argued that the release of the withheld information in the shareholders' agreement would prejudice its ability to optimise its financial benefits from its relationship with NHS SBS. It provided the following arguments which it considers explains why the information relates to a commercial activity, why the activity is conducted in a competitive environment, whose commercial interests are affected and specifically how the prejudice 'would' occur:

- i. *'the provisions relating to the proportion of activity that can be delivered from an offshore location. Rivals knowledge of this would enable them to bid a larger proportion, thus decreasing their fees and giving them an advantage.*
- ii. *restriction covenants around Steria's ability to operate in certain markets, in competition to SBS. Considered to be sensitive to Steria, it also affects what they are permitted to bid.*
- iii. *provisions around the value of the Oracle licenses, which is proprietary information to Oracle, as well as SBS.'*

39. It added:

'In summary, the provisions of the shareholder agreement collectively go to the value of the DH's interest in SBS in that its corporate structure goes directly to the value of the company and the DH's share of it, which has a value. Consequently, the DH considers that each of the clauses referenced above should be withheld on the basis that to provide them to the market would prejudice potentially the value of the company, giving competitors an insight into its operation and decision making process, in addition to its financial makeup.'

40. Firstly, the DOH has provided no evidence that Oracle has been consulted in relation to the withheld information or that the views about commercial sensitivity of the information concerning Oracle licenses emanate from Oracle itself. Therefore, in line with the Tribunal's approach in *Derry City Council v The Information Commissioner*, in the absence of this evidence the Commissioner does not consider that the DOH has provided sufficient evidence to demonstrate that Oracle's commercial interests would or would be likely to be prejudiced.
41. The DOH has provided evidence of Steria's views that its commercial interests would be prejudiced if the withheld information were to be disclosed and that it concurs with the arguments the DOH has made. The DOH also considers that its own commercial interests would be prejudiced. As the DOH and Steria are the only shareholders in NHS SBS, the Commissioner considers that the views of each party are sufficient to take into account whether the disclosure of the withheld information would or would be likely to prejudice NHS SBS's commercial interests.

42. In Hogan v the ICO and Oxford City Council the Tribunal stated that:

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice."

43. The Commissioner considers that the information withheld under section 43(2) of the FOIA relates to and could impact on commercial activity. For example, the shareholder agreement sets out how NHS SBS operates, how it is financed, the restrictions on shareholders commercial activities and how dividends are paid. He also considers that the commercial activity is conducted in a competitive environment. Steria has argued that NHS SBS operates in "a fiercely competitive market, where a relatively small number of companies bid for business from a finite number of potential clients." Whilst the Commissioner accepts this he also notes the complainant's argument that organisations within the NHS can award contracts to NHS SBS without undertaking a competitive tendering exercise. The advantages that the DOH considers that this provides were made clear in a letter sent to NHS organisations by the DOH's Director of Finance and Investment in 2008:

"These steps demonstrate the department's conviction that a single shared service operation, undertaken in partnership with Steria, is the most sensible and cost-effective way forward for the entire NHS to deliver its financial and other back office functions, including HR, payroll and family health services. Whilst it is quite possible that individual companies may offer prices that appear to undercut those offered by the shared service centre, after allowing for the cost of the tender process within the NHS organisation and the loss of value and quantum in the centre, I find it hard to see how this could provide better overall value for money to the NHS. This is even more the case now NHS SBS is offering a wider range of services.

The NHS SBS offering includes a framework agreement that means customer trusts need not undertake a separate OJEU competitive tender process before transferring work. The framework contains terms and conditions which are an acceptable alternative to the standard "NHS Conditions of Contract for the Supply of Services" issued by NHS PASA. This includes all services offered by NHS SBS, including Finance and Accounting, HR, Payroll, Family Health Services and

*EProcurement. There is no requirement for individual organisations to undertake further external legal review of the contract terms.*⁴

44. The DOH and Steria have argued that disclosing the withheld information about NHS SBS's operations and finances would provide competitors with a distinct competitive advantage when bidding for work. The Commissioner considers that disclosing some of the information withheld under section 43(2) of the FOIA would provide competitors with valuable information about NHS SBS that could be used in the bidding process thereby giving competitors an advantage and prejudicing NHS SBS's chances of securing any given contract. He considers that the small number of companies in this market and its highly competitive nature increases the level of prejudice to NHS SBS's commercial interests and those of its shareholders. He also considers that the likelihood of prejudice is increased due to the nature of the market and that there is a significant risk that substantial prejudice would be likely to occur as a result of the disclosure. However, he does not consider that the DOH has met the threshold to demonstrate that the prejudice would occur. The information which the Commissioner considers to be commercially sensitive on this basis is outlined in the confidential annex.
45. The Commissioner does not consider that all of the information withheld under section 43(2) of the FOIA, if disclosed, would cause prejudice to the applicable interests of NHS SBS and its shareholders that the DOH have identified. The Commissioner does not consider that the DOH or Steria have demonstrated that Steria's commercial interests would or would be likely to be prejudiced by disclosing information about restrictions on Steria acting in competition to NHS SBS. In addition he does not consider that the DOH has provided sufficient evidence to demonstrate that disclosing information about oracle license details, rights to other markets, insurance, NHS SBS's business plan, delegated management arrangements or pensions matters would or would be likely to prejudice NHS SBS's commercial interests. This information, as outlined in the confidential annex, should be disclosed to the complainant.

The public interest

46. The Commissioner considers that section 43(2) of the FOIA is engaged in relation to some of the withheld information as outlined in the confidential annex. He will therefore go on to consider the balance of the public interest in relation to this information.

⁴http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_102395.pdf

47. The DOH has argued that there is a general public interest in disclosing financial information on services that are produced using taxpayers' money and demonstrating that such services are value for money. The Commissioner considers that there is a public interest in transparency and accountability in the expenditure of public money and has attributed weight to this factor.
48. The complainant has argued that there is a considerable public interest in information about the relationship between the DOH and Steria in relation to NHS SBS being disclosed. He considers that there is an ongoing debate within the NHS regarding the transfer of services to NHS SBS. The DOH does not accept that this is a relevant consideration. The Commissioner considers that there is a public interest in ensuring that companies are able to compete fairly for public sector contracts. He considers that there is a public interest in disclosing commercial information about NHS SBS, which can be contracted by NHS organisations without a competitive tendering process, to allow public scrutiny of NHS SBS's operations and whether this arrangement is in the best interests of tax payers. The Commissioner has attributed weight to this factor.
49. The DOH has argued that the balance of the public interest is in favour of maintaining the exemption. It considers that there is a public interest in NHS SBS being able to operate effectively in a competitive market and in the DOH being able to optimise financial benefits from the shared services agreement model. In turn it considers that this affects the value of the company and the value of DOH's shares in the company. The Commissioner considers that the prejudice that would be likely to occur to NHS SBS's commercial interests and those of its shareholders as a result of competitors being able to undercut NHS SBS's bids could be significant. He has afforded significant weight to this factor whilst also recognising that the prejudice would be mitigated in part where NHS SBS is contracted to provide services without a competitive tendering process being conducted.
50. The Commissioner also considers that there is a public interest in effective competition for public sector contracts to ensure value for money for tax payers. He considers that the disclosure of the information identified in the confidential annex could distort competition and provide NHS SBS's competitors with a competitive advantage. He has attributed some weight to this factor.
51. On balance, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information identified in the confidential annex. The DOH is not required to disclose this information.

Other matters

52. Steria has noted that the NHS SBS shareholders agreement includes a confidentiality clause which, where practicable, requires the DOH to supply a copy of any business information in connection with the shareholders' agreement that is required to be disclosed by a regulatory authority before it is disclosed and to comply with reasonable requests regarding the extent of such disclosure.
53. For the avoidance of doubt, the Commissioner does not consider that this clause has any effect on the steps the DOH is required to take in response to this decision notice.

Right of appeal

54. 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

55. 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.

56. 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

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