

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 September 2015

Public Authority: Wirral University Hospital NHS Trust (the Trust)

Address: Arrowe Park Hospital
Arrowe Park Road
Upton
Wirral
CH49 5PE

Decision (including any steps ordered)

1. The complainant has requested the data held on the number and cost of tests undertaken on Diabetic Patients for 2013-2014. The Trust refused to disclose the requested information under section 43(2) FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 43(2) FOIA to the withheld information in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant requested the data held on the number and cost of tests undertaken on Diabetic Patients for 2013-2014.
5. On 11 March 2015 the Trust responded. It refused to provide the information requested under section 43(2) FOIA.
6. The complainant requested an internal review. The Trust sent the outcome of its internal review, it upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 8 May 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Trust correctly applied section 43 FOIA to the withheld information.

Reasons for decision

9. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
10. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."¹
11. Upon viewing the withheld information the Commissioner considers that it is pricing information relating to diabetic services provided by the Trust and the Trust has confirmed that the test prices have remained unchanged over the last 12 months. The information does therefore fall within the scope of the exemption.
12. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.

Whose commercial interests and the likelihood of prejudice

13. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

14. The Trust has stated that disclosure of the information would prejudice the commercial interests of the Trust itself.

The nature of the prejudice

15. The Trust explained that at the time of the request it was in the middle of contract negotiations with its NHS Clinical Commissioner (Wirral Clinical Commissioning Group or 'the CCG') for 2015/16 which includes pathology tests and therefore releasing this information at that time would prejudice these discussions. Furthermore it said that if no agreement was reached with the CCG, the service could potentially be put out to tender and therefore releasing current commercially sensitive pricing information at that time would severely handicap its bid and put potential competitors at an unfair advantage thereby undermining the legal process of competitive tenders. The Trust provided further submissions contained within the Confidential Annex attached to this Notice.
16. After considering the arguments presented by the Trust, the Commissioner considers that as the withheld information would reveal the Trust's current pricing and because at the time of the request it was negotiating with the CCG for the 2015/16 service, which if unsuccessful could potentially lead to an open tender, it has demonstrated that the prejudice it has claimed to its own commercial interests would occur.
17. As the Commissioner does consider that section 43(2) FOIA was correctly engaged, and this is a qualified exemption, he has gone on to consider the public interest test in this case.

Public interest test

Public interest in favour of disclosure

18. The Trust said that it had considered the wider public interest in favour of disclosure in this case, but it did not elaborate further.
19. The Commissioner considers that there is a public interest in health organisations, such as the Trust in this case, operating in an open and transparent way and in particular demonstrating that they are delivering services in a cost effective and efficient manner.

Public interest in favour of maintaining the exemption

20. The Trust confirmed that after considering the public interest in favour of maintaining the exemption, the public interest was best served by withholding the requested information. It again did not elaborate further.

21. The Commissioner considers that there is a strong public interest in not disclosing current pricing information whilst negotiations for the forthcoming year's services are ongoing. Particularly as if unsuccessful, this could be put out to tender and thereby put the Trust's competitors at a commercial advantage. This would be because the Trust's current pricing would be known and the pricing of other potential bidders would not similarly be known to the Trust.

Balance of the public interest

22. Whilst the Commissioner does consider there is a public interest in the Trust operating transparently and being open with pricing to demonstrate it is operating cost effectively this must be counter balanced with not putting it at a commercial disadvantage whilst negotiations for the following year's services are ongoing as prices have remained unchanged. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.

Right of appeal

23. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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
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