

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2016

Public Authority: Wye Valley NHS Trust
Address: Trust Headquarters
County Hospital
Union Walk
Hereford
HR1 2ER

Decision (including any steps ordered)

1. The complainant has requested how much the hospital is paid per patient, per year for the DAWN INR service. The Trust provided details of the acute service provision but the block contract provision was withheld 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.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 18 December 2015 the complainant requested information of the following description:

"Under the Freedom of Information Act please could I ask you to tell me how much the hospital is paid per patient, per year for the DAWN INR service."

5. On 30 December 2015 the Trust responded. It provided the complainant with information in response to his request relating to the acute service contract.

6. On 15 January 2016 the complainant wrote back to the Trust disputing the figures it had provided him with and making a further FOIA request:

"Please could I ask that you re check the figures you supplied to me below are in fact correct. If in fact they are not correct please could you re-answer the same question.

It is possible that in fact there are 2 contracts running concurrently. If so please would you supply me with the data for both contracts and also the rough proportion of numbers of patients being covered by each contract.

Please could I also ask whether there are any claw-back clauses in the contract which allow the CCG to withhold payments if a patient's INRs go out of range."

7. On 29 January 2016 the Trust wrote to the complainant and explained that :

"The information supplied is correct for the acute contract of INR. We also have a block community contract but the unit prices in that are historical and not accurate.

We are unable to provide further details on the further contract requests as it could be anti-competitive."

8. As the complainant was dissatisfied with this response he asked the Trust to carry out an internal review.

9. On 15 February 2016 the Trust wrote to the complainant with the result of the internal review. It said that it would not provide any further information under section 43(2) FOIA (prejudice to commercial interests exemption).

Scope of the case

10. The complainant contacted the Commissioner on 29 February 2016 to complain about the way his request for information had been handled.

11. During the course of the Commissioner's investigation the Trust wrote to the complainant to confirm whether or not there were any claw back clauses in the contract.
12. The Commissioner has considered whether the Trust was correct to apply section 43(2) FOIA to the withheld information requested on 18 December 2015 and 15 January 2016, this is the financial and activity figures under the block contract for the DAWN INR service.

Reasons for decision

Section 43 – commercial interests

13. 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.
14. 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
15. Upon viewing the withheld information the Commissioner considers that it is the financial and activity figures under the current block contract between Wye Valley NHS Trust and the Clinical Commissioning Group (the CCG) for Herefordshire. It relates therefore to pricing for services provided by the Trust. This does therefore fall within the scope of the exemption.
16. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

which disclosure would cause and the relevant party or parties which would be affected.

The nature of the prejudice

17. The Trust has explained that the block contract is for services in the community rather than for inpatients in a hospital setting (the acute setting). It has explained that it is its own commercial interests that would be prejudiced if the withheld information were disclosed. It said that its potential competitors for the block contract community service are GPs within the area. It has said that GPs would not be asked to provide this service within the hospital (acute setting) which is why the figures under the acute contract have been provided. GPs would only be able to compete in terms of providing the service in the community (which the Trust currently does under the block contract).
18. The Trust contacted the CCG to support the Trust's position in this case. The CCG provided the following evidence in support:

"We understand from Primary Care colleagues you answered with a payment by results tariff. We also commission activity for anticoagulation through the community contract. We have not shared our costs and activity figures (to give an average price) with primary care as we consider it commercial in confidence within the WVT community contract.

This is a LES (Local Enhanced Service) currently being offered out to local GPs. The issue that has arisen is that some of the GP community believe the CCG is not consistent about how it contracts with providers and in this case how the LES is funded. We have consistently said that the funding model is based on the community contract but are not able to release that information."
19. The Trust has explained that LES require an enhanced level of provision above what is required under General Medical Services (GMS contracts). These are the contracts under which GPs work in providing patient care under the auspices of NHS England. GPs provide primary care and are not managed by the Trust. The Trust is a provider of acute, secondary and community care.
20. The Trust explained that the block contract is a negotiated contract which, should the CCG wish to, can be negotiated with another provider.

21. The Trust has confirmed that it is currently providing services under the block contract it has with the CCG which is being negotiated currently. It said that disclosure of these figures for provision of services within the community by the Trust would jeopardise its commercial interests given that GPs are, in this scenario, its competitors for a given service.

Likelihood of prejudice

22. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”

23. In this case the Trust has argued that disclosure would prejudice its own commercial interests.
24. To demonstrate that the prejudice would occur, the Trust must therefore show that the prejudice occurring is more probable than not. This is a fairly high burden to meet. The Trust has argued that if this information were disclosed, it is more probable than not that GPs would use this information to negotiate with the CCG to provide an LES service which is currently undertaken by the Trust under the block contract. As the CCG has confirmed that this is currently being offered out to GPs and the Trust has confirmed that its block contract is currently under negotiation, the Commissioner considers that it is more probable than not that GPs would utilise the withheld information within their own negotiations with the CCG to their own commercial advantage which in turn would prejudice the Trust's commercial interests. Section 43(2) was therefore correctly engaged in this case.
25. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest in this case.

Public interest test

Public interest arguments in favour of disclosure

26. There is a general public interest in terms of openness and accountability as to how the Trust is contracting out its services and upon what financial

terms as this relates directly to the spending of public money within the NHS.

27. The Trust has explained to the Commissioner that a block contract is a payment made to a provider to deliver a specific, usually broadly defined service. Block contracts are paid in advance of the service being undertaken and the value of the contract is independent of the actual number of patients treated or the amount of activity undertaken. Payments are made on a regular, usually annual basis. It has said that as block contracts are made in advance of a service being delivered they have been criticised for not motivating clinical care and efficiency or an increase in patient demand or cost of care could result in providers rationing services as these unexpected pressures are not taken into account in a block contract. The Commissioner considers that because there are significant criticisms of this type of contract this increases the public interest arguments relating to accountability and transparency.

Public interest arguments in favour of maintaining the exemption

28. The Trust argued that it is in the public interest to withhold information from its competitors to enable all parties to describe a complete service in an affordable way.

Balance of the public interest arguments

29. The Commissioner considers that there is a public interest in disclosure of the withheld information as it promotes openness and transparency surrounding CCG contracting of services, particularly under the criticised block contract.
30. However, equally, the Commissioner does not consider that it would be in the public interest to distort competition for provision of these services as disclosure would damage the Trust's commercial position by revealing current commercially sensitive financial information which would be relied upon by their competitors to obtain a commercial advantage within current re-negotiations.
31. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly applied.

Other Matters

32. The Commissioner notes that in its response of 29 January 2016 to the complainant, the Trust stated that “We also have a block community contract but the unit prices in that are historical and not accurate.” This contradicts the arguments that the Trust has provided to the Commissioner during the course of his investigation relating to the fact that the block contract is current/live and that the financial/activity figures would be of use to GPs who may wish to negotiate with the CCG to take on provision of services in the community. The Commissioner has based his decision, set out above, on the arguments presented during the course of his investigation but would highlight the importance of providing accurate reasoning behind the application of exemptions from the outset.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Gemma Garvey

Senior Case Officer

Information Commissioner's Office

Wycliffe House

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SK9 5AF