

# Freedom of Information Act 2000 (FOIA)

## Decision notice

**Date:** 20 February 2017

**Public Authority:** NHS Business Services Authority  
**Address:** Stella House  
Goldcrest Way  
Newburn Riverside  
Newcastle Upon Tyne  
NE15 8NY

### Decision (including any steps ordered)

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1. The complainant has requested the numbers of particular medical products purchased by individual NHS trusts in the financial year 2015 – 2016. The NHS Business Services Authority (NHSBSA) provided some higher level information but refused to provide the details requested under section 43(2) – commercial prejudice.
2. The Commissioner's decision is that NHSBSA is entitled to rely on section 43(2) to withhold the requested information.
3. The Commissioner does not require the public authority to take any further action in this matter.

### Request and response

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4. On 19 April 2016 the complainant requested information of the following description:

"Can I please know the volume of the following lines of Contenance Wipes sold by NHS Supply Chain (NCP's listed below), that is the amount of each product line below sold in the year 2015 -2016 **and the Trusts that these were sold to.**

NPC	Description
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VJT298	Wipe patient moist 240 x160mm continence care wipe, individual patient packs. 65gsm
ELY566	Continence Care Wipes Pack of 8

Thank you very much for your help”

5. On 18 May 2016 the NHSBSA responded. It refused to provide the information on the numbers of wipes sold to individual trusts on the basis that the information was exempt under section 43(2) – prejudice to commercial interests. Through a link to a page on its website where it published responses to freedom of information requests it did however disclose the total number of sales for each of the wipes sold within four regional areas – London, South, Midlands and the North.
6. The complainant requested an internal review on 1 June 2016. The NHSBSA sent her the outcome of its internal review on 29 June 2016. NHSBSA upheld its original position.

### Scope of the case

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7. The information being withheld comprises the names of the individual trusts to which the wipes were sold and the quantity of each wipe sold to each of those trusts.
8. The complainant contacted the Commissioner on 15 July 2016 to complain about the way her request for information had been handled. She argued that disclosing the information would not prejudice the interests of the NHSBSA, the NHS Supply Chain (NHSS SC) or any of the current suppliers; furthermore, even if this were the case, the complainant argued the information should be released in the public interest. The complainant raised some specific counter arguments to NHSBSA’s claim that the withheld information was commercially sensitive. These will be discussed in more detail later.
9. The Commissioner considers that the matter to be decided is whether the requested information is exempt under section 43 and, if so, whether the public interest favours maintaining that exemption

### Reasons for decision

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10. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial

interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.

11. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
12. In this case NHSBSA has confirmed that it is relying on the lower threshold to engage the exemption. Although relying on the lower threshold makes it easier to engage the exemption it also reduces the value in maintaining the exemption when it comes to consider the public interest test.
13. NHSBSA has argued that as well as being likely to prejudice its own commercial interests disclosing the information would impact on the following organisations:
  - NHS SC
  - Customers of NHS SC ie NHS trusts
  - Suppliers to NHS SC under the framework agreement
  - DHL Excel Europe, which operates NHS SC
  - The wider NHS
14. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which NHSBSA alleges would be likely, to occur if the withheld information was disclosed has to relate to the commercial interests;
  - Secondly, NHSBSA must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

15. NHSBSA's concerns relate to the supply and sale of medical products to NHS Trusts. In broad terms, NHS SC has a contract with NHSBSA, known as the Master Service Agreement. Under that contract NHS SC is obliged to maintain a framework agreement with suppliers of different medical products such as the wipes referred to in the request. Under the framework agreement companies agree to supply NHS SC with their products at a fixed price. These goods are then made available to NHS trusts through a catalogue. The difference between the prices that NHS SC obtains the products and the price they are offered in the catalogue represents a profit generated for NHS SC and the private company, DHL Excel Europe, which operates it. There are clearly a number of commercial relationships and interests involved and NHSBSA has argued that these would be damaged if the information was released. Furthermore NHSBSA has argued that as the purpose behind the framework agreement is to provide NHS bodies with a means of obtaining quality goods at acceptable prices in an efficient way, disrupting the operation of the framework agreement would impact on the commercial interests of the wider NHS. The reason for creating a simplified and cost effective supply chain for the NHS is obviously to reduce NHS spending. Under the Master Service Agreement NHS SC is committed to a target of saving the NHS £1bn. The Commissioner is satisfied that the actual harm alleged by NHSBSA relates to commercial interests; the first criterion is met.
16. In order to consider the second criterion, whether disclosing the information is likely to actually harm those interests, it is necessary to look more closely at how the framework agreement operates and how the withheld information could be used to undermine the agreement. Public procurement exercises cost both the supplier and the public authority money. The framework agreement means suppliers only need to go through one procurement exercise, ie with NHS SC in order to make its products available to the entire NHS. Although it is understood that suppliers are selected by NHS SC mainly on the quality of their products, the fact that NHS SC has the potential purchasing power of many trusts means that the prices it can negotiate are reasonable ones. The centralisation of the supply chain through NHS SC has also resulted in an efficient distribution system. Therefore the trusts benefit from being able to select products of a known quality, at reasonable prices with the confidence that they will be delivered on time without having to engage in a separate procurement exercise. NHS SC is able to make a profit through the difference between the price it purchases products and the price they are sold through the catalogue.
17. Therefore the framework agreement provides very real, practical and commercial advantages to the trusts as customers and suppliers as

well allowing NHS SC and DHL Excel Europe to generate a profit. The Commissioner understands NHS SC's profit is capped through the Master Service Agreement. Any profit above that is redistributed to the NHS, typically the trusts who have purchased goods through the catalogue.

18. It is important to understand however that although the framework agreement provides that compliant products can be purchased at set prices, they do not in themselves commit NHS SC to buy any goods from the suppliers, nor are individual NHS trusts obliged to purchase products from the catalogue, they could choose an alternative supplier or even contract directly with a supplier whose goods are listed in the catalogue. This means suppliers are also free to sell their products directly to NHS trusts and can do so at whatever price they can negotiate. However the fact that up to 40% of products purchased by the NHS are sourced through the catalogue demonstrates the benefits of the framework agreement.
19. Furthermore if one trust or a number of trusts is confident it can predict how much of a product it, or they, will use and can therefore commit to purchasing a particular amount, the framework agreement provide a mechanism whereby they can negotiate a more favourable price at which they can purchase those products through NHS SC.
20. NHSBSA is concerned that if it disclosed information on the volume of sales of a particular product purchased by individual trusts, this would allow suppliers to cherry pick those trusts purchasing the highest volume of that product and target them for a sales drive, offering them the same, or a comparable product at a lower price. It should be noted that the catalogue has been published in response to a different freedom of information request in February 2016. Therefore the price of the products are in the public domain. In particular suppliers who were not currently party to the framework agreement would have a strong incentive to market their products in this way. This would reduce the pool of potential customers who purchased products through the catalogue which would reduce the purchasing power of NHS SC as well as reducing the incentive of suppliers to enter into a framework agreement. Although the request relates to only two products from the catalogue it might prove difficult to resist requests for other products if this one was complied with. Ultimately the supply chain maintained by NHS SC through the framework agreement would begin to fragment.
21. Although on the face of it those trusts targeted by suppliers because of their high volume of purchases may benefit from being offered products at lower prices, any initial savings may be lost if the supply chain managed by NHS SC became less efficient and attractive to

suppliers as a whole. Furthermore NHSBSA has argued that individual trusts use the catalogue as it provides a quick and easy way of buying the products they need and may not welcome direct approaches from suppliers because this will inevitably involve a cost in terms of staff time.

22. The Commissioner accepts the rationale of this argument. Nevertheless the Commissioner has to be satisfied that the concerns raised accurately reflect those of the parties involved, ie those of NHS SC, suppliers signed up to the framework agreement and the trusts as customers. Normally the Commissioner would expect a public authority to have consulted the parties concerned. In this case NHSBSA is basing its arguments partly on a limited consultation exercise it conducted in respect of a previous request, but primarily on its extensive knowledge of the market for healthcare products and the operation of the framework agreement. In this case the Commissioner is prepared to accept that NHSBSA is in a position to hold an informed view on the concerns of those involved. This is because of the nature of its core business activities, its knowledge of the framework agreement through its management of the Master Service Agreement and through that its close working relationship with NHS SC.
23. Before deciding whether the exemption is engaged however it is still necessary to consider the counter arguments presented by the complainant.
24. The complainant has argued NHSBSA gave no reason in support of its claim that disclosure would weaken the NHS SC's management of the framework agreement. She contended that it was not possible to weaken the management of the agreements as the process for providing products under the framework agreement is established in the agreement itself. The Commissioner accepts that the framework agreements do commit suppliers to providing products in accordance with the terms of the agreement. However the contracts for the individual products included in the framework agreement only run for two years with an option to extend for a further two years. Therefore they are renewed on a regular basis. If disclosing the requested information makes it more difficult to re-tender those contracts because NHS SC had lost some of its purchasing power and suppliers are less convinced as to the value of entering into agreements, the Commissioner would accept its ability to manage the framework agreement is weakened.
25. Secondly the complainant has argued that if the NHSBSA is correct and disclosing the information would allow competitors to undercut the prices in the NHS SC catalogue, this could only result in reducing costs to the NHS. This point has already been discussed. The

Commissioner accepts that initially some individual trusts may benefit from lower prices in respect of a limited number of the products they purchase. But if this makes it more difficult for NHS SC to negotiate contracts in the future, certainly those trusts using smaller numbers of that product are likely to be worse off and, ultimately, all trusts may suffer if the supply chain established by the framework agreement begins to breakdown.

26. The complainant believes that when NHS SC has to run a fresh procurement exercise to select suppliers for the framework agreement, the requested information would have to be released under EU transparency requirements. This argument was put directly to NHSBSA. It explained that this was simply incorrect. When procurement exercises are run the volume or value of sales would have to be disclosed but only in respect of the total number that NHS SC itself expected to purchase, ie national figures. There would be no requirement to provide details of how many each trust then purchased through NHS SC.
27. The complainant rejects NHSBSA's argument that disclosing the information would allow competitors to target key customers on the basis that the request does not seek pricing information, only the volume of sales and that those suppliers who were currently part of the framework agreement could not be removed from the framework agreement. The Commissioner does not find this counter argument persuasive. As explained earlier, the catalogue was published by NHSBSA as a result of a previous freedom of information request and therefore pricing information is already in the public domain. Therefore it would be open to any supplier whether or not they were a party to the framework agreement to use the requested information to try and cherry pick the most lucrative markets.
28. The Commissioner does not consider the counter arguments presented by the complainant undermine the logic of NHSBSA's position that disclosing the information could prejudice the commercial interests of parties listed in the bullet points at paragraph 13. The remaining question is whether the risk of that prejudice occurring is real and significant. The Commissioner notes that NHSBSA's argument that some trusts would object to being approached directly by suppliers because of the time involved in dealing with them could be seen as undermining an argument that the supply chain could be weakened by competitors successfully stealing custom away from NHS SC. Nevertheless the Commissioner is satisfied that the requested information provides intelligence as to which trusts are most worth targeting and would allow suppliers to prepare offers tailored to the specific purchasing habits of a particular trust. The Commissioner finds that it is likely that some of those approaches would be successful and although there is nothing which

prevents suppliers, including those who are a party to a framework agreement, in marketing their products to any trust they wish to, disclosing the information does pose a real and significant risk that suppliers would be encouraged to make such approaches and for those approaches to be more tempting. Ultimately this does threaten the continued success of the framework agreement which in practice provides commercial benefits for suppliers and trusts while generating profit for NHS SC (and where the profit cap is exceeded the NHS trusts). The existence of an efficient supply chain has commercial advantages to the whole NHS.

29. The Commissioner finds that the exemption is engaged.

### **The public interest test**

30. Section 43(2) is subject to the public interest test as set out in section 2 of the Act. This means that even though information may be exempt it can only be withheld if, in all the circumstances of the case, the public interest in withholding the information outweighs the public interest in its disclosure.
31. NHSBSA has only identified one public interest argument in favour of disclosure, that being the public interest in transparency in the use of public monies. The Commissioner accepts this to be a valid factor and, having regard, for the pressures on the NHS gives it some weight.
32. In her submission to the Commissioner the complainant also argued that when there is a new procurement exercise to select suppliers for the framework agreement, releasing the requested information would allow potential bidders to prepare more accurate bids and offer better prices. The Commissioner accepts the basic principle that knowledge of the volumes required would help suppliers produce more competitive bids. However bidders are already provided with the relevant information ie the volumes which the NHS SC anticipate being purchased at a national level. Therefore the complainant's argument falls away.
33. The Commissioner finds it difficult to identify any additional public interest arguments in favour of disclosure.
34. The most compelling public interest argument in favour of maintaining the exemption is the potential for disclosure to undermine the framework agreement and thereby weakening of the supply chain managed by NHS SC. The Commissioner is satisfied the current supply chain maintained by NHS SC provides trusts with real practical and commercial benefits. Under the Master Service Agreement NHS SC is committed to a target of saving the NHS £1bn. Given the pressures on the NHS achieving this target is very much in



the public interest. The Commissioner would not suggest that disclosing the information requested in the case would in itself lead to the collapse of the framework agreement and loss of £1bn in savings, but it would signal to suppliers the potential that participation in the framework agreement could become less beneficial and make it more difficult for NHSBSA to rebuff requests for sales figures of individual trusts in respect of other products. Therefore it would damage the integrity of the framework agreement.

35. Disclosure is also likely to have a more direct impact on those trusts purchasing only small numbers of the wipes named in this particular request if doing so made it more difficult to negotiate favourable terms when NHS SC ran a fresh procurement exercise for these wipes in the future. This too would work against the public interest and would offset any savings enjoyed by other trusts which purchased high volumes of wipes directly from suppliers.
36. The value in preserving the framework agreement creates a public interest in protecting the commercial interests of the suppliers signed up to it and in the ability of NHS SC (and therefore DHL Excel Europe) to earn a profit from managing the agreement.
37. The Commissioner finds that the public interest favours maintaining the exemption primarily because of the value in protecting the integrity of the framework agreement from which the NHS as a whole benefits. NHSBSA are entitled to withhold the requested information. The Commissioner does not require it to take any further action in this matter.

## Right of appeal

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38. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. 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** .....

**Rob Mechan**

**Senior Case Officer**

**Information Commissioner's Office Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**