Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **17 May 2019**

Public Authority: **Dr Jefferies & Partners**
Address: **The Medical Centre**
139 Lillie Road
London, SW6 7SX

Decision (including any steps ordered)

1. The complainant has requested information relating to the contract between Dr Jefferies & Partners (the practice) and Babylon GP at Hand.

2. The Commissioner's decision is that the practice has correctly applied section 43(2) to the withheld information.

3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 April 2018, the complainant wrote to the practice and requested information in the following terms:

"Please provide a copy of the sub-contract with Babylon referred to as above. I am content that you redact personal information protected by the FOIA and redact/excise any commercially confidential provisions of such sub-contract to which an exemption under the FOIA might apply, provided that, in so doing, reasons are given for each excision to accord with the FOIA, and - in each case - the balancing public interest test exercise carried out and set out in your response. I am particularly interested in how you deal with the collection and sharing of data bearing in mind the provisions of the GPaHP&T (noting that GP at Hand website and Babylon Healthcare have slightly different privacy policies and terms and conditions).

Please provide a copy of your GMS contract, if the sub-contract contains obligation by reference, and would therefore be necessary for an

understanding of the sub-contract. I am content that you redact personal information protected by the FOIA and redact/excise any commercially confidential provisions of such sub-contract to which an exemption under the FOIA might apply, provided that, in so doing, reasons are given for each excision to accord with the FOIA, and - in each case - the balancing public interest test exercise carried out and set out in your response."

5. The practice responded on 11 June 2018 and provided a redacted copy of the information requested at part 1. It cited section 43 of the FOIA as its basis for the redactions. It also provided a link to a standard GMS contract which was already in the public domain. It also stated that it did not hold any information relating to the remainder of the request.

6. Following an internal review the practice wrote to the complainant on 3 September 2018 and maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 13 June 2018 to complain about the way her request for information had been handled.

8. During the course of the Commissioner's investigation the practice disclosed some further information to the complainant. The remaining withheld information comprises of the following clauses: 4, 5.4, 6, 7, 8, 9, 11, 12, 13, 15, and 16, and Schedule 3.

9. The practice consulted with Babylon about the potential disclosure of the sub-contract. Following an attempt to resolve the complaint informally on 24 September 2018), Babylon seeks only to withhold information from the sub-contract that details (i) how its NHS services are structured, and (ii) the pricing mechanisms. Babylon maintains that those provisions are exempt under section 43(2) FOIA, because their disclosure to the public would be highly likely to cause real, actual or substantial prejudice to Babylon's commercial interests.

10. A very limited amount of information has been redacted under section 40(2) FOIA (personal data). The complainant has not indicated that she is concerned with this information and therefore the Commissioner has not considered it in this decision notice.

11. The complainant also provided some additional information in support of her complaint that had been obtained from other public authorities. However, as this information was obtained after the request to the practice, the Commissioner cannot consider it as she can only consider the circumstances at the time of the request.

12. Therefore the Commissioner considers the scope of this case to be to determine if the practice correctly applied section 43 to the withheld information.

Reasons for decision

13. The Commissioner notes that the medical practice itself is not a public authority for the purposes of the FOIA. Rather, each GP within the practice is a separate legal person and therefore each is a separate public authority. The Commissioner acknowledges that when an applicant makes a freedom of information request to a medical practice it is reasonable to expect for convenience that the practice will act as a single point of contact. However, each GP has a duty under section 1 of the FOIA to confirm or deny whether information is held and then to provide the requested information, subject to the application of any exemptions. For ease and clarity, this decision notice refers to the Practice where appropriate in detailing the correspondence and analysis that has taken place.

14. Lillie Road Medical Centre is the trading name for GP at hand. The subcontract in question, dated 26 May 2017, is between the partners of the practice and Babylon Healthcare Services Ltd ("Babylon"). "GP at hand" is also the name of the service provided pursuant to this sub-contract.

Section 43 – commercial interests

15. Section 43(2) of the FOIA states that that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

16. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her 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.

17. Section 43(2) is a qualified exemption and is therefore subject to the public interest test.

18. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the commercial interests;

- Secondly, the public authority 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.

19. In relation to the first point the requested information comprises of a contract and the information describes the commercial relationship between the practice and GP at hand. Therefore the Commissioner is satisfied that it is 'commercial' in nature.

20. It is now necessary to consider whether the practice has demonstrated that disclosing the requested information could cause the prejudice claimed.

21. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur, or prejudice 'would be likely to' occur.

22. With regard to 'would be likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

23. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

24. With regard to the alternative limb of 'would prejudice', the Tribunal in Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

25. The practice considered that there is a real and significant risk that disclosure would be likely to prejudice the aforementioned parties'

commercial interests by granting potential competitors an unfair advantage. This is evidenced by the facts that: (i) GP at hand is a unique and innovative service; (ii) the structure of the services that GP at hand provides would be of significant value to a potential competitor; and (iii) such information is not in the public domain.

26. The practice consulted with Babylon about the potential disclosure of the sub-contract. Babylon seeks only to withhold information from the subcontract that details (i) how its NHS services are structured, and (ii) the pricing mechanisms. Babylon maintains that those provisions are exempt under section 43(2) FOIA, because their disclosure to the public would be highly likely to cause real, actual or substantial prejudice to Babylon's commercial interests.

27. The Commissioner has considered the practice's position and accepts that disclosure of the information would be likely to have a prejudicial impact on the commercial interests of Babylon/GP at hand.

28. The practice explained that GP at hand forms a crucial part of Babylon's commercial success. Babylon is currently the only digital provider of a full NHS GP service (that is one that delivers the full spectrum of care under a General Medical Services contract, rather than one digital component of it e.g., video consultation). As is self-evident, the NHS is a large and attractive market for providers of digital medical services. The market for such services is highly competitive: Babylon has a number of rivals that would wish to enter the NHS market for full NHS GP services by securing similar contracts with NHS entities. At present, however, Babylon has a very strong competitive edge.

29. The practice further explained that that edge comes in part through Babylon's innovative approach to structuring certain fundamental features of its arrangements with NHS entities. Babylon has invested its ingenuity and resources in crafting those features as part of its offering to NHS providers. Those features are crucial to both Babylon's and the practice's success with the NHS.

30. Those features are not known by Babylon's competitors. If they become known, competitors will seek to replicate those features in their own offerings to NHS entities.

31. This will greatly assist them in securing contracts that Babylon seeks to secure, maintain or extend, and will be potentially detrimental to Babylon's negotiations to provide a similar service outside of London. That in turn will greatly reduce the competitive advantage in this market, with very serious consequences for their commercial interests.

32. In this respect, the practice consider there is a strong analogy between this case and the very recent decision of the First-Tier Tribunal in Bedfordshire Police v IC, Garden Productions and Cox (EA/2018/0118) (decision promulgated on 5 December 2018). That case also concerned a contract between a private party and a public authority. The private party sought to redact certain provisions from the contract, relying on section 43(2) FOIA.

33. The Tribunal agreed. See in particular paragraph 33, where the Tribunal endorsed the central argument, as follows:

"This argument is that this document is a key road map that would allow competitors to 'see behind the curtain'. The publication of this document would significantly elevate the prospects for rivals in a highly competitive market".

34. The practice acknowledge that each case must be assessed on its own facts, but this is precisely Babylon's case here. It considered that the reasoning of the Tribunal in that case applies squarely to the sections of the contract it sought to redact in this case, for the same reasons.

35. The practice argued that there are very limited redactions from the body of the sub-contract itself. Those redactions concern the crucial innovative structural features of the offering that has been crafted and that has brought both parties success with the NHS. Disclosure would indeed provide both parties' competitors with a "road map" of how to replicate the innovative advantages of the sub-contract. This would help them to "steal a march" on Babylon as it could of course have no corresponding insights into their competitors' approach to such contracts.

36. The practice noted that the Tribunal in the Bedfordshire Police case took the view that redaction by redaction analysis did not meet the central "road map" argument. Nonetheless, the practice sought to assist the Commissioner by providing a table that summarised why each item of proposed redaction is a crucial and sensitive part of the "road map".

37. The second category of withheld information concerns the detailed pricing mechanism set out in Schedule 3 to the sub-contract. In part, the same concerns as discussed above apply here: the pricing mechanism is a key part of Babylon's "road map". In addition, pricing information is perhaps the quintessential example of commercially sensitive information because of its impact on parties' positions in respect of future negotiations. In particular, if other entities to whom Babylon offers these (or equivalent) services in future were to learn via public disclosures how the agreed pricing arrangements worked in this case, they would use that information to strengthen their hand – and

thus weaken Babylon's hand – in those negotiations. They would know what Babylon was prepared to offer here, and would not realistically settle for anything less. This would weaken Babylon's ability to secure the best possible prices in future.

38. The Commissioner sought further clarification from the practice regarding the 'road map'. It explained that the 'road map' is not a separate document as such, but rather the contents of the contract. If disclosed in an un-redacted form it could provide a competitor with a 'road map' on how to provide similar services via learning the structure of them.

39. That information on structure is the information that the practice propose to withhold from disclosure as such information is vital to its own and Babylon's commercial interests.

40. This concern applies also to the commercial interests of the practice. It could realistically seek to secure digital services from alternative private providers instead of or in addition to Babylon. Again, if the details of the agreed pricing mechanism in this case were in the public domain, the practice's ability to secure the best price for itself in future would be weakened.

41. The practice referred to the Commissioner's guidance on section 43 that supports that approach to the commercial sensitivity of pricing information. See for example paragraph 52:

    "Impact on other negotiations – revealing information such as a pricing mechanism can, for example, be detrimental to a public authority's negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain."

42. In addition, with regards the sensitivity of pricing information, it referred to a further example given at paragraph 51 of the guidance, namely the case of Council of the Borough and County of the Town of Poole v IC EA/2016/0074.

43. Having considered the matter, the Commissioner is satisfied that the harm alleged would, or would be likely to, occur if the disputed information were released, relates to the interests applicable to section 43(2) as it is a commercial harm to the practice and Babylon. The first criteria has been met and the Commissioner has gone on to consider the second.

44. Under the second criteria, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the

exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must, be real, actual or of substance.

45. The Commissioner is again satisfied that a causal relationship exists between disclosing the disputed information and prejudice to the practice's and Babylon's commercial interests resulting from the disclosure. Disclosing the pricing information would clearly provide competitors or other clients with details that could weaken Babylon's position. The Commissioner considers that this alleged prejudice is of substance.

46. Regarding the third criteria, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – e.g. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

47. It is the Commissioner's view that there is a real and significant risk of prejudice to both parties commercial interests if the requested information was to be disclosed. At the time of the request Babylon were providers of a unique and innovative service. Disclosure of the withheld information would provide competitors with an insight into how to provide similar services, as well as the costs the practice would be likely to pay for such services.

48. Although she has found the section 43(2) exemption is engaged, it may still be released if the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

Public interest test

Arguments in favour of disclosing the withheld information

49. Babylon acknowledges the importance of transparency in general, and in particular about commercial relationships between public authorities (such as those in the NHS) and private entities (such as Babylon).

Arguments in favour of maintaining the exemption

50. The practice argued that the specific items of withheld information would not further the public interest to any significant extent. It referred to the Upper Tribunal that has made clear that the requester's interests can be relevant in assessing the public interest in disclosure. See Department of Health v IC & Lewis [2015] UKUT 159 (AAC) at [37]:

"the linkage between the contents of the information and the application of the general public interests in favour of disclosure will often be informed by the reasons for the request, which will normally be founded on what it is thought it contains or might contain or omit".

51. The practice considered that the public interest in maintaining the exemption is much weightier. This is in part because of the very substantial harm that disclosure would do to Babylon's commercial interests, as well as those of the practice. Disclosure would also be unfair, in that it would provide both parties' rivals free access to valuable commercial tools in which both Babylon and the practice have invested ingenuity and resources.

52. More broadly, the practice also submitted that such harm would damage fair competition in this market, in that the leading commercial party (Babylon) would in effect be forced to forfeit key parts of its "road map", without corresponding access to its rivals' commercial thinking. That would be unfair in itself. It would also do damage to this market, which serves not only the commercial interests of Babylon, but an important public interest in the use of technology to improve healthcare services.

53. In other words, disclosure will harm the aforementioned parties and this market, and harm to this market is very strongly contrary to the public interest.

Balance of the public interest

54. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority carries out its functions. This public interest is heightened where the information relates to the spending of public money.

55. The Commissioner considers there is a strong public interest in protecting a public authority's ability to negotiate with commercial organisations around the supply of services to patients using the NHS and to secure best value for money. The NHS is under significant pressure to stretch budgets to be able to deliver high service standards in the UK. If information is disclosed which would be likely to make the negotiation process more difficult, this would significantly hinder the practice's negotiating position in this area which would not be in the public interest.

56. The Commissioner also considers that there is a public interest in not distorting the commercial playing field, by disclosing the detailed commercial arrangements of one party to the advantage of its competitors or other potential customers.

57. 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. She therefore finds that the practice we correct to apply section 43(2) to the withheld information.

Right of appeal

58. 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

59. 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.

60. 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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