

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 May 2010

Public Authority: Great Yarmouth and Waveney PCT

Address: 1 Common Lane North
Beccles
Suffolk
NR34 9BN

Summary

The complainant requested the amount paid per Unit of Dental Activity by the public authority to each NHS dental practice within its area in an anonymised form. The public authority withheld this information under section 43(2). The Commissioner has concluded that section 43(2) was not engaged and has consequently ordered the disclosure of the withheld information. The Commissioner has also identified a number of procedural breaches of the Act by the public authority.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 12 May 2009 the complainant requested the following information:

"Please supply figures for UDA values (Units of Dental Activity) for each NHS dental practice within the PCT area."

3. On 26 May 2009 the public authority wrote to the complainant refusing his request on the basis that the information was commercially sensitive. However it did provide the figure for the average Unit of Dental Activity ("UDA") for the dental practices within its area rather than the figure for each dental practice.
4. On 2 June 2009 the complainant made a new request for the figures for UDA values for each NHS dental practice within the public authority's area in an anonymised form.
5. On 24 July 2009 the complainant emailed the public authority to point out that he had not received a response to his request.
6. On 27 July 2009 the public authority provided the complainant with the lowest and highest UDA values for dental practices within its area but did not provide a response to him in respect of the specific information he had requested.
7. On 12 August 2009 the complainant asked for an internal review.
8. On 17 August 2009, the public authority informed the complainant that the result of the internal review was that it was satisfied with the decision that had been made.

The Investigation

Scope of the case

9. On 25 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant subsequently agreed that the scope of the investigation should be to determine whether the public authority was entitled to withhold the figures for UDA values for each NHS dental practice within its area in an anonymised form and to determine whether it had complied with the relevant procedural aspects of the Act.

Chronology

10. The most significant communications between the Commissioner, the public authority and the complainant are identified below.
11. On 21 January 2010 the Commissioner, having previously been provided with a copy of the withheld information, discussed with the

public authority the reasons for its belief that the requested information was exempt from disclosure. The public authority agreed to reconsider its previous decision in light of the passage of time.

12. On 1 February 2010 the public authority explained to the Commissioner that it still believed that the withheld information was exempt under section 43(2), particularly in light of further procurement exercises it planned to carry out later in the year.
13. On 4 February 2010 the Commissioner wrote to the public authority with a number of questions with regard to its application of section 43(2) to the withheld information.
14. On 9 March 2010 the public authority wrote to the Commissioner with a detailed response to the questions he had asked.
15. On 15 March 2010 the Commissioner wrote to the public authority seeking further clarification of points made in its letter with regard to its application of section 43(2).
16. On 23 March 2010 the public authority provided further explanation in relation to the issues raised in the Commissioner's letter.

Analysis

The full text of the provisions of the Act which are referred to can be found in the Legal Annex at the end of this notice.

Exemption

Section 43(2) – Prejudice to commercial interests

17. The Commissioner considered whether the information that had been withheld by the public authority was exempt from disclosure under section 43(2).
18. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
19. The withheld information was the UDA figures for the contracts the public authority had agreed with a number of different dental practices in its area. The Commissioner accepts that this information relates to the commercial activities of the public authority and the dental

practices concerned and that the information is potentially relevant to the exemption. He went on to consider whether the release of the information would, or would have been likely, to have prejudiced the commercial interests of either the public authority or the dental practices concerned at the time that the request was made.

20. The public authority informed the Commissioner that it believed that disclosure of the withheld information would have prejudiced its own commercial interests and would have been likely to prejudice those of the existing providers of dental services in its area.
21. In dealing with the issue of whether disclosure would have prejudiced the commercial interests of the public authority, the Commissioner has taken this to mean that, whilst it is not necessary to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.
22. In dealing with the issue of whether disclosure would have been likely to prejudice commercial interests, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that *"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."* (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
23. The Commissioner has also taken into account the views of the Tribunal in the same case that it accepted that *"the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction."* (para 15). However, the Tribunal noted that certain factors should be considered in such cases, stating that whether or not prejudice was likely "would depend on the nature of the information and the degree of similarity between the two transactions." (para 15).
24. The Commissioner considered the potential prejudice to the public authority and service providers in turn.

Prejudice to the commercial interests of the public authority

25. The public authority explained that, as a commissioning organisation, it was responsible for commissioning healthcare services in its area. In the case of primary care dental services, these were provided by independent contractors with whom it had legally enforceable

contracts. These contractors might be individuals, partnerships or corporate bodies. In recent and future commissioning of services, some of the service providers would be required to tender in open competition in order to be awarded new business by the public authority.

26. The public authority argued that disclosure of the withheld information would have adversely affected the value of bids received in response to planned tenders in 2010. At the time of the request, it believed that disclosure would have affected a procurement it was undertaking in Lowestoft.
27. The public authority provided an example of why it believed disclosure would impact on the tenders it received in future tendering exercises. During the summer of 2008, it offered additional, non recurring activity at a specific average UDA value. Subsequent to the release of this information, it went out to tender for general dental services in Great Yarmouth. It received bids from three local providers which equated almost exactly to the average UDA value at which it had offered the non recurring activity. It also received one bid from an organisation which was not an existing provider and was therefore not party to the earlier offer. This bid was significantly below this average UDA value.
28. At the end of 2009 the public authority explained that it had invited tenders for dental services in Lowestoft. It received two bids from local providers within 1% of the average UDA value at which it offered the non recurring work, whereas an out of area bidder submitted a bid at 8% below this average UDA value.
29. The public authority believed that the release of the average UDA value had an impact on the bids from providers who were aware of the information. This was not the case for bidders who did not have the information. These bids were more competitively priced. It therefore considered that the release of the requested information would have affected its ability to procure value for money healthcare services through competitive tendering and would consequently have prejudiced its commercial interests.
30. The withheld information consists of UDA figures for 28 different dental practices within the public authority's area. The Commissioner notes that the UDA value is different for each practice and that there is a significant variance between the highest and lowest figures. He also notes that sixteen of the contracts were agreed on 1 April 2006, with the remainder being agreed between November 2007 and 1 April 2009. Five of the contracts have end dates whilst the remainder are open ended.

31. The public authority informed the Commissioner that

"...contract values vary between providers for a multitude of reasons. Some provide additional services as part of their contract such as domiciliary visits and open access sessions. This activity is above and beyond the provision of general dental services and has the effect of increasing the UDA value."

32. The public authority confirmed to the Commissioner that all contracts are subject to uplift every year for the lifetime of the contract. Therefore contract values were not static and had at least the potential for variation. In addition it informed him that contract values could also change during the course of a year, for example some providers had undertaken additional non recurring activity at a fixed price. This would have had the effect of either increasing or decreasing the providers' UDA value on a temporary basis. The public authority also informed the Commissioner that the UDA value for some of the contracts included an element based on previous historical activity levels from prior to 2006.
33. The complainant requested the figures for the UDA values for each dental practice within the public authority's area. The Commissioner notes, as the public authority has made clear, the UDA values for each practice may vary for a multitude of reasons. These include the type and age of the contract, the activities being undertaken, on a permanent or temporary basis, and levels of activity under previous contracts. The UDA figure provides no indication as to how it has been arrived at. In light of this, the UDA values would appear to be of little assistance to anyone who was seeking to identify the UDA value the public authority might accept in future tendering exercises.
34. Furthermore, the complainant requested the information in an anonymised form which would mean that it would be of even less value to anyone seeking to identify how the values might have been arrived at as it would be difficult to see how it would be possible to identify which figure related to which practice. The Commissioner is therefore not convinced that any sensible tenderer for future contracts with the public authority would use these figures as a basis for determining the UDA value they should include in their bid.
35. In addition, the Commissioner notes that the public authority appeared not to perceive the disclosure of the average UDA value for dental practices in its area to be prejudicial to its commercial interests as on 26 May 2009 it released this figure to the complainant, whilst still withholding the UDA values for each individual dental practice. It also

released the highest and lowest UDA values for the area to the complainant.

36. The public authority also argued that should the requested information be released, particularly at times of procurement activity, it would have no way of knowing if the request was being made by a bidder for commercial advantage rather than the request being made in the public interest.
37. The Commissioner's view is that the Act is motive and applicant blind and that therefore requests should be considered without reference to the identity of the requester or reasons behind the request. Whether a requester makes a request for commercial reasons is not a factor which should affect the decision as to whether information should be disclosed. In any event, as any disclosure is to the world at large, the Commissioner, as part of his considerations, looked at whether there was likely to be any prejudice caused if the information had been disclosed to a bidder who might seek to use it for its commercial advantage. As explained above, he was not satisfied that any such prejudice was likely to have occurred.
38. The public authority argued further that it could be subject to legal challenge if the requested information was disclosed and became available to a bidder during its future procurements on the basis that the process was not a fair one. As a contracting authority, it was required under the EU Directive 2004/18/EC to treat bidders equally and in a non discriminatory way.
39. By releasing information during a procurement period, the public authority believed that it could inadvertently give an unfair advantage to a bidder who made a request for this pricing information. That bidder might use the information it had obtained to assist it in pricing its bid. Unsuccessful bidders could then make a legal challenge that a bidder had been given information that was not shared with other bidders.
40. The Commissioner assumes that the public authority would treat anyone making requests under the Act equally and not discriminate between them. If a disclosure of information is made by a public authority under the Act, then the same information should generally be made available to anyone else making the same request. If a potential bidder was provided with pricing information by the public authority following a request under the Act, then the Commissioner would expect the same information to be disclosed to any other party which sought to use the legislation to obtain it. He is therefore not convinced that a disclosure under the Act could lead to successful legal challenges by

parties that did not avail themselves of the opportunities that it offered.

41. Based on the arguments provided to him by the public authority, the Commissioner can find no basis to conclude that disclosure of the withheld information would have prejudiced its commercial interests.
42. The Commissioner went on to consider whether the evidence presented by the public authority was sufficient to engage the lower threshold for the application of section 43(2), that disclosure would have been likely to prejudice its commercial interests. However, for the same reasons outlined in his consideration of the application of the higher threshold for the exemption, he is not satisfied that it is engaged.

Prejudice to the commercial interests of the existing service providers

43. The public authority also contended that disclosure of the withheld information would have been likely to prejudice the commercial interests of its current providers of dental services. It argued that in any open market situation, the pricing information of individual organisations is considered to be commercially sensitive. Within its own area, a healthy market for the provision of general dental services exists and organisations contracting with it have a right to expect commercially sensitive information to be treated as confidential and not shared with their competitors.
44. In addition, the public authority argued that dental providers used a subcontracting arrangement with individual dentists to provide their services. Release of contract values could potentially undermine the position of provider organisations when negotiating contracts with individual dentists, driving up market costs.
45. Where a public authority argues that the disclosure of information may result in prejudice to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments advanced by public authorities about how prejudice may occur to those parties. This is in line with the Information Tribunal decision in *Derry Council v Information Commissioner (EA/2006/0014)*. Whilst the Commissioner accepts that it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
46. In his correspondence with the public authority, the Commissioner explained his position as set out in the preceding paragraph. He asked

the public authority to clarify on what basis it had established that prejudice to a third party's commercial interests might result from disclosure and to provide copies of any correspondence with third parties in relation to the information requested.

47. The public authority informed the Commissioner that it had not consulted with third parties but it had outlined its own concerns as to the effect that disclosure might have on service providers' commercial interests. Based on this the Commissioner is not satisfied that the public authority has established that there was a basis to conclude that disclosure would have been likely to prejudice the commercial interests of service providers and has concluded that section 43(2) was not engaged.
48. Even if the above were not the case, the Commissioner is not convinced by the public authority's arguments. The complainant requested the information in an anonymised form and, consequently, it is not apparent how it would be possible to identify which UDA figures had been agreed with a particular practice within the public authority's area.
49. Even if it was possible to link a specific UDA figure to a particular practice, the Commissioner is not persuaded that this would reveal the price that a service provider might include in any future bids for contracts. The UDA figure is not broken down into component parts and no indication is provided as to how it has been arrived at.
50. There are, as the public authority acknowledged, a multitude of factors that potentially affect the UDA figure for each dental practice. This would make it very difficult for a competitor to try to work out what UDA figure a particular service provider might include in a tender in a future procurement exercise. In order to do this, the competitor would need to be able to take account of factors such as how the service provider's existing UDA figure had been calculated, how this calculation might change for the proposed contract, the effect of the passage of time since the UDA figure had been agreed and changes in market forces. The Commissioner is not convinced that this could be done with any degree of accuracy and consequently is not persuaded that any of the existing service providers' commercial interests would have been likely to have been prejudiced by disclosure.
51. Having considered the arguments presented to him by the public authority, the Commissioner is of the view that there is not sufficient evidence to support the application of section 43(2) to the withheld information. He has therefore decided that the exemption was not engaged and the information should have been disclosed.

Procedural Requirements

Sections 1, 10 and 17 – Communication of information and refusal notice

52. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should within the time for complying with section 1(1): -
- a. state that fact,
 - b. specify the exemption in question,
 - c. state why the exemption applies.
53. In this case, the public authority breached section 17(1) by failing to issue a refusal notice within 20 working days of the request for the information in an anonymised form. It also failed, by the time of the completion of the internal review, to state that it was relying on section 43(2) or explain why it applied. It therefore breached section 17(1)(a),(b) and (c).
54. By not explaining why the public interest in maintaining the exemption outweighed the public interest in disclosure, the public authority breached section 17(3)(b).
55. By not explaining including in its refusal notice the particulars of any procedure for dealing with complaints about the handling of requests or stating that it did not provide such a procedure, the public authority breached section 17(7).
56. In addition, by not providing the requested information to the complainant within 20 working days of the request, the public authority breached section 10(1). By not providing the requested information to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

The Decision

57. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:
- it incorrectly applied section 43(2) to the information that had been requested;

- it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review;
- it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request;
- it breached section 17(1) by not providing a refusal notice within 20 working days of the request;
- it breached section 17(1)(a), (b) and (c) by not stating in its refusal notice that it was relying on section 43(2) or explain why section 43(2) applied;
- it breached section 17(3)(b) by not explaining why the public interest in maintaining the exemption outweighed the public interest in disclosure; and
- it breached section 17(7) by not including in its refusal notice the particulars of any procedure for dealing with complaints about the handling of requests or stating that it did not provide such a procedure.

Steps Required

58. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the withheld information.

59. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

60. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

61. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
62. The Commissioner has highlighted in this notice a significant number of procedural breaches of the Act by the public authority. These include its failure to provide the complainant with a response to his request for the UDA values in anonymised form within the 20 working day deadline set by the Act. It also did not specify which exemption it was applying to the withheld information or explain why it believed that the information was exempt from disclosure in either its refusal notice or its internal review response.
63. The Commissioner expects to see an improvement in the public authority's handling of requests in future and will monitor any complaints that he receives for any evidence of non compliance.

Right of Appeal

64. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 25th day of May 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

- (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that -

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time

for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Commercial interests.

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”