

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 July 2012

**Public Authority:** NHS Wiltshire  
**Address:** Southgate House  
Pans Lane  
Devizes  
Wiltshire  
SN10 5EQ

#### Decision (including any steps ordered)

---

1. The complainant has requested information relating to the proposed transfer of the family health service functions of primary care trusts in the south west to NHS Shared Business Services. The Commissioner's decision is that NHS Wiltshire ("the Trust") has incorrectly applied the exemption provided by section 43 (commercial interests) of FOIA to the contents of two documents covered by the request.
2. The Commissioner requires the public authority to disclose the following documents with the exception of any names and contact details included in the information that the Trust considers are subject to section 40(2) (third party personal data) of FOIA -
  - 'Transforming and Modernising Family Health Services in the South West Region – Programme Update 20<sup>th</sup> June 2011' PowerPoint presentation
  - 'Transforming and Modernising Family Health Services in the South West Region – NHS SBS Proposal'
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

---

4. On 21 September 2011 the complainant requested information in the following terms –
  - (a) copies of any proposal documents or business plans submitted by NHS Shared Business Services for the provision of FHS [family health service] services,
  - (b) details of any responses to those proposals or plans sent by the South West PCTs to SBS, and
  - (c) the notes or minutes of all meetings of the South West Project Steering Group.
5. The Trust responded on 19 October 2011. Addressing each of the requests in turn, it stated that; (a) the requested information was exempt information under section 43 of FOIA, (b) the information was not held by the Trust, and (c) there was a meeting in May 2011 but no records were kept by the Trust.
6. Following an internal review the Trust wrote to the complainant on 22 December 2011. It upheld its decision to refuse to comply with request (a) but revised its position in respect of requests (b) and (c). Regarding request (b), the Trust claimed that any information held was exempt from disclosure courtesy of section 43(2) of FOIA. In connection with request (c) the Trust informed the complainant that it had managed to locate the minutes of three meetings relevant to the request. Copies of these minutes were provided subject to redactions made under sections 40(2), 43(2) and 36(2) (prejudice to the effective conduct of public affairs) of FOIA.

## Scope of the case

---

7. The complainant contacted the Commissioner to complain about the way his requests for information had been handled.
8. Following the involvement of the Commissioner, developments have occurred which have limited the scope of the issues that he has needed to consider. Specifically, the Trust has confirmed that it does not in fact hold information described at request (b). Furthermore, it has agreed to the full release of the documents requested at (c).
9. In light of these events, the complainant has informed the Commissioner that he is content for the decision to focus on the two documents covered by request (a). Building on this point, the complainant has also clarified that he is not interested in pursuing the

disclosure of the names and contact details contained in the documents to which the Trust had later argued would be exempt information for the purposes of section 40(2) of FOIA.

10. The decision set out below therefore only focuses on the information held in connection with request a) and the Trust's reliance on section 43(2) of FOIA in respect of this information ("the disputed information").

## Reasons for decision

---

11. For section 43(2) of FOIA to be applied correctly, a public authority must be able to demonstrate that the following conditions are satisfied –
  - Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
  - In all the circumstances, the weight of the public interest in maintaining the exemption outweighed the public interest in disclosure.
12. The first issue for the Commissioner to assess, therefore, is whether disclosure could result in the prejudice that section 43(2) is designed to protect against. If this is found not to be the case, the exemption is not engaged and there is no requirement to consider the public interest factors associated with disclosure.
13. The now standard approach to the prejudice test involves the consideration of three questions; (1) What are the applicable interests within the exemption? (2) What is the nature of the prejudice being claimed and how it will arise? (3) What is the likelihood of the prejudice occurring?
14. The Trust has argued that the disclosure of the disputed information would be likely to prejudice the commercial interests of NHS SBS. This is the party that produced a proposal to transform the FHS in the south west region.
15. FHS are the regulatory and statutory functions which include, among other things: the patient registration process; call and recall for screening; and, the performer list application process. Currently, seven of the fourteen primary care trusts (PCTs) in the south west provide FHS for one or more PCT. The services cover a population of 5.3 million, with an operating expenditure of around £6.9 million.
16. A South West Project Steering Group had been established to support the review of a regional FHS model. Two proposals for the operation of a

southwest wide service were developed. One proposal was received from NHS SBS and the other from a group of the current FHS providers led by NHS Gloucestershire.

17. The disputed information records why NHS SBS considers that it can, and should, deliver a new model for providing the FHS in the region. The Commissioner accepts that this relates to the commercial interests of NHS SBS and has therefore gone on to examine the nature of the potential prejudice.
18. Echoing the comments of the Information Tribunal in *Hogan*<sup>1</sup>, the Information Commissioner considers that an evidential burden rests with a public authority to be able to show that some causal relationship exists between the potential disclosure and the prejudice described. Furthermore, this prejudice must be real, actual or of substance.
19. The disputed information comprises the way in which NHS SBS plans to structure and support its service framework and the associated costs and financial benefits. To disclose this information could lead, in the view of the Trust, to NHS SBS incurring the cost of preparing and undertaking the groundwork for a transfer of services in this or future exercises but a contract being placed elsewhere. On this basis, the Commissioner is prepared to accept in principle that the prejudice being claimed by the Trust is neither trivial nor insignificant.
20. The next step for the Commissioner is therefore to consider whether a link has been made between disclosure and a detriment to the commercial interests of NHS SBS. This requires an assessment of the Trust's arguments, which can be split along these lines; firstly, the prejudice to the interests of NHS SBS in the current bid and, secondly, the prejudice to any future bids of NHS SBS. The Commissioner addresses each of these strands in turn.
21. The procurement exercise for the provision of the FHS in the south west region mirrors a trend in which greater consideration has been given by healthcare providers to outsource parts of the services they provide. This consideration has been based on the potential of a third party to improve efficiency, with the corresponding reduction in costs to run a service.

---

<sup>1</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

22. NHS SBS itself is a joint venture between Steria, which specialises in the delivery of IT business services, and the Department of Health. According to NHS SBS' website<sup>2</sup> -

*"NHS SBS is the largest provider of Family Health Services (FHS) to the NHS in England; the scope of the services provided under Family Health Services are back-office administrative support services designed to support primary care providers e.g GP practices, dental practices, community pharmacies and high street optometrists."*

23. The procurement exercise for the FHS in the south west region was carried out under an existing framework agreement and was not subject to open procurement. The current providers of the FHS in the region were also required to produce an equivalent proposal and this had been received at the time of the request.
24. The Trust has claimed that if the details of the NHS SBS proposal had been made public, the current provider could have used the information to improve its own proposal, thereby leaving NHS SBS at a commercial disadvantage. Yet, the Commissioner has not been persuaded by this argument. This is because of his understanding of the nature of the 'competition' for the FHS, in which NHS SBS' proposal was submitted.
25. The Commissioner has reminded himself that healthcare providers are attracted to the services offered by enterprises such as NHS SBS because of the expertise they have accrued, their flexibility and their access to specialised resources. It is precisely because organisations like NHS SBS have a commercial basis that they are able to propose a different operating model to current healthcare providers.
26. In this case the nature of the procurement exercise meant that NHS SBS had not been pitted against rival commercial competitors but had been classified as the preferred bidder. This left only the proposal of the current providers as a means of comparison. The Commissioner considers it unlikely that the current providers could effectively utilise and ultimately improve on the particular model that NHS SBS had developed. This is because of the vastly different ways in which the current provider and NHS SBS operate, not least in terms of scale.
27. The argument of the Trust similarly ignores the fact that the proposals of both NHS SBS and the current providers had been received at the

---

<sup>2</sup> <http://www.sbs.nhs.uk/family-health-services>

time of the request. There can be little doubt that the current providers would have needed to invest a considerable amount of time to produce a proposal in the first place. Accordingly, it seems a remote possibility that the current providers could amend their proposal in light of the disclosure within a suitable timeframe required for the procurement exercise.

28. The position of the Trust has also been undermined, to a greater extent, by its failure to match the arguments for the application of section 43(2) with the contents of the disputed information itself. It is the view of the Commissioner that a public authority must be able to give specific examples of how disclosure could lead to the prejudice described in the exemption. Yet, having had the benefit of viewing the withheld information, the Commissioner has been unable to reconcile the general arguments advanced for the engagement of section 43(2) and the way in which the procurement exercise was carried out with the disclosure of the disputed information.
29. Finally, even if the points made above could be disregarded, the Commissioner finds it is highly improbable that NHS Gloucestershire - the PCT spearheading the other proposal - will not have had access to the proposal of NHS SBS by virtue of being one of the current providers of the FHS in the region; he particularly notes that the other current providers including the Trust subject of this request had sight of the NHS SBS proposal. The consequences of this, if correct, would be to effectively diminish any prejudice that could be said to arise through disclosure.
30. The Commissioner has therefore decided that the first strand of the Trust's argument fails to demonstrate a causal link between disclosure and the prejudice described. He has therefore gone on to consider the strength of the second strand of the Trust's argument; namely, that disclosure would prejudice any future bids made by NHS SBS. Again, however, the Commissioner has not been convinced that section 43(2) can be found to be engaged based on the merits of the argument.
31. The Commissioner accepts that there may be circumstances where the disclosure of commercial information will impair the ability of a third party to bid for future contracts. This will normally be the case where similar procurement exercises are due to be carried out and it is reasonable to conclude that the requested information could be used by a competitor to give it a commercial edge. For example, the competitor may seize on and adopt the unique features of a rival bid in order to offer a more competitive proposal in a subsequent procurement exercise.
32. However, this is not the case here. Firstly, the Commissioner considers that the procurement exercise is area and time specific. This means that

the information contained in the proposal reflects the particular arrangements found in the south west region at that time. The fact that these arrangements are distinctive to the area should protect against the possibility of a competitor using the information in any future procurement exercise to the commercial detriment of NHS SBS.

33. Secondly, the Commissioner acknowledges the unique position that NHS SBS finds itself because of its size and experience of dealing with FHS in conjunction with other healthcare providers. This ensures that NHS SBS enjoys the use of resources that would not be available to most, if indeed any, of its competitors. Taking into account these factors, the Commissioner is unable to envisage how a competitor could use the disputed information to its advantage in any separate procurement exercise.
34. Ultimately, the emphasis of FOIA is on transparency and therefore the onus is on a public authority to justify why any information should not be made publicly available. It is the Commissioner's determination that the arguments of the Trust have not shown how disclosure would lead to the prejudice described by section 43(2) and for this reason he has decided the exemption is not engaged.
35. The Commissioner would like to point out that in coming to the decision, he has not felt it necessary to consider in depth a further argument advanced by the Trust. This relates to the possible anxiety that might be felt by staff members if all the details of the disputed information were released. The Commissioner notes that this argument is not one that will have any bearing upon the question of whether disclosure could have a prejudicial effect on a party's commercial interests.

## Right of appeal

---

36. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**