

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 January 2014

Public Authority: Department of Health
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested from the Department of Health (DoH) anonymised information relating to the 2009 Pharmaceutical Price Regulation Scheme (2009 PPRS). The DoH provided the complainant with information it considered fulfilled the requests, although it noted that the information which could not be anonymised was exempt under sections 41 (information provided in confidence) and 43 (commercial interests) of FOIA. The Commissioner's decision is that the DoH has taken appropriate steps to disclose an anonymised version of the requested information. He does not therefore require the DoH to take any steps as a result of this notice.

Request and response

2. On 8 June 2011 the complainant made a number of requests to the DoH regarding the 2009 PPRS. The wording of the requests is reproduced in the annex (A) attached to this notice.
3. The DoH responded on 30 June 2011. It confirmed that the DoH held information relevant to the requests but claimed this was exempt from disclosure under sections 41 (information provided in confidence) and 43 (commercial interests) of FOIA.
4. The complainant wrote to the DoH again on 25 August 2011 expressing their dissatisfaction with the response and asking for the DoH to carry out an internal review. In doing so, the complainant challenged the DoH's 'blanket' refusal and, in particular, challenged the application of

the exemptions to that part of the requested information that 'is aggregated and/or is (or can be) anonymised'.

5. The DoH subsequently completed an internal review, the outcome of which was provided to the complainant on 27 September 2011. The DoH maintained its reliance on section 43(2) in respect of some of the requested information but provided what it considered to be the relevant information for a number of the other requests.

Scope of the case

6. The complainant contacted the Commissioner to complain about the DoH's handling of the information requests. In particular, the complainant asked the Commissioner to consider the general adequacy of the DoH's response to the requests as well as its refusal to disclose certain items of information under section 43(2) of FOIA.
 7. During the course of the Commissioner's investigation the DoH provided further clarification in respect of the information that had been requested. The complainant has subsequently stated that the Commissioner's decision should focus on the following areas: 1) the possibility that the DoH could have provided additional anonymised information and 2) the possibility that the DoH should have expanded on specific parts of its responses in order to comply with FOIA. The Commissioner addresses each of these items in turn below.
 8. In respect of item 1), the Commissioner notes that the DoH considers that it has disclosed all the relevant information that can be anonymised. For the remaining information, the DoH has continued to rely on section 43 of FOIA but has also re-introduced section 41 as a ground for non-disclosure.
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Reasons for decision

Background

9. To place this matter in context, the DoH has provided the Commissioner with the following explanation of the PPRS process:

[The complainant's application for information] relates to information and documentation provided under the 2005, 2008 and 2009 PPRS agreements. The three PPRS agreements, which were negotiated between the Department of Health and the Association of the British Pharmaceutical Industry (ABPI), aim to strike a balance to ensure that the interests of patients, the NHS, the industry and the taxpayer are promoted for each other's mutual benefit. The 2009 PPRS is currently viewed as a voluntary scheme which is not binding under the law of contract which applies to manufacturers and suppliers of licensed branded medicines who have consented to become scheme members. Any company that does not participate in this scheme is subject to a statutory scheme under sections 262(2) and 263(7) of the National Service Act 2006.

10. The ABPI has also produced a document entitled 'Understanding the 2009 PPRS¹' with the aim of describing the rationale behind the PPRS and to give a broad outline of the structure and working of the agreement introduced in 2009. On page 4 of the document, under the heading 'The objectives of the PPRS', the ABPI states that the point of the scheme was that it should: promote access and uptake for new medicines, deliver value for money, encourage innovation and provide stability, sustainability and predictability. In terms of delivering for money, the PPRS implements a mechanism by which a ceiling is set on companies' profits on NHS sales.

¹ <http://www.abpi.org.uk/our-work/library/industry/Documents/Understanding%20the%20pprs%202009%20final.pdf>

The scope of the requested information

11. In this case the DoH has confirmed that the only information withheld from the complainant relates to details of two mediation hearings. The DoH has claimed that disclosure of this information contains commercially sensitive information, which if released could harm both its own commercial interests and the commercial interests of the companies involved in the mediation. On this basis, it has argued that the information is exempt information under section 43(2) of FOIA. In addition, the DoH has claimed that the information was provided in confidence and was therefore exempt under section 41(1) of FOIA.
12. Against this, the complainant has clarified that he is only seeking anonymised information; that is to say, information from which it is not possible to identify (whether by 'back engineering' or otherwise) any particular members of the 2009 PPRS or any confidential or commercially sensitive information supplied by these members. In light of this clarification, the complainant has argued that neither of the exemptions cited by the DoH could reasonably be found to be engaged. For its part, the DoH considers that it has already provided the complainant with anonymised information relating to the two mediation meetings. In effect then, the DoH is of the view that to release anything further would allow the companies involved in the meetings to be identified.
13. The result of this difference in opinion is that the Commissioner must initially consider whether there is additional information contained within the mediation hearing records that could be anonymised.
14. To answer this question, it has been necessary for the Commissioner to compare the anonymised information that has already been disclosed by the DoH with the records of the meetings that have been withheld. On the basis of this analysis, the Commissioner is satisfied that the DoH has succeeded in extracting or summarising the substantive parts of the withheld information for the purposes of the requests. To the Commissioner's mind, anything further contained in the withheld information is not central to the requests or its disclosure would allow the company in question to be identified.
15. The Commissioner has therefore decided that the DoH discharged its obligations under FOIA as a result of the disclosure of information during the investigation, bearing in mind the complainant's explicit clarification that only anonymised information was being sought.

16. In making this finding, the Commissioner observes the complainant has also suggested that the anonymised information can only be properly understood if the DoH provided details of the context in which it came to be compiled. This is owing to the fact that the information was originally prepared in response to a separate appeal made to the Information Tribunal in connection with the Commissioner's decision made under the reference FS50413464², which similarly involved the DoH.
17. The appeal (EA/2012/0162)³ was settled by way of a consent order following the disclosure of the information that has subsequently been provided to the complainant in this case.
18. The Commissioner recognises the complainant's concerns about the provenance of the information. However, he considers that it was not incumbent on the DoH to supply these supplementary details given that they are clearly not covered by the scope of the original requests.

The adequacy of the DoH's responses

19. In addition to the consideration of the withheld information, the complainant has stated that the DoH should provide information as to whether:
 - the reference prices used by the 2005 under delivering companies when entering the 2009 PPRS (or statutory scheme) take into account the percentage price cut required under the 2005 PPRS, and
 - the Non-Repaying (and under-delivering) companies under the 2005 PPRS which subsequently participated in the 2009 PPRS are now on track to deliver the required savings under the current 2009 PPRS.

² http://ico.org.uk/~media/documents/decisionnotices/2012/fs_50413464.ashx

³ http://www.informationtribunal.gov.uk/DBFiles/Decision/i959/EA-2012-0162_2013-01-29.pdf

20. The Commissioner considers that these points go beyond the scope of the original complaint brought to his attention. To this extent, the Commissioner does not feel he would be under an obligation to consider these points. In any case, however, the Commissioner considers that the points are not covered by the terms of the complainant's requests and so it would be outside of the Commissioner's remit to decide whether the specified information should be provided.

Right of appeal

21. 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: GRC@hmcts.gsi.gov.uk

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

22. 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.
23. 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

Annex A – information requests (8 June 2011)

*We request that the DoH provides us with all the information it is holding which led to it reaching the decision that it was not in a position to carry forward modulation over-deliveries under the 2005 and 2008 PPRS [Pharmaceutical Price Regulation Scheme]s to the 2009 PPRS because the re-payment 'threshold' of 75% by value of modulation under-deliveries under the 2005 and 2008 PPRSs to the DoH has not been met, such that the DoH sent [named party] the Notification Letter (the "**information**"). The Information includes, but is not limited to, the following matters:*

- 1. Please say what the total amount is (in GB Pounds) that the DoH considers to be due to it in respect of modulation under-deliveries under the 2005 and 2008 PPRSs.*
- 2. Please say what was the 75% figure (in GB Pounds) that was the DoH's target for recovery at the commencement of the 2009 PPRS (the "**75% Target**").*
- 3. Please say if the 75% Target has been modified (whether upwards or downwards) at any point during the life of the 2009 PPRS. If so, please give the reasons for any such modification(s) and say how much (in GB Pounds) the 75% Target has been modified.*
- 4. Please state how many companies which are (or were) members of the 2009 PPRS have requested the DoH's consent under the 2009 PPRS to modulate their product prices downwards? Of these, please state how many companies were refused consent by the DoH and provide the reasons given by the DoH for any such refusals of consent? As a consequence of any such refusals, what was the amount (expressed in GB Pounds and in percentage terms against the 75% Target) that the DoH did not collect?*
- 5. Please identify those under-delivering companies under the 2005 and 2008 and PPRSs that have not agreed to make re-payment to the DoH (the "**Non Re-Paying Companies**"). Please also give the total number of companies that are Non Re-Paying Companies.*
- 6. Please say what is the total amount (in GB Pounds) that the DoH considers to be due from the Non Re-Paying Companies.*
- 7. Please say what reasons have been given by the Non Re-Paying Companies for not agreeing to make re-payment to the DoH. Please also say what steps have been, and are intended to be, taken against the Non Re-Paying Companies by the DoH to recover the payments that the DoH considers to be due from them.*

8. *Please identify the under-delivering companies under the 2005 and 2008 PPRSs that have agreed to make re-payments to the DoH (the "**Re-Paying Companies**"). Please also give the total number of companies that are Re-Paying Companies.*
9. *Please say what is the total amount (in GB Pounds) that has been agreed to be re-paid to the DoH by the Re-Paying Companies.*
10. *Please say how many Re-Paying Companies agreed to re-pay a reduced settlement figure to the DoH.*
11. *What mechanism, if any, did the DoH put in place to ensure that there was no actual or apparent conflict in its position between agreeing with Re-Paying Companies to a lesser re-payment amount and achieving the 75% Target?*
12. *If the DoH had received full re-payment from those Re-Paying Companies that it agreed to settle with for a lesser amount than the full amount than the DoH considered was due to it, what would have been the amount recovered by the DoH expressed as a percentage against the 75% Target?*
13. *Please say what the shortfall is (in GB Pounds) between the total amount that has been agreed to be re-paid to the DoH by the Re-Paying Companies and the total amount that the DoH considers to be due to it in respect of modulation under-deliveries under the 2005 and 2008 PPRSs.*
14. *Please express in percentage terms the amount that has been agreed to be re-paid to the DoH by the Re-Paying Companies against the total amount that the DoH considers to be due to it in respect of modulation under-deliveries under the 2005 and 2008 PPRSs.*
15. *Please identify the re-payment terms that have been agreed between the Re-Paying Companies and the DoH, including but not limited to:*
 - a. *how much money has already been received by the DoH from the Re-Paying Companies;*
 - b. *in respect of those Re-Paying Companies that have not already made a payment to the DoH, when it has been agreed that any payment(s) will be made; and*
 - c. *if relevant, the amount of any discounts agreed between the DoH and the Re-Paying Companies and the reasons for any such discounts having been agreed to.*

- 16. In respect of the cases said by the DoH to have been referred to the Panel in respect of the calculation of the modulation under-deliveries under the 2005 and 2008 PPRSs, please:*
- a. say how many cases were referred to the Panel; and*
 - b. what the outcome was of each case referred to the Panel.*
- 17. If companies that have over-delivered under the 2005 and 2008 PPRs are not to be offered scope for additional modulation to recover their over-deliveries during the lifetime of the 2009 PPRS, please say what alternative (if any) proposals is the DoH proposing to discuss with such companies which would allow those over-delivering companies to recoup the excess sums which they have paid to the DoH pursuant to the 2005 and 2008 PPRSs.*
- 18. Please provide copies of the minutes of the regular meetings that took place between the DoH and the APBI [Association of the British Pharmaceutical Industry] in relation to 7.49.4 and 10.9 of the 2009 PPRS.*