

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2016

Public Authority: NHS Commissioning Board (NHS England)
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested a breakdown of the current market rents (CMRs), in particular the £/m² or £/sq.ft, for practices in Herts Valleys as well as the premises grade for each practice. NHS England provided the complainant with information relating to premise grading but refused to provide information regarding the cost of individual premises under section 43(2) FOIA.
2. The Commissioner's decision is that NHS England correctly applied section 43(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 12 November 2015 the complainant requested information of the following description:

"Please would you let me have a breakdown of the CMRs, in particular the £/m² or £/sq.ft, for practices in Herts Valleys. I understand this information should be available under the Freedom Of Information Act."
5. The complainant added to this request by email on 24 November 2015 with the following:

"Please also let me have the premises grade for each practice."

6. On 4 December 2015 NHS England responded. It refused to provide the requested information under section 43(2) FOIA.
7. The complainant requested an internal review on 4 December 2015. NHS England sent the outcome of its internal review on 4 January 2016. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 12 January 2016 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, NHS England provided the complainant with the premises grade for each practice.
10. The Commissioner has considered whether NHS England was correct to apply section 43(2) FOIA to the withheld information.

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
12. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness 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."*¹

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

13. Upon viewing the withheld information the Commissioner considers that it relates to the costing information for individual GP practices, in particular the current market rent cost per m2. This does therefore fall within the scope of the exemption.
14. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

The nature of the prejudice

15. NHS England are of the opinion that the commercial interests of NHS England and GP contractors in the Hertfordshire Valley CCG geographical area would be prejudiced through disclosure of the costing information.

GP contractors in the Hertfordshire Valley CCG geographical area

16. NHS England explained that GP Practices are reimbursed in accordance with the National Health Service (General Medical Services - Premises Costs) Directions 2013. The reimbursement is for the GMS agreed net internal area (NIA) only. For example, some parts of the net internal area may be excluded such as, if a pharmacy operates from the premise, or a former Primary Care Trust (PCT) have invested capital sums which require abatement for a period of between 5 – 15 years and/or non GMS services are delivered from part of the premise and sub-let by the practice (i.e. a private physiotherapy, counselling or complementary service etc.).
17. It went on that each practice agreed NIA (which is necessary to work out the cost per square metre) is confirmed by the District Valuer (DV) upon instruction by NHS England, depending on their individual circumstances/business arrangements. That agreed NIA will form the basis for on-going reimbursement, subject to market conditions at the time of rent reviews, unless the circumstances of the practice change and gain prior NHS England agreement to a business case made for an increase of NIA.
18. It said therefore, depending on individual circumstances, anomalies exist between the agreed area/cost per m2 against the actual size, age, condition and internal premises rating of a premise. It said that contractors are able to appeal the DV assessment of CMR should they disagree with the qualified assessment of the DV.
19. It argued that the commercial interests of GP contractors in the CCG geographical area requested would be prejudiced as the detail of their

reimbursed notional and/or rental premises costs per square metre is confidential to them and NHS England. It explained that some premises payments form part of the Health and Social Care Information Centre (HSCIC) in their report "NHS Payments to General Practice England, 2013/14 Experimental Statistics". The premises payments in the data sets attached to this report titled "nhspaymentsgp-13-14-anx" are a general figure. They do not indicate whether the amount for premises reimbursement includes reimbursable business rates, water rates, clinical waste, trade waste. They do not provide a cost per square metre or a cost per patient, nor does it show any details of age, size, type or condition of the building nor approved GMS NIA on which practices are reimbursed.

20. It said therefore in terms of commercial sensitivity, against this publically available general data set, individual practices cannot be advantaged or disadvantaged. Without detailed knowledge of each partnership a member of the public viewing this public data is unable to ascertain how many premises the costs relate to and therefore does not compromise commercial sensitivity. It provided a link to this document:

<http://www.hscic.gov.uk/catalogue/PUB16847/nhspaymentsgp-13-14-anx.xlsx>

21. In contrast it said that the data requested in this request is very specific. It identifies each practice and their specific costing. Therefore, releasing this level of detail would give advantage to other competitors or contractors in a commercial marketplace in general and in future procurement projects. It is also a level of detail which would not ordinarily be available to these practices or to any other contractor; public or private, due to the commercial sensitivity it attracts.
22. It went on that the advantage which could be gained is that bidders not qualified to survey and professionally assess the current market value of a particular premise and able to obtain the £/m² data through such a disclosure could artificially inflate this specialised market via their premises costings. Additionally, it could also be used to undercut other bidders creating an unfair procurement environment and risking undermining NHS England's established procurement process and those it must maintain as per the Public Contracts Regulations 2015.
23. NHS England clarified that other bidders would be any provider expressing an interest in and responding to a Primary Medical Services advertised opportunity. This will generally cover both public and private sector providers.

24. It said that pass through costs are shown in Invitations to Tender. They include a breakdown of lease rent, business rates, water rates, clinical waste costs, trade refuse but do not provide a cost per square metre and therefore tenderers do not provide an alternative value for the premises.
25. Tenderers do quote for providing the Primary Medical Services; taking into account the following: Contract duration and type, Commencement of the services, Local integration, Demographics/health profile, the Service detail requirements; i.e. Service location, Premises management, Patient registration numbers, Opening hours, GP practice services, Quality of service, Contingency arrangements, Delivering an appropriate local service (taking into account demographics/profile of patients), Prescribing, the Primary Care Strategy and local commissioning requirements, Quality, Staffing, Governance, Commercial and Financial, Operational/Mobilisation/Exit strategies.
26. It summarised that a GP has competitors in a procurement sense when an opportunity is advertised. Then, competitors will be any provider expressing an interest in and responding to the opportunity.

NHS England

27. It explained that NHS England, as contract holder, does not disclose any financial breakdown of contract costs agreed with the GP practice because this level of contract information is considered confidential between NHS England and the individual contract holder. It requires the permission of the Contract Holder to share any financial details with a third party.
28. NHS England does not have such permission nor feels it beneficial for the reasons outlined in this response to attempt to obtain this due to the damage disclosure would have to NHS England and the GP contractors themselves. It is also considered likely that such permission would not be granted. However, even if granted NHS England considers its own commercial interests to be at risk should this information be disclosed.
29. If disclosed, NHS England's commercial interests would be at risk in its ability to procure effectively, examples of this are: -
 - (i) NHS England, when procuring services, does not disclose its financial envelope to bidders. This is to ensure tenders are competitive

and assure value for money for patients, the wider public and the public purse.

(ii) If released it would harm the ability to prove compliance with due diligence processes during procurement of services.

(iii) It would leave NHS England open to challenge on procurement decisions, i.e. were successful tenders based on cost over quality and patient safety because of access to potential competitors' finance details.

30. NHS England explained that it has a number of procurement projects underway at present and planned for 2016. It said that there are a number of planned procurements for Primary Medical Services across NHS England – Midlands & East (Central Midlands) region. In addition a number of emergency procurements for caretaker services will be required, as and when existing Contractors retire and/or rescind their contracts for other reasons, e.g. ill health. While NHS England is unable to quantify numbers moving forward, it confirmed that the region has had to undertake a number emergency procurements already this year. All tenders with a value over the threshold of approximately £584,000 (over the total contract term) are advertised on <http://ted.europa.eu/TED/main/HomePage.do>
31. It went on that procurements need to ensure that there is sufficient information published, and it is equally available to all interested parties. Tenderers do need to know the premises costs that will be reimbursable under the contract and this is provided by the Commissioner as part of the tender documentation. NHS England, as Commissioner, does not however provide the cost per square metre of premises as a further breakdown of the premises costs. The local costs per square metre of GP premises are also not in the public domain for comparable purposes.
32. As such, it concluded that sharing this information would adversely impact on NHS England's ability to secure best value for money within such upcoming procurement processes.

Likelihood of prejudice

33. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."

34. In this case NHS England has argued that disclosure would prejudice its own commercial interests and the commercial of the relevant GP contractors.
35. To demonstrate that the prejudice would occur, NHS England must show that the prejudice occurring is more probable than not. This is a fairly high burden to meet. NHS England has argued that if this information were disclosed, it is more probable than not that potential competitors of the GP contractors and those who may submit bids in future NHS England procurements would use this information within such future procurements to gain a commercial advantage over these parties. It has explained that it has a number of procurement projects underway at present and planned for 2016. The withheld figures are live as they are the current market values determined per m2 specific to particular named GP practices. The Commissioner is therefore satisfied that this level of detail would be a commercial advantage to potential competitors within this area in direct competition with the GP contractors and in terms of NHS England's commercial position in the upcoming procurements.
36. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest in this case.

Public interest test

Public interest arguments in favour of disclosure

37. There is a public interest in NHS England's commitment to transparency and openness of information held by it alongside ensuring value for (public) money in a competitive commercial environment.

Public interest arguments in favour of maintaining the exemption

38. There is a strong public interests in ensuring that value for money is delivered for the taxpayer; that public bodies are able to procure and contract effectively; and that NHS England is able to meet its statutory obligation (in s. 13D of the NHS Act 2006) to discharge its functions efficiently, effectively and economically; and its further obligation to promote and assure open and fair procurement processes, which the disclosure of this information would compromise.

Balance of the public interest arguments

39. The Commissioner considers that there is a public interest in disclosure of the withheld information as it promotes openness and transparency around surrounding public spending within the NHS.

40. However, equally, the Commissioner does not consider that it would be in the public interest to damage the GP contractor's or NHS England's, commercial position by disclosure of current commercially sensitive pricing information which would be relied upon by their competitors/bidders to obtain a commercial advantage in upcoming procurements.
41. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly applied to withhold the requested information.

Right of appeal

42. 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

43. 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.
44. 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

Gemma Garvey
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