

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2017

Public Authority: West Hampshire Clinical Commissioning Group
Address: Omega House
112 Southampton Road
Eastleigh
Hampshire
SO50 5PB

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the West Hampshire Clinical Commissioning Group ("the CCG") for a number of separate pieces of information regarding Orthopaedic services. The CCG disclosed some of the information, explained that some information was not held and withheld some information under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that where the CCG has said that some of the requested information is not held she is satisfied that this is correct and that the CCG has complied with section 1 of FOIA. The Commissioner also found that most of the information withheld under section 43(2) was not exempt and should be disclosed. For a small amount of information the Commissioner accepted that section 43(2) was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The CCG shall disclose to the complainant the information falling within the scope of part 1 of the request with the exception that the information on pages 386 and 387 may be withheld under section 43(2).

4. 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 January 2016 the complainant made a freedom of information request to the CCG which asked for the following information:
 1. *A copy of the WHCCG contract with Southern Health NHS Foundation Trust for the provision of Orthopaedic Choice services.*
 2. *A copy of the WHCCG standard contract with Independent Service Providers i.e. BMI Sarum Road, Nuffield Hospital etc. which I understand is referred to as "Inter-provider transfers." Please also provide a copy of the Standard Letter WHCCG issued to independent providers referred to as "Elective Referral" which I have been advised is dated 01.04.2015.*
 3. *A copy of WHCCG blanket directions letter and information pack issued to General Practitioners last year instructing them to refer all of their registered patients with musculoskeletal conditions (550k registered patients according to the WHCCG website) to Southern Health NHS Foundation Trust "Orthopaedic Choice."*
 4. *Please confirm whether WHCCG MSK (Musculoskeletal) Service organised the one-day education training course for GPs on the "Orthopaedic Choice" procedure they must follow when referring their registered patients, with osteoarthritis and related bone conditions, for a "Direct Consultant Opinion." I understand from my conversations with WHCCG commissioning manager last year that this course was run in conjunction with Southern Health NHS Foundation Trust in October 2015. If the course was run by WHCCG, or they have a copy of the training course and related information, please send me a copy of the documents.*
 5. *Please confirm how many, of the 50k registered, patients GPs referred to "Orthopaedic Choice" in WHCCGs last financial year. Please confirm WHCCG's expenditure on "Orthopaedic Choice" services in the last financial year. Confirm the dates of the financial year and the month in that financial year when WHCCG instructed all GPs not to refer any patients for direct consultation with a consultant of the patients' choice or to a hospital or service of the patients' choice.*

6. The South Central and West Commissioning Support Unit (CSU) responded to the request on 22 February 2016 when it disclosed some information, confirmed that some information was not held and refused to disclose some information under the section 43 exemption (commercial interests). The Commissioner understands that the CSU administers FOIA requests on behalf of the CCG and so the Commissioner has referred to the CSU as if it were the CCG in this Decision Notice.
7. The complainant was not satisfied with the response she received and asked the CCG to carry out an internal review. It presented its findings on 8 June 2016. The review addressed some of the complainant's concerns but the complainant said that she remained dissatisfied with the response she received to certain elements of her request. The Commissioner has discussed the scope of the complainant's request below.

Scope of the case

8. On 27 October 2016 the complainant contacted the Commissioner to complain about the way her request for information had been handled. Following discussions with the complainant the Commissioner understands that she remains dissatisfied with the following elements of her request (using the same numbering as the request).

1. The CCG has refused to disclose its contract with the Southern Health Foundation Trust under the section 43(2) exemption. The complainant disputes that the exemption applies or else the public interest in disclosure outweighs the public interest in maintaining the exemption.

2. The complainant is not satisfied that she has been provided with a copy of the standard contract with independent service providers. In particular, she appears to be seeking copies of the CCG's specific contracts with BMI Sarum Road and the Nuffield Hospital rather than the general template which she was directed to on the NHS England website.

The complainant had also asked for the "Standard letter WHCCG issued to independent providers referred to as 'Elective Referral'". The CCG had said that it does not hold any information falling within the scope of the request but the complainant disputes this.

3. The complainant has said that the information leaflet and referral form that were sent to her do not meet the terms of this part of her request and that in particular she believes she has been sent "out of date, inaccurate information in response to my FOI Request which does not reflect the current referral process".
5. For this part of the request the complainant has complained that the CCG has not provided her with information regarding that element of her request which asked for the dates on which GP's were apparently told not to refer any patients for direct consultation with a consultant of the patients' choice or to a hospital or service of the patients' choice. Again, the complainant has said that she has recordings of telephone calls which show that the CCG did issue such instructions to GP's.
9. The Commissioner agreed to investigate the complainant's concerns as described above. Where the CCG has applied an exemption to withhold information the Commissioner will go on to consider whether the exemption was applied correctly. Where the complainant has said that she is unhappy with the information that was disclosed the Commissioner has considered whether the CCG holds any further information falling within the scope of the request.

Reasons for decision

Section 1 – information not held

10. For the most part the complainant is dissatisfied because the CCG has said that it does not hold the information she requested or else she does not accept that the information that was disclosed is the full extent of the information that is held or the correct information.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

Part 2

12. This part of the complainant's request asked for a copy of the CCG's "standard contract with Independent Service Providers...". In response

the CCG directed the complainant to the NHS England standard contract which is available on its website. However, the Commissioner is not happy with this response and during the course of the Commissioner's investigation suggested that in fact what she was seeking were copies of the CCG's actual contracts with the various services providers. The complainant suggested that the CCG has misinterpreted her request.

13. In responding to a request a public authority must interpret that request objectively. Where the meaning of a request is in dispute it is up to the Commissioner to decide whether the public authority's or the complainant's interpretation is an objective reading of the request.
14. The CCG has explained that it has contracts with numerous healthcare service providers. The contract form which it referred the complainant to is the NHS standard contract for all, it said, with the only differences being that the particulars change depending on the services being contracted. Therefore it said that the link it provided to the standard contract was appropriate.
15. The Commissioner has considered the terms of the request which asked for the "standard contract" and the CCG has clearly explained that it uses the NHS England standard contract which the Commissioner notes is "mandated by NHS England for use by Commissioners for all contracts for healthcare services". The Commissioner would take "standard contract" to mean a template contact such as this which includes details of the various clauses and schedules that would need to be included but without the specific details of any particular agreement.
16. In reaching her decision the Commissioner has also taken into account the fact that in part 1 of the request the complainant had clearly asked for "*the WHCCG contract with Southern Health NHS Foundation Trust for the provision of Orthopaedic Choice services*". This suggests that where the complainant wanted to see a specific contract she was quite able to phrase this as such and so in the Commissioner's view the CCG's interpretation of the request was objectively reasonable.
17. This part of the request had also asked for "a copy of the Standard Letter WHCCG issued to independent providers" which the CCG said it did not hold. The complainant disputed this and in particular has said that she has a recording of a telephone conversation with a service provider where they confirm that they have received such a letter.
18. At the internal review stage the CCG explained that it had searched for information using a time span of two months before and after the date in question in order to try and locate the letter referred to by the complainant. As a result the CCG was able to confirm that the requested

information was not held – i.e. a standard letter was not issued. However, it did find that a set of revised criteria was sent out relating to this contract and it now provided this information to the complainant.

19. During the course of her investigation the Commissioner asked the CCG to elaborate on the steps it had taken to search for the requested information. In response it explained that it performed the following extensive searches to locate a letter referred to as "Elective Referral". It said that the searches would have been likely to retrieve the relevant information because they focussed on potential senders and recipients and included key words that would have been in any relevant correspondence:
 - *Searched emails with each contract manager for each independent provider at the CSU on the date specified and a week before and after the requested date of 01/04/2015. No letter was found.*
 - *Searched all emails with CCG members with all staff involved in orthopaedic choice at the time – no letter relating to this was found, on the date specified and a week before and after the requested date 01/04/2015.*
 - *Searched all computer folders on the CCG network with Independent provider information in relating to the question and no such letter was found*
20. The CCG added that its search was conducted on networked resources and emails, and laptops where appropriate. It said that search terms used included (but were not limited to): "Elective Referral"; "Standard Letter"; "Orthopaedic Choice"; "Independent provider"; "guidance"; "orthopaedic".
21. The Commissioner has considered the CCG's handling of this aspect of the request and is satisfied that it has taken reasonable steps to search for the requested information and that on the balance of probabilities no information beyond that which has already been provided to the complainant is held.
22. The Commissioner also notes that the complainant was very specific in describing the information she is seeking. Notably, she has said explicitly that she was requesting the "standard letter" referred to as "Elective Referral". The CCG has clearly explained that it does not hold any information that meets the terms of her request. Nevertheless it has provided her with some relevant information and Commissioner is satisfied that the CCG has complied with this element of the request.

Part 3

23. For this part of the request the CCG disclosed a copy of what it termed the "information leaflet and referral form" and confirmed that no blanket directions letter was sent. However it did provide the complainant with an excerpt of a communication that was sent to GP's and which provided details of the new referral process. As noted above, the complainant has said that this information does not meet the terms of her request and has complained that she has been sent "out of date, inaccurate information in response to my FOI Request which does not reflect the current referral process".
24. In response to the complainant's concerns the CCG provided the Commissioner with a copy of the information leaflet which it disclosed to the complainant and which it confirmed was in use at the time she made her request. The Commissioner has considered the information the CCG has disclosed and compared this to the complainant's request. It appears to her that this information was in effect at the time she made her request and fulfils the terms of her request. It is unclear exactly why the complainant is unsatisfied with this information and again the Commissioner is satisfied that the CCG has complied with this element of the request.

Part 5

25. This part of the complainant's request asked the CCG to confirm, amongst other things:

"...the dates of the financial year and the month in that financial year when WHCCG instructed all GPs not to refer any patients for direct consultation with a consultant of the patients' choice or to a hospital or service of the patients' choice."

26. In response the CCG explained that it had not sent any communications to GP's with instructions of this kind and therefore the information was not held. It did however explain that it provides guidance to GPs on specific pathways. This guidance does not state that GPs cannot make direct referrals, and therefore does not fall within the scope of the complainant's request.
27. The Commissioner asked the CCG to explain the steps it had taken to confirm that no such instructions had been issued. In response it said that the following searches were done at the time the request was received and no information was found which supported the complainant's statement.

- *Email searches within the CCG to General Practices*
 - *Searches within the CCG folders (independent provider folders and MSK folder)*
 - *Searches dated within the financial year (time of the original request) as requested in the FOI*
 - *Key word searches, not limited to... 'Patient Choice' 'Orthopaedic Choice' 'Refer' 'independents'*
28. The Commissioner has considered the CCG's explanation and accepts that it has taken reasonable steps to search for information falling within the scope of the request and none was found. Therefore the Commissioner has concluded, on the balance of probabilities, that the requested information is not held.
29. It may well be that the guidance which the CCG has said it holds is the information which was referred to in the telephone conversation where the complainant said she was told that GP's had been given the instructions she described. However, due to the very specific way in which she phrased her request, this information would not fall within its scope because it does not state that GP's cannot make direct referrals.

Section 43(2) – commercial interests

30. The CCG has withheld the copy of the contract at part 1 of the request under the exemption in section 43(2) which provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person including the public authority holding it.
31. The CCG has provided the Commissioner with a copy of the contract and explained that it is applying section 43(2) because in its view disclosure would be likely to prejudice the commercial interests of Southern Health NHS Foundation Trust as well as its own interests.
32. In order for a prejudice based exemption, such as 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 applicable interests within the relevant exemption;
 - 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 which the

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

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes 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 to discharge.
33. Furthermore, when a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
 34. The Commissioner's guidance explains 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. In this case the withheld information comprises a commercial contract between the CCG and Southern Health Foundation Trust for the provision of medical services to its patients. The information clearly relates to a commercial service and the Commissioner accepts that the prejudice envisaged by the CCG falls within the scope of the exemption. The Commissioner is satisfied that this first element of the test is met.
 35. As regards the nature of the prejudice the CCG said that in its view disclosure would be likely to prejudice its ability to participate effectively in a competitive market. This is because, it said, disclosure would make it harder for the CCG to obtain best value through fair competition. It also said that disclosure would be likely to put the current provider, Southern Health Foundation Trust, at a disadvantage during any re-procurement because data on 'spend per patient' would be available to other competitors.
 36. The CCG also suggested that section 43(2) was engaged because disclosure would constitute a breach of confidentiality which would lead to a lack of trust from current and future providers. It also said that because of this the CCG may put itself at the risk of legal challenge. To

be clear, the Commissioner has not taken these arguments into account because they do not relate to commercial interests. To engage an exemption a public authority must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect. Arguments about prejudice to any other interests will not engage the exemption. Therefore, arguments surrounding loss of confidentiality are more properly considered under the section 41 (Information provided in confidence) exemption and are not relevant here.

37. In applying the exemption the CCG confirmed that it had contacted Southern Health which said that it did not consent to disclosure. It provided the Commissioner with a letter from Southern Health where it explained that it was concerned that disclosure would allow anyone to readily calculate the costings and arrangements it has agreed for the provision of its service. It suggested that a private provider could use the information to assess these costs and potentially undercut them. This could in turn lead to a competitor winning future contracts ahead of Southern Health, it said. It went on to say that if the service covered by the contract should be put out to tender it believed that it would be put at an unfair disadvantage because information on 'spend per patient' would be available to its competitors.
38. The Commissioner has considered the CCG's and Southern Health's concerns and reviewed the withheld contract which is almost 500 pages in length. Whilst the Commissioner is prepared to accept that some information may potentially be of use to a competitor, it is also apparent that a very significant portion of the contract is relatively innocuous, and it is very difficult to see how disclosure would prejudice the commercial interests of any party. Indeed much of the contract is made up of standard clauses and schedules that one would expect to find in a contract of this kind and are not sensitive or unique to this agreement. For instance, much of the information concerns details about the level of service the CCG expects from the service provider rather than information about how Southern Health intends to meet that service or information which would be particularly unique to Southern Health. Therefore, for much of the information the Commissioner considers that the CCG has not properly explained how disclosure would prejudice its interests or those of Southern Health.
39. It is apparent that the CCG have applied the section 43(2) exemption in a blanket fashion without properly considering the impact of disclosure of the different parts of the agreement. The CCG need to be able to identify what information they consider to be commercially sensitive and which would be valuable to a competitor and they need to explain why if they want to successfully apply this exemption. With this in mind the

Commissioner contacted the CCG after she had received its arguments to make it clear that she would be unlikely to uphold the exemption to the whole contract in its entirety and that it should give some more thought to which elements of the contract were particularly sensitive. The Commissioner explained that she has a lot of experience in considering disclosure of large public sector contracts, especially within the NHS and that it is incumbent on public authorities to identify the information that would genuinely give rise to commercial prejudice if it was disclosed. She invited the CCG to provide further arguments in support of its position and in doing so noted that its arguments around disclosure of information on 'spend per patient' would only apply to a fraction of the information contained within the contract. Unfortunately, the CCG failed to provide the Commissioner with any further explanation as to why the information contained within the contract was commercially sensitive.

40. The Commissioner finds this lack of engagement from the CCG very disappointing, but she also takes it as an indication that the CCG is perhaps not overly concerned about the consequences of disclosure. In light of this the Commissioner finds that the vast majority of the information contained within the contract is not exempt as it not obvious to her how disclosure would be beneficial to competitors of Southern Health or how disclosure would make it harder for the CCG to obtain best value in any future tender. Therefore the Commissioner has decided that for the majority of the information contained within the contract the CCG has failed to demonstrate that a causal relationship exists between the disclosure of the information and the prejudice it envisages and consequently section 43 is not engaged.
41. However, given that the CCG has raised specific concerns about the disclosure of information on 'costings' and 'spend per patient' the Commissioner has considered whether disclosure of this particular type of information would give rise to the prejudice the CCG envisages. However, in the absence of any detailed explanation from the CCG the Commissioner would extend this only to what she considers the most obviously sensitive information which can be clearly identified within the withheld contract. The Commissioner is not prepared to speculate on the CCG's behalf about why information might prejudice a party's commercial interests.
42. The Commissioner has found that pages 386 and 387 of the contract deal with the value of the contract and the cost of the various services Southern Health has been contracted to provide. The Commissioner is satisfied that a link can be drawn between disclosure of this information and the commercial interests of both Southern Health and the CCG's commercial interests being prejudiced. This is because the information

reveals how much Southern Health charges to provide different services to the CCG. If this information was disclosed it is reasonable to conclude that a competitor of Southern Health could use it to tailor their own bid in any future tendering exercise so as to undercut them. It may also make it harder for the CCG to obtain best value as potential providers would have a better idea of what the CCG would be willing to pay in order to secure a contract to provide different services. The Commissioner is satisfied that section 43(2) can be applied to this information and she has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

43. The complainant argued that disclosure of the contract would promote transparency. In particular she said that she wanted to see how the contract with Southern Health NHS Foundation Trust had been agreed and on what basis it accepts referrals of patients from the West Hampshire CCG.
44. For its part the CCG said that it recognised that there was a public interest in the disclosure of information which facilitates the accountability and transparency of public bodies for decisions taken by them.

Public interest arguments in favour of maintaining the exemption

45. The CCG advanced a number of arguments in support of its position that the public interest favoured maintaining the section 43(2) exemption. The relevant arguments are reproduced below:
 - *Publication of the information requested, namely the entire contract relating to Southern Health Foundation Trust including the Orthopaedic Choice service, could give future potential providers an unfair advantage in negotiating contracts with the CCG as disclosure would allow any member of the public with access to the information to readily calculate the various costings and arrangements agreed for the provision of this service. This in turn could increase the cost of these services provided under NHS contracts in the CCG area, which would not be beneficial to the public.*
 - *Release of such detailed information would constitute a breach of confidentiality with the provider, which would lead to lack of trust*

not only from the current but also future providers, thus restricting future competition for tenders and would prejudice the CCG's ability to obtain best quality of service and value, potentially impacting on budgets set within NHS West Hampshire CCG and the NHS which is not in the public interest. The CCG approached Southern Health FT to ask if they would support release of the contract in this matter, and has written confirmation that Southern Health would not agree to the release of the contract.

- Disclosure of the information requested could increase the risk of collusion between future bidders for these services with the possibility of price/service setting as a 'ring', which could undermine the integrity and competitive nature of procurement and would not be in the public interest.*
- Disclosure would restrict the submission of truly competitive bids in future tender processes and impact on the CCG's ability to obtain best quality of service through fair competition.*

Balance of the public interest arguments

46. The Commissioner has considered the competing arguments and would accept that there is a public interest in disclosure insofar as this would promote transparency and accountability around the spending of public money. However, this also has to be balanced against the prejudice that would be caused to the commercial interests of the CCG and Southern Health.
47. The Commissioner does not consider that it would be in the public interest to damage Southern Health's commercial position by disclosure of commercially sensitive information which would be likely to be relied upon by their competitors to obtain a commercial advantage in any future procurement. The Commissioner is also satisfied that disclosure would be likely to prejudice the commercial interests of the CCG because if a bidder in any future procurement knew the price they had to beat they would have less incentive to submit a tender that significantly undercuts the price to provide the particular services.
48. In the Commissioner's view there is very strong and inherent public interest in ensuring fairness of competition and it would be firmly against the public interest if Southern Health's commercial interests are harmed to the advantage of its private competitors. Furthermore, the Commissioner also finds that there is an inherent, and very strong, public interest in ensuring that the CCG's own commercial interests are not undermined as this ultimately protects the NHS and public funds.

49. For these reasons the Commissioner has decided that for the information regarding the value of the contract and costs, the public interest in protecting the commercial interests of Southern Health NHS Foundation Trust and the CCG, outweighs the public interest in disclosure.

Other matters

50. Throughout this investigation the Commissioner has been disappointed by the lack of engagement from the South Central and West Commissioning Support Unit (acting on behalf of the CCG) and its delay or failure to respond to her enquiries. It failed to meet deadlines set by the Commissioner and promises to send information or answer her questions were repeatedly broken.
51. The Commissioner first wrote to the CSU with details of the complaint on 11 May 2017 and asked for a response within 20 working days. Despite several reminders the Commissioner did not receive a response until 14 September 2017. The CSU did not send a copy of the withheld contract, as requested by the Commissioner, until 24 October 2017 – a delay of over 5 months.
52. The CSU's failings in this case have frustrated the Commissioner's investigation and on this occasion she finds it necessary to place this on record as part of this decision notice.

Right of appeal

53. 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

54. 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.
55. 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

**Paul Warbrick
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