

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 January 2019

Public Authority: Royal Liverpool and Broadgreen University
Hospitals NHS Trust

Address: Pembroke House
Prescot Street
Liverpool
L7 8XP

Decision (including any steps ordered)

1. The complainant has requested Clinical Pathology Accreditation (CPA) and/or the United Kingdom Accreditation Service (UKAS) reports/correspondence from 2016 to the date of his request for all laboratories under the Royal Liverpool and Broadgreen University Hospitals NHS Trust (RLBUHT) management concerning the revoking of laboratory accreditation.
2. The Commissioner's decision is that RLBUHT has correctly applied section 43(2) of the FOIA to the requested information and that the public interest favours maintaining the exemption. However, the Commissioner's decision is that the RLBUHT has breached section 10(1) of the FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 2 March 2018, the complainant wrote to RLBUHT and requested information in the following terms:

"To whom it may concern I understand that a laboratory in the

Royal Liverpool has had its accreditation revoked. Please supply all the CPA and/or UKAS reports for all the laboratories

under the management of the Royal Liverpool Hospital (be they a Joint Venture, hub lab, spoke lab or otherwise) for ALL laboratory disciplines for the period 2016 to date. This is to include any interim report documentation or conditional offers of accreditation. Please supply a copy of the correspondence which revoked the Laboratory accreditation.”

5. The RLBUHT responded on 29 May 2018 well beyond the statutory timeframe and refused to provide the requested information citing section 43(2) of the FOIA – prejudice to commercial interests.
6. Following an internal review the RLBUHT wrote to the complainant on 5 June 2018. It maintained its original position that section 43(2) applied. It also explained that the laboratories were CPA accredited but were in the process of transitioning to UKAS accreditation.
7. The public authority subsequently provided the Commissioner with the information it had withheld and later confirmed to her that it was the entirety of the requested information.

Scope of the case

8. The complainant first contacted the Commissioner on 4 May 2018 to complain about the way his request for information had been handled. He argued that the information he requested should be readily available to the public.
9. The Commissioner considers that the scope of this investigation concerns whether RLBUHT was correct in applying section 43(2) to the requested information.

Background

10. Liverpool Clinical Laboratories (LCL) is a joint contractual venture between the Royal Liverpool and Broadgreen University Hospitals NHS Trust (RLBUHT) and Aintree University NHS Foundation Trust, with the RLBUHT being the host organisation and having legal responsibility. LCL provides commercial laboratory services locally, regionally and nationally to other organisations which generates income.

11. The public authority has provided the Commissioner with some background information that she requested concerning the CPA and UKAS for ease of understanding.
12. In 2010 the CPA became part of UKAS and there was a transition process, moving laboratory accreditation from CPA standards to an internationally specified standard, "ISO 15189 Medical laboratories – Requirements for quality and competence".
13. UKAS assessors visit laboratories to assess and accredit the laboratory tests, based on laboratory compliance with ISO 15189. To ensure a thorough assessment, UKAS assessors must have access to confidential information. Reports produced by UKAS assessors contain confidential and commercially sensitive information and are managed in line with the agreement that laboratories sign with UKAS.

Reasons for decision

Section 43(2)

14. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
15. The Commissioner has defined the meaning of the term "commercial interests" in her guidance on the application of section 43 as follows:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity"¹

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
16. The exemption is subject to the public interest test which means that even if the exemption is engaged the Commissioner needs to assess whether it is in the public interest to release the information.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

17. The complainant's view is that the requested information should be readily available. He argues that the fact that accreditation has been removed from a laboratory responsible for cancer tests for patients in Merseyside and that the reports are referenced on RLBUHT's website should warrant their disclosure. He supports this view by stating that the LCL is to be the "hub" for all NHS laboratories in Cheshire and Merseyside.
18. RLBUHT applied this exemption because it believes that the requested information is confidential and to release it would cause prejudice to itself. Assessment reports are marked 'commercial in confidence' and that is the basis on which the assessment report was written.
19. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - 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. Any prejudice that results must also be real, actual or of substance.
 - Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice occurring.
20. RLBUHT explained that the requested information was withheld because it contains detailed information that is specific to the operations of the LCL Cellular Pathology Laboratory, significantly the Cytopathology section. The findings of this assessment have the potential to impact on LCL's current and future business and services. The loss of accredited status can be found on the UKAS site.²

² <https://www.ukas.com/services/other-services/sanctions/organisations-under-sanction/>

21. RLBUHT has explained that LCL is a joint contractual venture (see Background) for which it is the host. LCL provides commercial laboratory services and bids for contracts like any other commercial operation. LCL generates income for RLBUHT.
22. The Commissioner agrees that the actual harm is to the public authority's commercial interests. She is satisfied that the first criterion is met.
23. RLBUHT believes that the release of the information might affect LCL's reputation and the potential loss of valuable contracts with other organisations both within and outside the catchment area that it currently provides commercial laboratory services to. It could also mean that opportunities to win additional business are compromised and therefore it has the potential to prejudice its future commercial activities.
24. The Commissioner also accepts that there is a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect, therefore the second criterion is met.
25. Finally, the Commissioner needs to establish whether the level of likelihood of prejudice that is being relied upon by RLBUHT is met. To meet the lower threshold of "would be likely to" result in prejudice, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. Regarding the higher threshold, there must be a stronger evidential burden on the public authority and prejudice must be more likely than not.
26. The public authority has not explicitly claimed the higher threshold or the lower threshold but it is clear from its submission that its arguments are set at the lower bar. The Commissioner considers that the disclosure of this information "would be likely to prejudice" RLBUHT's commercial interests because the release of the requested information is likely to be used by its commercial competitors to its detriment and consequently affect its future commercial prospects when bidding for contracts. The third criterion has therefore been met and the exemption is engaged.
27. Although the Commissioner accepts that the exemption is engaged, it is necessary for her to go on to consider whether the public interest favours maintaining the exemption or disclosing the requested information.

Public interest arguments in favour of disclosure

28. The complainant's view is that there is a reluctance to release report information containing the reasons for the removal of the accreditation from the laboratory carrying out cancer tests on NHS patients. He suggests that there is a legitimate public interest in knowing why accreditation was removed. His view is that it is a monopoly, there is no commercial competition and the information has been withheld because the service is poor.
29. RLBUHT provided little in the way of argument in favour of disclosure but their view is that it has considered the right to disclosure against the destabilisation to the service that might ensue as a result of the loss of current or future commercial activities.

Public interest arguments in favour of maintaining the exemption

30. RLBUHT judged it highly probable that the withheld information contains information that could be used by both NHS and commercial competitors within the geographical area to gain a commercial advantage which would be likely to be detrimental to the business and the services it provides to the public.

Balance of the public interest arguments

31. The Commissioner has carefully considered the benefits of transparency in this instance due to the importance of LCL's ability to carry out medical work on which the public depends. There is clearly a benefit in the public knowing that RLBUHT is running its laboratories effectively and safely. However, she considers that transparency is served by the accreditation outcome itself being available to the public.
32. The current status of the LCL laboratories is on the LCL site and is explained as follows:

*"All laboratories are UKAS accredited to ISO 15189:2012 apart from The Histopathology Service which is awaiting a UKAS assessment to include the service in the Cytology scope of accreditation (UKS ref 7924)..."*³

³ <https://www.liverpoolcl.nhs.uk/about-lcl/>

33. The fact that the Histopathology service had had its accreditation suspended is published on RLBUHT's website, though not in a prominent place⁴:

"LCL Governance Report:

- CPA accreditation has been suspended for the Histopathology service for 3 months following assessment in December. The status of this accreditation would be reviewed after 3 months and following satisfactory clearance of the findings. All other laboratories have maintained CPA accreditation and were offered UKAS accreditations to ISO 15189 following initial assessment subject to clearance of findings."*
34. As previously explained in this decision notice, the assessment reports are classed as 'commercial in confidence', UKAS has made its assessment and the outcome is available to the public on its website.
35. The Commissioner considers that the level of technical understanding and ability to assess performance that would be required to understand some of the matters under consideration during an accreditation process would not aid the public understanding. It would also place LCL under a level of scrutiny that other laboratories operating in a commercial marketplace would not be subject to. The public interest in this case lies in allowing the accreditation body UKAS to take decisions about accredited status as the body tasked with protecting the public and improving standards.
36. The disclosure of this information is likely to lead to speculation, regarding a situation that may have been remedied or be undergoing a process of amendment. The Commissioner is also persuaded that competitors may gain an unfair advantage if this information were to be disclosed. The resultant detriment to LCL's ability to compete in the marketplace would not be in the public interest. The Commissioner agrees with RLBUHT that any loss of income is not in the public interest. The information has been withheld appropriately for the reasons given in this notice.

Section 10 – time for compliance

37. Section 1(1) of the FOIA states that:
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⁴ <https://www.rlbuhth.nhs.uk/media/6044/20180227-public-trust-board-e-version.pdf>

"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."

38. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
39. The Commissioner finds that RLBUHT did not deal with the request for information within the appropriate time frame and therefore breached section 10(1).

Right of appeal

40. 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

41. 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.
42. 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

Pamela Clements
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Wycliffe House
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SK9 5AF