

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 July 2019

**Public Authority:** Health & Social Care Business Services Organisation (HSCBSO)

**Address:** Franklin Street  
Belfast  
BT2 8DQ

### Decision (including any steps ordered)

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1. The complainant requested information relating to 11 practices grouped together as [named dental group]. In particular he requested the amount paid by HSCBSO for the practice allowance and whether the practice allowance was paid at 4% or 11%.
2. HSCBSO refused to disclose the requested information under section 40(2) FOIA.
3. The Commissioner considers that HSCBSO correctly applied section 40(2) FOIA.
4. The Commissioner requires no steps to be taken.

### Request and response

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5. On 20 August 2018 the complainant requested information of the following description:  
  
"Please find attached my Freedom of Information request for the attached information on the whether the Practice Allowance has been paid by the BSO for the 11 practices grouped together as [named dental group] and if so, the value of the allowance paid and if so at what rate i.e. 4 or 11 %. If no allowance has been paid, please confirm that no allowance has been paid for that practice."

In order to make this request easier to compile, I have attached a spreadsheet partially completed with the information that I am aware of."

6. On 5 September 2018 HSCBSO responded. It refused to provide the requested information under section 40(2) FOIA.
7. As the complainant was dissatisfied with the response he requested an internal review on 6 September 2018.
8. On 25 September 2018, HSCBSO wrote to the complainant with the result of the internal review. It upheld its application of section 40(2) FOIA to the withheld information.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 20 November 2018 to complaint about the way his request for information had been handled.
10. The Commissioner has considered whether HSCBSO was correct to refuse to disclose the information requested under section 40(2) FOIA.

### **Reasons for decision**

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#### **Section 40(2) personal information**

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a) . This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

## **Is the information personal data?**

15. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. In this case HSCBSO has explained that the Health and Personal Social Services (Northern Ireland) Order 1972 and the General Dental Services Regulations (Northern Ireland) 1993, in Northern Ireland, allows only for the Health and Social Care Board (HSCB) to make arrangements for the provision of general dental services with individual dental practitioners. HSCBSO provides a service to HSCB, whereby it manages payments to practitioners on HSCB's behalf. HSCB/HSCBSO cannot make arrangements with a commercial entity to provide general dental services: arrangements with individual dentists are not transferable and under the General Dental Services regulations therefore HSCB/HSCBSO cannot commission or contract with a corporate body/limited company. There is no contractual relationship between HSCB/HSCBSO and a corporate body (in this instance, [named dental group]), and as such any payments made to individual dentists constitutes their personal information, and not commercial information.
20. HSCBSO provided the Commissioner with a sample of the withheld information, which does include with the breakdown of payments the 'Practice Allowance'. HSCBSO reiterated that the 'Practice Allowance', along with all other payments, are personal to the dentist (the individual) and not to the practice itself.
21. HSCBSO explained that the practice allowance is paid to one 'designated dentist' within each practice. The names of all dentists (along with the practice they operate from) is published on HSCBSO's website:

<http://www.hscbusiness.hscni.net/2070.htm>

22. It said that if HSCBSO removed / anonymised the name of the designated dentist, whilst providing the name of the practice, it argued that it would only require simple look-up process to identify the dentist from the above published spreadsheet.
23. Furthermore it clarified that allowance payments of 4% or 11% are paid under certain conditions. These conditions are set out within the Statement of Dental Remuneration, available at:

<http://www.hscbusiness.hscni.net/pdf/STATEMENT%20OF%20DENTAL%20REMUNERATION%202017-18.pdf>.

It said that providing the practice allowance for this small cohort of dentists, particularly if the allowance percentage was disclosed, would enable the identification of these individuals.

24. In the circumstances of this case, the Commissioner is satisfied that the requested information, payments made to specific dentists (in particular the amount of 'practice Allowance' paid) does constitute the personal information of the individuals the payments were made to. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

27. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

28. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

30. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child” .

31. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
  - i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
32. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

33. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
34. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. The complainant acknowledges that HSCBSO contracts directly with dentists to perform dental services on behalf of the NHS in Northern Ireland. The NHS makes payments to the dentist for treatment provided. These payments are usually assigned to the practice owner by way of a bank mandate from whose premises are used to provide the services under a contractual agreement between the practice owner and the dentist concerned. However, the practice owner is also entitled to receive additional payments from the NHS for the use of dental equipment and premises owned by the owner which includes reimbursement payments for rates on the premises owned or rented by the practice owner, or capital grants for dental equipment used for the provision of NHS dentistry or a six monthly practice allowance

payment meant specifically for the practice owner for making available the practice premises for the provision of NHS dentistry.

36. The complainant has explained that in total, all of the above payments along with the payment of dental fees makes up the practice owner's income, some of which are shared with the dentist but some meant exclusively for the benefit of the practice owner.
37. The HSCBSO requires the information for the reimbursement of business rates i.e. copies of the actual paid receipts for business rates, or paid receipts of capital equipment paid or the percentage split of private dentistry to NHS dentistry to be provided and certified by the practice owner. The HSCBSO prefers to use the existing bank mandate of an NHS dentist to use as a conduit to make payment to the practice owner even though the said dentist has never paid the rates bills, or the capital equipment or is required to open a dental practice to make suitable for NHS dentistry
38. HSCBSO takes the view that it cannot share any information on the timing and payment for above rates, capitation and practice grants monies intended for the practice owner on the grounds that this information is personal to the dentist to whom the payment was made by the HSCBSO despite the practice owner's being required to provide the information in the first place.
39. As a result, this lack of transparency is causing a significant degree of business risk in trying to recover and reconcile amounts paid to dentists who have actual interests in these payments.
40. The Commissioner can see that the complainant has a private business interest in disclosure of the withheld information. The Commissioner also recognises the broad general public interest in accountability and transparency, particularly in relation to the spending of public funds.

### **Is disclosure necessary?**

41. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
42. The Commissioner considers that disclosure of the withheld information would be necessary to meet the legitimate interests set out above.

## **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
44. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
45. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
47. Disclosure under FOIA is tantamount to publication to the world at large. The Commissioner must therefore balance the legitimate interests with the data subject's interests when determining whether the information can be disclosed into the public domain and not just to the complainant.
48. HSCBSO has argued that there is no expectation on the part of the data subjects that their information would be made public. HSCBSO believes that the release of such personal information would be likely to cause significant distress to these individuals, particularly as it would reveal details of their financial affairs.

49. The Commissioner considers that disclosure of payments made to individual dentists would reveal information regarding the data subject's financial affairs. The Commissioner accepts that the data subjects in this case are unlikely to expect that this information would be disclosed into the public domain.
50. The Commissioner also accepts that the complainant has a private legitimate interest in the withheld information however she does not consider that disclosure of the payments made to individual dentists into the public domain would be justified by this private interest. Whilst there is also a general public interest in transparency with regard to the spending of public funds, she again does not consider that this justifies the disclosure of payments made to individual dentists.
51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
52. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
53. The Commissioner has therefore decided that HSC BSO was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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54. 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@Justice.gov.uk](mailto:grc@Justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

55. 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.
56. 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**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**