

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2021

Public Authority: NHS Business Services Authority
Address: Stella House
Goldcrest Way
Newburn Riverside
Newcastle upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant has requested copies of complaints made to the Pension Regulator and any responses received. NHS Business Services Authority ("NHSBSA") provided some redacted information, but withheld the remainder. It relied on section 43(2) of the FOIA (commercial interests) and section 44(1) of the FOIA (statutory prohibition on disclosure) in order to do so.
2. The Commissioner's decision is that NHSBSA has correctly relied upon section 44 of the FOIA to withhold information. However, it has not demonstrated that section 43(2) of the FOIA is engaged and is thus not entitled to rely on that exemption. NHSBSA also breached sections 10 and 17 of the FOIA respectively in responding to the request.
3. The Commissioner requires NHSBSA to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, copies of the two BoL reports it has shown to the Commissioner. NHSBSA may only redact the PSR numbers and the personal data that it has already highlighted.
4. NHSBSA 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 June 2020, the complainant wrote to NHSBSA and requested information in the following terms:

"During a meeting on 26 February 2020 between the BMA and NHS Pensions, it was disclosed that NHSBSA had reported PCSE to The Pensions Regulator about not receiving certain up-to-date data from PCSE required for GP pension calculations. The following questions are submitted as a Freedom of Information request. (1) Has NHSBSA referred PCSE to The Pension Regulator? (2) If so, please provide a copy of the communication sent."

6. NHSBSA responded on 13 July 2020. It stated that it needed further details in order to identify the requested information and asked for clarification as to which communication was being referred to.

7. The complainant responded on 10 August 2020 to say that:

"Beyond disclosure of a complaint being raised by NHSBSA about PCSE to The Pensions Regulator, we are not aware of the details surrounding this complaint so are unable to provide further information.

"[1] Could you please confirm if NHSBSA has informally complained about or formally reported PCSE and/or Capita to The Pensions Regulator within the last 7 years, and

"[2] if so provide a copy of the complaint and

"[3] any response."¹

8. NHSBSA responded to the clarified request on 8 September 2020. It confirmed that a complaint had been made (element [1]), but in respect of the remaining elements, it considered that a qualified exemption would apply and it needed further time to consider the balance of the public interest.

9. On 6 October 2020, NHSBSA issued a further response in respect of all three elements. It broadly maintained its stance in respect of element [1] – although it clarified that the complaint had been submitted against

¹ The complainant did not break their request down into its component elements. The Commissioner has done so in order to make the following analysis easier to understand.

NHS England (as the employer) and not PCSE (the administrator). In respect of elements [2] and [3] (which it dealt with together), it now amended its position and claimed that the information it held was exempt under section 44 of the FOIA.

10. Following an internal review NHSBSA wrote to the complainant on 4 December 2020. In respect of element [3], it maintained its stance that section 44 of the FOIA was engaged. In respect of element [2], it now disclosed some redacted information. It mainly relied upon section 43(2) of the FOIA to withhold the information it had redacted, however it also relied upon section 31 of the FOIA (law enforcement) to withhold the PSR number and section 40(2) of the FOIA (personal data) to withhold some names and contact details.

Scope of the case

11. The complainant contacted the Commissioner on 11 January 2021 to complain about the way their request for information had been handled.
12. The complainant's original correspondence focused exclusively on NHSBSA's use of section 43(2) and the Commissioner's original letter to NHSBSA reflected that focus. However, NHSBSA emphasised that it was prohibited from sharing information within the scope of element [3] by the Pensions Act 2004 and questioned the Commissioner's powers to even seek such information for the purposes of her investigation. However, as the complainant has not taken issue with the way these exemptions were applied, the Commissioner has not considered, as part of her decision, whether NHSBSA was entitled to rely on either section 31, 40(2) or 44 of the FOIA respectively.

Background

13. Primary Care Support England (PCSE), run by Capita, is contracted by NHS England to deliver primary care support services to General Practitioners, pharmacies, dentists and opticians. This includes functions relating to the administration of NHS pensions such as ensuring pension contributions are accurately recorded and that the general administration of pensions is processed efficiently.

Reasons for decision

Section 43 – Commercial Interests

14. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

15. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
16. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for any third party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

NHSBSA's position

17. NHSBSA explained in its response that disclosure "would" prejudice the commercial interests of third parties and itself. It stated that harm would accrue to NHS England, to PCSE and to its parent company, Capita.
18. The Commissioner asked NHSBSA to provide a "detailed explanation to support the position that disclosure of the withheld information would (or would be likely to) prejudice a party's commercial interests." NHSBSA's response to that question was to say that:

"NHS England have confirmed that as this relates to the performance of one of their suppliers the disclosure would likely to result in legal action by the supplier." [sic]

19. Given that the prospect of litigation had already been raised in NHSBSA's internal review, the Commissioner asked it to explain why PCSE would be likely to have an actionable claim against NHS England if it were to disclose the withheld information. NHSBSA's response was:

"Releasing this information would impact the Commercial relationship of NHS England with a critical supplier."

20. Finally, the Commissioner asked NHSBSA to clarify the basis on which it had concluded that a third party's commercial interest would be prejudiced and it explained that:

"We have asked NHS England for their views and have provided a copy of correspondence with them. Disclosure would:

- Prejudice and weaken current working relationships between Capita/PCSE, NHS England and NHS Business Services Authority to resolve the complaints raised.*
- Have a potentially serious detrimental effect on the commercial interests of NHS England due to any legal action taken by PCSE/Capita."*

21. NHSBSA did provide several email chains between itself and NHS England in which it discussed drafting amendments to its refusal notice and its submission to the Commissioner.

The Commissioner's position

22. The Commissioner considers that such cursory explanations as those provided above are rarely likely to demonstrate that a prejudice-based exemption is engaged and do not do so here.
23. The Commissioner is particularly disappointed that, despite having raised the point specifically in her correspondence, NHSBSA has been unable to explain why PCSE/Capita would be likely to have an actionable claim against NHS England – or indeed why they would have a claim in the first place – if it disclosed the withheld information.
24. NHS England and NHSBSA are two separate legal entities. NHS England is not responsible for NHSBSA's actions. If PCSE/Capita took issue with a complaint being made by NHSBSA, it should take the matter up with NHSBSA. It is not clear to the Commissioner – and NHSBSA has failed to explain, despite prompting – what exact claim it believes PCSE/Capita would even have against NHS England – let alone explained why such a claim would be actionable.
25. It is not sufficient for a public authority to merely assert a likelihood of litigation. Threats of litigation against public authorities are not uncommon – although successful actions are. It must be able to provide a rational basis on which litigation could be brought and demonstrate that such action would have some prospect of success.
26. In the supporting documentation, vague references have been made to "breach of contract", "performance" and to "contract mechanisms" but no rationale has been put forward to explain what the relevant

contractual clauses are, why disclosure of the withheld information would breach those clauses and why NHS England would be held responsible for those breaches.

27. The Commissioner notes that issues with the PCSE contract were well-documented at the time the complaint was submitted. The NAO published a critical report in 2018 about the handling of the contract by both NHS England and Capita.² In that report, the NAO noted that:

"basic principles of the contract are still not agreed, which limits NHS England's ability to hold Capita to account."

Therefore the Commissioner considers that, to the extent that the withheld information touches on performance issues, issues regarding performance had already been aired and discussed via the NAO report. It is difficult to see what else is contained within the withheld information that would cause additional prejudice to the "working relationship" that the NAO has not already raised.

28. Furthermore, NHSBSA has asserted in its submission that:

"The information in the complaint is already in the public domain and can be accessed using an internet search engine. There is no or very limited public benefit gained from the disclosure...GP NHS Pension members are already aware of the complaint as this is important information, they need to take account of when completing their annual certificate of pensionable pay."

29. The Commissioner has carried out her own simple searches using keywords such as "TPR [the Pensions Regulator] receives complaint about PCSE", "NHSBSA makes complaint to TPR" "complaint to the pensions regulator about PCSE" and "NHSBSA makes complaint to the pensions regulator about NHS England." None of these searches return results that confirm that a complaint had been made – let alone what the substance of the complaint was.
30. NHSBSA also provided the Commissioner with a document highlighting several links to information already in the public domain. However, whilst these articles do record frustration about the performance of

² <https://www.nao.org.uk/wp-content/uploads/2018/05/NHS-Englands-management-of-the-primary-care-support-services-contract-with-Capita.pdf>

PCSE, they do not record a complaint having been made – by NHSBSA or anyone else.

31. The Commissioner considers that NHSBSA cannot have it both ways. If the details of the complaint (and the fact that it was submitted), were already in the public domain at the time of the request then no further commercial prejudice can result from disclosure. On the other hand, if the information is not in fact in the public domain, there may well be a strong public interest in disclosure – given the number of potentially-affected people.
32. The Commissioner considers that the information being withheld in this case is the exact grounds on which NHSBSA submitted its complaint. Whilst this may (or may not) have some overlap with the most common frustrations being expressed by GPs and others, it does not follow that such information is in the public domain.
33. In summary, NHSBSA has failed to explain to explain exactly what commercial prejudice would result from disclosure of this particular information. It's ability to do so would not have been helped by the cursory explanations it received from NHS England. NHS England had a clear reluctance to allow any of the information to be disclosed, but failed to provide adequate explanations as to why that was the case. The Commissioner therefore takes the view that NHSBSA has failed to demonstrate that section 43(2) is engaged and it thus follows that it is not entitled to rely on the exemption.
34. As the exemption is not engaged, the Commissioner is not required to consider the balance of the public interest. However, had she done so, she may well have concluded that the balance of the public interest would favour disclosure – given the number of individuals who would potentially be affected.

Procedural matters

35. Section 10 of the FOIA requires a public authority to disclose non-exempt information within 20 working days of receiving a request.
36. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*

(c) states (if that would not otherwise be apparent) why the exemption applies.

37. The Commissioner notes that NHSBSA did not issue a refusal notice, informing the complainant that it was relying on either section 44(1), section 31 or section 40(2) of the FOIA to withhold information, within 20 working days. As sections 44(1) and 40(2) are absolute exemptions, NHSBSA was not permitted to extend the deadline for citing these exemptions.
38. The Commissioner also notes that NHSBSA did not elaborate on which of the various limbs of section 31 it considered would be engaged, nor why the relevant prejudice would (or would be likely to) result from disclosure.
39. The Commissioner therefore considers that NHSBSA breached section 17 of the FOIA in responding to the request.
40. NHSBSA did not disclose some of the non-exempt information until it completed its internal review. Whilst the Commissioner recognises that, in this case, the internal review partially did its job in revisiting the original response, the fact remains that the information was not communicated within 20 working days. She is therefore obliged to record a breach of section 10 of the FOIA in responding to the request.

Other matters

41. The Commissioner would expect to see better quality submissions from NHSBSA when dealing with future complaints. She would also draw NHSBSA's attention to section 51 of the FOIA which gives her the power to issue information notices requiring a public authority to hand over any information she reasonably requires in order to assess whether a request has (or has not) been handled in accordance with the FOIA.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

Roger Cawthorne
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