

Decision Notice



Decision 036/2013 Mr George Matthews and Borders NHS Board

Comparative costs of hearing aids

Reference No: 201201743
Decision Date: 6 March 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Mr Matthews asked Borders Health Board (NHS Borders) for cost of “in the ear” hearing aids and “behind the ear” hearing aids. NHS Borders withheld the information, on the basis that its disclosure would prejudice substantially the commercial interests of those supplying such devices. While she accepted this approach, the Commissioner also found that NHS Borders failed to deal with Mr Matthews’ requirement for review within the relevant statutory timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. Following related correspondence with NHS Borders, on 12 April 2012 Mr Matthews wrote to NHS Borders requesting the proper costing/prices for “in the ear” hearing aids and “behind the ear” hearing aids.
2. NHS Borders responded on 11 June 2012. It provided an explanation of its audiology budget, but withheld the cost of individual hearing aids as commercially sensitive information in terms of section 33(1)(b) of FOISA. NHS Borders claimed that disclosure of this cost might significantly disadvantage its suppliers and would be detrimental to the contracting process.
3. On 16 June 2012, Mr Matthews wrote to NHS Borders, requesting a review of its decision. His view was that disclosure of the information would not have the effect claimed.
4. Having received no response, Mr Matthews wrote to the Commissioner on 25 July 2012, stating that he was dissatisfied with the outcome of NHS Borders’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA in respect of NHS Borders’ failure to respond to his requirement for review.



5. NHS Borders then notified Mr Matthews of the outcome of its review on 24 August 2012. It explained that it had discussed the information with the NHS Scotland Procurement Directorate, which supported its initial decision to withhold the information. NHS Scotland therefore upheld that initial decision.
6. On 11 September 2012, Mr Matthews wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of NHS Borders' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA on whether (i) the information requested should be disclosed by NHS Borders and (ii) NHS Borders had breached any of the technical requirements of FOISA in dealing with his request and review requirement. He withdrew his earlier application to the Commissioner.
7. The application was validated by establishing that Mr Matthews made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 14 September 2012, NHS Borders was notified in writing that an application had been received from Mr Matthews and was asked to provide the Commissioner with the information withheld from him. NHS Borders responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted NHS Borders, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. It was asked various questions about the information held, and also to justify its reliance on section 33(1)(b) of FOISA.
10. NHS Borders was asked to confirm that it held the withheld information at the time of Mr Matthews' request. NHS Borders confirmed that it held the information at the time of the request and explained that the information (the lists provided to the Commissioner for the purposes of the investigation) was given to NHS Boards' Audiology Departments by NHS Scotland Procurement for reference.
11. NHS Borders was also asked about a percentage cost difference provided to Mr Matthews in correspondence preceding his request. It explained that this figure was provided by a clinician responding to a letter from Mr Matthews and was a rough estimate.
12. NHS Borders supplied the Commissioner with a list of costs for the various hearing devices. It was asked if it held any information showing a single average price for each type of hearing aid. NHS Borders confirmed that it did not hold this information, but offered to ask its audiologists to make a calculation, which could be provided to Mr Matthews.



13. Average costs were calculated and provided to Mr Matthews, but he indicated that he still wished a decision on whether NHS Borders was correct to withhold the costs from him in terms of section 33(1)(b) of FOISA.
14. The relevant submissions received from both NHS Borders and Mr Matthews will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Matthews and NHS Borders and is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – Commercial interests and the economy

16. NHS Borders submitted that the information sought by Mr Matthews was exempt from disclosure in terms of section 33(1)(b) of FOISA. This section provides that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
17. There are elements an authority needs to demonstrate are present when relying on this exemption. In particular, the authority needs to indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure.
18. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
19. NHS Borders was of the view that the relevant commercial interests were those of the suppliers of hearing aids to NHS Scotland and that there would be "an impact on NHS Scotland as a result." NHS Borders explained that the suppliers of hearing aids to the NHS were commercial companies, and that NHS Scotland negotiated contracts for NHS Boards, using a competitive tendering process to ensure value for money.



20. As has been stated by the Commissioner in previous decisions, commercial interests will generally relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of generating revenue and normally within a competitive environment. The Commissioner is satisfied that the suppliers referred to by NHS Borders have relevant commercial interests: they are organisations involved in the provision of goods in a competitive commercial environment, the withheld information relating to such provision. Having reached this conclusion, the Commissioner will consider whether these commercial interests would, or would be likely to, be prejudiced substantially by the disclosure of the information.
21. NHS Borders also explained that it had consulted National Services Scotland (National Procurement) (NSS), as the holder of the contracts with hearing aid suppliers. NSS advised that they would not support disclosure of the information (for the reasons stated below).
22. NHS Borders submitted that the unit price of the products was commercially sensitive as it provided the respective suppliers with part of their “competitive edge in tendering for contracts.” NHS Borders explained that the unit price in individual contracts was not commonly known and might vary from contract to contract. It also commented that the audiology hearing aid market was “very competitive at the moment, with a number of these suppliers actively reviewing their pricing and product portfolios in relation to the National Contract.”
23. If the unit cost were in the public domain, NHS Borders submitted, competitors would be likely to use this information to gain advantage in tendering for contracts. If purchasers were aware of the unit price negotiated with other purchasers, this would also disadvantage the supplier in future negotiations. NHS Borders also explained that NSS was currently engaging with the suppliers to extend the current contract terms and conditions, including pricing. This extension period would be due to commence from 6 January 2013 for a further twelve months.
24. Mr Matthews submitted that there would not be any prejudice as he wished the information for his own personal use and had no intention of disclosing it to anyone else. He was therefore of the view that NHS Borders’ claims about the effect of disclosure to him, in terms of section 33(1)(b), were unjustified.
25. While the Commissioner accepts what Mr Matthews has argued – that is, his reasons for wishing the information and that he has no intention of publicising it – it must be noted that the effect of the disclosure of the information to Mr Matthews in terms of FOISA would be the equivalent to putting the information into the public domain.
26. The Commissioner has considered the above arguments and she accepts that, if this information were to be disclosed, it is likely that substantial prejudice would be caused to the suppliers’ commercial interests. Given the nature of the withheld information (unit price), the Commissioner agrees that its disclosure would give a significant (and commercially advantageous) insight to competitors.



27. The Commissioner has also noted that the contracts are currently under negotiation. Time-sensitivity of certain commercial information is recognised in The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental information (Scotland) Regulations 2004 (at 4.3):

Most contractual and procurement-related information is only sensitive for a definable period of time. It is not, however, possible to be prescriptive about when the sensitivity will decrease; this time period will vary widely depending on the type of procurement information in question and the stage reached in the tender exercise. The sensitivity of price information may decrease after a relatively short period, whereas 'trade secret' information may be sensitive for much longer.

28. The Commissioner therefore accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of the suppliers, and that the exemption in section 33(1)(b) was correctly applied on that basis.

Public interest test

29. As the Commissioner has found that the exemption in section 33(1)(b) applies, she must consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
30. In his submissions, Mr Matthews argued that it was in the public interest for people to be aware of these costs, to be able to assess their value for money and to understand NHS Borders' actions in respect of hearing aids. He also commented that he sought the information as a private citizen and as someone who wished to make sense of the actions of the authority in respect of differing hearing devices.
31. In its submissions, NHS Borders acknowledged Mr Matthews' point that it was necessary for its contracting processes and outcomes to be open and accountable. As a publicly-funded authority, the public had a right to know how its funding was spent and to be assured that it achieved value for money in its purchasing contracts. However, NHS Borders believed this scrutiny could be achieved without revealing the unit price of specific products within those contracts.
32. NHS Borders submitted that, if it were to release this type of information into the public domain, its suppliers' confidence in the NHS procurement process would be diminished. This would inevitably impact on the NHS's ability "to negotiate with a wide range of commercial companies, and would reduce the NHS's ability to ensure value for money for the taxpayers who fund our services."
33. Because the information was current and subject to negotiation of an extension of the contracts in the near future, NHS Borders considered the risks of damage to the purchaser/supplier relationship outweighed the public interest in disclosure.



34. The Commissioner accepts that there is a public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for tenders of this nature. She also accepts that, where a public authority is engaging in competitive tendering, it is in the public interest that it is able to do so without its status as a public body impacting significantly on its ability to purchase effectively in a competitive market – in particular by securing best value through the widest possible response from suitable persons.
35. At the same time, the Commissioner also accepts the general public interest in transparency and accountability and the more specific interest in ensuring that value for money is seen to be obtained, particularly where this involves spending from the public purse.
36. The Commissioner has considered all of the factors set out above. She accepts NHS Borders' submission that, as the information is current and subject to negotiation of an extension of the current contracts, there is a genuine risk of damage to the purchaser/supplier relationship as a result of disclosure. While there may be some circumstances in which the public interest requires the disclosure of information even when substantial prejudice would result from the disclosure, the Commissioner does not, on balance, find this to be the case here.
37. After weighing up the competing interests in this case, the Commissioner has concluded that, in all the circumstances, the public interest in disclosing the information is outweighed by the public interest in maintaining that exemption. She is therefore satisfied that this information was correctly withheld by the Council under section 33(1)(b) of FOISA.

Timescales

38. Mr Matthews originally made an application to the Commissioner on the basis that he had not received a review. Having received the review outcome from NHS Borders, Mr Matthews withdrew that application but re-applied because he did not agree that the information should be withheld. However, he still wished any technical breaches of FOISA to be addressed, specifically NHS Borders' failure to respond timeously to his requirement for review.
39. NHS Borders explained that Mr Matthews had been in contact with it on a number of occasions when, on 5 April 2012, he wrote raising a range of issues and asking for the comparative costs of certain hearing aids.
40. Following discussion between the authority staff handling information requests and the authority's complaints officer, NHS Borders explained, it was agreed that (because Mr Matthews' issues were already being handled through the formal complaints process) it would be appropriate and simpler for a single response to be made to all of his concerns in one letter, in accordance with the complaints process.
41. NHS Borders' FOI officer drafted a response to the request for pricing information and provided it to the complaints officer to include in the letter. When Mr Matthews disputed NHS Borders' use of section 33(1)(b) of FOISA to withhold the pricing information along with a number of other concerns, again it was considered appropriate by NHS Borders to make a single response.



42. NHS Borders explained that, on consideration of Mr Matthews' request for a review, it considered seeking permission from the supplier to release the information. Therefore, contact was made with NSS, who negotiated and managed the contract. To ensure the response to the complaint was not delayed, it was agreed to advise Mr Matthews that this was being done.
43. NHS Borders commented that the response to the complaint was delayed for other reasons. NHS Borders acknowledged its failings in this regard. It explained that the issues raised in this case had been discussed and its protocol amended to include instruction that all requests for information handled under FOISA and any resulting correspondence must be handled separately from any other issues raised in other correspondence with the applicant, to ensure accurate tracking and monitoring of responses.
44. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
45. Since NHS Borders did not provide a response to Mr Matthews' requirement for review within 20 working days, the Commissioner finds that it failed to comply with section 21(1) of FOISA.
46. Given that NHS Borders has now responded to Mr Matthews' requirement for review and acknowledged its failure to comply earlier, the Commissioner does not require it to take any further action in this case, in response to Mr Matthews' application.

DECISION

The Commissioner finds that Borders Health Board (NHS Borders) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Matthews.

The Commissioner finds that NHS Borders was entitled to withhold the information under section 33(1)(b) of FOISA.

However, the Commissioner also finds that NHS Borders failed to comply with Part 1 by failing to respond to Mr Matthews' requirement for review within the timescale laid down by section 21(1) of FOISA. Given that a response has since been provided to Mr Matthews, the Commissioner does not require NHS Borders to take any action in respect of this failure in response to Mr Matthews' application.

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and Borders NHS



Appeal

Should either Mr Matthews or Borders Health Board wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
6 March 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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