

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2013

Public Authority: Dr Lucinda King
Address: The Burbage Surgery
Sprays
Burbage
Marlborough
Wiltshire
SN8 3TD

Decision (including any steps ordered)

1. The complainant has requested information from the Burbage Surgery (the "Practice") concerning the Practice and its expenditure for 2009-2011. The Practice provided some information and applied section 43(2) of the FOIA to the withheld information. It has also argued that it does not hold any information in relation to one of the requests (question 9).
2. The Commissioner's decision is that the outstanding information concerning total GP pay, dispensary income and profit figures is exempt under section 43(2) of the FOIA. The Commissioner is also satisfied that the Practice does not hold any information in relation to question (9). He does not require any steps to be taken.
3. The Commissioner notes that the medical practice itself is not for the purposes of the FOIA a public authority. Rather, each GP within the practice is a separate legal person and therefore each is a separate public authority. The Commissioner acknowledges that when an applicant makes a freedom of information request to a medical practice it is reasonable to expect for convenience that the Practice will act as the single point of contact. However, each GP has a duty under section 1 of the FOIA to confirm or deny whether information is held and then to provide the requested information to the applicant, subject to the application of any exemptions.
4. For the purposes of this decision notice one partner in the Practice has been named as the relevant public authority. The Commissioner notes that this partner has undertaken to respond to the request as the public

authority given that the Practice holds the information on her behalf. However for clarity and ease of reading the notice refers to the Practice where appropriate in detailing the correspondence and analysis that has taken place.

Request and response

5. On 27 September 2011 the complainant wrote to the Practice and asked for eleven pieces of information:

"Please could you provide answers to the following questions:

Who we are and what we do

1. *Practice name*
2. *Number of registered patients at 1st October 2011*
3. *Number of GP sessions per month – please indicate how many sessions are taken by GP Registrars (if applicable)*
4. *Do you claim Rural practice payments (RRP)? If so, for how many patients?*
5. *Number of staff employed/contracted in the following categories (as FTE):*
 - *GP*
 - *Nursing*
 - *Administrative and Management*
 - *Dispensary*

What we spend and how we spend it

From your audited accounts:

6. *Actual total **NHS** income for 2009-10; 2010-2011 (excluding dispensary)*
7. *Actual total dispensary income for 2009-10; 2010-2011*
8. *Dispensary profit for 2009-2010; 2010-2011*
9. *Percentage of dispensary profits invested into services for patients 2009-2010; 2010-2011*

10. *Total GP pay for 2009-2010; 2010-2011 please include all partners, salaried doctors & locums*
 11. *Income received for GP training"*
6. The Practice responded on 17 October 2011. It provided a response to five of the questions (questions 1 to 4, and question 6 for 2009-2010). It informed the complainant that the requested information regarding questions 5, 7, 8, 9 and 10 was commercially sensitive. It explained it could not provide the total NHS income for 2010-2011 as the audited accounts had not yet been prepared (second part of question 6). It did not respond to question 11.
 7. On 7 November 2011 the Practice confirmed that it did not hold the information requested at question 9. However on 1 December 2011 (at internal review) it informed the complainant that it had been advised not to provide this information.
 8. On 29 November 2011 the Practice informed the complainant that it considered the information requested at question 10 to be personal data.
 9. Following an internal review the Practice confirmed its response to each question and clarified that it does not receive income for GP training (question 11).
 10. On 22 December 2011, following a request for clarification from the complainant, the Practice applied section 43(2) to questions 9 and 10.
 11. Following the Commissioner's intervention, on 2 February 2012, the Practice provided a formal refusal notice to the request in accordance with section 17 of the FOIA. It confirmed that it had applied section 43 of the FOIA to questions 7 and 8, and section 40 to question 10. It explained it did not hold the information requested at question 9.
 12. The Practice responded to question 5 regarding the number of staff employed/contracted although it did not provide the full time equivalents which had been requested. The Practice has explained to the Commissioner that it understood the complainant was satisfied with its responses to questions 1 to 4, 6 and 11.
 13. On 8 February 2102 the complainant asked the Practice to provide the number of staff employed/contracted as full time equivalents. She asked the Practice to confirm that it does not know how much of the dispensary profit it has reinvested for the benefit of patients (question 9).

14. The Practice has now confirmed to the Commissioner it wishes to apply section 43 to question 10. It has also now provided the full time equivalents of the number of staff employed/contracted to the complainant.

Scope of the case

15. On 15 March 2012 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
16. In relation to questions 7, 8 and 10 the Commissioner has considered whether the requested information is exempt under section 43(2).
17. With respect to question 9, the Commissioner has considered whether the information is held.

Reasons for decision

Information not held

18. In situations where there is a dispute between a public authority and a complainant about whether the requested information is held, the Commissioner applies the civil standard of the balance of probabilities. The Commissioner must therefore decide whether, on a balance of probabilities, a public authority holds any information which falls within the scope of the request. In making this decision he will consider, where appropriate, the extent of the scope, quality and thoroughness and results of any searches and other explanations offered as to why the information is not held.
19. The Practice has confirmed that it does not hold the percentage of dispensary profits invested into services for patients. It has explained that this information is not held as the profits are all part of practice income. It does not hold the percentage of profit from the dispensary which has been used to improve the surgery.
20. The Practice has explained that its accounts show the fees it receives for dispensing drugs, the reimbursement it receives for the drugs and the cost it has paid for the drugs. They do not show the running costs of the dispensary (such as staff costs, IT costs, heating and lighting) as a separate entity from the rest of the surgery. It is a small practice and because the dispensary is not separate from the surgery, they share resources (such as the staff, the IT system and telephones). It is therefore not possible to calculate profit attributable to the dispensary

alone. The Practice has explained that the figure of reinvestment in patient care is not shown in accounts in any form. Even if it were shown, it would be impossible to say what percentage came from the dispensary as the profits are shown as a whole.

21. In the absence of any evidence to suggest that this information is, or should be, held by the Practice the Commissioner is satisfied that this information is not held.

Section 43(2)

22. Section 43(2) provides an exemption from disclosure of information which would, or would be likely, to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
23. The term 'commercial interests' is not defined in the FOIA. However the Commissioner considers 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.
24. The Practice has argued that dispensary income and profit is commercial information as it would essentially disclose the profitability of its business. As the income per prescription is fixed, the Commissioner considers that the disclosure of either the profit or the income of the dispensary would indicate the business potential of the dispensary, and would therefore be commercially sensitive. The Commissioner is therefore satisfied that information concerning the income and profits of the dispensary (questions 7 and 8) is commercial information.
25. With respect to question 10 the complainant has confirmed that she does not require the salary of any one individual doctor but requires the total for all doctors added together.
26. The Practice has argued that total GP pay is commercial information and has explained that the partners are not paid a salary but share the profits of the practice. There is one full time and two part time doctors. One part time doctor is a salaried doctor; the full time doctor and the other part time doctor are partners who share any profits. This is profit from private and NHS practice work and includes dispensary profit. The Commissioner has therefore considered whether section 43(2) also applies to this information.
27. The Commissioner notes that the Practice is run as a business and that the partners share in the profits derived from the provision of medical services and the dispensary (NHS and private).

28. For this reason the Commissioner considers that the total salary information requested in question 10 relates to the profitability of the Practice as a whole and can therefore be considered as commercial information under section 43.

What is the nature and likelihood of prejudice?

29. The Practice has argued that disclosure of the dispensary income and profit would be likely to prejudice its commercial interests. It has explained that the requested dispensary income and profit would effectively provide almost all the information needed to determine the potential viability of a new chemist setting up locally in competition with its dispensary. The total dispensary income minus the dispensary profit will be a fairly accurate reflection of the number of prescriptions processed as the average income per prescription is reasonably constant and the private element of dispensary profit is minimal. Having arrived at this number, a chemist or company looking for an opportunity could gain a valuable insight into the potential profitability of a dispensary in the area.
30. It has argued that disclosure would very likely lead to the establishment of a further chemist in competition with its dispensary. There is no chemist in Burbage at present. The Practice considers that releasing the dispensary income and profit would allow a competitor to gain an insight into the potential viability of opening a pharmacy business in the community.
31. In a similar case (case reference FS50420107), dealing with a request for identical information, another medical practice argued that there are many examples across the country where a chemist / pharmacy has opened up and this has resulted in a dispensing doctor's surgery having to close the dispensary which in turn impacts upon patient services. It provided the following link in support of this argument:
- <http://www.perthshireadvertiser.co.uk/perthshire-news/local-news-perthshire/perthshire/2012/02/03/new-pharmacy-a-bitter-pill-for-gp-surgery-73103-30255318/>
32. The Commissioner notes that the article postdates the request for information. As the Commissioner must consider the circumstances that existed at the time the request was submitted, he has considered its content only to the extent that it reflects circumstances that existed in September 2011.
33. Having considered all of these points, the Commissioner is satisfied that the Practice's dispensary is operating in a highly competitive environment.

34. There is information held by NHS Wiltshire and the NHS Business Services Authority regarding practice prescribing data which is available online. This shows information per practice on a monthly basis and gives the:
- total number of items prescribed and dispensed;
 - total net ingredient cost; and
 - the total actual cost.
35. In case reference FS50420107 the Commissioner considered the arguments of another medical practice concerning this publically available information. It argued that these figures would assist a competitor in calculating the profit from the income of a dispensary and explained that the income and profit of the dispensary depends on the size of the dispensary and the schemes it has in place with drug companies. The dispensary's profit cannot be made on the prescriptions which are fixed at £7.65 per item. However a dispensary can make a huge profit or loss on the drugs which are bought in from the drug wholesaler.
36. It is therefore apparent that there is already publically available information which would enable a competitor to accurately estimate the potential income of the dispensary and then calculate any profits it may be able to make depending on schemes it may have in place or may be able to negotiate with a drug company.
37. The above information therefore provides the volume of prescriptions and their cost. However when considered with the income and profit of the Practice, the combined information clearly illustrates the potential profitability of setting up a new pharmacy in the area. The availability of prescription volumes means that both the income and the profit of the dispensary are of interest to a competitor.
38. The Commissioner is therefore satisfied that disclosing the income and profit of the dispensary would place further information into the public domain which would assist a competitor in judging the viability of setting up in competition with minimal effort. Therefore the Commissioner considers that this information would be of interest to potential competitors who were considering whether to open a new pharmacy in the area.
39. If a competitor were granted a licence to open a new dispensary within the Practice's main catchment area, the Practice would legally be unable to dispense to any patient who lives within 1.6 miles of the new pharmacy.

40. The Practice has argued that there are already at least two chemist shops in Marlborough and one in Pewsey which means that it already cannot dispense to its patients living within a radius of 1.6 miles of these chemists. Should another chemist shop open in Burbage it would be detrimental to the Practice as it would not be able to dispense to almost all of its patients. If this were to happen, the Commissioner considers that it is likely that this would be harmful to the commercial interests of the Practice's dispensary, and to the commercial interests of the Practice itself. The Practice has argued that were these potential consequences to occur, this could ultimately result in the Practice having to close.
41. In relation to the total GP salary, the Practice has argued that this information would allow potential competitors to estimate its profitability. It has argued that private companies are interested in running such services and are actively pursuing such opportunities.
42. The Commissioner is aware that primary care health service contracts are currently being granted to private companies and that there were examples of this in the public domain at the time of the request.
43. Bearing these points in mind, the Commissioner is satisfied that the Practice is operating in a competitive commercial environment.
44. The Commissioner accepts that the total salary paid to the GPs would indicate the profitability of the Practice. It would be possible to deduct the average salary of the one part time salaried GP and the remainder would provide an approximate indication of the Practice profits (including the dispensary profits).
45. He is satisfied that to disclose information that provided an insight into both the dispensary's income and profit, and the overall profitability of the Practice, would put the Practice at an unfair disadvantage compared to any private competitors who may not be under such an obligation to publish this information. This would clearly give any competitors an unfair advantage.
46. Therefore, the Commissioner considers that the disclosure of the withheld information would be likely to prejudice the commercial interests of the Practice. Therefore this exemption is engaged.
47. In this case, the likely damage to the commercial interests of the Practice also applies to the commercial interests of the partners who own the Practice. As the partners derive their income from the profits of the business any damage to the business profits will also prejudice their commercial interests.

Public interest in favour of disclosing the information

48. There is a public interest in openness, accountability and transparency. The Practice provides a service to the public and is funded by the NHS. The Practice undoubtedly has an obligation to be transparent regarding its spending of public money and accountable to the public for the NHS service it provides. Its profitability would show how efficiently the Practice is running the dispensary and provide transparency concerning the service it is delivering. There is also a strong public interest in knowing the earnings of public servants such as GPs, particularly if this includes the profits of their dispensaries and practices.
49. There is undoubtedly a public interest in the provision of information concerning the debate about the delivery of dispensary services, which has been a controversial issue since 2005. The NHS (Pharmaceutical Services) Regulations 2005 prevents a doctor's dispensary (in a controlled locality) from dispensing medication to patients when they live within 1.6km of their nearest pharmacy.
50. Recent auditing in 2012 by NHS Primary Care Trusts has led to a tightening of the rule resulting in many patients being informed that their doctor's dispensaries can no longer provide their medicines. This in turn has led to a call for the regulation to be abolished. The Commissioner considers that disclosing information as to the profitability of existing dispensaries would contribute to this debate.
51. When considered within the context of wider NHS changes in which private providers may bid to run medical services, there is a clear public interest in information concerning the profitability of dispensaries run by GP surgeries and the profitability of the practices themselves. It could also be argued there is a public interest in encouraging competition which could result in better services to the public.

Public interest in favour of withholding the information

52. However, the Practice has already disclosed its total NHS income to the complainant and it considers that this fulfils its obligations with respect to transparency and accountability.
53. The Practice is operating as a business in a commercial environment and there is a strong public interest in preserving its ability to compete and to make a profit, some of which is paid to the partners and some of which is reinvested into the business.
54. In an environment where there are competing private medical providers it is not in the public interest that the commercial interest of an existing provider should be unfairly compromised.

55. The Practice has argued that losing the dispensary would be financially significant as the Practice would struggle to manage. The Commissioner considers that this means that the loss of the dispensary would therefore be highly likely to prejudice the commercial interests of the Practice.
56. The Commissioner considers that this is a strong argument in favour of withholding the dispensary income and profit and the total GP salary. Although the Practice is providing NHS services and receives income from the NHS, it and its dispensary are effectively operating in a commercial environment. Both would suffer from the disclosure of their profitability to potential competitors. The Commissioner considers that there is a public interest in any public body avoiding unwarranted prejudice to its commercial interests.

Balancing the public interest

57. The Commissioner considers that there are strong public interest arguments both for and against disclosure in this case. He acknowledges that there is a strong public interest in promoting the accountability of organisations which provide NHS services. There is also a public interest in knowing the earnings of public servants such as GPs if this includes the profits of their dispensaries and practices. The argument that GP practices should be transparent concerning the level of their profits has therefore been accorded some weight by the Commissioner.
58. However, the Commissioner considers that public interest in accountability and transparency has been somewhat met by the Practice disclosing the amount of NHS income it receives.
59. Given the increasingly competitive market that the Practice is operating in, the Commissioner is satisfied that the disclosure of information that would allow competitors insight into the profitability of the Practice, and its dispensary, would be likely to prejudice its commercial interests and may result in the closure of the Practice. Bearing this in mind, the Commissioner finds the public interest in avoiding unnecessary and unwarranted prejudice to the commercial interests of the Practice particularly weighty.
60. The Commissioner therefore considers that the public interest favours maintaining the exemption.

Conclusion

61. After considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the withheld information is

exempt from disclosure under the section 43(2) commercial interest exemption and should not be disclosed.

Right of appeal

62. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

63. 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.
64. 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

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