

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2013

Public Authority: Dr Elizabeth Potter
Address: The Pewsey Surgery
High Street
Pewsey
Marlborough
Wiltshire
SN9 5AQ

Decision (including any steps ordered)

1. The complainant has requested information from the Pewsey Surgery (the "Practice") concerning the surgery and its expenditure for 2009-2011. The Practice provided some information and initially applied section 43(2) to the request for total GP pay, arguing that the partners of the Practice are paid out of the profits of the business. During the course of the investigation, the Practice explained that it does not hold the requested total GP pay. This is because its partners are paid out of the joint NHS and private profits of the business and it cannot separate the two. It therefore argued it does not hold a payment figure made with regard to NHS work only. It therefore considered that the information it holds in relation to GP pay falls outside the remit of the FOIA.
2. The Commissioner's decision is that the Practice does hold the information requested for the purposes of the FOIA. However he considers this information to be exempt under section 43(2) of the FOIA and therefore 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.

Request and response

4. 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"*
5. The Practice responded on 10 October 2011. It provided a response to six of the questions (questions 1 to 4, and questions 6 and 11) but to the remaining five questions it informed the complainant that the requested information was commercially sensitive.
 6. Following an internal review the Practice wrote to the complainant on 21 December 2011. It explained it is a non-dispensing practice and therefore it did not hold any information in relation to questions 7 to 9. It provided information with respect to the number of staff employed (question 5). This left one outstanding question (question 10). The Practice confirmed that it had applied section 43(2) of the FOIA to this information.

Scope of the case

7. On 15 March 2012 the complainant contacted the Commissioner to complain about the Practice's refusal to respond to question 10 of her request.
8. During the investigation of the case the Practice argued that it did not hold the information relating to question 10 for the purposes of the FOIA.
9. Therefore the scope of this case has been to consider whether this information is held for the purposes of the FOIA and, if so, whether it is exempt under section 43(2).

Reasons for decision

Is the outstanding information held?

10. Section 1(1) of the FOIA states that –

"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."

11. The FOIA only covers GPs in respect of information relating to the provision of services under the National Health Services Act 2006. Therefore the complainant is only entitled under the FOIA to be provided with information relating to the provision of those NHS services.
12. The Practice has explained that for the time period in question there were three partners who received a share of the profits and one salaried doctor. 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.
13. The partners are not employees of the NHS and are therefore not salaried. The Practice has explained that in effect it is a small business and an independent contractor.
14. The partners are not paid a salary. Instead their pay consists of profit from the practice business. Some of this profit is from the Practice's NHS work and some from its private non-NHS work. Although the Practice's main contract is with the NHS, it has confirmed that it also does private work such as medical reports, insurance examinations and fitness to drive assessments.
15. It has explained that whilst it is possible to differentiate between NHS and private income in its accounts (it has provided its NHS income for the specified years to the complainant), it cannot specifically calculate what proportion of its profit derives specifically from the provision of NHS services.
16. The Practice has explained that this information is not held in its accounts and it would be difficult to work out because the costs associated with doing private work are different to those of providing

clinical services for the NHS and are not actually quantifiable. Specific information about NHS profit is not specifically collected.

17. Therefore it has argued that it does not hold information to show what amount of the total GP salary derives from profit earned only from its provision of NHS services.
18. In order to consider whether this information is held, for the purposes of the FOIA, the Commissioner has to consider whether this information relates to the provision of medical services under the National Health Services Act 2006.

The provision of NHS Services

19. Paragraph 43A of Schedule 1 of the FOIA states that for the purposes of the FOIA a public authority is:

"Any person providing primary medical services, primary dental services or primary ophthalmic services—

(a) in accordance with arrangements made under section 92 or 107 of the National Health Service Act 2006, or section 50 or 64 of the National Health Service (Wales) Act 2006; or

(b) under a contract under section 84 or 100 of the National Health Service Act 2006 or section 42 or 57 of the National Health Service (Wales) Act 2006;

in respect of information relating to the provision of those services."

20. GPs are therefore covered by the FOIA in respect of information "relating to" services under an NHS contract.
21. However the words "relating to" are interpreted broadly by the Commissioner and are taken to mean "have reference to, concern; have some connection with". This is in accordance with the plain meaning of the phrase.
22. The Commissioner's starting point is that the information must simply have some connection with NHS services. It does not need to relate exclusively or even primarily to NHS services, impart anything important about NHS services, or be held for the purpose of NHS services, as long as it has some connection with NHS services.
23. Therefore he considers that information that relates to both private and NHS practice does still relate to NHS services.

24. A GP may argue that the amount of NHS work undertaken was so small as to be insignificant, so the connection is too remote for the information to really relate to NHS services. However it seems likely that, in most cases, earnings will actually relate mostly to NHS work.
25. In reaching this view the Commissioner has noted an annual report on GP Earnings and Expenses published by the NHS Information Centre. The report makes clear that split figures are not available and the earnings information it provides is also a combined NHS/private figure. However it notes that on average, 90.7% of earnings relate to NHS work. It therefore appears that on average the earnings of a GP will relate mostly to NHS work.
26. The FOIA gives the framework for a balance to be struck between the competing interests in withholding the information (particularly any private practice's commercial interests) and any public interest in NHS transparency. If combined NHS and private practice information were considered to be outside of the FOIA, the information would never be disclosed under the FOIA, even if it predominantly relates to NHS services and could serve a useful purpose in terms of transparency and accountability. However if such combined information is within the FOIA, an exemption may be applied and the public interest arguments for and against disclosure may then be considered.
27. In view of all of the above, the Commissioner is satisfied that combined GP earnings which include both payment for NHS work and private practice work relate to NHS services and is covered by the FOIA.
28. Having found that the requested information is held for the purposes of the FOIA the Commissioner has gone on to consider below the Practice's initial argument that the information requested at question 10 is exempt from disclosure under section 43(2).

Section 43(2)

29. 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.
30. 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.

31. In this case the Practice has argued that disclosure of its total GP pay would be likely to prejudice the commercial interests of the three current partners.
32. The Practice has explained that for the time period in question there were three partners who received a share of the profits and one salaried doctor. It has argued that as its total 'pay' is essentially its partnership profits plus one salary, this is commercial information. It has argued that the requested information would effectively disclose its business profits.
33. 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?

34. The Practice has explained that disclosure of the requested information would be likely to prejudice the commercial interests of the three current partners. It has argued that if details of the Practice's profitability are disclosed it may attract the interest of one of the many large commercial healthcare providers that have appeared over the past few years and are seeking to expand into general practice.
35. The Practice has argued that disclosing the requested information does not merely pose a hypothetical risk to its business as these takeovers are gradually happening across the country.
36. The Commissioner is aware that primary care health service contracts are currently being granted to private companies and that there are examples in the press of such NHS contracts granted over the past year.
37. The Practice has also explained it has a particular kind of contract with the Primary Care Trust (the PCT) known as 'Personal Medical Services' (PMS). These practice-specific contracts were introduced about twelve years ago to provide scope for local flexibility in the provision of GP services, but unlike the regular GP contract 'General Medical Services' (GMS) they can be terminated by the PCT within three months' notice.
38. Bearing these points in mind, the Commissioner is satisfied that the Practice is operating in a competitive commercial environment.
39. 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 salaried GP and the remainder would provide an approximate indication of the Practice profits.

40. He is satisfied that to disclose its information that provided an insight into the Practice's profitability (as contained in the total salary figure) would put it 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.
41. Therefore the Commissioner considers that the disclosure of the detail of the profits of the Practice would be likely to prejudice the commercial interests of the three current partners. This information would be of interest to competitors and would potentially encourage another healthcare provider to move into the area.
42. As the Commissioner accepts that commercial interests of the three current partners would be likely to be prejudiced, the exemption is therefore engaged.

Public interest in favour of disclosing the information

43. 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 providing a service to the local community 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 practices.
44. 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 GP practices. 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

45. However, the Practice has already disclosed its NHS income to the complainant and it considers that this fulfils its obligations with respect to transparency and accountability.

46. 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.
47. In a commercial environment where there are competing private medical providers it is not in the public interest that the commercial interests of an existing provider should be unfairly compromised.
48. Although the Practice is providing NHS services and receives income from the NHS, it is effectively operating in a commercial environment and would suffer from the disclosure of its profits to a competitor. The Commissioner considers that there is a public interest in any public body avoiding unwarranted prejudice to its commercial interests.

Balancing the public interest

49. The Commissioner considers that there are strong public interest factors 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 practice. The argument that GP practices should be transparent concerning the level of their profits has therefore been accorded some weight by the Commissioner.
50. However, the Commissioner considers that public interest in accountability and transparency has been somewhat met by the Practice disclosing the amount of public money it receives.
51. 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 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.
52. The Commissioner therefore considers that the public interest favours maintaining the exemption.

Conclusion

53. 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 concerning GP pay is exempt from disclosure under the section 43(2) commercial interest exemption and should not be disclosed.

Other matters

54. During the investigation of this case, the complainant argued that every GP makes a submission to the local PCT in relation to NHS earnings for pension purposes. She asked for the total of these figures.
55. The Practice has explained that not all NHS earnings (and profits) are counted as pensionable income and that two of its GPs were not in the NHS pension scheme for at least part of the time period concerned. However it does not consider that this is the information requested and has confirmed that this information is available from the PCT. The complainant has argued that all NHS income is pensionable.
56. The Commissioner does not consider that the practice pension submissions to the PCT are part of the original request and is not the same as the (total) GP pay which was asked for. The complainant may wish to submit a new Freedom of Information request for this information, if she has not already done so.

Right of appeal

57. 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

58. 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.
59. 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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