

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2022

Public Authority: Aneurin Bevan University Health Board
Address: Mamhilad House
Mamhilad Park Estate
Pontypool
NP4 0YP

Decision (including any steps ordered)

1. The complainant has requested a report into access to GP services and associated information. Aneurin Bevan University Health Board ('the Board') disclosed the report having redacted practice names under section 43(2) of FOIA, which concern commercial interests. The Board indicated it does not hold the remaining information. The Board subsequently confirmed it was also relying on section 41(1) which concerns information provided in confidence.
2. The Commissioner's decision is that the names of specific GP practices were provided in confidence and are also commercially sensitive. The Board is therefore entitled to withhold this information under section 41(1) and section 43(2) of FOIA. The Commissioner finds that the Board does not hold the GP "action plan" the complainant requested but that it breached section 10(1) of FOIA as it did not communicate non-exempt information to the complainant within 20 working days. Finally, the Board's refusal notice was inadequate and did not comply with the requirements of section 17(1) of FOIA.
3. The Commissioner requires the Board to take the following step to ensure compliance with the legislation:
 - If it has not already done so, disclose the county borough level information which it has indicated to the Commissioner it is prepared to disclose.

4. The Board must take this step 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 22 November 2021, the complainant wrote to the Board and requested the following information:

"Having recently been informed about a review of GP surgeries and care in all locations of Aneurin Bevan Trust I wrote to the Health Board asking for the consultation document so I could make constructive comments for my residents but was told:

The report will not be released to the public, elected members or local authorities but only shared with neighbourhood care network leads

Why do the Health Board state in a letter to me dated 11/11/21 the report has not been produced for consultation purposes?

In the interests of openness and transparency please regard this as an FOI request"

6. The Board responded on 15 February 2022 and disclosed the report with some information redacted from it.

7. On 20 February 2022 the complainant wrote to the Board and, in addition to more general questions, asked:

"...Can the practices not be shown here with a list please within the trust or even broken down into each County Borough...

... I see the report has presented varying degrees of accuracy and can you forward me an action plan on how the practices will meet the challenges you have identified with a timescale please this would include patient demand and how they are prioritised by practices"

8. In wider correspondence dated 9 March 2022 the Board explained to the complainant that information had been redacted because it "contains individual practice business sensitive information".

9. The complainant formally requested an internal review on 22 April 2022 and the Board provided one on 24 May 2022. It acknowledged it had not responded to the request within 20 working days. The Board confirmed

that it was withholding some information from the disclosed report for the reason it had given on 9 March 2022.

10. With regard to the further question about a practice "action plan" the Board advised that it would be meeting certain practices over the next eight weeks and that these individual discussions would not be released. Finally, the Board advised that its correspondence of 9 March 2022 had also addressed other, more general questions the complainant had asked in their 20 February 2022 correspondence.

Reasons for decision

11. In its submission to the Commissioner, the Board advised that in addition to section 43(2) it is also now relying on section 41(1) to withhold information redacted from the report.
12. This reasoning focusses on whether the Board is entitled to withhold information from the disclosed report under section 41(1) and section 43(2) of FOIA. It will also consider whether the Board holds the requested "action plan" and its compliance with section 10 and section 17 of FOIA.

Section 41 – information provided in confidence

13. Under section 41(1), a public authority is entitled to withhold information if (a) the information was obtained from another person and (b) disclosure would constitute a breach of confidence.
14. With regard to section 41(1)(a), the Board has advised that individual GP practices provided it with the redacted information voluntarily (outside of contractual arrangements) and in confidence as it was not gathered for any public consultation. The practices would have expected the Board to maintain this information in confidence, for the purposes for which it was provided. The Commissioner is satisfied that the condition at section 41(1)(a) is met and that the Board obtained the withheld information (GP practice names) from another person – the GP practices themselves.
15. With regard to section 41(1)(b), information has the necessary quality of confidence if it is not trivial or otherwise available; was imparted in circumstances importing an obligation of confidence and finally, if disclosing the information would be contrary to the confiders' reasonable expectations and therefore cause a detriment to them.
16. The Board says that it requested the information in agreement with, and with full support of, the Gwent Local Medical Committee (LMC) and the

Aneurin Bevan Community Health Council for the purpose of the review exercise, as outlined above. In considering disclosure of the redacted information, the LMC advised the Board that, if disclosed, the LMC would advise individual GP practices only to provide data to the Board that they are contractually obliged to submit. Disclosure would therefore damage the Board's relationships with GP practices and the LMC, which is a representative Committee of GPs. Disclosure would also impact the Board's ability to seek future information from GP practices which may inform service development and commissioning arrangements for the benefit of the population for which the Board has responsibility.

17. The Commissioner is satisfied the first two conditions are met – the information concerns a review of access to GP services so is not trivial, and if the information were otherwise available the complainant would not have to request it from the Board. Given the sensitivity of the Access to GP Service review and the fact that the review was not intended for wider publication, the Commissioner accepts that the GP practices would have volunteered information to the review with the expectation that it would be handled confidentially and not disclosed to the public. Since disclosing the information would be contrary to the confiders' reasonable expectations, disclosure would, in the Commissioner's view, cause a detriment to those practices.
18. Section 41 is an absolute exemption and so is not subject to the public interest test. However the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
19. The Commissioner is satisfied that the public interest in access to GP services has been met to an adequate degree through the measures that will be discussed in the section 43 analysis below. He considers that there is greater public interest in the Board being able to maintain good a relationships with GP practices and so be able to develop appropriate medical services and commissioning arrangements for Gwent's residents. This is more likely to be achieved if Gwent's GP practices are prepared to continue to engage fully in reviews such as the one the Board carried out in this case, and to continue to volunteer information over and above what they are contractually obliged to provide.
20. The Commissioner has therefore decided that the disputed information meets the conditions under section 41(1)(b) and that the Board is therefore entitled to withhold it under section 41(1) of FOIA.

Section 43 – commercial interests

21. The Board did not refer to any specific FOIA exemption in its response to the request and internal review but referred to the information it was withholding as being “business sensitive”.
22. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
23. In a submission to the Commissioner, the Board first confirmed it is relying on section 43(2) and then provided the following context. It is responsible for providing General Medical Services to residents throughout Gwent and in doing so commissions services from independent contractors (GP Practices) through the National Health Services (General Medical Services Contracts)(Wales) Regulations 2004.
24. Individual GP practices are therefore private businesses with whom the Board has a contractual relationship. Individual practices are able to determine how they deliver the care commissioned by the Board, within the parameters of the contractual requirements set out in regulations.
25. The review exercise, which is the subject of the FOI request, was designed to determine practice access arrangements at that specific time, which was a very challenging period due to the impact of the pandemic. The purpose of the review was to support internal management discussions in respect of assessing pressures across the healthcare system and to determine where support or guidance may be offered. It was not designed or intended to be a public consultation or engagement process or to provide a comparison for the public on perceived performance. It was also not intended to lead to further scrutiny of individual GP practice performance and their systems.
26. Regarding its reliance on section 43(2), the Board went on to say that disclosing the “business sensitive” information would be likely to prejudice the commercial interests of the GP practices involved.
27. It says that the overall detail of the report, including the data obtained and reviewed has been provided to the complainant. Individual GP practices were identifiable in just two areas of the report and were subsequently redacted when disclosed. In the absence of national benchmarks in relation to some of the data collated, locally agreed benchmarks were established. The Board says that it is important to note that these are not contractually binding benchmarks and targets, and a number of caveats should be considered when reviewing the data against such benchmarks. The Board therefore considered it would not

be in the public interest to share this level of information without the knowledge and understanding of the associated caveats.

28. The Board confirmed that GP practice names were redacted from the following elements of the report:
 - Data regarding the number of clinical sessions provided at that time.
 - Venn diagram displaying the 'outliers' as determined by the heavily caveated benchmarks.
29. The Board deemed this data commercially sensitive as it pertains to business operational data and is an indication of operating expenditures, which individual GP practices are not contractually obliged to provide to the Board. This information was provided to the Board voluntarily (outside of contractual arrangements), and in confidence, with a view to being able to contextualise the pressures across the healthcare system, at that time, due to the unprecedented impact of the pandemic.
30. The Board says that it remains of the view that disclosing the redacted information may cause reputational damage to the respective GP practices. The information identifies respective practices as providing less clinical time, fewer face to face consultations and fewer phone lines than others. This the potential to undermine patient confidence in the respective GP practice and risks destabilising individual GP practices should patients seek to register elsewhere with practices that they determine to seemingly provide a better service. It is also important to note that this information is now almost 18 months old and the position of practices has changed significantly since the report was written.
31. The Board reiterated that GP practices are private businesses that can determine how they deliver the care commissioned by the Board within the parameters of the contractual requirements.
32. The Commissioner had asked the Board to clarify why it would not be possible to provide the redacted information in a format such that the GP practices could not be identified and their commercial interests would not be prejudiced.
33. The Board explained that with a small number of GP practices in each of the five boroughs of Gwent, it had originally determined that disclosing the information on a borough basis could enable individual GP practices to be identified. However, having reconsidered the redacted information, its view now is that it could provide the information on a borough basis.
34. The Board also advised that General Practice is reporting unprecedented demand and the sustainability of general practice remains a significant

challenge. Practices continue to face undue criticism of service delivery, which is impacting on the wellbeing of staff. The Board believes that disclosing the full report could further impact on these aspects. The Commissioner has noted this important point but it is not relevant to section 43(2).

35. However, the Commissioner is satisfied first, that the harm the Board envisages relates to commercial interests; those of individual GP practices. Second, the Commissioner accepts that a causal link exists between disclosure and commercial prejudice. If the withheld information were disclosed, patients may seek to register with alternative GP practices which would be likely to financially destabilise specific practices. Finally, the Commissioner will accept the Board's position that the envisioned prejudice would be likely to happen. The Commissioner's decision is therefore that the Board is entitled to apply section 43(2) to the withheld information and he will go on to consider the associated public interest test.
36. There is a specific public interest in this case in the public being able to know which of the GP practices performed well and which faced particular challenges during the difficult circumstances of the COVID-19 pandemic. There is also a general public interest in public authorities being open and transparent.
37. The Board has disclosed the majority of the information in the 'Review of Access to GP Services' report, which includes a broad summary of the situation across Gwent at a particular time. It has also advised that it will now disclose the county borough information. Furthermore, the Board had advised the complainant that it intended to meet certain practices to discuss issues they faced and, presumably, to discuss the way forward. The Commissioner considers that these factors adequately address the public interest in the performance of GP practices in Gwent with regard to access to their services, and the general public interest in transparency.
38. The Commissioner notes that the pandemic created highly unusual and difficult circumstances for many organisations and that period of time would not necessarily be representative of the services GP practices are generally able to provide. He accepts however, that many people would be able to draw that conclusion themselves. Nevertheless, there is also a strong public interest in Gwent's GP practices being able to remain stable so that they can focus on improving their services if and where necessary and continue to provide those services for their communities. On balance therefore, the Commissioner finds that the public interest favours maintaining the section 43(2) exemption in this case.

Section 1 – general right of access to information held by public authorities

39. Section 1(1)(a) of FOIA requires a public authority to confirm to an applicant whether it holds requested information. On 20 February 2022 the complainant requested a “action plan” for particular General Practices. The Board advised that it intended to meet certain General Practices over the coming eight weeks.
40. The Commissioner notes that in the disclosed report it is stated that an initial meeting had already been held with one practice (its name is redacted) and a follow up was planned for three months time.
41. As such and on the balance of probabilities, the Commissioner accepts that at the time of the request, the Board did not hold in recorded form an action plan that would fall within scope of the request. This is because it had only had one initial meeting with one practice and had not met any other General Practices at the date of the request in February 2022.

Section 10 / Section 17 - timeliness

42. Under section 10(1) of FOIA a public authority must communicate non-exempt information within 20 working days of the request. Under section 17(1) it must issue a refusal notice in respect of any exempt information within the same timescale. The refusal notice must also state that the information is exempt, cite the appropriate exemption and explain why the exemption applies. In this case, the complainant submitted their request on 22 November 2021 and did not receive relevant information or a refusal notice until 15 February 2022. Furthermore the refusal did not meet the remaining requirements of section 17(1). The Board therefore breached section 10(1) and 17(1) of FOIA.

Right of appeal

43. 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

44. 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.
45. 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

Cressida Woodall
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