

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2022

Public Authority: Health Education and Improvement Wales

Address: heiw.foi@wales.nhs.uk

Decision (including any steps ordered)

1. The complainant submitted a number of requests for information to Health Education and Improvement Wales (HEIW) regarding contracts between HEIW and Cardiff & Vale University Health Board (CVUHB) and HEIW and Cardiff University in respect of Pre-registration Employment and Training in Clinical Psychology. HEIW originally provided a redacted copy of a contract with Cardiff University, refusing to provide some information on the basis of section 43(2) (commercial interests) FOIA, and the personal information within the contract on the basis of section 40(2). It subsequently provided a further redacted contract with CVUHB citing the same exemptions as above. During the course of the Commissioner's investigation, it also provided redacted copies of the requested variation orders, again citing section 43(2) to withhold the financial information.
2. After significant correspondence regarding the existence or otherwise of additional contracts, the Commissioner's decision is that HEIW holds only one contract relevant to this request and has complied with its obligations under section 1(1) FOIA. The Commissioner is also satisfied that HEIW was entitled to rely on section 43(2) to withhold the financial information. The Commissioner has not investigated HEIW's reliance on section 40(2) in respect of the personal information, as it does not form part of the complainant's concerns. The Commissioner has however recorded a breach of section 10(1) FOIA in respect of HEIW's failure to provide the redacted variation orders within the specified timescales laid out under section 10(1) FOIA.
3. The Commissioner does not require HEIW to take any steps.

Request and response

4. On 13 July 2020, the complainant wrote to HEIW and requested the following information in respect of HEIW contracts pertaining to the Pre-Registration Employment and Training in Clinical Psychology:
 - "1. Contract between HEIW and Cardiff and Vale University Health Board;
 2. Contract between HEIW and Cardiff University"
5. HEIW responded on 31 July 2020. It enclosed a redacted copy of a contract with Cardiff University and stated that it was withholding the cost information within the documentation in reliance on section 43(2) FOIA. It also confirmed that it was withholding the names of individuals and their signatures by virtue of section 40(2) FOIA. It further informed the complainant that it does not have a contract with CVUHB.
6. Following an internal review the HEIW wrote to the complainant on 4 September 2020. It informed the complainant that its contract for education provision is with Cardiff University and reiterated comments from its original response that it does not have a contract with CVUHB. It upheld its original decision to withhold the cost information on the basis of section 43(2) FOIA.
7. There followed various post internal review correspondence between both parties with the complainant disputing the status of CVUHB as a host unit and the requirement for NHS CVUHB employees to hold doctorates, both of which are beyond the remit of the Commissioner's investigation.
8. On 29 October 2020 HEIW contacted the complainant and informed him that it does hold a contract with CVUHB which it had recovered from records transferred from NHS Wales Shared Partner Services following the merger of the NHS Workforce Education and Development Service into HEIW. It enclosed a redacted copy withholding information on the basis of section 43(2) FOIA. It added that although the contract end date was 31 March 2019, the contract was extended and subject to Variation Orders for the agreement of the contract price and student numbers.
9. The complainant argued that the attached contract was a contract between HEIW and Cardiff University dated September 2012 and not between HEIW and CVUHB as stated. He reiterated his request for a contract between HEIW and CVUHB and maintained his position that he does not consider the financial information is commercially sensitive.

10. Correspondence between both parties on the matter continued up to 6 April 2021 with HEIW maintaining its position.
11. The complainant also submitted a number of related requests for information, including one on 3 August 2020 and another on 6 September 2020. As the complainant did not request an internal review of either of these requests, they do not form part of the Commissioner's investigation.
12. However, the complainant subsequently submitted a further two requests with the first being the subject of an internal review, and the second not responded to until the Commissioner began his investigation. They have been reproduced below and for the purposes of this notice, are referred to as request two and request three.

Request two

13. On 27 October 2020, the complainant submitted a further request for information on the same subject:

"Details setting out the total amount of Public Money paid (per year below) to Cardiff and Vale University Health Board in respect of (a) Cardiff & Vale University Health Board agreeing to be the 'payroll host' for employees of Cardiff & Vale University Health Board and (b) for the provision of vocational employment training in clinical psychology (employment and vocational employment training funded by Public Money allocated HEIW):

2017?

2018?

2019?

2020?"

14. HEIW responded on 12 November 2020, refusing the request on the basis of section 43 FOIA on the grounds that there would be a significant risk of prejudicing the commercial interests of HEIW by affecting its bargaining position with education providers.
15. Its response was upheld at its internal review dated 6 April 2021.

Request three

16. In correspondence dated 29 October 2020, the complainant submitted the following further related request for information:

"...a true full and complete copy of the 'Variation Orders for the agreement' referred to in the HEIW response of 29/10/20,..."

17. As stated earlier in this notice, HEIW did not respond to this request until the Commissioner started his investigation, and provided redacted copies of the variation orders to the complainant on 15 February 2022, citing section 43(2) to withhold the financial information.

Scope of the case

18. The complainant contacted the Commissioner on 3 May 2021 to complain about the way their requests for information had been handled. They believe HEIW holds more information within the scope of their request, are not satisfied with HEIW's reliance on section 43(2) and considered that it had issued false statements in its responses with the intention of concealing information, alleging a section 77 FOIA offence (altering records with the intent to prevent disclosure).
19. The scope of the Commissioner's investigation is to consider whether HEIW has complied with its obligations under section 1(1) FOIA and if it was entitled to rely on section 43(2) FOIA in respect of the cost information of each request. As the complainant has not expressed dissatisfaction with the HEIW's reliance on section 40(2) to withhold personal information, this does not form part of the Commissioner's investigation. The Commissioner would point out that dissatisfaction with the content of the information provided, and reliance on an exemption, (whether deemed justified or otherwise), does not constitute a section 77 offence. Additionally, it is beyond the Commissioner's remit to investigate any dissatisfaction with the content of the information itself.

Reasons for decision

Section 1 – General right of access to information held

20. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
21. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

22. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
23. In this particular case the complainant believes that HEIW has not provided all relevant contracts in respect of his request.
24. The Commissioner notes that after initially stating that it did not have a contract with CVUHB, it enclosed a redacted copy of what it considered to be the appropriate information with its response to the complainant of 29 October 2020 which it confirmed had been recovered from records transferred from NHS Wales Shared Services Partnership (NWSSP) following the merger of NHS Workforce Education and Development Service into HEIW.
25. It also explained to the complainant that although the contract end date states 31 March 2018, the contract was extended, and subject to Variation Orders in respect of the contract price and student numbers.
26. The complainant did not accept that this fulfilled their request and pointed out that it referred to Cardiff University and does not pertain to CVUHB.
27. HEIW maintained its position that this was the relevant information in respect of this part of the complainant's request.
28. The Commissioner asked HEIW for details and evidence of the search undertaken to identify information relevant to the request. HEIW subsequently provided some background information to both the complainant and the Commissioner stating that HEIW was established by the Welsh Government, bringing together the following three key organisations for health:
 - Wales Deanery
 - NHS Wales Workforce Education and Development Services (WEDS)
 - Wales Centre for Pharmacy Professional Education (WCPPE).
29. It further explained that the organisation of training in Wales prior to HEIW being established was somewhat fragmented across organisations in Wales, which has caused some confusion when responding to the requests.
30. It confirmed to both the complainant and the Commissioner that the contract with Cardiff University provided with its original response was provided erroneously, as it is not a contract which relates to the pre-

registration and training of clinical psychologists. It apologised to the complainant for this, and assured them that it had no intention to mislead with its responses.

31. HEIW added that the contract under which pre-registration training of clinical psychologists currently takes place is the contract between HEIW and CVUHB and confirmed that the redacted contract provided on the 29 October 2020 is the sole and correct contract under which the pre-registration training of clinical psychologists currently takes place and includes CVUHB.
32. HEIW also confirmed that the complainant was correct that the parties identified in this contract (National Leadership and Innovation Agency for Healthcare) (NLIA and South Wales Doctoral Course in Clinical Psychology) were not set out in the agreement with sufficient precision. It confirmed that NLIA was an organisation hosted by Cwm Taff Morgannwg University Health Board and the contract was signed by a Director of Finance on behalf of the Health Board. The agreement was transferred over to NHS Wales Shared Services Partnership and was subsequently transferred again to HEIW following its inception as a Special Health Authority.
33. It reiterated that the contract provided on 29 October 2020 is the contract which has managed the relationship between HEIW and CVUHB despite its lack of clarity over the identity of the parties. It also informed both the complainant and the Commissioner that HEIW has only made payments under this contract to CVUHB who host the course, and in turn, CVUHB have a separate contract with Cardiff University addressing awards of qualifications and other matters. It confirmed that HEIW is not party to that contract and makes no direct payments to Cardiff University for the training of pre-registration clinical psychologists. Finally, it confirmed that HEIW does not hold any other relevant contracts.
34. In respect of its search, HEIW informed the Commissioner that it was found from an electronic search of records transferred by NWSSP when HEIW was established. It also confirmed that its retention schedule provides that contracts should be held for a period of six years after the end of the contract, and reiterated that this is a live contract.
35. The Commissioner acknowledges that HEIW's responses to the complainant have been somewhat contradictory. However, having considered the explanation provided by HEIW in paragraphs 28 to 33 of this notice, he believes that its responses were the result of genuine confusion, as opposed to the complainant's allegations of a deliberate attempt to conceal information relevant to the request.

36. Based on HEIW outlining the fragmented provision of education and training before its creation and details of its search, the Commissioner has concluded that on the balance of probabilities, there is only one contract and that HEIW has therefore complied with its obligations under section 1(1) FOIA in respect of the complainant's requests.

Section 43(2) – prejudice to commercial interests

37. Section 43(2) of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).

38. In order for section 43(2) (or any prejudice based exemption) to be engaged, the following criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (ie be prejudicial to the commercial activities of any person – an individual, a company, the public authority itself or any other legal entity);
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

39. The first point for the Commissioner to consider is whether the arguments provided by the Council relate to the relevant applicable interests.

40. The term 'commercial interests' is not defined in FOIA. However, the Commissioner's guidance on the application of section 43 explains 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. Their underlying aim may be to make profit, however, it could also be to cover costs or simply to remain solvent.

41. The Commissioner considers that in order for the exemption to be engaged, it must be shown that disclosure of the information will result in the specified prejudice to one of the parties.
42. The Commissioner asked the Council to provide full arguments setting out why it considers the exemption is engaged. He confirmed that its submissions should identify whose commercial interests it believes would, or would be likely to be prejudiced in the event of disclosure, and details of the nature of the prejudice itself. He also explained that it would need to provide evidence that any arguments relating to a third party came from the third party itself.
43. In this case the withheld information is the financial figures in the contract and the variation orders relating to the cost of the contract with details of the total amount paid for each year from 2017 to 2020 by HEIW to CVUHB in connection with pre-registration training of clinical psychologists. The Council has confirmed that the variation orders break the payments from HEIW to CVUHB down as follows:
 1. Staff costs
 - a. Psychologist staff salaries
 - b. Administrative staff
 2. Non-Staff costs
 - a. Overheads – accommodation
 - b. Non staff
44. The variation orders also provide the student numbers for the relevant years.
45. HEIW considers that disclosure of the withheld information 'would be likely' to harm not only its own commercial interests, but those of Cardiff University and CVUHB and has therefore indicated the lower level of prejudice.
46. The complainant does not accept that section 43 is engaged in respect of this information. He does not consider the information to be commercially sensitive and has stated that there is only one provider of Employment and Pre-Registration Training of Trainee Clinical Psychologists in South Wales, therefore there is no competition for its provision.

HEIW commercial interests

47. HEIW explained to the Commissioner that it is a Special Health Authority established to ensure that the people and healthcare professionals of Wales benefit from a cohesive, consistent approach to education and training, and to workforce modernisation and planning. It has a specific responsibility for the commissioning of education, and needs to be able to conduct a fair tender procedure for the provision of its training.
48. It further informed the Commissioner that all Health Professional contracts expire in July 2022 when a tendering exercise will be undertaken to determine the education providers going forward and as such, any University will be able to bid for the new contract.
49. It further confirmed that a new contract is being drafted which will be available for all potential bidders with the terms and conditions being set out in the Invitation to Tender (ITT) when that stage is reached. It added that it is hoped that a new contract will be in place for the provision of this training by February 2023, and confirmed that depending on how the tender is framed, it is likely that competing educational providers or organisations will be able to tender.
50. For the tender process to be as fair as possible it must ensure that its host, and or, bidders are not at an unfair advantage or disadvantage by possessing commercial information about the current arrangements.
51. HEIW considers that knowledge of the current pricing framework between the organisations would be likely to enable competitors to calculate the value of the arrangement between CVUHB and Cardiff University, as well as identifying the cost of staffing value per student. It has argued that this information could be used by potential providers to design their bid with reference to, and in full knowledge of the current pricing basis in place with the existing providers.
52. It further considers that this could permit bidders tendering this year to undercut the incumbent arrangements, put off potential bidders and could overall undermine the tender exercise achieving the optimum outcome in terms of HEIW being able to deliver the best quality course for value.
53. In turn, this may lead to providers reducing the costs indicated within theirs, which may reduce the quality of the provision.
54. The Commissioner has also considered HEIW's argument that disclosure of the information would prejudice the commercial interests of both CVUHB and Cardiff University.
55. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the

Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.

CVUHB commercial interests

56. In response to the complainant's view that there is only one provider of Employment and Pre-Registration Training of Trainee Clinical Psychologists in South Wales, therefore there is no competition for its provision, HEIW explained to the complainant that CVUHB are not the provider of Clinical Psychologists in South Wales, they host the trainees on their payroll. To ensure that all competencies are met and to address the needs of South and West Wales the trainees work across all the Health Boards in South and West Wales during their three year contract.
57. HEIW informed the Commissioner that as the host organisation, CVUHB employ the staff running the course as well as those undertaking the training. It has argued that they have a clear commercial interest in the future arrangements for the course as the provider, as well as having a commercial interest with whoever is selected as the awarding body for the course (currently Cardiff University).
58. HEIW further informed the Commissioner that CVUHB had been consulted and objected to the release of what it considered to be commercially sensitive information. It believes it would be at a disadvantage in the forthcoming tendering exercise as it may be possible to predict the likely costs after viewing those of the last few years.
59. The Commissioner has considered CVUHB's response and notes that it has stated that disclosure of the information would give a competitor organisation an advantage in preparing a bid built on the awareness of its costs which have been carefully negotiated over time. It added that disclosure might enable a competitor to plan a bid based on work it has undertaken to consider all costs that are incurred by running a programme, and might enable a competitor to undercut its costing.

Cardiff University

60. HEIW also considers that disclosure of the financial information would be likely to prejudice the commercial interests of Cardiff University. It has argued that the contract pricing and the variation orders identify costs specific to their services which gives them a commercial interest in

the data, which if disclosed, would place them at a disadvantage when the tender exercise takes place.

61. When approached by HEIW for its views on the disclosure of the information, Cardiff University attached its response to a similar FOIA request it had received for copies of all contractual documents in respect of the recruitment, selection and employment and Pre-registration Training of CVUHB employees (Trainee Clinical Psychologists).
62. The Commissioner notes that it refused to provide an unredacted copy, citing section 43(2) FOIA in respect of the cost information on the basis that the contract expires in July 2022, at which point the University will be able to take part in a tendering process for the award of a new contract for the provision of the course. It considered the cost information contained within the current contact, if disclosed, may provide information to competitor providers, which it considers would be detrimental during the tendering process.
63. It added that the higher education and training market is extremely competitive and disclosure of the information would give commercial insight to competitors and allow them to exploit information for their own advantage. It added, that given that it is a highly specialised and competitive market, the impact of any such disclosure would be likely to have a magnifying effect.
64. Cardiff University's response further stated that disclosure would be likely to have a negative effect in terms of its ability to partner with other organisations if it was considered that the University might disclose information generated as a result of a partnership.

The Commissioner's view

65. Having viewed the withheld information, the Commissioner accepts that it is relevant to the applicable interests within the commercial interests exemption, and therefore the first part of the test above is met.
66. The Commissioner has considered the arguments and evidence put forward by HEIW and its associated parties to the contract and variation orders, and is satisfied that the figures would be of use to a competitor during the forthcoming tendering process. He accepts that HEIW and its third parties have provided reasonable arguments to suggest that there is causal relationship between disclosure of the withheld information and the prejudice cited, which is real, actual or of substance in respect of HEIW's own commercial interests and the relevant third parties.
67. The Commissioner is satisfied that HEIW has demonstrated sufficient arguments in support of the lower level of prejudice for its own

commercial interests and those of CVUHB and Cardiff University. As he is satisfied that disclosure would be likely to prejudice these commercial interests, and therefore section 43(2) FOIA is engaged, he now needs to consider the public interest test.

Public interest arguments in favour of disclosing the information

68. The complainant has argued that the contracts are public sector contracts paid for by taxpayers and considers that it is in the overriding public interest for HEIW to provide full non-redacted disclosure of the contract.
69. The Commissioner notes that HEIW did not advance any arguments in favour of disclosure of the withheld information. However, CVUHB acknowledged the public interest in transparency and in the accountability of spending public funds.
70. It added that it is in the public interest that public funds are used effectively and that public sector bodies obtain best value for money when contracting for the provision of services.
71. Cardiff University also acknowledged the public interest in openness and transparency and considers it important that it should be as open and transparent as possible when it comes to decisions around its collaborative partnerships.

Public interest arguments in favour of maintaining the exception

72. HEIW stated that it is in the public interest that pricing information is withheld as the public has a significant interest in the provision of high quality educational training to medical staff via a fair and competitive tender.
73. For its part, CVUHB has argued that as it considers that disclosure of the information under FOIA would give an unfair advantage to its competitors, it would not be in the public interest to diminish the bargaining position of either itself, HEIW or Cardiff University, as it could lead to less effective use of public funds.
74. It has further argued that disclosure of this information and the likely failure to protect the interests and relationships arising in a commercial contract, could have the effect of discouraging companies from dealing with public authorities such as itself, HEIW or Cardiff University, because of fears that disclosure of information could damage them commercially. It has added, that in turn, this could jeopardise a public authority's ability to compete fairly and pursue its function to bring forward development in the area and obtain value for money.

Balance of public interest arguments

75. Although HEIW does not appear to have advanced any arguments in this regard, the Commissioner notes that CVUHB considers that in this case, the balance of public interest is weighted in favour of maintaining the exemption as it has accorded more weight to the importance of protecting a competitive tendering process than giving competitors an unfair advantage which is likely to result from disclosure.
76. The Commissioner has considered both the factors in favour of disclosure and those in favour of maintaining the exemption and notes the importance of transparency and accountability with regard to the expenditure of public money. However he notes the public interest in CVUHB and Cardiff University being able to provide a service in a competitive field without fear of revealing its pricing and cost figures to its competitors, and believes it outweighs the public interest in the disclosure of these figures. Such disclosure could mean that both CVUHB and Cardiff University lose their competitive edge and may not win future bids placing them both at a disadvantage. This in turn, will have implications for HEIW when it is attempting to fulfil its function of providing high quality educational training to medical staff via a fair and competitive tender.
77. The Commissioner therefore considers that in all the circumstances of this case, the public interest lies in favour of maintaining the exemption.

Right of appeal

78. 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

79. 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.

80. 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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**