

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2023

Public Authority: Guy's and St Thomas' NHS Foundation Trust
Address: St Thomas' Hospital
Westminster Bridge Road
London SE1 7EH

Decision (including any steps ordered)

1. In two requests, the complainant requested information associated with the price of a piece of equipment from Royal Brompton and Harefield hospitals, which is a subsidiary of Guy's and St Thomas' NHS Foundation Trust ('the Trust').
2. The Commissioner's decision is that the Trust has not provided a response under FOIA to the first request and has therefore not complied with section 10(1). The Trust is entitled to withhold the information requested in the second request under section 43(2) of FOIA as it is commercially sensitive. The public interest favours maintaining the exemption.
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
 - Provide a response to the first request, of 13 March 2022, that complies with FOIA.
4. The Trust 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 13 March 2022, the complainant wrote to the Trust and requested the following information:

“Our request for providing a copy of the relevant manufacturer list price of "XIENCE SIERRA - STENT" was denied by Private Patients, Deputy Finance Manager as being confidential and not publicly available.
6. The Trust advised it did not hold this information.
7. On 27 March 2022 the complainant requested the price that the Royal Brompton and Harefield hospitals (RBHH) had paid for the above equipment.
8. The Trust refused to disclose this information, relying on section 43(2) in order to do so. It upheld both responses at internal review.
9. However, with regard to the first request, the Trust subsequently confirmed to the complainant, on 26 April 2022, that its Private Patients service had provided the manufacturer’s list price to the complainant in December 2021.

Reasons for decision

10. With regard to the first request of 13 March 2022, the complainant had requested the manufacturer’s list price for a particular item of equipment.
11. Under section 1(1) of FOIA a public authority is obliged to confirm whether it holds information an applicant has requested and to disclose it if it is held and is not exempt information. Under section 10(1), a public authority must comply with section 1(1) promptly and within 20 working days of the request.
12. The Trust’s final position with regard to the first request is that it has previously provided the complainant with the manufacturer’s list price. It has provided the Commissioner with a copy of the relevant email to the complainant, sent on 7 December 2021 at 16:44. In this email – sent by the Trust’s Private Patients service and not its FOIA team - the manufacturer’s list price is given together with the Trust’s handling fee.
13. While the Trust may have previously provided the complainant this information, it is not clear that it was provided under FOIA. The Trust’s

FOIA team has advised the Commissioner that it had not been aware of the Private Patients' correspondence to the complainant, initially.

14. For the avoidance of doubt and because disclosure under FOIA is, in effect, disclosure to the wider world, the Commissioner requires the Trust to take the step outlined in this notice. And because the Trust has not provided a clear response to this request under FOIA, he finds that it has not complied with section 10(1) of FOIA.
15. With regard to the second request of 27 March 2022, 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.
16. The Trust advised the complainant that disclosing the information they have requested – the price RBHH paid for the equipment in question – “may” prejudice the supplier’s commercial interests and its own.
17. The Trust explained that the supplier has an interest in competing in a fair market. The supplier’s commercial interest may be prejudiced if RBHH were to release information which is not in the public domain and which its competitors can use to the supplier’s disadvantage.
18. At the same time, the Trust explained, RBHH has an interest in procuring goods and services at a price which is good value for money. RBHH’s interests, and therefore that of its patients, may be prejudiced if RBHH cannot obtain good quality goods and services at value for money prices.
19. The Commissioner is satisfied first, that the harm the Trust envisages relates to commercial interests; the equipment supplier’s and its own/those of RBHH. Second, the Commissioner accepts that a causal link exists between disclosure and commercial prejudice. Disclosing into the public domain the price that RBHH paid for the equipment could give the supplier’s competitors an insight into the supplier’s pricing; competitors could potentially offer the equipment at a reduced price, which would be likely to disadvantage the supplier. The Trust’s commercial interests could be prejudiced through the marketplace becoming less competitive and innovative. Finally, the Commissioner accepts the Trust’s position that the envisioned prejudice **would be likely to** happen, rather than **would** happen. The Commissioner’s decision is therefore that the Trust was entitled to apply section 43(2) to the withheld information and he will go on to consider the associated public interest test.

20. The Trust noted in its internal review that: there is a public interest in ensuring that RBHH is conducting commercial activities in a fair and open way and in ensuring that RBHH is getting value for money and is not paying too much for goods or services. Disclosing the unit pricing may lead competitors to offer the same product at better pricing.
21. However, with regard to the public interest in maintaining the exemption the Trust noted the following:
- Disclosure of information under FOIA is a disclosure to the general public. This means that the information in question may be shared or published widely and including on websites available to the general public, including that of the Trust's suppliers' competitors.
 - Disclosing the prices of one supplier and not others competing on the same market may cause an unfair disadvantage to the supplier. Where there are several companies providing the same or similar goods, unit pricing is often the main basis of competition. If the unit price were disclosed competitors may use this information to undercut the current supplier which would not be in the supplier's interests.
 - Disclosing the withheld information into the public domain could decrease the differentiation between suppliers. This is because processes, practices and commercial offerings may become homogenised, thus endangering true and fair competition. This would further hinder the ability of suppliers to act competitively within the market. Internal processes that allow such suppliers to create and maintain a competitive advantage would be lost as they become public knowledge, creating unfair competition and stifling innovation and creativity.
 - An expectation that RBHH is able to withhold information valuable to a supplier ensures that RBHH has a reputation for being a reliable partner. It is therefore able to secure best value for public money when procuring goods and services and so save taxpayers' money.
22. The complainant has a private interest in the withheld information but has not put forward any wider public interest arguments for its disclosure. The Commissioner considers that the public interest in transparency is adequately met through the related information the Trust disclosed. He is satisfied that, on balance, the public interest favours maintaining the section 43 exemption in this case for the reasons the Trust has cited.

Right of appeal

23. 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

24. 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.
25. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF