



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0262

Decided without a hearing on: 13 September 2021

Before

**JUDGE SOPHIE BUCKLEY
DAVE SIVERS
MICHAEL JONES**

Between

JOHN FRANCIS BYRNE

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) BUSINESS SERVICES ORGANISATION
(3) HEALTH AND SOCIAL CARE BOARD**

Respondents

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50860758 of 3 August 2020 which held that the Business Services Organisation (BSO) was entitled to rely on section 43(2) (commercial interests) of the Freedom of Information Act 2000 (FOIA). The Commissioner did not require the BSO to take any steps.

Factual background to the appeal

2. The BSO provides an administrative service to the Health and Social Care Board (HSCB). The HSCB is responsible for commissioning health services for the Northern Ireland. General Practitioner (GP) services are provided by independent small businesses run either by a single GP or a number of GP practice partners. GPs or GP partners enter into contracts to provide medical services to their patients with the HSCB under the Health and Personal Social Services (General Medical Services Contract) Regulations (Northern Ireland) 2004 (the 2004 Regulations).
3. The HSCB provides funding to GP practices under its contract with them. The funding provided is dependent on the GP practices' 'weighted list'. The weighted list can be larger or smaller than a GP practice's actual list and is calculated in accordance with a formula known as the 'Global Sum' calculation. The Global Sum is a nationally agreed formula which takes account of a variety of factors including age, gender, new registrations/list turnover and rural or additional needs.
4. In Northern Ireland approximately 40% of GP practices have three or less GPs and are often based in rural settings where those GPs live. Almost 22% of practices have a single practitioner or two partners. GP services therefore suffer significant pressure if a practitioner dies or retires. There is no contractual obligation on GP practices to absorb additional demand. Although the HSCB can assign additional patients this has to be done in collaboration with the relevant practices, a difficult process which is facilitated by the goodwill built up between the HSCB and the GP practices.

Request and Decision Notice

The Request

5. Mr. Byrne made the request which is the subject of this appeal on 4 February 2018:

I am writing to you to make a request under the Freedom of Information Act for information regarding the weighting of a Practices patient list for the purpose of payments for general medical services.

For example, within our Practice based on our remittance sheet for January 2019, our actual list size on the 1 January 2019 was 7746 and our weighted list size on the 1 January 2019 was 6495.

I would like to have the same information for all the practices under the Board. The practice number, e.g. Crumlin Medical Practice is N303; This would be sufficient to name each practice.

The Response

6. The BSO responded on 5 September 2019 and stated that the information was being withheld under s 43(2) (prejudice to commercial interests). After an internal review the BSO upheld its decision on 9 July 2019.

The Decision Notice

7. The Commissioner was satisfied that the information was commercial in nature. The Commissioner accepted that there was a direct causal link between disclosure of the requested information and the prejudice caused to the commercial interests of both the HSCB and the GP practices because it would be detrimental to the good working relationship between the HSCB and GPs which would be likely to affect the delivery of services by the GP practices.
8. In relation to the public interest balance, the Commissioner gave significant weight to the public interest in disclosing information which would promote transparency and accountability of how a public authority operates in its decision-making and in its expenditure of funds.
9. The Commissioner concluded that the argument that the public interest rests in maintaining the relationship which currently sees HSCB and General Practices work on a collegiate basis to manage capacity issues is a strong one and carries significant weight.
10. In all the circumstances of the case the Commissioner concluded that the public interest was in favour of maintaining the exemption.

Grounds of Appeal

11. Mr. Byrne's main ground of appeal is, in essence, that HSCB does not offer any reason why the information requested would damage the working relationship between GPs and the HSCB. If the process of weighting is fair, there will be no damage to the working relationship.

The Commissioner's response

12. The Commissioner considers that the relevant interest is a 'commercial' one as it related to HSCB's commissioning of GP services through contracts.
13. The BSO told the Commissioner that the HSCB had submitted that disclosure of the requested information would detrimentally affect the relationship between the HSCB and the British Medical Association (BMA) at a time when the relationship was fundamental. The BSO further asserted that disclosure of the requested information would prejudice the willingness of GP practices to work with the HSCB in such a free and flexible manner to quickly and seamlessly absorb displaced patients and gaps in provision of service. The Commissioner noted that the Northern Ireland General Practitioners Committee (a standing committee of the BMA) also considered there would be a detrimental impact to the relationship.
14. The Commissioner gave the BSO's representations due regard and accepted that disclosure would prejudice the identified interest.
15. In relation to the public interest the Commissioner stands by the analysis set out in the decision notice.

Submissions of the BSO and the HSCB dated 5 February 2021

16. The information requested would provide valuable market intelligence to GP contractors with respect to their competitors and would not be of benefit to the overall system or patients. If the information was released, in the event of practice list dispersal or merger, a practice might not be willing to accommodate another's patients if it would dilute their total needs index within their existing list. This would introduce financial interest into a process which currently places patient need at the forefront.
17. The HSCB is already at a disadvantage in commercial negotiation as there is no contractual obligation on GP providers to absorb additional demand in the existing contract under the 2004 Regulations. The HSCB can only assign patients in collaboration with the relevant practices and the goodwill built up with practices facilitates what can be a difficult process. The HSCB therefore relies on the goodwill of GPs to freely engage with them to quickly and seamlessly absorb displaced patients and gaps in provision of services as they arise.
18. The Chairman of the NIGPC in an email dated 9th March stated:

we have had some more discussion and there is a concern about a potential impact on the relationship between HSCB and GP practices given the sensitive nature of the information and the likelihood of identifiable

information even with full anonymization in what is a relatively small group of practices. There is also a risk of further impact in future discussions and negotiations with practices including pressures, potential closures and also in the current environment of pandemic planning, and we would hence have a significant concern about this information being released.

19. Disclosure of the requested information would enable anyone to determine how much of the Global Sum payment is given to each identified GP practice and, in respect of single-handed practices, to the individual contractor.
20. The public interest is in favour of maintaining the exemption because:
 - 20.1. Releasing the requested information would prejudice the collaborative relationship between the HSCB and GP practices which underpins the delivery of those GP services;
 - 20.2. Releasing the information would be detrimental to the goodwill that exists between the HSCB and GP practices which would adversely affect placing of displaced patients;
 - 20.3. Many GP practices have a single or two practitioners.
21. The BSO has offered to explain the weighting and calculations which are done in accordance with the disclosed Global Sum calculation.

Response of the HSCB and the BSO dated 12 March 2021

22. The relevant interests are commercial i.e. the contracts the HSCB enters into with GPs in Northern Ireland under the 2004 Regulations.
23. The prejudice to commercial interests includes the damage to the working relationship between GPs and the HSCB.
24. The prejudice relied on includes the damage to the working relationship between the GPs and HSCB at a time when it is increasingly fundamental to the HSCB discharging its legal functions and delivering responsive GP services. The HSCB relies on the goodwill of GPs to absorb additional demand in relation to enhanced services.

Evidence

25. We have read an open and a closed bundle of documents, which we have taken account of where relevant. The closed bundle contains the disputed information, so that is necessary to withhold that information in order not to defeat the purpose of these proceedings.

Legal framework

S 43 – Commercial interests

26. Section 43(2) provides

Information is exempt information if its disclosure under this Act, would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it)

27. 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

28. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

29. S 43 is a qualified exemption, so that the public interest test has to be applied.

The Task of the Tribunal

30. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

31. The issues we have to determine are as follows:

Commercial interests

1. Are the relevant interests 'commercial interests'?
2. Is the prejudice to commercial interests claimed by the BSO real, actual or of substance?
3. Has the BSO shown that there is some causative link between disclosure and the claimed prejudice?
4. Has the BSO shown that the occurrence of prejudice is more probable than not or, if not, that there is a real and significant risk of the occurrence of that prejudice?
5. If so, does the public interest favour maintaining the exemption?

Discussion and conclusions

32. The prejudice relied on is set out in the submissions of the BSO and HSCB. They argue that releasing the information would affect the commercial interests of the Board and the GP practices because, in essence:
 - 32.1. It would enable anyone to determine how much of the global sum payment is paid to each identified GP practice or the individual contractor;
 - 32.2. The release of this commercially sensitive information would provide valuable market intelligence to GP contractors with respect to their competitors, and in turn this would have a detrimental impact on the relationship between GP practices and the HSCB;
 - 32.3. If they had this knowledge, GP practices would be less willing to absorb displaced patients, making the operation of the system more difficult.
33. 'Commercial interests' has a wide definition. We find that the prejudice relied on by the BSO would be prejudice to commercial interests.
34. It includes, in our view, prejudice to the BSO's negotiating position when attempting to get GP practices to take on additional patients or enhanced services, or prejudice to its ability to operate the system effectively, because the system has a commercial underpinning: it is underpinned by contractual relationships with independent small businesses.
35. It also includes prejudice to the GP practitioners' market position if valuable market intelligence is provided to their competitors, which would affect, for example, the prospects of agreeing a merger.
36. When assessing whether or not prejudice would or would be likely to occur, there is always likely to be an element of speculation because the information has not been released and hard evidence of the effect of its release is accordingly difficult to come by.
37. In this case, BSO and HSCB have given their opinion as to the risks and have sought the opinion of the Chair of the Northern Ireland General Practitioner's Committee.
38. The tribunal, as a matter of common sense, accepts the assertion that there is a real and significant risk that GP practices would be less likely to work with the HSCB in a flexible manner to absorb displaced patients if the requested information were available and they were aware that accommodating the other practice's patients would dilute their total needs index within their existing list.
39. Further the tribunal accepts that at least some GP practices are likely to be put at a commercial disadvantage, if for example a merger was proposed, because their competitors would be aware of this information.

40. Finally the tribunal accepts that the evidence from the NIGPC suggests that at least some GP practices would be opposed to the release (both on the basis that it is commercially sensitive information and on the basis that individual GPs' funding would be identifiable) and that this would therefore be likely to have a detrimental impact on the relationship between the practices and the HSCB which, in the light of the way the system operates, carries a real and significant risk that the operation of the system would be adversely affected. We find that there is a similar risk of perceived unfairness if individual practices' figures are released – even though the funding is based on a universally applied formula. This would also, in our view, be likely to be have a detrimental impact on the relationships and the way the system currently operates.
41. Taking all this into account the tribunal accepts that there is causative link between releasing the information and the prejudice set out by the BSO and the HSCB and accepts that there is a real and significant risk that this prejudice will occur.
42. Looking at the public interest balance, we take account of the particular situation in Northern Ireland as described by the BSO and HSCB. We note that the effective operation of the system depends heavily on goodwill between the HSCB and GP practices in particular in negotiations with practices to deal with absorbing displaced patients. The effective operation of the GP system weighs heavily in the balance.
43. There is a general public interest in transparency in relation to the spending of public money on health and a public interest in ensuring that the funding of GP practices is done fairly. However, we find that this interest is served to a large extent by the disclosure of the detailed information on the formula that is applied and the explanation of its operation.
44. On balance, and taking all the above matters into account, we find that the public interest balance is in favour of maintaining the exemption.

Conclusion

45. For the reasons set out above the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 21 September 2021