

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2014

Public Authority: NHS Business Services Authority
Address: Stella House
Goldcrest Way
Newburn Riverside
Newcastle Upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the NHS Business Services Authority ("the BSA") for information on the number of prescriptions dispensed at seven particular pharmacies, together with details of the doctor who issued the prescription. The BSA disclosed most of the requested information but applied the section 43 exemption (commercial interests) to withhold the information for one of the pharmacies.
2. The Commissioner's decision is that the requested information is exempt under section 43 but the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The BSA shall disclose to the complainant that part of the requested information which was withheld under the section 43 exemption.
4. The public authority must take these steps 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 27 August 2013 the complainant made a freedom of information request to the BSA for information on prescriptions dispensed at pharmacies. The request read as follows:

'A count of the number of prescriptions dispensed by dispensing site (to include the site name or postcode) for the year April 2012 to March 2013 for the Scarborough & Ryedale CCG area or if this is only held at historical PCT level then Scarborough, Ryedale & Whitby PCT. The count to be by the postcode of the patient restricted to either 4 digit eg. YO13 but preferably to 5 digit eg YO13 9. If this is possible can you include the patients registered GP practice code if this does not compromise patient confidentiality.'

6. This was followed by a further exchange of emails with the BSA where the complainant sought to clarify the information he was seeking after which he confirmed that the request should be interpreted as follows:

'For the period April 2012 to March 2013 please provide the postcode, total of monthly items dispensed and the GP practice code that prescribed them for the following 7 pharmacies located at the postcodes below: YO13 9HL, YO11 3YN, YO12 5EG, YO12 5AX, YO12 5AE, YO11 1LN and YO11 1XP' I am happy to get this back trimmed to the first 5 char of the postcode if that helps. Can you confirm the threshold for statistical outliers (small numbers) is that a count of 5 or less?'

7. NHS BSA responded to the request on 18 September 2013 when it disclosed the total number of items dispensed by the seven selected pharmacies for the months April 2012 to March 2013. However, it said that it could not disclose information at the practice level. First of all it said that it could not provide all of the information as requested as the cost of doing so would exceed the appropriate limit, therefore it was relying on section 12 of FOIA.
8. Of the information that could be processed within the cost limit NHS BSA said that it was being withheld under the section 43(2) exemption. It explained that the information would be likely to prejudice the commercial interests of the pharmacies and it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
9. The complainant subsequently asked NHS BSA to carry out an internal review and it issued a fresh response to the request on 4 November 2013. It now disclosed for 6 of the 7 pharmacies a breakdown of the

prescriptions it dispensed including the code, name and practice address of the prescriber who wrote the prescriptions dispensed by the pharmacy. For one of the pharmacies no information was disclosed because, it was argued, the particular situation of the pharmacy meant that it "would suffer significant commercial harm if the requested information was released". The information was withheld under section 43(2) and again the NHS BSA concluded that the public interest favoured maintaining the exemption.

Scope of the case

10. On 10 November 2013 the complainant contacted the Commissioner to complain about the BSA refusal to disclose all of the information he requested. The Commissioner agreed with the complainant that the scope of the complaint would be to consider the BSA's application of the section 43 exemption to the information for one of the pharmacies.

Reasons for decision

Section 43(2) – Commercial interests

11. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person. In this case the BSA has confirmed that disclosure would prejudice the commercial interests of the owner of the pharmacy for which the information was withheld (at the postcode YO13 9HL).
12. Section 43(2) is a prejudice based exemption which means that in order for the information to be withheld the BSA must be able to identify and explain the nature of the prejudice it envisages would be caused by disclosure. Following the test adopted by the Information Tribunal in *Hogan and Oxford City Council v the Information Commissioner*, this means that the public authority must be able to show that the prejudice claimed is "real, actual or of substance" and that there is some "causal link" between disclosure of the information and the prejudice claimed.¹

¹ Christopher Martin Hogan and Oxford City Council v the Information Commissioner [EA/2005/0026 and 0030]

13. As explained above, the information withheld in this case is details of the number of prescriptions dispensed at one particular pharmacy, including details of the doctor who wrote the prescription. The BSA has said that disclosing this information would allow the commercial viability of the pharmacy to be assessed which could damage perception of the pharmacy services offered and which could potentially affect its ability to obtain discounts from wholesalers.
14. 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]*.² 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, arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
15. In light of this the BSA confirmed that it had sought the opinions of the pharmacies concerned prior to applying the section 43 exemption. It explained that the pharmacy at the YO13 9HL postcode objected to disclosure because his business had been subject to a local campaign to try and stop it opening and indeed to try and close it down. The pharmacy considered that the release of the information would re-ignite and add fuel to the arguments of the protest group.
16. The Commissioner is aware of the existence of a campaign targeting the pharmacy in question and considers that the owner's concerns as described by the BSA are genuine. In particular the Commissioner notes that the existence of a campaign group aimed at boycotting the pharmacy has been confirmed in local press reports.³
17. The Commissioner is limited in what he can say as to why disclosure would be detrimental to the pharmacy for fear of revealing the nature of the requested information. However he would say that he is satisfied that the disclosure would be likely to intensify opposition to the operation of the pharmacy aimed at making it commercially unviable. Therefore the Commissioner accepts that disclosure would be likely to

² Derry Council v Information Commissioner [EA/2006/0014]

³ <http://www.thescarboroughnews.co.uk/news/local/villagers-vow-to-boycott-pharmacy-1-1361266>

prejudice the commercial interests of the pharmacy and that section 43(2) is engaged.

Public interest test

18. Section 43(2) is a qualified exemption and therefore the Commissioner has carried out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of maintaining the exemption

19. The BSA argued that there was a demonstrable material impact on the business concerned and for this reason the public interest favoured maintaining the exemption. In the view of the BSA disclosure could threaten the viability of the business.

Public interest arguments in favour of disclosure

20. In its submission to the Commissioner the BSA listed the following arguments it considered in favour of disclosure:
 - Transparency
 - Lack of perceived commercial harm
 - The information requested could be broadly derived from other information that is in the public domain.
 - The fees and disbursements that are made to pharmacies are detailed in the drug tariff. And as this is a publically available document from the nhs bsa web-site (<http://www.nhsbsa.nhs.uk/PrescriptionServices/924.aspx>) it is reasonably easy, when combined with other available information to estimate the fees and disbursements a particular pharmacy will receive.
 - Similar requests made to the BSA's counterpart in Scotland (NHS National Services Scotland) have been answered in full.
 - Similar information on the performance of NHS Dentists, specifically Units of Dental Activity, is now routinely released after a successful complaint was made to the ICO by a requester. This information allows calculation of the value of a particular dental practice, which is similar to the impact that would occur for pharmaceutical contracts following the release of prescription volumes information.
 - Applications to open a pharmacy are "needs assessed" by Local Authority Health and Well-Being Boards on behalf of NHS England and therefore even if volume information is released it would not necessarily mean that a competing pharmacy could be opened, unless the needs assessment showed that there was a requirement for an additional pharmacy in the locality.

21. The pharmacy concerned is understood to be in receipt of subsidies through the Essential Small Pharmacies Local Pharmaceutical Services scheme. This scheme provides financial assistance to pharmacies which would not otherwise be financially viable due to their location but which are considered vital to providing pharmaceutical services to their communities. Therefore, the complainant argues that the public interest favours transparency and accountability in the operation of the scheme and in the spending of public money.
22. The complainant has argued that the public interest favours disclosure as it would allow for the merits of the essential pharmacies scheme to be examined.

Balance of the public interest arguments

23. The Commissioner has dealt first with the arguments in favour of maintaining the exemption and accepts that there is a certain amount of public interest in not prejudicing the commercial interests of the business concerned. The commercial interests of third parties should not be prejudiced lightly. In deciding that the exemption is engaged, the Commissioner accepts that it is at least likely that disclosure of the information would galvanise the campaign opposed to the pharmacy and this could have a detrimental impact on the commercial interests of the pharmacy and its owner.
24. However, when balancing the public interest the Commissioner must also give consideration to the extent and severity of any prejudice caused to the pharmacy. Here, the Commissioner is mindful of the fact that, as the BSA has itself acknowledged, it is already possible to get a broad understanding of the number of prescriptions dispensed at the pharmacy by information already in the public domain. Doctors' practices record details of which pharmacies the prescriptions it issues are allocated and in this case the information has been obtained from the local doctors' surgery. The number of items prescribed for a particular practice is routinely made available on the Health and Social Care Information Centre's website.
25. The Commissioner understands that the campaign was formed in protest against the pharmacy concerned after some patients were barred from using the pharmacy services of the local doctors' practice, which also dispenses the medicines it prescribes to patients (a "dispensing practice"). The law designed to separate the prescribing and dispensing of medicines does not permit patients to use a dispensing practice where they live within 1.6 km of a pharmacy. The effect of this is that when the new pharmacy opened some patients who had previously used the

dispensing practice now had to have their prescriptions dispensed at the new pharmacy or at other pharmacies further afield. By disclosing the number of the prescriptions the pharmacy dispenses and from which doctors they were issued the complainant would be able to establish to what extent the pharmacy is being used by the patients at the local dispensing practice. However, as the Commissioner has already said, it is already possible to broadly calculate this information because the local practice has disclosed the total number of prescriptions issued by the local practice and the complainant has also requested the number of prescriptions dispensed at other local pharmacies. The difference between the total of the prescriptions counted at all other pharmacies and the totals issued by doctors practice and the number they dispense themselves would give a total of the number issued by the local pharmacy.

26. In light of this the Commissioner considers that disclosure of the information would cause only a limited commercial prejudice to the pharmacy. Whilst it may serve to galvanise the campaign the Commissioner does not consider that this would greatly affect the financial success of the business. Moreover the campaign would appear to be well established and so it could be argued that disclosure of the information would have little material impact on the pharmacy beyond what has already happened.
27. On the other hand, the Commissioner considers that there are compelling public interest arguments in favour of disclosure. As the complainant argues, and as the BSA acknowledges, there is a legitimate public interest in communities being able to understand how the essential pharmacies scheme operates and in ensuring transparency in the spending of public money. Those in receipt of public money should expect a certain amount of transparency as to how their business operates. Bearing in mind the strongly held concerns of members of the local community, the Commissioner has given the arguments in favour of disclosure certain weight.
28. As regards the other reasons for disclosure, the fact that in other similar cases the Commissioner has ordered disclosure of data on NHS dentists or that similar information has been disclosed in Scotland are not in themselves grounds for finding that the public interest favours disclosure as the Commissioner decides all cases on their individual merits. That said, this does suggest that businesses working with the NHS should have an increasing expectation that information will be disclosed.

29. Given the limited prejudice that would be caused and the compelling reasons for transparency and accountability in this case the Commissioner has decided, bearing in mind the presumption in favour of disclosure that the public interest in disclosure is not outweighed by the public interest in maintaining the exemption.

Right of appeal

30. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

**Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**