

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2016

Public Authority: Brent CCG
Address: 116 Chaplin Road
Wembley
HA0 4UZ

Decision (including any steps ordered)

1. The complainant has requested copies of two contracts between Brent CCG (the CCG) and the relevant service providers. One contract is for the provision of ophthalmology services and the other for cardiology services. The CCG provided the bulk of the information from those contracts but withheld certain information under section 43 on the basis that it was commercially sensitive.
2. The Commissioner's decision is that only part of the withheld information is covered by the exemption provided by section 43.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information that does not engage section 43. This information is identified in the open annexe which accompanies this notice.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 July 2015 the complainant requested information of the following description:

"Please can I have a copy of the NHS Standard Contract particulars for ophthalmology with BMI and Cardiology with Royal Free Hospital?"

6. On 23 July 2015 the North West London Collaboration of Clinical Commissioning Groups responded on behalf of Brent CCG. It provided some information within the scope of the request but refused to provide the remainder. Although it did not cite a specific exemption as its basis for doing so, the North West London Collaboration of Clinical Commissioning Groups did explain that the information was being withheld to protect both Brent CCG's own commercial interests and those of the provider organisations.
7. The complainant requested an internal review on 24 July 2015. The North West London Collaboration of Clinical Commissioning Groups sent him the outcome of the internal review on 12 August 2015. The review upheld the original position and clarified that the information was being withheld under section 43(2), the exemption relating to information, the disclosure of which would prejudice the commercial interests of any party.

Scope of the case

8. The complainant originally contacted the Commissioner on 21 August 2015 to complain about the way his request for information had been handled. However it was only after the complainant submitted the necessary documentation that the complaint was accepted.
9. The Commissioner considers that the matter to be decided is whether the CCG is entitled to rely on the exemption provided by section 43(2) to withhold the information in question.

Reasons for decision

10. 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).
11. Commercial interests refer to the ability to participate in a commercial activity. In this case the information relates to the procurement of particular health services. The contract for the provision of ophthalmology services was awarded to BMI Healthcare Ltd (BMI) and the contract for cardiology services was awarded to the Royal Free London NHS Foundation Trust (the Trust). The CCG has argued that disclosing the information would be likely to harm both its own

commercial interests and those of the organisations providing those services. Those organisations are providing the services for profit, while the CCG's aim is to obtain the best value for money when securing those services. The information clearly relates to a commercial activity in which the CCG and both respective service providers have an interest.

12. Where a public authority is arguing that disclosing the information may harm the commercial interests of a third party, ie, in this case, either of the two service providers, the Commissioner will expect those arguments to be based on a proper understanding of their concerns. The Commissioner will not accept mere speculation about whether there would be any prejudice or how that prejudice may occur. Therefore he would generally expect the public authority to be able to demonstrate that it had discussed the matter with the relevant third party. In this case the CCG has provided a copy of the correspondence it has had with BMI and that letter supports the arguments presented by the CCG. However there is no evidence that the CCG has discussed the consequences of disclosing information from the contract for the provision of cardiology services with the Trust. In light of this the Commissioner will only consider arguments in respect of the CCG's own commercial interests when considering information redacted from the cardiology contract.
13. The exemption can be engaged on the basis that the alleged harm to commercial interests either 'would' occur or 'would be likely' to occur. The CCG is seeking to apply the exemption on the basis of the lower threshold, ie that the prejudice would be likely to occur. This is taken to mean that there must be a more than hypothetical possibility of the prejudice occurring. There must be a real and significant risk, even if that risk falls short of being more probable than not. (Although relying on the lower threshold makes it easier to engage the exemption, the lower level of certainty means there is less weight given to the factors for maintaining the exemption when considering the public interest test.)
14. Both contracts provide for the delivery of the respective health care service from local health centres as opposed to more centralised hospitals, so making the service more convenient for patients. Patients are referred to the relevant service by their GP or consultant.
15. The information redacted from the two contracts is quite limited and is generally restricted to pricing information in respect of the price paid for each initial appointment, the price paid for follow up visits and the care of patients with long term conditions. The redacted information includes that from which these prices can be calculated. The CCG has stated that these prices do not represent national tariff rates but have been offered following a competitive tendering exercise. Information on the minimum

payments that the service provider is entitled to receive regardless of the level of activity, ie the number of patients treated, has also been redacted.

16. In addition, information has been redacted from the ophthalmology contract including the ratio of follow up visits to initial visits, information on the expected level of activity, schedules of the timing of payments and information on the rent to be paid for use of the health centres from which the service is to be provided
17. The Commissioner will start by looking at the Ophthalmology contract between the CCG and BMI. The contract commenced in September 2014 and runs for 3 years, up to September 2017. The procurement process for a new contract will start in September 2016. This means that at the time of the request (July 2015) any pricing information was current and would also be of some relevance to a procurement process due to commence in 15 months' time.
18. The CCG has argued that if information on the prices BMI was prepared to offer Brent CCG were made public it would be likely to prejudice BMI's ability to compete for other, similar, contracts. This is on the basis that other CCGs would expect to be offered terms as least as favourable as those offered to Brent CCG. BMI is understood to operate on a national level and, from the submissions provided by the Brent CCG, it is understood that more CCGs are seeking to move services closer to communities and therefore BMI expects to be competing for similar contracts in the future. Neither the CCG, nor BMI has identified any particular procurement exercises that may arise in the future. This weakens their argument. However the Commissioner understands that the drive to deliver services locally is a relatively new initiative and that BMI's considers its pricing model offers an innovative solution to Brent CCG's needs. Therefore the Commissioner considers it likely that competitors would seek to glean whatever intelligence they could from the pricing information if it was disclosed.
19. In respect of its own commercial interests the CCG has argued that disclosing the withheld information on pricing would be likely prejudice its ability to obtain best value for money in future procurement exercises. It considers that disclosing the requested information will result in those submitting tenders in future procurement exercises being less likely to offer their best deal. The Commissioner understands that Brent CCG believes that other service providers may be guided by knowledge of what the CCG had accepted in the past and seek to undercut that price by as slim a margin as possible. The Commissioner can see the logic in such an argument, although this would be a risky strategy where there were a number of service providers bidding for the contract.

20. The Commissioner accepts there is a realistic risk that if the information on the prices of initial visits, follow up visits and long term care were disclosed the commercial interests of BMI could be prejudiced. Although the arguments presented in respect the CCG's own commercial interests are less compelling, the Commissioner nevertheless accepts that the risk is a real one. The exemption is therefore engaged in relation to this pricing information and any other information from which those prices can be calculated.
21. Included in the withheld information is that from table 'F. Expected Annual Contract Values', including the total value contained in the bottom cell of the last column. This value represents the total annual value of the contract. This information could be released without allowing the prices for initial visits, follow up visits and care of glaucoma patients to be calculated. This total does not engage the exemption. Nor do the figures for 'Total Activity' ie the number of patients treated. The remainder of the table does engage the exemption.
22. Contained in the contract is a table relating to the payments to be made to BMI titled 'Payment Profile of Brent Ophthalmology Contract'. The figures on the actual payments engage the exemption as their disclosure would enable the prices charged to be calculated. However the information on the level of activity (ie the number of initial visits, follow up visits and number of glaucoma patients receiving long term care expected) contained in the last three columns could be released without revealing any pricing information and therefore does not engage the exemption. In any event the Commissioner considers that information on anticipated patient numbers would be provided to those bidding for future contracts so that they could submit realistic tenders.
23. Information from that table has been extracted and is included in 'Table H - Timing and Amounts of Payments in First/Final Contract Year'. Again the pricing information attracts the exemption but the information the level of activity does not.
24. The contract also provides for block payments, which the Commissioner understands to be payments that BMI are guaranteed to receive regardless of the number of patients treated. The figures may not in themselves allow the unit price of each form of treatment to be calculated, but they do represent the minimum price which the CCG will pay for the provision of services. The Commissioner recognises that this may be the subject of negotiation in future contracts. Therefore to disclose what the two parties were prepared to accept in this contract would be likely to undermine both their bargaining positions in any future procurement exercise they were involved in. The exemption is engaged in respect of this information.

25. The CCG has also withheld the ratio used to calculate the number of initial visits for general eye care that result in follow up visits. This figure appears in a number of places throughout the contract. For reasons explained in the confidential annexe the Commissioner does not accept that this information engages the exemption. The confidential annexe has only been provided to the CCG
26. Another piece of information withheld by the CCG relates to the rent for the premises from which BMI will deliver the ophthalmology services. In light of the information that the CCG has already disclosed about these arrangements, the Commissioner considers that there is nothing sensitive about this information. This information does not engage the exemption and should be disclosed. In any event the CCG has not advanced any arguments in favour of withholding this information.
27. Finally the CCG has withheld information from 'Schedule 5 – Governance'. This schedule lists the documents relied on by the CCG and BMI. From the list of documents relied on by the Commissioners one document has been withheld and two further documents were mistakenly omitted from the original disclosure. These two documents were listed against 1 July 2014 and 5 September 2014. Having recognised the mistake the CCG is happy to release these to the complainant and should now do so.
28. The document which the CCG intentionally withheld was listed against the 10 December 2012. The Commissioner has examined this document. It contains the annual value of the contract. As discussed at paragraph 21, this information does not allow the unit price of the different services offered under the contract to be calculated and therefore should be disclosed. The Commissioner understands that the CCG does not wish to apply any exemptions to the remaining part of the document and so it should be disclosed in its entirety.
29. The Commissioner will now consider the information withheld from the cardiology contract with the Royal Free London NHS Foundation Trust. The only information that has been redacted from this contract is that relating to unit price agreed on various services such as new outpatient visit, follow up visits, care for patients with long term conditions or in need of cardiac rehabilitation, together with the details of block and guaranteed payments. The unit price information has been withheld from table 'F. Expected Annual Contract Values', the block and minimum payments have been redacted from table 'H. Timing and Amounts of Payments in First/Final Contract Year'.
30. The Commissioner notes that the Cardiology contract only commenced in March 2015, only four months before the request was received

31. For the same reasons as set out in respect of similar information in the ophthalmology contract (see paragraphs 19 and 24) the Commissioner accepts that the disclosure of such information would be likely to prejudice the commercial interests of the CCG itself.
32. However, contained within table F is a total figure for the annual value of the contract in the bottom row of the fourth column. The Commissioner is not satisfied that the unit prices can be calculated from this figure. Therefore it does not engage the exemption. The Commissioner also notes that in the redacted version of this table which was provided to the complainant there are annotations which suggest further redactions to the top row of columns two and three, and the bottom row of column two. However it does not appear that any information has actually been redacted from these cells. These annotations are therefore misleading and when the CCG provides the complainant with the total for the annual value of the contract it should amend the table so that only those cells from which information is being withheld are shown as having information redacted from them.
33. The CCG also informed the Commissioner that another local CCG is running a procurement exercise for a community cardiology service very similar to that which the Royal Free London NHS Trust provides in Brent. The CCG assumes that the Trust may bid for that contract. The Commissioner recognises that if this was so, there would be a good argument that disclosing the pricing and payment information would undermine the Trust's negotiating position with the neighbouring CCG and provide potentially useful information to its competitors. However in the absence of evidence that this argument accurately reflects the concerns of the Trust, the Commissioner is not prepared to consider it.

Public interest test

34. Section 43 is a qualified exemption. Therefore in respect of the information from the two contracts which engages the exemption it is necessary to consider the public interest test before deciding whether the information can be withheld.
35. The public interest test is set out in section 2(2)(b). It states that information can only be withheld if,

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."
36. The Commissioner notes that the exemption has been engaged on the basis that the prejudice envisaged by the CCG and BMI is only likely to

occur. This reduces that weight that can be given to their arguments about the impact that disclosing the information would have.

37. In favour of disclosing the information the CCG has acknowledged that there is a public interest in transparency, accountability and the promotion of public understanding of its work. It says that it has taken into account the fact that the contracts concern large sums of public money.
38. The Commissioner considers this understates the public interest in disclosing the pricing and payment information. The information does relate to the large sums of public money and it is understandable that the local community would wish to know how limited resources are used so that they can be satisfy themselves as to whether the CCG obtained best value for money and managed the procurement exercise in a competent manner. This is all the more important if, as the CCG itself suggests, similar procurement exercises and outsourcing of services are to be become more common. The use of health care providers from the private sector is not without its critics and there is a genuine public debate over how desirable, or effective, the use of such service providers is.
39. The Commissioner has not been able to find any details relating to the overall cost of the contracts on the CCG's website, nor has the CCG explained what information on the value of the contract has been published. In the absence of such information there is a greater public interest in making the financial details of the two contracts public. However, the Commissioner has found that the annual values of each contract should be released (see paragraphs 21 and 31) and this will go part way to meeting this public interest.
40. The Commissioner also considers the argument that the pricing and payment information would be of use to other service providers when bidding for future contracts is double edged. That is, disclosing information on the price per unit of the successful bid may drive that price down when it is retendered. It is also arguable that the incumbent service provider, with detailed knowledge and experience of running the contract has an advantage when the contract comes up for renewal. Therefore disclosing the withheld information could level playing field.
41. In favour of withholding the information, the CCG has argued there is a public interest in it being able to obtain best value when putting contracts out for tender. It considers that, despite counter arguments, the most likely result of disclosing the pricing and payment information is that, in future procurement exercises, competitors of the two current service providers would seek to undercut those prices by the narrowest of possible margins, rather than offering the best price possible. On

balance the Commissioner considers this is the more likely of the two outcomes and that disclosure would undermine the CCG's ability to obtain ophthalmology and cardiology services for the lowest price the market could offer. This obviously has an impact on the public purse.

42. The Commissioner has also taken into account that at the time of the request the ophthalmology contract had only been running for just over nine months and so the pricing and payment information can still be regarded as current. Therefore releasing this information still had the capacity to significantly undermine BMI's interests. The Commissioner finds that for public authorities such as the CCG to benefit as fully as possible from its procurement exercises, it is important that potential bidders are not deterred from competing or that the submission of innovative pricing modes is not stifled by disclosing such information.
43. Having considered all the factors discussed above the Commissioner finds that the public interest in maintaining the exemption and continuing to withhold the information, outweighs the public interest in its disclosure. Therefore that information which engages the exemption can be withheld under section 43(2).
44. The Commissioner has produced two annexes to this notice. The first will be provided to both the complainant and the CCG and will identify the information which should be disclosed and which can be withheld. The second annexe will be made available only to the CCG as it provides some additional explanation of why some of the information does not engage the exemption. That explanation risks revealing the actual information in question and therefore if provided to the complainant would undermine the CCG's right of appealing this decision.

Right of appeal

45. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

46. 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.
47. 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

Robert Mehan
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