

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2017

Public Authority: Guy's & St Thomas' NHS Foundation Trust

Address: Guy's Hospital
Commercial Directorate
F1 Counting House
Great Maze Pond
London
SE1 9RT

Decision (including any steps ordered)

1. The complainant has requested information on commissions paid to agents for patients treated where this was paid for by an overseas government. Guy's and St Thomas' NHS Trust refused to provide this information on the basis that it would prejudice its commercial interests (section 43(2)).
2. The Commissioner's decision is that the Trust has failed to demonstrate the causal link between disclosure of the information and the stated prejudice to its commercial interests. She therefore finds the section 43(2) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the amount of any commissions paid to agents or intermediaries for services relating to the introduction or case management of patients treated at the Trust where the treatment costs was funded by an overseas government.
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 27 December 2015, the complainant wrote to Guy's & St Thomas' NHS Foundation Trust ("the Trust") and requested information in the following terms:

"For each of the past ten financial years, up to and including 2015-16, please advise the amount of any commissions paid to agents or intermediaries for services relating to the introduction and or case management of patients treated at your organisation where the cost of the treatment was funded by an overseas government. Please list any intermediaries who have received over £25,000 in any given year, together with the amount paid to them in each year."

6. The Trust responded on 25 January 2016. It stated that it held information within the scope of the request but was withholding this on the basis of section 43(2) of the FOIA. The complainant responded on 26 February 2016 disagreeing with the decision and asking that the Trust, as a minimum, agree to disclose the total amount of the commissions paid in each year. The complainant indicated he would be willing to withdraw the part of his request asking for a breakdown of payments by agent for those receiving over £25,000 in a year.
7. The Trust responded again on 30 March 2016 maintaining that any information held was exempt from disclosure under section 43(2) and, in addition, stating that commissions were only paid for private patients using money raised only from private activity.
8. The complainant requested an internal review of this decision on 11 April 2016 and after failing to receive any response, referred the matter to the Commissioner. The Commissioner wrote to the Trust on 2 July 2016 to ask the Trust to conduct an internal review and this was done and the outcome communicated to the complainant on 19 July 2016. The Trust upheld its position that the information it held was exempt on the basis of section 43(2) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 3 June 2016 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied the exemption at section 43(2) to withhold the information it holds.

Reasons for decision

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
12. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance¹ on the application of section 43. This comments 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."
13. The withheld information relates to the amount of commissions paid to agents for services for patients where the treatment was funded by an overseas government. The Trust has explained that it has a small international practice and only one agent is used. The withheld information would therefore be a total sum paid for each of the last ten financial years to that agent.
14. On this basis the Commissioner considers that this information does fall within the scope of the exemption as it is clearly information on a commercial activity as it relates to the costs involved in the provision of a service.
15. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties which would be affected.

The nature of the prejudice

16. The Trust explained that the release of the amount paid to this agent could commercially compromise its relationship with that agent. It states that this could lead to the agent stopping the referral of patients to the Trust which would have a material impact on private practice revenues.

¹ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

17. The Trust further argued that revealing this information and putting this together with other information on the Trust's pricing structure would undermine the commercial position of the trust within the competitive London private patient market. In expanding on this point, the Trust stated that the commission fees paid to agents could be combined with information on income by speciality and category which have been previously disclosed. As well as this any competitor with a reasonable knowledge of private patient non-pay averages would be able to use the figures on commissions and this would compromise the Trust's commercial position.
18. This prejudice to the Trust's commercial interests would come about as it would undermine the Trust's ability to remain competitive by disclosing information which could be used by competitors to undercut the pricing model. This in turn would compromise the Trust's status as a preferred provider and hospital for its brokers, affecting revenue flows for private practice, its position with competitors, and relationships with embassies and overseas governments. The Trust states it requires excellent relationships with overseas governments for its broader international commercial strategy.
19. The Trust argues that private patient activity overall provides net profits to the Trust, helping to subsidise NHS costs. The referrals received by the Trust in this way amount to a significant proportion of the Trust's private practice revenues.
20. The Commissioner accepts that private patient activity is of importance to NHS Trust's and the revenue they generate. However, she must be convinced that disclosing the specific information in question would prejudice the Trust's commercial interests – in this case that disclosing the commissions paid for the last ten years would undermine the Trust's ability to remain competitive.
21. The Commissioner recognises that in a situation where only one agent is involved then disclosing the information on commission paid will then also show how much is paid to one individual agent rather than if multiple agents were involved and the sums paid could be combined to provide a total. This does suggest that disclosing the sums would reveal how much the Trust has paid in commission to one agent in each of the last ten financial years. The main question for the Commissioner to consider is whether revealing this would have a prejudicial effect on the Trust's commercial interests by providing competitors for private patient referrals from overseas with an ability to undercut the Trust.
22. To accept this argument the Commissioner must be satisfied there is a causal link between disclosure of the information and the prejudice argued by the Trust. For historical information, dating back several

years it is difficult to see how disclosure of the information now would have a prejudicial effect on the Trust as the situation now will be different than at the time the commissions were paid. There can be a huge number of variables which will affect the amount paid, from financial conditions at the time to the amount of private patients referred in that financial year. For information for previous years the Commissioner is not minded to accept that disclosure would have a prejudicial effect on the Trust when it will essentially show a historical position and not reflect the current amount paid by the Trust.

23. For the commissions paid in the most recent financial year; the Commissioner accepts the information is more relevant as it reflects the most recent position at the Trust and the most up to date figures for the amount of commission paid to agents for private patients referred from overseas. That being said, the Commissioner again observes that the amount paid to an agent is likely to be affected by a number of variables so it is difficult to see how releasing this figure would be useful to competitors.
24. The Commissioner has concluded that the Trust has failed to explain the causal link between the implied commercial prejudice and the disclosure of the information. She therefore does not consider it has been sufficiently demonstrated that there would be any prejudice to the Trust's commercial interests.

Right of appeal

25. 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

26. 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.
27. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF