

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2018

Public Authority: NHS Norwich Clinical Commissioning Group

Address: Room 202 City Hall
St Peter's Street
Norwich NR2 1NH

Decision (including any steps ordered)

1. The complainant has requested from Norwich Clinical Commissioning Group ('the CCG') a functioning version of a particular spreadsheet. The CCG has withheld the information under section 43(1) of the FOIA (trade secrets) and 43(2) (prejudice to commercial interests).
2. The Commissioner's decision is that:
 - the CCG can be said to hold the requested information in line with section 1(1)(a) of the FOIA; and that
 - the requested information is exempt from disclosure under section 43(2), with the public interest favouring maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 26 April 2017 and as part of a wider request, the complainant wrote to the CCG and requested information in the following terms:

"3. Please provide a functional, digital template for this spreadsheet."

5. The CCG responded to this request on 23 May 2017 (its reference FOI.17.NOR019). It said that it did not hold this information and that it would be held by NHS NEL Commissioning Support Unit ('the CSU'). The CCG provided the complainant with the relevant email address.
6. The CCG provided an internal review of its response on 31 July 2017. It revised its position and confirmed that it does hold the requested information but that it is exempt from release under section 43(1) and section 43(2) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 10 July 2017 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has first focussed on whether the CCG can be said to hold the requested information. If so, she has been prepared to next consider whether the information is exempt from release under either section 43(1) or section 43(2) of the FOIA, and the balance of the public interest.

Reasons for decision

Section 1 – right of access to recorded information

9. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled to be told (a) whether the authority holds the information and (b) to have the information communicated to him or her if it is held.
10. In the submission it has provided to the Commissioner, the CCG argued that it does not consider that the request is a request for recorded information and that, as such, the complainant does not have a right of access to this information under the FOIA.
11. The CCG has noted that the rights under the Act are rights of access to 'information', which is described in section 84 as 'information in any recorded form'. It says the fact that this definition covers information recorded 'in any form' means that, for example, requests can be made for access to written memoranda, photographs, plans, video and sound recordings, and data held on a computer. If the information is not recorded then it is not covered by the Act; the CCG has referred to Mr N Ingle v Information Commissioner (EA/2007/0023) 29/06/2007).

Although information must be recorded before it falls within the scope of the Act, the CCG has noted that the Act provides a right to 'information' rather than to 'documents'.

12. The CCG has referred to examples of recorded information given in the Commissioner's guidance, such as design and layout, logos and letterheads and email transmission details.
13. The guidance goes on to state that this 'broad interpretation' is based on the Upper Tribunal decision in *IPSA v Information Commissioner and Leapman* UKUT 0033 (ACC) (23 January 2014). In *IPSEA v ICO & Leapman*, the requester sought disclosure of copies of the original documents produced by MPs in support of their expenses claim. The Information Commissioner ordered production of those copies, on the basis that the receipts would have "visual context". The First-tier Tribunal, and then the Upper Tribunal, agreed with the Information Commissioner.
14. The CCG has gone on to refer to the Court of Appeal judgement in 2015 (Richards, LJ) which affirmed the position of the Upper Tribunal, accepting that in some cases it will be necessary to disclose the record itself, in order to give effect to the entitlement to the entirety of the information contained within it. In that case, it was not enough for the Independent Parliamentary Standards Authority to simply provide a transcript of the original documents. Rather, the form and layout of the invoices provided additional information to which the requester was entitled. For example, reviewing the form and layout of a receipt is one way to assess the genuineness of the document. In that case the requestor was entitled to the originals of the receipts requested.
15. The CCG says that in this case the complainant has specifically requested access to 'a functional, digital template [for the Cost Calculation Tool]'. The Cost Calculation Tool is a tool that has been developed by the CSU Personal Health Budget (PHB) Team to calculate PHBs in as efficient way as possible so that the CCG maximises the use of its budget, whilst also complying with its statutory obligations. According to the CCG, the Cost Calculation Tool operates much like a calculator does and, it argues, is not simply 'recorded information' that the requester would be entitled to under the Act. The CCG says the Cost Calculation Tool operates much like a function within an operating system, with coding that sits behind the main interface. It says it is a tool that contains unique formulae, and does more than merely record raw data or other static information.
16. The CCG considers that it is important to note that while the decision in *Ipsa v Information Commissioner and Leapman* clarified, to an extent, the breadth of the definition of 'recorded information', it does not follow

in its view that the Act is now a route for documentary disclosure, any more than the Data Protection Act is. Accordingly, the CCG has confirmed that it is of the view that the complainant does not have a right of access to the 'functional' Cost Calculation Tool under the Act, as it is not recorded information for the purposes of section 84.

17. The Commissioner has noted the CCG's arguments. But she has also noted that, behind the complainant's request is a concern about how she considers the CCG is managing her own PHB, and PHBs more generally. In the Commissioner's opinion what the complainant is seeking through her request is not the Cost Calculation Tool document, as such, but information on both the content of the Cost Calculation Tool and the formulae it contains that generate costings when particular data is entered.
18. The CCG has provided the Commissioner with a copy of the Cost Calculation Tool. She notes it is an Excel document comprising three sheets titled 'Hourly', 'Live-in' and 'Guidance'. If a formula can be unearthed and viewed, which is the case in an Excel spreadsheet such as the Cost Calculation Tool, then the Commissioner is satisfied that the information can be said to be held information.
19. In coming to this view, the Commissioner has also considered her decision in FS50636725 and her own guidance on 'Determining whether information is held', which discusses data behind an electronic document. The Commissioner notes that the CCG has told her that the complainant has received 'pdf' versions of the 'Live-in' and 'Guidance' sheets – ie non-functioning versions – in response to a subject access request under the Data Protection Act.
20. The Commissioner has considered the CCG's concern and is satisfied that a functioning version of the Cost Calculation Tool can be considered to be information that the CCG holds under section 1 of the FOIA, and that the complainant's request is valid under the Act.

Section 43 – commercial interests

21. The CCG has provided the Commissioner with a background and context to the requests. It has told her that a PHB is an amount of money to support the identified healthcare and wellbeing needs of an individual. This is planned and agreed between the individual, or their representative, and the local clinical commissioning group. A PHB is another way of delivering NHS continuing healthcare (CHC).
22. PHBs are one way to give people with long term health conditions and disabilities more choice and control over the money spent on meeting their health and wellbeing needs.

23. A personal health budget may be used for a range of things to meet agreed health and wellbeing outcomes. This can include therapies, personal care and equipment. There are some restrictions in how the budget can be spent.
24. The CCG says that personalised care and support planning is essential to making personal health budgets work well. A personalised care and support plan helps people to identify their health and wellbeing goals, together with their local NHS team, and sets out how the budget will be spent to enable them to reach their goals and keep healthy and safe.
25. This means that PHB holders can choose to have someone they know look after them, so that they are in control over who comes into their home and provides care for them. This differs from other forms of CHC where CCGs source and contract their care. However, it does not mean that PHB holders are entitled to any more, or less, care than someone who is not on a PHB.

The role of the CCG and Commissioning Support Unit

26. Under the National Health Service (Direct Payments) Regulations 2013, CCGs are required to provide and manage CHC, which includes PHBs. However, the provision and management of CHC can be contracted out to third parties such as the CSU. In this case, the CSU manages PHBs on behalf of NHS Norwich CCG and within the CHC budget envelope that is set by the CCG.
27. As part of the PHB care package approval process, the CCG says that the PHB team within the CSU will calculate the cost of the package, which involves calculating the cost of care as it would have been delivered via a brokerage team. However, an agency also charges the NHS an element of profit, overheads, administration and travel-time for carers. As a PHB-holder usually pays for care directly and therefore does not incur these costs, the CSU can reduce the price that they would have paid an agency via a sliding scale – from a 4% reduction for packages costing less than £30,000 a year to a 26% reduction for packages costing more than £120,000 per annum. This means the PHB-holder will still have sufficient money to meet the full costs of their care needs (10 hours per day at a Tier 1 level (ie low support needs) in the example above) and will be able to comply with all Employment Law requirements and PHB requirements.
28. As such, the CCG says it is fully compliant with legislation regarding PHBs, which state that “[a] *health body must ensure that the amount of the direct payments paid to or in respect of a patient is sufficient to provide for the full cost of each of the services specified in the care*

plan." In other words, there needs to be sufficient funding to pay for all costs of employment and training, amongst other things.

Section 43(1) – trade secrets

29. Section 43(1) of FOIA provides that information is exempt information if it constitutes a trade secret. There is no statutory definition of a "trade secret" but the Commissioner will follow the Information Tribunal's preferred view of the meaning of trade secret as outlined in the case of Department of Health v Information Commissioner at paragraph 50. The Tribunal referred to the Lansing Linde V Kerr [1991] WLR 251, Staughton LJ Court of Appeal case.
30. It is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria:
 - (i) it must be information used in a trade or business
 - (ii) it must be information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
 - (iii) the owner must limit the dissemination of the information or, at least, not encourage or permit widespread publication.
31. It is the Commissioner's view that a trade secret implies that the information is more restricted than information which is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment.
32. In her published guidance on section 43¹ the Commissioner explains that trade secrets can include a 'technical' secret, such as an invention, manufacturing process, engineering or drawing design or a recipe, or a 'business' secret, such as how much a company spent on product development, supplier lists or pricing information.
33. The Commissioner goes on to say that just because information falls into one of the above categories, this does not necessarily mean it will be a trade secret. A business secret in particular is less likely than a technical secret to be considered as a trade secret.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

34. With regard to the first criteria at paragraph 30(i), in its submission to the Commissioner, the CCG has re-stated that the CSU operates in a commercially environment. It says the CSU bids for, and provides services to, over 100 customers including clinical commissioning groups across England; in London, Essex, Hertfordshire, Bedford, Luton, East Anglia, Kent, Surrey and Sussex. The CSU also sells and delivers a range of support services and bespoke solutions to healthcare organisations across England. These include hospital trusts, hundreds of GP practices, mental health trusts, NHS England nationally and regionally and to local authorities. The Commissioner considers the first criteria is satisfied and that the requested information is used in trade or business.
35. In relation to the second criteria, the CCG has told the Commissioner that the way the CSU calculates a PHB – through its Cost Calculation Tool - is how it sells this service to CCGs. It argues that if the formulae were disclosed, it would then be open for any organisation, including other CSUs, to use these and provide a competing service.
36. The CCG says that the Cost Calculation Tool is part of the core offer that the CSU makes to CCGs and disclosing it would put the CSU at a significant commercial disadvantage in relation to the PHB service. Finally, the CCG has argued that disclosing the Cost Calculation Tool would provide competitors with a blueprint, which would reveal the CSU's 'hard won expertise and design ideas' and distort competition in the CHC market. On the basis of the CCG's arguments, the Commissioner is prepared to accept that disclosing the Cost Calculation Tool, which the CSU has designed and which is unique to it, would be liable to cause real or significant harm to the CSU.
37. With regard to the third criteria at paragraph 30(iii), the CCG has confirmed that the digital version of the Cost Calculation Tool, and its methodologies, are not widely shared or known outside of the CSU.
38. The CCG has noted that there is no requirement under section 43(1) to assess the prejudice that disclosure would cause, because this is inherent in the meaning of trade secret.
39. While the three criteria at paragraph 30 appear to have been met, the Commissioner has not been persuaded that the information requested in this case can be considered to be a trade secret. While there is a technical aspect to the spreadsheet, the Commissioner considers that this information more comfortably fits the 'business secret' categorisation of trade secret. As mentioned, a business secret is less likely to be considered to be a trade secret.

40. Because the threshold for categorisation as a 'trade secret' is high, it is extremely rare for the Commissioner to find that information that has been withheld under section 43(1) engages that exemption. The Commissioner is not satisfied that the threshold has been met on this occasion.
41. The Commissioner therefore finds that the requested information does not engage the exemption under section 43(1) and she has gone on to consider the CCG's application of section 43(2).

Section 43(2) - prejudice to commercial interests

42. Section 43(2) of the FOIA says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The exemption is again subject to the public interest test.
43. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. Firstly, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
44. In this case, and as discussed above, the Commissioner accepts that the harm that the CCG alleges would, or would be likely to, occur if the requested information was disclosed relates to the commercial interests of the CSU, which is the interest applicable to section 43(2).
45. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must, be real, actual or of substance.
46. The Commissioner accepts that if the CSU's Cost Calculation Tool – which is the methodology the CSU uses to price its services - was released it would be likely to result in a commercial detriment to the CSU, including loss of income. This is because, as explained by the CCG, organisations offering competing services would have access to key CSU information which it would be able to use to calculate their own PHB, and to design a service around it. This would place the CSU at a disadvantage when bidding for contracts and would have a negative effect on its revenue streams and competitive edge. The Commissioner is satisfied that this alleged prejudice is of substance.
47. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would'

result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

48. In its submission to the Commissioner, the CCG has advised that it considers that disclosing the requested information *would be likely to* prejudice the CSU's commercial interests. In this case, although it may not be possible to confirm that the CSU would definitely be put at a commercial disadvantage, the Commissioner is prepared to accept that if the requested information was to be disclosed, there may very well be prejudice caused to the CSU's commercial interests.
49. Because the Commissioner has found that the three criteria for prejudice have been met, she finds that section 43(2) is engaged with respect to the request. She has gone on to consider the public interest test with regard to this exemption.

Public interest test

50. The complainant has provided the Commissioner with the following public interest arguments for disclosure.
51. First, the complainant has said that, regarding the funding of PHBs, the CCG's chief executive PHBs had stated that PHBs will need to be cost neutral and the complainant has referred the Commissioner to a letter from the CCG's Chief Officer dated 21 August 2018⁷. The Commissioner understands from this letter that 'cost neutral', in this context, means that the NHS should not incur costs to deliver PHBs, such as addition staffing and support costs.
52. The complainant has told the Commissioner that in October 2017, and following her complaint to the Commissioner, the CCG has indicated to her that the NHS does not need to allocate the same amount of money to a PHB that a CHC package would cost. The CCG has said it can use the money it would otherwise have spent on fees and profit margins to fund more NHS care, making the best use of its resources. The complainant disputes this. She argues that as many PHB holders use their budgets to commission agency care, the CCG's 'adjustment' argument is entirely obsolete. She considers that the claim that the sliding scale of cuts is implemented equitably is "ludicrous". The complainant considers the sliding scale of cuts is arbitrary and discriminatory and creates vastly inexcusable discrepancies in funding.

53. The complainant has told the Commissioner that, due to extreme underfunding, PHB holders are being forced to compromise either on the quality or quantity of their care. She says that the CCG calculates PHBs in such a way that some PHB holders who directly employ their own staff cannot even pay National Minimum Wage. The complainant has provided evidence (a Cost Calculation Tool based on rates from a fellow PHB-holder) that a patient with one high level (ie 12 hour) live-in carer would only be able to pay £7.46 per hour, whereas a patient with lower assessed needs, who only requires half as many care hours, could pay their carer £13.95 per hour.
54. Central to the complainant's concern is the sliding scale of cuts. She argues that by applying "the discriminatory cut", the rate of pay available to PHB holders is rendered inversely proportional to the level of assessed needs and that the most unwell patients are therefore being forced to accept the most dangerous levels of care. More specifically, the complainant is also very concerned because she considers the PHB funding she receives is insufficient to meet her assessed care needs and has not been reviewed since 2015.
55. The complainant considers that PHB processes, such as those above, are a cause for great concern, and require public scrutiny. She disputes that disclosing the information would be likely to prejudice the commercial interests of the CSU, and considers it would most certainly expose the "gross incompetence and inequalities" in the CCG's methodologies.
56. According to the complainant, rival CSUs and other competitors would not want to design a service around the CCG's model of PHB calculation, as it is inviting complaints that are being upheld. She has provided an example of such a complaint regarding a PHB holder in Norwich who raised a complaint with the Parliamentary and Health Service Ombudsman (PHSO) that was upheld. According to the complainant, the PHSO upholds fewer than 3% of complaints about CHC, which she says gives a very good indication of how "appalling" PHB service provision in Norwich is.
57. To further support her position, the complainant has directed the Commissioner to information on the costs – over £25,000 - of the CSU's PHB services to the CCG, which the CCG publishes. She also says that NHS England and the CCGs frequently respond openly to requests about how many PHBs are funded in any given area, and has provided an example. Finally, the complainant has advised the Commissioner that as of 1 November 2017, the CSU no longer provides PHB services to the CCG.
58. In its submission to the Commissioner, the CCG has given the following public interest factors in favour of disclosure: the inherent public interest

in public authorities being open and transparent and that disclosing the information would aid public understanding of the PHB process.

59. As public interest factors against disclosing information, the CCG has provided the following arguments:

- there is public interest in ensuring fair competition
- disclosing the information would give competitors an unfair advantage when services are put out to re-tender or when competing on new bids.
- disclosing the requested information would reduce the CSU's ability to negotiate future contracts; and
- there is strong public interest in the CSU being able to protect its methodologies.

60. The CCG has said that, overall, it does not believe that the factors favouring disclosure outweigh the factors favouring maintaining the section 43 exemptions. It acknowledges the significant public interest in full disclosure and transparency but says it also recognises the importance of treating competing concerns equally and fairly and, most importantly here, in protecting the CSU from unreasonable commercial disadvantage by disclosing critical information to its rivals. The CCG further acknowledges that in every consideration of the public interest test there will be tension between the two principles that must be balanced. However, the CCG has confirmed that in this instance it does not believe there is any significant public interest value that outweighs the prejudice that would be caused to the CSU if the requested information were to be disclosed.

Balance of the public interest

61. The Commissioner has noted the CCG's explanations at paragraphs 27 and 28 and that the CCG's position is that it is fully compliant with legislation regarding PHBs.

62. The Commissioner has taken into account that the requested information is of interest to the complainant and she has noted the concerns that the complainant has detailed, and the supporting material she has provided. The Commissioner has also noted that the complainant has argued that if the information she has requested is not disclosed it will be more difficult to hold the CCG accountable for its actions.

63. The calculations behind the CSU's Cost Calculation Tool may, or may not, be flawed. The Cost Calculation Tool is nonetheless the

methodology by which the CSU sold its services to purchasers at the time of the request and currently; competing with other service providers offering similar services. Disclosure under the FOIA is effectively disclosure to the world at large. The Commissioner considers there is a strong public interest in the CSU being able to compete fairly in a commercial environment and this ability would be compromised if the requested information were to be released.

64. In the Commissioner's view, this argument is stronger than the arguments for disclosure that the complainant has provided. In the Commissioner's view, a more appropriate route to hold the CSU and/or CCG to account with regard to her own circumstances would be by submitting a complaint to the PHSO. Any wider problem with the CSU's methodology would be likely to be surfaced if the PHSO were to receive a number of such complaints from different individuals in receipt of a PHB provided by the CCG.
65. The Commissioner's decision is therefore that the information requested is exempt from release under section 43(2) of the FOIA and that the public interest favours maintaining the exemption.

Right of appeal

66. 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

67. 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.
68. 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

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