

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 June 2018

**Public Authority:** NHS Commissioning Board (NHS England)

**Address:** Quarry House  
Leeds  
LS2 7UE

#### Decision (including any steps ordered)

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1. The complainant has requested information on sources of revenue income for a number of Commissioning Support Units (CSU's). NHS England provided overall figures but refused to break this down further into funding received from Clinical Commissioning Group's (CCG's), other NHS bodies and non-NHS bodies on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that NHS England has failed to demonstrate that there would be prejudice to the commercial interests of the CSU's if the information were to be disclosed. The Commissioner finds the section 43(2) exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information requested at parts a), b) and c) of the request
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

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5. On 6 April 2018, the complainant wrote to NHS England and requested information in the following terms:

*"With regard to the following organisation: North of England CSU, Greater East Midlands & Arden CSU, Midlands & Lancashire CSU, South Central & West CSU and South East CSU & North and East London CSU.*

*I request the following information in relation to each CSU:*

*1) Total revenue income for your CSU in the financial year 2015/16, and specifically its source:*

*a) Funding from Clinical Commissioning Groups (CCGs), by CCG, and by value (£)*

*b) Funding from other NHS bodies, by organisation, and by value (£)*

*c) Funding from non-nhs bodies, by organisation, and by value (£)."*

6. NHS England responded on 26 April 2018. It provided figures for the total revenue income for each of the CSU's but refused to provide the further breakdowns on sources of funding on the basis of section 43 of the FOIA.
7. An internal review was not requested by the complainant after discussions with the Commissioner. This request was made following the refusal of an earlier request under section 12 of the FOIA. The earlier request had asked for the information requested in this case but as this was part of a larger request it was refused under section 12. However, NHS England did explain that even if section 12 had not applied this information would be withheld under section 43. Following advice and assistance from NHS England, the information request which is the subject of this decision notice was made and subsequently refused under section 43 of the FOIA. As NHS England had already made it clear that its position remained unchanged, the Commissioner agreed to accept this complaint without an internal review.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 26 April 2018 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation is to determine if NHS England has correctly relied on the provisions of

section 43(2) of the FOIA to withhold the information requested in parts a), b) and c) of the request.

## Reasons for decision

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### Section 43 – prejudice to commercial interests

10. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
11. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which 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;
  - Secondly, 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 which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes 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 to discharge.
12. The Commissioner's guidance explains 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. In this case the withheld information relates to the funding received by the CSU's. NHS England explained the CSU's all operate within a commercial environment, competing with one another and other organisations in the provision of services to clinical commissioners. Information on sources of funding for each of the CSU's would be commercial as it relates to their finances and thus their ability to operate commercially.

13. Furthermore, 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]*. 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, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
14. NHS England argues that disclosing the breakdown of CSU's income, in terms of amount and source of funding would be likely to prejudice the commercial interests of the CSU's. However, as CSU's are hosted by NHS England they are not, as such, third parties. However, NHS England did liaise with each CSU and the national CSU transitions team to reach the view that it would be likely to prejudice the CSU's commercial interests to disclose the requested information.
15. NHS England also suggested disclosing this information would commercially disadvantage private organisations who are not subject to the FOIA by putting commercially sensitive information into the public domain. This would allow competitors access to information which would not normally be available and would have a commercial impact on the organisations who have relationships with CSU's. Whilst the Commissioner cannot accept a purely speculative argument regarding prejudice to private organisations she does recognise this ties into the argument that private organisations may be dissuaded from working with CSU's.
16. It is argued by NHS England that disclosing the information would expose details of CSU's and their structures and finances to the public. This would give a greater level of detail about their structure, resource and potential financial position than would normally be given. NHS England argues that exposing information that would not normally be made available about a business and its position gives rise to potential competitive disadvantage at a time when CSU's are competing to secure business.
17. NHS England further considers that the content of the information requested, if made public, could be used by potential competitors to build an alternative model to offer to the CSU's customers. Consequently this could have a detrimental effect on the CSU income and potentially lead to loss of business. This puts the CSUs at an unfair competitive disadvantage as compared to their direct competition. This in turn risks commissioning bodies being unable to secure best value for the public purse through effective and fair competitive marketplace and could

impact wider on NHS England as there may be costs that would need to be paid for centrally as a result.

18. The Commissioner has considered the arguments presented by NHS England regarding the perceived prejudice to the CSU's should it be disclosed how much funding they receive from CCG's, other NHS bodies and non-NHS bodies.
19. The Commissioner notes that CSU's are self-sustaining entities that operate in a competitive market. CSU's do not have allocated budgets and are entirely dependent on the income they receive from customers. The funding they received from CCG's, other NHS bodies and non-NHS bodies for their services is therefore integral to their ability to continue to operate. However, this does not automatically mean that there would be a commercial disadvantage to the CSU's should it be known publicly how much funding they receive from each of these sources.
20. It is acknowledged that disclosing this information would provide some insight into spending by the bodies who fund the CSU's and into how the CSU's operate but it would only show very high level details of this.
21. The main arguments from NHS England relate to the idea that disclosing this information will impact on the CSU's ability to operate in a commercially competitive market. The Commissioner recognises that CSU's compete for contracts and that there will be other CSU's and other bodies who also compete to provide similar services. The argument that disclosing information that may provide any party with a competitive advantage or disadvantage is one that the Commissioner accepts. However, she must be convinced that disclosing the specific information in question would have this prejudicial affect.
22. On this point NHS England's main argument is that disclosing this information would somehow reveal details about the CSU's structure, resource and potential financial position which would not be known about other CSU's who may be competing to secure business.
23. Whilst this may be the case the Commissioner is unclear on how this information would place any of the CSU's at a competitive disadvantage. It is important to be able to demonstrate there would be a causal link between disclosure of the actual information requested and the argued prejudice. The Commissioner is unclear on how disclosing this information would reveal anything about a CSU's structure or resource. It would show their financial position and the sources of income it receives but this in itself would not reveal anything further about the CSU.

24. With regard to the argument that disclosure would put the CSU at a competitive disadvantage in any future bids for business; there has been no evidence presented to suggest there is any specific tender any of the CSU's are involved in but it would be reasonable to assume that some of the CSU's would be involved in some kind of ongoing tendering exercise to provide services.
25. That being said, without clear evidence to show how disclosing this information would prejudice any prospective or ongoing tendering exercise it is difficult to accept the arguments presented by NHS England.
26. Having taken all of the above into account, and after considering the circumstances of the case, the Commissioner has found that disclosure would not prejudice the commercial interests of NHS England. Consequently the Commissioner has determined that the section 43(2) exemption is not engaged.

## Right of appeal

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27. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

28. 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.
29. 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**  
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**SK9 5AF**