

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2017

Public Authority: East Cheshire NHS Trust
Address: Macclesfield District General Hospital
Victoria Road
Macclesfield
Cheshire
SK10 3BL

Decision (including any steps ordered)

1. The complainant has requested information on parking at Macclesfield District General Hospital, specifically the number of people using car parks, the revenue generated and the number of penalties issued. East Cheshire NHS Trust provided most of the requested information but withheld the number of penalty charge notices issued as it considered this would be likely to prejudice the commercial interests of the parking company.
2. The Commissioner's decision is that the Trust has incorrectly applied the provisions of section 43 and the exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the number of people that incurred penalty notices in 2015
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 9 January 2016, the complainant wrote to East Cheshire NHS Trust ("the Trust") and requested information regarding Macclesfield District General Hospital in the following terms:

"Please could you tell me how many people used the car park in 2015, what revenue that generated, and how many people incurred penalties?"

6. The Trust responded on 8 February 2016. It provided figures for the number of car park users and the revenue generated and confirmed parking at the Hospital was provided by ParkingEye but that further information on parking penalties could not be provided as it was exempt from disclosure under section 43(2) of the FOIA – that disclosure would, or would be likely, to prejudice the commercial interests of the Trust.
7. The complainant requested an internal review on 23 March 2016; writing to the Trust and explaining the part of the request he was most concerned with was the number of penalty notices issued and how much the public at large had been levied.
8. Following an internal review the Trust wrote to the complainant on 12 April 2016. It stated that it upheld the decision to withhold this information under section 43(2) of the FOIA, explaining that ParkingEye are a commercial organisation and disclosing this information would be useful to its competitors and would undermine its relationship with the Trust.

Scope of the case

9. The complainant contacted the Commissioner on 8 June 2016 to complain about the way his request for information had been handled. He registered his concerns about the refusal of the information and stated he would be satisfied with simply knowing how many penalty notices have been issued. During the course of her investigation, the Trust also sought to rely on section 43(1) of the FOIA, considering that the information constituted a trade secret.
10. Therefore, the Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied either section 43(1) or 43(2) to withhold the number of penalty notices issued by ParkingEye.

Reasons for decision

Section 43(1) of FOIA

11. 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.
12. It is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria: -
 - it must be information used in a trade or business
 - 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
 - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication
13. The Trust argues that information such as a company's pricing structure, if it is not generally known, could be a trading advantage. ParkingEye has informed the Trust that disclosing the information could be used to calculate ParkingEye's revenue which would in turn reveal details of their remuneration that could be used by competitors.
14. It is the Commissioner's view that a trade secret implies that the information is more restricted than information that is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment. Although the Commissioner notes the Trust's arguments on behalf of ParkingEye, she is not convinced that the withheld information has the highest level of secrecy which the term 'trade secret' would appear to merit. Therefore she is not satisfied that section 43(1) of the FOIA would apply.
15. As the trust has applied section 43(2) of FOIA to the withheld information, the Commissioner has exercised her discretion to consider whether section 43(2) could apply to this information.

Section 43(2) of FOIA

16. Section 43(2) 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.

17. The withheld information in this case is the number of penalty notices issued. The Trust has highlighted that the request, whilst referencing "penalties", is actually relating to the amount of the parking charge issued for non-compliance with the terms and conditions of parking. The Trust has provided the complainant with information on the revenue generated from paid parking tariffs as this is income the Trust benefits from but the revenue from parking charges for non-compliance with parking conditions reveals information about ParkingEye's revenue.
18. The Trust and ParkingEye are concerned that disclosure of the number of parking charges issued in conjunction with freely available information about parking charges applicable at the site which are displayed on signs, would allow an individual to calculate the revenue which could be generated from parking charge notices and therefore determine part or all of ParkingEye's income from the contract.
19. The Commissioner accepts that the information is commercial in nature and falls within the scope of the exemptions and that the relevant commercial interests of those of ParkingEye. However, before determining if the exemption is engaged she must consider whether disclosure of this information would, or would be likely to, prejudice those commercial interests.
20. For the Commissioner to agree that section 43(2) is engaged the Trust must demonstrate that prejudice would or would be likely to occur to the commercial interests of ParkingEye. The Trust has indicated it believes disclosure "would be likely" to cause the stated prejudice. This means the chance of prejudice should be more than hypothetical and there must be a real and significant risk.
21. Where prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner*¹, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Both the code of practice issued under section 45 of the FOIA and the Commissioner himself recommend that authorities should consult directly with relevant third parties in such cases and seek their views.
22. In this case the Trust has stated it has engaged with Parking Eye and sought its opinion on whether the information should be disclosed. The

¹ EA/2006/0014

Trust obtained the views of ParkingEye and these mirrored the views of the Trust – that disclosure would be likely to prejudice their commercial interests.

23. The arguments presented by the Trust after its consultation with ParkingEye focus on the fact that ParkingEye does not have a monopoly on the market and that disclosing the number of parking charge notices alongside publicly available information on the amounts of these notices would allow a competitor to calculate the potential revenue and ParkingEye's remuneration for providing the services. This in turn would affect ParkingEye's ability to compete in the market.
24. The Trust expanded further on this by arguing that if the number of parking charge notices was high then competitors may be more likely to bid for future services, leading to more competitive quotes and more competition for ParkingEye. Whereas if the number of notices was relatively low there may be less bidders for future services and the Trust may suffer from less competitive quotes.
25. Furthermore, the Commissioner has been informed by the Trust that ParkingEye are currently considering bidding for further car park management services at other NHS Trust's and that if it does the bid is likely to be based on similar commercial arrangements to those in place with East Cheshire NHS Trust. Disclosing the number of parking charge notices issued at car parks for a similar type of client could enable a competitor to ascertain the revenue which could be generated at car parks and potentially calculate what ParkingEye's bid for the new services might be.
26. The Trust further argues if the number of parking charges issued at the car park was to become within the public domain, there is a real possibility that other car park management providers could use this as an opportunity to speak to similar clients of ParkingEye and to encourage them to terminate the services provided by ParkingEye by offering them what may appear to be an improved commercial deal. The Trust argues this would have a detrimental impact on ParkingEye's ability to carry out its business of car park management, but may also compromise the quality of the services.
27. The Commissioner accepts that the amount of revenue that ParkingEye generates from parking charge notices is commercial information that does go some way to accounting for the total amount of revenue ParkingEye receives from the car park management services it provides. However, she must be convinced that disclosure of the number of notices would prejudice ParkingEye's commercial interests.

28. The Commissioner does not dispute that disclosing the number of notices could lead an interested individual to easily calculate an approximate value for the amount of money this has generated. However, this would only be an approximate value as the Trust points out that there are two different payment amounts that can occur depending on how quickly a payment is made. Therefore, disclosing the number of notices would only give a somewhat incomplete picture of the revenue generated for ParkingEye.
29. In addition to this the Commissioner's understanding is that the contract between ParkingEye and its clients will not be entirely predicated on ParkingEye only receiving income from parking notices but will also involve other financial agreements. Therefore it is difficult to see how disclosing the number of notices issues would have a prejudicial effect on ParkingEye's commercial interests in the sense of it revealing a complete picture of how much money Parking Eye receives from car park management services at the Trust which could be used by a competitor to undercut future bids for services.
30. The Commissioner has also considered whether simply knowing the number of notices issued may have a prejudicial effect on ParkingEye's commercial interests. The Commissioner accepts that if the number of notices issued is particularly high this would suggest that there has been a significant amount of revenue generated and it may encourage potential bidders to tender for future contracts. However, this would just be a snapshot of a particular year and may not be indicative of the situation over a longer period at the car park. That being said, if the potential revenue that could be obtained from car park management does encourage new bidders for the services it is still not clear how this would be prejudicial to ParkingEye's commercial interests as there is no reason to believe these bidders would provide better value for money than ParkingEye as they would still have no knowledge of the details of the current contract between the Trust and ParkingEye.
31. On the other hand, should the number of notices issued be relatively low in comparison to other similar sites there is the possibility this may discourage future bidders – a situation which would not prejudice Parking Eye's commercial interests as they would have less competition.
32. The Commissioner is not convinced that disclosing the number of notices issued, whether this is high or low, would change the behaviour of any future bidders for car park services. As the Trust points out, ParkingEye does not have a monopoly on this but it does manage a number of car park sites across the country and is considering bidding on more. This is a competitive market and the Commissioner is mindful of not ordering the disclosure of information which might affect the open competition by revealing information which prejudices one company over another but

she must be convinced that disclosing the information in question would provide competitors with information which could be used to undercut ParkingEye.

33. 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 and she observes that the number of notices issued would not reveal the amount of revenue received by ParkingEye as there are other variables such as the value of the payment and the contract between ParkingEye and the Trust. In addition the volume of notices issued would show a snapshot of a situation over a period of time but is not necessarily indicative of the longer term picture. In any event the Trust has not demonstrated that a high number of notices would encourage more interest in bidding for future services or that these new bidders would have any competitive advantage over ParkingEye in securing future contracts.
34. 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 Parking Eye's commercial interests.

Right of appeal

35. 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

36. 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.
37. 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