

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2018

Public Authority: NHS England
Address: 2N22 Quarry Hill
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested rent, lease and ownership information about properties housing GP practices in Birmingham. NHS England (NHSE) provided a link to where some relevant information is published. It withheld other information under section 41(1) of the FOIA (information provided in confidence) and section 43(2) (commercially sensitive information). During the investigation, NHSE withdrew its reliance on section 41(1) with regard to some of the information and applied section 21(1) to this information (information already accessible to the applicant).
2. The Commissioner's decision is as follows:
 - The information requested in requests 5 and 6 is exempt information under section 21(1).
 - NHSE is correct to withhold the information requested in requests 1, 4 and 7 under section 43(2) and the public interest favours 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 17 April 2017 the complainant wrote to NHSE and requested information in the following terms:

"Please see below can you provide all practices in Birmingham information as old information is now outdated which was provided previously Request for Clarification FOI-053052 [1] Current rental figures [2] practice name, [3] address, [4] rent payable, [5] is building owned or leased, [6] property owner name i.e. gp, LIFT Prime or NHS owned [7] next rent review due date?"

5. NHSE responded on 19 May 2017. It provided the complainant with a link to where names and addresses of all GP practices in Birmingham are published; this addresses requests 2 and 3. With regard to 'rents payable', 'rental figures' and 'premises ownership details' NHSE said that this information was exempt from disclosure under section 43(2) and that the public interest favoured maintaining the exemption. With regard to 'the ownership of premises', NHSE said that this information was exempt under section 41(1) as it was information provided in confidence. It said that NHSE operated under the terms of the open government licence and provided a web link to where its terms and conditions are published.
6. NHSE provided a review on 20 June 2017. It maintained its original position with regard to 'rents payable'; that this information is exempt under section 43(2). With regard to 'rents payable', 'rental figures', and 'premises ownership details', NHSE said that this information was exempt from disclosure under section 43(2) and that the public interest favoured maintaining this exemption.
7. During the Commissioner's investigation, NHSE withdrew its reliance on section 41(1) with regards to requests 5 and 6 and applied section 21(1) to this information. The Commissioner advised NHSE to communicate its new position to the complainant, which it did on 31 July 2018.

Scope of the case

8. The complainant contacted the Commissioner on 22 December 2017 to complain about the way his requests for information had been handled. He remained dissatisfied following NHSE's communication of 31 July 2018 as this did not address the rental information he requested.

9. The Commissioner's investigation has therefore focussed on requests 5 and 6 and NHSE's application of section 21(1) to these requests, and NHSE's application of section 43(2) to requests 1, 4 and 7.

Reasons for decision

Section 21 – information accessible to applicant by other means

10. During her investigation, when she was considering NHSE's original application of section 41(1) to requests 5 and 6, the Commissioner noted that the information requested in request 5 – whether a building is owned or leased – is already in the public domain, on the Land Registry's website. The information requested in request 6 – the property owner's name – is also available from the Land Registry's website, on payment of a fee.
11. The Commissioner queried this with NHSE and it subsequently confirmed that it is no longer relying on section 41(1) with regard to these two requests, but is relying on section 21(1) to withhold this information.
12. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held.
13. Section 21(1) says that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
14. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
15. Relevant practice names and premises addresses have been released to the complainant. By entering an address into the relevant page of the Land Registry's website it is possible to gather information on whether the property at each address is owned or leased, and, on payment of a fee, to gather information on the property owner's name. The Commissioner has no reason to believe that the complainant does not have access to the internet and, as such, she considers that this particular information – the information requested in requests 5 and 6 – is already reasonably accessible to him. Although NHSE may hold this information, the information engages the section 21(1) exemption and NHSE is not obliged to release it to the complainant.

Section 43 – prejudice to commercial interests

16. NHSE has confirmed that it is relying on section 43(2) to withhold information about rents. This is information associated with requests 1, 4 and 7.
17. 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 subject to the public interest test.
18. 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.
19. From the information it provided in its initial submission to her, the Commissioner understood that releasing the information requested in the three requests would harm the NHSE's commercial interests. This is because GP practices receive rent for the property in which they are housed from the NHS. NHSE says that businesses exist that offer a support service to GP practices that wish to challenge the NHS – through the District Valuer – on its rental valuation for a property with a view to increasing the amount the practice receives in rent from the NHS. Such businesses include prospective buyers, landlords and chartered surveyors within what NHSE has categorised as the 'challenging valuations' sector. The Commissioner's understanding is that the above businesses in the 'challenging valuations' sector support challenging (as being too low) rent reimbursement. NHSE says such challenges would have real and significant commercial consequences for the NHS.
20. Disclosing information about what each GP practice is paid (for rent) and when the rent review is due would allow the District Valuer to be challenged more easily. This would, according to NHSE, jeopardise the NHS's ability to negotiate rents and provide robust and effective services in the future. Based on the number of comparisons that could be provided by the businesses challenging his or her figures, the District Valuer would be pushed to his or her upper limits of valuations. This would result in more challenges going to the litigation authority. Both of these factors would, says NHSE, cost the NHS time and money.

21. Following further questioning by the Commissioner, NHSE explained that, in accordance with the Premises Cost Directions 2013¹, every three years a GP Practice is required to complete a CMR1 form confirming the status of his or her premises - leasehold or GP owned - and what he or she uses each room for. This is then reviewed and passed to the District Valuer for a current market rent valuation. The District Valuer will then visit the premises to confirm what the Practice has put on the form and value the premises to determine a current market rent figure.
22. NHSE has explained that for leased premises the process is similar to that of GP owned premises but the District Valuer also reviews the lease provided by the landlord. As stated in the Cost Directions, with leased premises the lower of the two figures is reimbursed. For example, if the District Valuer values premises at £100,000 per annum, but the lease gives a figure of £120,000 per annum, the actual amount paid is £100,000. It is the relevant Clinical Commissioning Group (CCG) that reimburses – for both leased and GP owned buildings – with NHSE providing the service on behalf of the CCG.
23. Having considered the matter, the Commissioner is satisfied that the harm NHSE alleges would, or would be likely to, occur if the disputed information were released, relates to the interests applicable to section 43(2) as it is a commercial harm to the NHS. The first criteria has been met and the Commissioner has gone on to consider the second.
24. Under the second criteria, 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.
25. NHSE has told the Commissioner that releasing the requested information would provide the applicant and the public at large with details of rents that are payable and when the rent reviews are due. Making this information available to the public would allow the applicant and/or others to contact all of the practices at the time their rent review is due and to encourage the GP to challenge the rent review and aim for higher valuations based on what other practices are receiving. The more challenges that take place, the higher the costs for the NHS and the potential for more involvement with the litigation authority.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/184017/NHS__General_Medical_Services_-_Premises_Costs__Directions_2013.pdf

26. Providing the requested information would, NHSE argues, jeopardise the NHS's ability to negotiate rent reviews for GP premises fairly and competitively. This would result in increased costs to the NHS and therefore would not be in the public interest. Providing information on all rent paid in a specific area could be used to challenge the District Valuer's valuation.
27. NHSE says that disclosing the requested information would be doing the work of the challenging company for that company. Providing the requested information would give the complainant (and/or others) all of the information they would need to take into consideration when challenging a rent review and it would leave the District Valuer with nowhere to go and no room to negotiate.
28. The Commissioner is again satisfied that a causal relationship exists between disclosing the disputed information and prejudice to the NHS's commercial interests resulting from the disclosure. Disclosing current rent figures and rents payable, associated with all GP practices in Birmingham, combined with when rent reviews are due, would facilitate parties with their own commercial interest in these matters to approach a GP practice at the point of its rent review – or indeed, at any other time - with a view to encouraging that practice to challenge the District Valuer and to request higher rent payments from the NHS. This would put the NHS at a commercial disadvantage: through having to pay higher rents to GP practices (both GP owned and leased) and through being involved in more litigations. This model might also be repeated in other areas of the country. The Commissioner is persuaded that this alleged prejudice is of substance.
29. Regarding the third criteria, 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.
30. NHSE's submission is not completely clear on this point but having reviewed the submission, it is the Commissioner's view that NHSE's overall position is that the alleged prejudice would be likely to occur. Although the probability of prejudice occurring may be less than 50%, the Commissioner is prepared to accept that there is nonetheless a real and significant risk of prejudice to the NHS's commercial interests if the requested information was to be disclosed.

31. In its further submission, NHSE has clarified that challenges can come for both GP owned and leasehold premises but that it is easier to challenge a valuation of a GP owned premises because there is no lease involved and it is therefore less complicated. The Commissioner nonetheless finds that the three criteria for prejudice have been met because releasing the information would be likely to lead to an increase in challenges in relation to both GP owned and leasehold premises. This would be likely to prejudice NHSE's commercial interests and the Commissioner therefore finds that section 43(2) is engaged with respect to requests 1, 4 and 7. She has gone on to consider the public interest test with regard to this exemption. Although she has found the section 43(2) exemption is engaged, it may still be released if the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

Public interest in releasing the information

32. In correspondence to the Commissioner, the complainant has indicated that the NHS has previously provided this information "*as it is in the public interest*" to do so because rents are paid from the public purse. He has added that all Birmingham Primary Care Trusts (PCTs) – which the complainant described as "*OLD NHS teams*" – have previously provided the information he has requested. The Commissioner understands that PCTs include a range of bodies such as dentists, pharmacists and optometrists as well as GP practices. The Commissioner sought clarification and the complainant indicated that PCTs that changed to NHSE area teams have previously provided the information. However, the data the complainant has is now several years old and his request is for updated information.
33. The complainant has stated that it is in the public interest to disclose the information. The Commissioner notes that the requested information may be of interest to the complainant but disclosure under the FOIA is disclosure to the wider world. The complainant has not provided any specific argument or evidence that would suggest that there is any wider public interest in this information.
34. The Commissioner asked NHSE to provide her with public interest arguments but it did not provide her with arguments that are discreet. In the absence of these, the Commissioner has taken account of a general public interest in rental costs that NHSE referred to in its response to the complainant.

Public interest in maintaining the exemption

35. As above, NHSE has not presented discreet public interest arguments. It is not the Commissioner's role to formulate public interest arguments on behalf of a public authority and so she has considered the public interest elements contained in NHSE's wider submission and its correspondence with the complainant.
36. In the correspondence, NHSE has indicated that releasing the disputed information would compromise its ability to negotiate commercial contracts for the NHS that are the best value. There is a public interest in the NHS being able to provide robust and effective services in the future and this would be lessened if the information were disclosed. NHSE has said that releasing contractors' business information would also damage its future dealings with, and reputation with, contract holders. NHSE has repeated these arguments in its submission to the Commissioner.

Balance of the public interest

37. The Commissioner considers that neither party has put forward particularly strong cases for the release or withholding of the information in question. She has noted that the complainant says he has been provided with this information previously. First, it does not appear to have been NHSE that disclosed this information and second, that disclosure appears to have been some years ago and the Commissioner must consider this new situation as it is now.
38. The Commissioner has noted NHSE's concerns about the 'challenging valuations sector'. There appear to be parties that approach NHS bodies such as GP practices and offer to support them to challenge the NHS on its rent reimbursement valuation. Such organisations work on a commission basis.
39. It seems to the Commissioner that if a particular GP practice has its own concerns that its rent reimbursement is too low, there will be a means – presumably at the rent review point - by which this matter can be raised and negotiated, and the reimbursement adjusted if appropriate.
40. NHSE has argued that if information about what rent reimbursement GPs across Birmingham receive was released, this would allow the District Valuer to be challenged more easily as a lot of information would be readily available (that is; when combined with information that is already publicly available). The District Valuer can offer selective comparisons to prove value for money. A third party would have all other practice information which would enable it to push for higher valuations. Access to the information would, according to NHSE,

unfairly distort future rent negotiations. Armed with all the released and already published information third parties would have all the information they need to consider when challenging a rent review, which would leave the District Valuer with nowhere to go and no room to negotiate.

41. The Commissioner has not been made aware of any wider public concerns about how much NHSE reimburses GP practices for rent, in Birmingham or elsewhere. Such concerns might tip the balance in favour of releasing the information. In addition, if a third party wishes to support a particular practice with regard to challenging the District Valuer there would seem to be nothing to stop it from approaching a particular practice and asking the questions covered by the complainant's three requests. The practice could choose to divulge this information or not to divulge it ie whether or not to engage the third party's services.
42. The Commissioner is prepared to accept that NHSE's commercial interests could well be harmed if – through the District Valuer - it had to negotiate rent reimbursements with parties that had more information than would be expected as a result of this FOIA request in addition to other information in the public domain. In the Commissioner's view the public interest in the NHS being able to use its resources efficiently and to achieve the best value that it can has greater public interest than, on this occasion, NHSE being seen to be transparent by disclosing rental information associated with Birmingham's GP practices.

Right of appeal

43. 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

44. 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.
45. 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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