

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 7 September 2018

**Public Authority:** NHS Business Services Authority  
**Address:** Stella House  
Goldcrest Way  
Newburn Riverside  
Newcastle upon Tyne  
NE15 8NY

**Decision (including any steps ordered)**

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1. The complainant has requested information on NHS penalty charges for prescriptions, specifically a document showing the criteria for whether a person acted wrongfully or if there was an exceptional reason. NHS Business Services Authority (NHS BSA) disclosed its NHS Prescription & Penalty Charge Guide with some information redacted on the basis of section 31(1)(a) and 36(2)(c) of the FOIA.
2. The Commissioner's decision is that NHS BSA has correctly applied section 31(1)(a) to withhold information from the Penalty Charge Guide and that the balance of the public interest favours maintaining the exemption. She therefore does not require NHS BSA to take any steps.

**Request and response**

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3. On 31 October 2017 the complainant wrote to NHS Business Services Authority (NHS BSA) and requested information in the following terms:  
  
*"1. I recently received a Penalty Charge Notice (NHS Penalty Charge Regulations 1999). Part of the form states 'contact us using the details provided below if you do believe this penalty charge notice should not apply. You will need to show that **you did not wrongfully, with any***

***lack of care or there is an exceptional reason why you should not pay the penalty charge.'***

*a. Please could you provide the source document that contains the exemptions set out in bold;*

*b. Please could you provide a copy of the decision makers' guide (or similar document) which provides the criteria in deciding whether or not a person 'acted wrongfully', with 'lack of care' or whether there was an 'exceptional reason';*

*c. If a member of the public requests that the charge should not apply for one of the reasons above, what grade of employee within PECS decides whether or not an exemption applies e.g. a customer contact agent, manager, senior manager?"*

4. NHS BSA responded on 28 November 2017. For (a) and (b) NHS BSA described the criteria used by staff in determining whether a person has acted wrongfully or there is an exceptional reason for an incorrect claim. For (c) NHS BSA stated that it did not hold the information what pay band/seniority staff needed to be able to make decisions on penalty charge notices.
5. The complainant requested an internal review on the same date. He stated that from the answer to (a) and (b) it was unclear what the source document the information was extracted from was and asked NHS BSA to provide this. NHS BSA provided the document but redacted some information on the basis of section 40(2) and 31 of the FOIA.
6. The complainant asked for a further review of this response on 1 January 2018 expressing concern that no subsection of section 31 had been cited.
7. Following an internal review NHS BSA responded to the complainant on 30 January 2018. NHS BSA confirmed it was relying on section 31(1)(a) of the FOIA and explained it's reasoning for this. NHS BSA also confirmed it considered any redactions made under section 40 had been appropriate and that it also should have cited section 36(2)(c) when refusing the request as it now also considered this applied.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 6 February 2018 to complain about the way his request for information had been handled.

9. The Commissioner considers the scope of her investigation to be to determine if any of the exemptions cited by NHS BSA – section 31 and 36 – provide a basis for redacting information from the Penalty Charges Guide document. The Commissioner has not considered the use of section 40(2) as this appears to have only been applied to withhold the names of individuals involved in the drafting of the document and is included as part of the version history. The Commissioner does not consider this information to be in the scope of the request.

## Reasons for decision

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### Section 31 – law enforcement

10. Section 31(1) states that:

*Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice, -*

*(a) the prevention or detection of crime,*

11. In determining whether prejudice would or would be likely to occur from disclosure, the Commissioner will consider the nature and likelihood of the prejudice in question occurring.
12. The information that has been redacted is from the NHS Prescription & Penalty Charges Guide document. This essentially sets out the process for applying penalty charges, surcharges and administrative easements in relation to prescription charges. The information that has been withheld is contained within the sections of this guidance relating to defences which can be claimed by those being issued with a penalty charge notice.
13. The primary argument of NHS BSA is that disclosing this detail could lead to abuse of the system as it would essentially disclose a “playbook” of acceptable reasons for failing to pay for prescriptions into the public domain.
14. With regard to section 31(1)(a) it is argued disclosure of the requested information would be likely to prejudice the prevention and detection of crime, in this case, avoiding payment of prescription charges by falsely claiming one of the reasons contained in the document.
15. The Commissioner has gone on to consider not just whether the section 31 exemption can be engaged but whether it is engaged in this case and where the balance of the public interest lies.

16. NHS BSA argues that disclosure of the requested information would be likely to prejudice its ability to enforce the NHS Act 2006, in particular section 194 which allows for a fine of up to £2500 to be levied against those found guilty of knowingly making a false claim to exemption from prescription charges. This is a criminal offence which is most often used for repeated or persistent evasion of NHS charges however a person is not liable for a penalty charge if they are convicted of a criminal offence under section 194. Conversely if a person pays the penalty charge they cannot be convicted under the provisions of section 194.
17. A penalty charge will be applied unless the patient has a defence or an administrative easement is deemed appropriate. The National Health Service (Penalty Charge) Regulations 1999 set out that where a person fails to pay a NHS charge which they are liable to pay, they may be issued with a penalty charge but that a person will not be liable for a penalty charge *"if he shows that he did not act wrongfully, or with any lack of care"* (Regulation 2(3)(g)(ii)).
18. It is some of these examples then listed in the Penalty Charges Guide which have been withheld by NHS BSA as it is claimed that disclosing the examples would put a list of excluded circumstances in the public domain. NHS BSA considers this would assist individuals in evading payment of penalty charges. The Commissioner accepts that the prejudice claimed by NHS BSA relates to the prevention of crime based on the above.
19. The Commissioner has considered whether the prejudice claimed is "real, actual or of substance", that is not trivial, and whether there is a causal link between disclosure and the prejudice claimed. She is satisfied that the prejudice being claimed is not trivial or insignificant and that there is the relevant causal link.
20. This is because the Commissioner notes the arguments from NHS BSA relate to the likely impact of disclosure on its future ability to enforce the NHS Regulations 1999 and the NHS Act 2006 in respect of issuing penalty charges. Whilst NHS BSA has not been prescriptive in explaining this; the Commissioner having viewed the information that has been redacted can appreciate that it is only that which is specifically detailing circumstances which would allow a reprieve from a penalty charge that has been withheld. Not only does the withheld information set out the scenarios but it also covers situations in which debts will not be recovered from patients even where the penalty charge may have been correctly issued.
21. Given the nature of the withheld information and the fact that none of this information is in the public domain the Commissioner considers it is

not unreasonable to reach the conclusion that the prejudice NHS BSA considered would be likely to occur is one that can be categorised as real and of substance.

22. NHS prescription charges are a topic of much debate on forums and blogs and it is clear that there is much discussion around who is entitled to free prescriptions. It stands to reason that some people would therefore have an interest in knowing what exceptions exist to paying the penalty charges that might be levied against them. The Commissioner has recognised in other cases that an intentional policy of minimising the amount of information in the public domain can be acceptable as it acts as a deterrent to individuals looking to circumvent systems and commit offences.
23. In this case, it is not a stretch to make the link between disclosure of the withheld information and the possible prejudice argued in this case. There are likely to be motivated individuals who, should information on exceptional circumstances that can be used to avoid payment be placed in the public domain, would use this to their advantage and prejudice the ability of NHS BSA and NHS Protect to take action in response to NHS prescription fraud.
24. The Commissioner therefore finds that section 31(1)(a) is engaged. Section 31 is a qualified exemption and the Commissioner must therefore consider the public interest test before reaching a conclusion.

*Public interest arguments in favour of disclosure*

25. NHS BSA recognises that disclosing the withheld information would provide the public with an opportunity to challenge the basis of the processes used by the NHS to check exemption claims and hold NHS BSA to account to ensure its resources are being used to detect fraud.
26. NHS BSA also considers there is a public interest in knowing that there is a rigorous system in place to detect fraudulent claimants and that where there is fraud this is stopped as it is a misuse of public funds.
27. The complainant argues that publishing full examples of when a penalty charge might not apply is in the public interest to allow patients to make informed decisions about whether to ask for a waiver of any penalty charge imposed.

*Public interest arguments in favour of maintaining the exemption*

28. NHS BSA states that disclosure would allow an increase in fraudulent claims by patients who do not have free entitlement and there would be

an increased cost to the tax payer to pay for the increase in fraudulent free exemption claims. As well as this NHS BSA considers there is a public interest in more generally avoiding prejudice to the prevention of crime.

*Balance of the public interest arguments*

29. The Commissioner considers there is a public interest in openness, transparency and accountability in relation to the penalty charges process and the measures taken by the NHS to combat prescription charges fraud as it impact on a significant proportion of the population whether because they are exempt from charges or are impacted by increased charges for prescriptions. She accepts there will be a public interest in the disclosure of information which would enable the public to understand the full circumstances which might lead to a penalty charge to save NHS BSA and NHS Protect time and resources.
30. That being said, the Commissioner notes that NHS BSA has disclosed the majority of its Penalty Charges Guide and has only sought to withhold some limited information which is examples of possible defences to penalty charge notices. There is ample information available online about who is entitled to free prescriptions and any requirements that need to be met. The Commissioner is of the view that this meets the public interest for the most part as any individual unsure if they are entitled to free prescriptions can access information to check their situation before applying for the prescription to be filled.
31. However, there will always be some individuals who believed they were entitled to free prescriptions wrongly (but unknowingly) and the Commissioner recognises that disclosing more information on what circumstances might allow for a waiver of the penalty charge would be helpful to those people. It is certainly a matter of fact that there have been an increase in penalty notices<sup>1</sup> and that a substantial proportion of these were withdrawn following appeals. However, the withdrawals were often for those who were falsely accused and were in fact entitled to free prescriptions and although this is troubling the disclosure of the information in this case would not necessarily go any way to preventing this happening in the future as it does not relate to this issue directly.

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<sup>1</sup> <https://www.theguardian.com/society/2018/mar/10/nhs-falsely-accuses-thousands-patients-prescription-fraud>

32. The withheld information is information which may be of assistance to those who claimed free prescriptions, were not entitled to them but have a legitimate claim for challenging the notice due to specific circumstances. Releasing this information is more likely to be of benefit to those individuals looking to circumvent having to pay for prescriptions knowingly than those who have done so unknowingly. Individuals who did not intend to defraud the NHS it is assumed will be able to explain the reasons for this without needing to see the withheld information to be provided with exact scenarios.
33. It is extremely important the NHS is able to take steps to combat fraud as it was reported last year that fraud was costing the NHS £1bn a year<sup>2</sup> and prescription fraud was part of this figure. By taking a tougher stance and issuing more fines it is hoped this will put off individuals from attempting prescription fraud. NHS BSA's deliberate policy of minimising the information on the exceptions to paying penalty charges is an intentional step to make it more difficult for motivated individuals to commit prescription fraud knowingly and the Commissioner considers the public interest in countering NHS fraud to be of significant weight.
34. Taking all of this into account the Commissioner considers that the public interest in favour of disclosure does not carry much weight beyond that in transparency of its processes. In contrast, there is a strong and compelling argument for maintaining the exemption to preserve NHS BSA's ability to effectively prevent prescription fraud and ensure the NHS is able to remain financially viable.
35. Therefore the Commissioner finds that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption. She has therefore not gone on to consider the use of section 36(2)(c).

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<sup>2</sup> <https://www.bbc.co.uk/news/health-41824180>

## Right of appeal

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36. 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)

37. 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.
38. 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**  
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