

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2018

Public authority: Boots Group Plc

Address: 1 Thane Road
Nottingham
NG2 3AA

Decision (including any steps ordered)

1. The complainant – on behalf of the BBC - has requested information from Boots Group Plc ('Boots') about time standards associated with its dispensing services, and how Boots calculates community pharmacy staffing needs and associated costs. Boots advised that the requested information is exempt from release under section 43(1) (trade secrets) and section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is as follows:
 - The disputed information is exempt information under section 43(2) of the FOIA and the public interest favours maintaining the exemption.
3. The Commissioner does not require Boots to take any steps to ensure compliance with the legislation.

Background

4. On 8 January 2018 the BBC broadcast a documentary under its 'Inside Out' strand called '*Boots – Pharmacists under pressure*'. The programme investigated concerns the BBC said had been raised by

Boots pharmacists who were worried that work pressures caused by understaffing could have an impact on patient safety, and cause harm.

5. In its submission Boots has told the Commissioner that, during the BBC's investigation, Boots engaged in detailed correspondence with the BBC. Boots says that in that correspondence it provided the BBC with information that the BBC would not otherwise have been entitled to under the FOIA. Boots has provided details about that correspondence in its submission to the Commissioner; she has reviewed it and does not consider it necessary to reproduce it in detail in this notice.
6. Broadly, Boots had explained to the BBC the steps it takes to ensure that its pharmacies are adequately staffed and discussed its Allocation of Colleague Investment (ACI) model and the associated time standards data. Boots' position is that its methodology for calculating staffing levels is highly confidential and commercially sensitive.
7. Boots has provided the Commissioner with an explanation of how it calculates time standards. The Commissioner has reviewed this but has not detailed the process within this notice. Boots says that information about its methodology – in general and in detail – would be of immense value to a competitor. A competitor could copy or adopt Boots processes in whole or in part, adapt its own processes or use the time standards to assess and compete with Boots on business opportunities, whether in relation to dispensing or pharmacy services.
8. The Commissioner understands dispensing services to mean the process of preparing and giving medicine to a named person on the basis of a prescription, and pharmacy services to mean other health services such as helping with common illnesses and giving advice on stopping smoking.

Request and response

9. On 12 May 2017 – during the BBC's programme investigation - the complainant wrote to Boots and requested information in the following terms, as part of a wider series of requests:

"13. Please specify the exact time standards you use to determine staffing levels for the following community pharmacy tasks:

- a) Clinical check*
- b) Accuracy check*

c) Dispensing of prescription items, including but not limited to those supplied in compartmentalised compliance aids eg dossette boxes, Medisure, Nomad, Venalink brands and similar.

14. Please explain how you assess the clinical, accuracy and dispensing time standards to allocate funding for staffing levels to ensure patient safety in an NHS community pharmacy."

10. Boots responded on 13 June 2017. With regard to both requests, it explained that it uses a unique time standards model to calculate the staffing levels required in store and noted that neither the General Pharmaceutical Council (GPhC) nor the NHS require any particular staffing level or model. Boots stated that it did not consider the requests for information fell within the FOIA as it was not captured by its provision of services under the NHS. Notwithstanding this, Boots said that if the time standards it uses were considered to be subject to the FOIA then its view was that the time standards would be exempt from release under section 43. It confirmed that the time standards are unique to Boots and could, therefore, be described as a trade secret. Boots said that disclosing the time standards would be highly likely to prejudice its commercial interests as other companies could then use or copy the model.
11. With regard to the public interest, Boots accepted that there is public interest in community pharmacy being accountable for spending NHS funds. However, Boots said that pharmacies are not remunerated based on staffing levels so this is not a factor in the payment that Boots, or any other community pharmacy, receives from the NHS. Boots considered that there was no countervailing public interest to warrant disclosing this commercially sensitive information.
12. Boots provided a review on 3 October 2018, upholding its original position.
13. During her investigation Boots confirmed to the Commissioner that its primary position is that the requested information is not captured under paragraph 44 of Schedule 1 of the FOIA. Paragraph 44 details the extent to which Boots is subject to the disclosure requirements as a result of its provision of NHS pharmaceutical services. With regard to the information that has been requested, Boots considers it is not a public authority for the purposes of the FOIA.

Scope of the case

14. The complainant contacted the Commissioner on 6 February 2018 to complain about the way her requests for information had been handled.

15. The Commissioner will first explain why Boots can be categorised as a public authority – and is therefore subject to the FOIA – for the purpose of these specific requests.
16. The Commissioner's formal investigation has focussed on whether Boots can rely on section 43(2) or section 43(1) of the FOIA to withhold the requested information, and the balance of the public interest.

Why Boots can be categorised as a public authority on this occasion

17. The FOIA gives members of the public the right to access recorded information held by public authorities and places a duty on public authorities to respond to requests for such information.
18. The definition of 'public authority' is given in section 3(1) of the FOIA. In particular it states that under the FOIA a "public authority" means -
 - (a) subject to section 4(4), any body which, any other person who, or the holder of any office which-
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
 - (b) a publicly-owned company as defined by section 6.
19. With regard to Schedule 1 of the FOIA, Boots has referred to paragraph 44, which lists as a public authority:

"Any person providing [general medical services, general dental services,] general ophthalmic services or pharmaceutical services under [the National Health Service Act 2006 or the National Health Service (Wales) Act 2006], in respect of information relating to the provision of those services."
20. That is to say that if a request is submitted to person providing pharmaceutical services under the National Health Service Act 2006 and the request is for information about the provision of those services, then the person can be categorised as a public authority.
21. In its submission to the Commissioner Boots has set out why it considers that the information the complainant has requested – which concerns time standards and staffing and funding allocation – does not fall under paragraph 44 of Schedule 1 of the FOIA.
22. Boots has explained that NHS pharmaceutical services in England are provided by community pharmacists under the National Health Service

(Pharmaceutical Services and Local Pharmaceutical Services) Regulations 2013 ('the Regulations').

23. Paragraph 28 of the pharmacy NHS Terms of Service (at Schedule 4 of the Regulations) is the only part of the Regulations that relate to staffing. It requires the pharmacy to have a "*staffing and staffing management programme*" which includes:-

"(i) arrangements for appropriate induction for staff (including locums),

(ii) appropriate training for all staff in respect of any role they are asked to perform,

(iii) arrangements for identifying and supporting the development needs of all staff engaged in the provision of NHS services, including continuing professional development for registered pharmacists and registered pharmacy technicians, any necessary accreditation in respect of the provision of directed services,

(iv) arrangements (which must include a written policy) for ensuring that all staff and locums who, arising out of their employment with the pharmacist –

(aa) make what is protected disclosure within the meaning given in section 43A of the Employment Rights Act 1996 (meaning of protected disclosure) have the rights afforded in respect of such disclosures by that Act, and

(bb) provide information in good faith and not for the purposes of personal gain to the General Pharmaceutical Council or to the [NHS England] which includes an allegation of a serious nature which they reasonably believe to be substantially true, but disclosure of it is not a protected disclosure within the meaning given in section 43A, have the right not to be subjected to any detriment or to dismissal as a consequence of that act;"

24. Similar requirements appear in the Welsh equivalent of the Regulations but not in the Scottish or Northern Irish equivalent. Boots has told the Commissioner that it can confirm that it fully complies with these NHS pharmaceutical services requirements relating to staffing.
25. Boots has further confirmed that to comply with NHS Terms of Service and to receive NHS funds for the provision of NHS pharmacy services, there is:
- no requirement to have particular staffing levels (subject to the legal requirement to have a pharmacist present) ; and

- no requirement to calculate staffing levels in a particular way.
26. Put simply, Boots says its provision of NHS pharmaceutical services is not contingent on having a staffing model or time standards underpinning that model. It is therefore Boots' view that the complainant's two requests do not fall within the general right of access to information held by public authorities under the FOIA as it is not information required by the Regulations.
27. Boots has drawn the Commissioner's attention to her decision in FS50465631. In that case Wm Morrison Supermarket PLC ('Morrison's') received a request for details of the number of its pharmacies open on Christmas Day 2011 and Easter Sunday 2013. Boots says that this FOIA request asked for information which is expressly included in the Regulations. Paragraph 25 of the NHS Terms of Service (found at Schedule 4 of the Regulations) states:
- "Where it appears to [NHS England / Primary Care Trust]... that the days on which or times at which pharmacy premises are or are to be open for the provision of pharmaceutical services will not, or no longer, meet the needs of –*
- people in its area; or*
- other likely users of pharmacy premises,*
- for the pharmaceutical services available at or from those premises, it must carry out an assessment as to whether to issue a direction requiring the NHS pharmacist whose premises they are to provide pharmaceutical services at the pharmacy premises at set times and on set days (which may include Christmas Day, Good Friday and bank holidays."*
28. As Morrison's provided a response prior to the decision notice being issued, the Commissioner did not have to consider the extent of its provision of NHS pharmacy services under the Regulations or the application of section 43 of the FOIA.
29. It is Boots' view that this request to Morrison's did fall under the provision of NHS pharmaceutical services under paragraph 44 of Schedule 1 of the FOIA as opening hours at the direction of the NHS is expressly included in the Regulations. Boots considers this is in contrast to the complainant's request in this case which is for information not required by, or included in, the Regulations.
30. Further to the NHS requirements it set out previously, Boots says there is no requirement from the GPhC – the regulator for pharmacists and

pharmacies – to calculate staffing levels in any particular way or to have any minimum staffing requirement.

31. The GPhC requires, at Standard 2.1 of the Standards for Registered Pharmacies that *"There are enough staff, suitably qualified and skilled, for the safe and effective provision of the pharmacy services provided."*
32. Boots has referred the Commissioner to a response GPhC had provided in the BBC's television programme in which it had stated that it considered the right staffing levels is best done by the people responsible for managing a pharmacy on the ground, rather than by the regulator.
33. Boots argues that, in light of the above, there is clearly no requirement set by the NHS or by the GPhC to have time standards and no requirement to calculate staffing levels in any particular way.
34. In her submission to the Commissioner, the complainant has argued that Boots is a public authority under Schedule 1 because it has to disclose information that relates to the provision of NHS pharmacy services. She says that the wording of paragraph 44 of Schedule 1 does not limit the requirement for disclosure to information about services that are required under the National Health Service Act 2006 only ie the FOIA concerns the provision of NHS pharmacy services more generally. The complainant argues that staffing levels at Boots directly relates to the provision of its pharmacy services; the services could not be provided without its staff.
35. Boots' argument is that since neither any time standards it uses nor how it assesses time standards to allocate funding are requirements set by NHS or the GPhC, it cannot be categorised as a public authority under paragraph 44 of Schedule 1 of the FOIA. However, the Commissioner agrees with the complainant. The NHS and the GPhC may not have set a requirement that pharmacies must have time standards or a requirement that staffing levels are calculated in a particular way. However, as the complainant has pointed out, paragraph 44 of Schedule 1 of the FOIA concerns the provision of pharmacy services under the National Health Service Act generally, and is not limited to the provision of services through any particular underpinning processes (such as time standards) that may be required by the NHS and / or the GPhC.
36. In the Commissioner's view the time standards Boots uses to determine staffing levels for particular pharmacy tasks (request 13) and how Boots calculates staffing and funding (request 14) both relate to its provision of NHS pharmacy services. As such the Commissioner is satisfied that, with regard to the information that has been requested in this case, under paragraph 44 of Schedule 1 of the FOIA Boots has an obligation

under the FOIA to respond to the requests. She has gone on to consider whether Boots can withhold the information that has been requested under section 43(2) of the FOIA.

Reasons for decision

37. In its submission to the Commissioner and in a subsequent telephone conversation with Boots, Boots has explained to the Commissioner what its time standards and its ACI are and how they work together. The Commissioner does not intend to provide detail on the time standards or the ACI in this notice.

38. Turning to the complainant's requests, for ease, these are as follows:

"13. Please specify the exact time standards you use to determine staffing levels for the following community pharmacy tasks:

a) Clinical check

b) Accuracy check

c) Dispensing of prescription items, including but not limited to those supplied in compartmentalised compliance aids eg dossette boxes, Medisure, Nomad, Venalink brands and similar.

14. Please explain how you assess the clinical, accuracy and dispensing time standards to allocate funding for staffing levels to ensure patient safety in an NHS community pharmacy."

40. The Commissioner has sought clarity from the complainant on what information she is seeking through her requests; she has also discussed its interpretation of the requests with Boots. In correspondence to the Commissioner, the complainant has referred to a *"list of time standards available on a spreadsheet which can be accessed quickly"*. In addition, the Commissioner understands that the terms 'clinical check' and 'accuracy check' are not formal terms used by Boots as such, associated with particular actions linked to time standards, they appear to be the complainant's own form of words. In the Commissioner's view therefore, request 13 can reasonably be interpreted as being a request for all the time standards associated with *'dispensing of prescription items'* ie part c) of request 13, with, in the Commissioner's view, part a) and part b) being incorporated within part c). This request would encompass all the time standards Boots uses with regards to its dispensing service.

41. The Commissioner has next considered request 14. Boots has confirmed that during the BBC's investigation, in meetings and correspondence, it

has provided the BBC with an explanation on how it uses the time standards and it has explained its ACI and how this model works. This being the case, and since the FOIA concerns information held in recorded form, in the Commissioner's view request 14 can reasonably be interpreted as a request for Boots' ACI, since the ACI would address the request.

42. Section 43 – commercial interests

Section 43(2) – prejudice to commercial interests

43. The Commissioner has first considered whether Boots can rely on section 43(2) to withhold the requested information. The requests are for the time standards Boots uses for particular community pharmacy and dispensing tasks and an explanation of how Boots assesses clinical, accuracy and dispensing time standards to allocate funding for staffing levels; effectively its ACI. The time standards - for dispensing and pharmacy services - are a key part of the ACI model which Boots uses to calculate the number of pharmacy staff required for a safe service, including a safe dispensing service.
44. 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.
45. 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.
46. In this case, Boots says that if it were to release the requested information – the time standards it designed and uses and the associated ACI – this would prejudice its commercial interests. In its response to the complainant, Boots indicated that this is because potentially other community pharmacies would be able to use or copy Boots' time standards model. It has repeated this in its submission to the Commissioner and added that if all the time standards were disclosed to the BBC (request 13), along with its the ACI model (request 14), it would then be possible for any third party to extrapolate any or all of Boots' time standards.
47. In its submission to the Commissioner, Boots has also stated that releasing its time standards would allow a third party – such a competitor – to assess Boots' costs. This would be highly damaging to Boots as it would enable a competitor to understand Boots' costs when

competing for services, such as offering pharmaceutical services to care homes. In addition, it would allow a competitor to analyse Boots' staffing costs when tendering for services with third parties, for example to offer travel health services.

48. Boots says that, with Boots' time standards information, a competitor could:

- copy or adopt the Boots model in part or in whole (Boots says that it considers its Standard Operating Procedures [SOPs] are disclosable under the FOIA and confirmed that it disclosed all Boots' SOPs for "dispensing all types of prescriptions" to the BBC pursuant to the BBC's FOIA request)
- change its own model if some or all of the Boots processes are more efficient or effective than its own
- assess what staffing levels it should have for a pharmacy, including potential for changes in the future; or
- use the information to analyse Boots' costs as part of a competitive tender process.

49. Having considered the matter, the Commissioner is satisfied that the harm Boots 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 Boots. The first criteria has been met and the Commissioner has gone on to consider the second.

50. 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.

51. Boots has referred the Commissioner to her decision in FS50567022. That case concerned a request for information relating to a preferred tender bid that Boots had submitted to Kingston Hospital NHS Foundation Trust. The Hospital categorised the information as Boots' intellectual property and argued that its disclosure would be seized upon by competitors. The Commissioner agreed that the information amounted to an important part of Boots' business model and that disclosure would reduce its competitiveness.

52. The Commissioner considers that, from the reference above and its wider submission, Boots has demonstrated the necessary causal relationship exists; namely if its time standards and ACI model were released, a competitor could copy or adopt Boots' model; possibly

changing its processes if some or all of Boots' processes are more efficient or effective than its own or, in respect of a tender process, a competitor could use the information to analyse Boots' costs and so be able to submit a tender that is more competitive than Boots'.

53. Relating as it does to the commercial interests of one of the five largest providers of NHS dispensing and pharmacy services in the UK, the Commissioner is satisfied that the alleged prejudice to Boots is also of substance.
54. 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.
55. Boots has advised the Commissioner that there are 14,000 pharmacies in Great Britain. As such Boots says it would be 'highly likely' that the alleged prejudice would occur as Boots has a large number of competitors – both large and small. The Commissioner is prepared to accept that, given Boots' profile, the risk that competitors could use the information in question to improve their own services or to analyse Boots' costs in order to compete with Boots in tender processes is real and significant and would be likely to prejudice Boots' commercial interests. She is satisfied that the third criteria is met.
56. The Commissioner finds that the three criteria for prejudice have been met because releasing the information would be likely to lead to a competitor using Boots' time standards and ACI model to improve their own processes – and therefore become a more effective competitor. Alternatively competitors would be likely to use the time standards and ACI model to analyse Boots' costs with a view to submitting tenders that are more competitively costed than Boots'. This would prejudice Boots' commercial interests and the Commissioner therefore finds that section 43(2) is engaged with respect to requests 13 and 14. 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, the information may still be released if the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

Public interest test

Public interest in disclosing the information

57. The complainant has provided a number of public interest arguments for disclosure, as follows:

- Boots is the largest provider of pharmacy services in Great Britain. Its NHS pharmacy services are funded from the public purse, through tax. It pays pharmacy staff from the NHS pharmacy 'global sum'. Boots has 1,922 pharmacies in England, out of 11,699 registered pharmacies in total. More than 1 billion NHS prescription medicines are supplied on the NHS each year in England; on the basis of a proportionate market share, this would suggest that Boots supplies 167 million of these prescription medicines to the public each year in England, alongside the other pharmacy services it provides. Since 2009, it has dispensed more than 200 million prescription medicines per year across the UK. The staffing levels required to deliver those services are of the utmost importance in ensuring patient safety and care.
- Staffing levels underpin the safe and effective provision of NHS pharmacy services - the GPhC's 'Standards for Registered Pharmacies' in which the GPhC states that the pharmacy or corporate body must ensure "*There are enough staff, suitably qualified and skilled, for the safe and effective provision of the pharmacy service provided.*" The complainant has referred to the Francis reports into the Mid Staffordshire hospitals crisis, the Royal Pharmaceutical Society's response to that report and the Berwick report (on how to achieve zero harm in the NHS) which all recognise the importance of staffing levels in ensuring patient safety.
- Claiming of public funds from the NHS - the complainant says that Boots holds two positions on the Pharmaceutical Services Negotiating Committee (PSNC), occupied by two of its Directors. The PSNC negotiates with the Department of Health (DH) how much money pharmacies in England will receive from the public purse for providing NHS pharmacy services. Boots provides information on its staffing levels to the PSNC in order that pharmacies can negotiate money from the public purse to deliver a particular NHS service. Given that the company is using its staffing levels information to enable pharmacies (including its own) to claim that public money, the complainant argues that it is in the public interest to know what staffing levels Boots is providing to its pharmacies and how these are set. This would enable comparisons with the amount claimed from the

government for the purpose of staffing levels and help ensure public funds were being put to proper use. From 2005 until December 2016 in England, and ongoing in Wales, community pharmacies are required to declare that they have a certain number of hours of staffing spent dispensing prescriptions, at least equivalent to an amount specified by the DH. If this condition is satisfied, pharmacies can claim a certain amount of money from the government for dispensing prescriptions.

- The complainant says that since 2015, Boots has withheld its time standards from its own staff, including pharmacists, who are, as a result, unable to use the information when making declarations to the government about the dispensing staffing levels. It is in the public interest that details of Boots' time standards and staffing model are released so that pharmacists can make decisions about how much money to claim from the NHS and so the public can compare the amount allocated to the dispensing process with the declarations made to the NHS by Boots.
- Without the information on Boots' staffing levels, the complainant argues that the public will be unable to critique it or to ask questions about what constitutes a safe staffing level at Boots, or more widely in pharmacy in general. The complainant has cited, as an example, a BBC news article that reported that research had indicated that higher levels of dispensing staff were associated with higher error rates; an apparent paradox.
- The complainant says that the Pharmacists Defence Association (PDA) Union asked pharmacists in a patient safety survey "*how often are there enough suitably qualified and skilled staff, for the safe and effective provision of the pharmacy services provided?*" which she says is the question used by the GPhC in its inspections of pharmacies. In 2015/16, just 1.8% of the 625 Boots pharmacists who responded said it was the case "all the time" - the standard a patient might expect - and 66.9% said it was around half the time or less. In 2016/17, pharmacists were asked the question again and 365 Boots pharmacists responded. Just 3.8% said it was the case all of the time and 69.3% said around half the time or less. The complainant argues that it is therefore important to understand Boots' time standards and staffing in that context – to understand the impact on patient safety.

- The complainant says links have been reported between inadequate staffing levels at Boots and dispensing errors which have reached patients, including those which caused harm¹.
- Boots expects all of its SOPs to be followed. If that is the case, the public must be able to be confident that it has sufficient staff to enable that to happen. Disclosing Boots' time standards and other staffing information is critical to that end. The complainant has quoted two communications Boots' Superintendent Pharmacist sent to Boots staff, one of which was sent following the broadcast of the BBC's programme, which stressed the importance of complying with SOPs.
- Boots' SOPs are available to all of its +/- 55,000 staff and thousands of external contractors, as a result of a previous FOI request. The complainant considers that the staffing levels Boots provides to enable staff to follow these SOPs are of equal importance.
- Pharmacists have a professional duty to make patients their first concern; to assess the risks in the care they provide and do everything they can to keep these risks as low as possible. Without the information about Boots' staffing model, time standards and staffing allocation process, pharmacists will not know what staffing they should have available and will be impeded in their ability to properly assess and address the risks and the root causes of any errors or incidents.
- The information about Boots staffing would be used in both common and publicly-conducted legal proceedings if it were available. Pharmacists are required by the pharmacy regulator to carry professional indemnity insurance, which pays compensation to patients in the event that they are harmed or experience any losses as a result of the pharmacist's actions or omissions. Separately, employers have to have vicarious liability insurance which pays compensation due to the actions or omissions of an employee. However, the employer's liability in such circumstances would be altered depending on the staffing levels it sets. Is the staffing it provides sufficient to allow its procedures to be

¹ <https://www.chemistanddruggist.co.uk/feature/what-truth-behind-staffing-concerns-boots>

followed? This is a fact which cannot be known or argued in Boots' case unless it provides its staffing levels information.

- Pharmacists can face criminal prosecution for inadvertent dispensing errors. However, if there were insufficient staff to follow safety procedures, prosecution would be unfair in such circumstances. Without the information about staffing levels at Boots, pharmacists cannot analyse it for potential use in their defence or as mitigation in sentencing, and the public cannot see the information in order to be able to make an assessment of whether the pharmacist could have followed the procedures which would have prevented the error.
- Pharmacists can face sanctions from the pharmacy regulator in the event that they make an error which leads to patient harm. These often follow a public hearing with a public determination. If pharmacists had the time standards and staffing levels information, they would be able to analyse the information and may be able to use it in their defence. Its availability in such cases would help ensure they receive a fair hearing – which could affect the future of their entire professional career. Equally important is that if the staffing levels information was available, the public would be assured that a fair hearing had been conducted in the context of that information. Otherwise, the public may be deprived of a pharmacist (if the pharmacist was struck off or suspended from the register) who might otherwise have been able to remain on it if he or she had access to Boots staffing levels information to use in mitigation. Or, if the staffing levels information did not assist the pharmacist but actually demonstrated that the pharmacist was capable of following the procedures in question; that could also be taken in to account. If the information is not available, however, no such arguments can be considered.
- At a time when the NHS is under extreme pressure, the complainant argues that public access to the disputed information is essential to be able to examine whether NHS pharmacy services within a private company provides a safe service for the public.
- When a private company provides a public health care service where patient safety is the priority there should be public access to information about how the company works out and allocates budgets to provide safe community pharmacy staffing levels. As above, pharmacists are on record highlighting the dangers of understaffing and others have raised concerns about the transparency of the calculations Boots' uses to allocate staffing. Last year's International Conference of Information Commissioners

highlighted the need for greater transparency in contracted out public services.

- The complainant considers that the information she has requested is specific to Boots' own operations and that it would not make sense for another pharmacy provider to try to copy Boots time standards (and ACI). If another provider copied the time standards and they provided more staff than its operations required, that pharmacy would lose money unnecessarily. If the time standards gave the other provider fewer staff than the pharmacy needed, this would put patient safety at risk.
 - Finally, during its programme investigation the BBC requested the same information from Lloyds Pharmacy (the UK's second largest pharmacy chain) and Lloyds Pharmacy complied with the request.
58. For its part, in its submission Boots has acknowledged that there is public interest in demonstrating transparency, accountability and value for money so that the public can better scrutinise the expenditure of public money. Boots said it had also considered whether disclosing the information would further the understanding of, and participation in, the issues of the day but concluded that disclosure would not assist in this way.

Public interest in maintaining the exemption

59. Boots has argued that as the staffing levels at Boots (and indeed every other community pharmacy) has no impact on the expenditure of NHS funds, there is no public interest under the FOIA to warrant disclosure of what is commercially sensitive information.
60. Boots argues that it is in the public interest for NHS pharmacies to be able to compete fairly, in the way they consider best to maintain patient safety, to the ultimate benefit of customers and patients. Disclosing Boots' time standards and ACI model would result in Boots being less competitive in the market with the result that the public benefit of having an efficient and competitive market is eroded. FS50567022 noted that there is a very strong public interest in ensuring competitiveness – in Boots' view, this indicates that the information should not be disclosed as a competitor could very easily adopt Boots' processes given that it could also have easy access to Boots' SOPs (which, as noted, have previously been released under the FOIA).
61. The SOPs that Boots has released detail the steps involved in each action associated with the dispensing process, such as 'Receiving a prescription from a customer' and 'Handing out dispensed medicines to the patient or representative'. As well as the process steps, each SOP

advises who is responsible for carrying out the step and 'Key Points' such as associated risks and guidance for good professional practice. It is a detailed level of information.

62. Boots also considers that its time standards and ACI model may not be easily understood by journalists and those who do not compete in the health sector. Taking individual values, without the full context of how the model works, may cause unwarranted reputational damage to Boots which, in turn, may damage its commercial interests through loss of trade. Moreover, releasing the information into the public domain may mean that customers try and calculate what the staffing levels should be in a particular Boots pharmacy without understanding the complexities of the model. Boots says that any questions or complaints from customers would distract staff and/or divert their attention away from providing excellent patient care.
63. The fact that there is media interest in discussing a topic – in this case Boots' time standards and its staff profiling and funding – does not, according to Boots, automatically create a public interest in disclosing the information about it that has been requested. To the extent that there could be said to be any public interest in the publication of information relating to Boots' staff profiling, Boots says this has been satisfied by the broadcast of the BBC programme. In this regard, Boots has noted the detailed correspondence it has had with the BBC and the fact that it has provided a great deal of information to the BBC and therefore cannot be said not to be acting transparently.
64. Boots has referred to Lloyds Pharmacy having released its time standards to the BBC. Boots has passed to the Commissioner correspondence it received from Lloyds Pharmacy dated 26 March 2018 in which Lloyds Pharmacy has indicated that sharing its time standards with Boots could breach competition law and that its time standards are confidential and commercially sensitive. Lloyds Pharmacy says that releasing the time standards to Boots would provide Boots with insight into the functioning of a key aspect of the Lloyds Pharmacy business, would enable Boots to directly compare Lloyds Pharmacy data with its own in such a way which could have the effect of preventing, restricting or distorting competition.
65. Disclosing the information would, Boots says, be disproportionate compared with the detriment to Boots. There is also a legitimate concern that any information released could be used by the PDA and its Union which are involved in legal proceedings with Boots.
66. Boots says that, given its size and reputation, it receives multiple FOIA requests and is happy to respond to them where the matter is covered by the Regulations or the FOIA.

67. Lastly, Boots has said it is part of a listed company, Walgreens Boots Alliance (WBA) that fully abides by all reporting and other regulatory obligations in all the markets in which it operates, including the UK. WBA publishes quarterly earnings announcements, containing a considerable amount of financial information on the company and its activities. This is part of an extensive range of financial and other information on the company that is fully accessible to the public on its website. In addition to this, and specifically in relation to Boots, full account details are freely available via the Companies House website.

Balance of the public interest

68. The BBC's documentary programme '*Boots – Pharmacists under pressure*', which the Commissioner has watched, highlighted three cases in 2012-2013 where patients had died as a result of medication errors by Boots pharmacists. The programme referred to some pharmacists indicating that they were under pressure at work because of their workloads and because of understaffing and that, therefore, safety procedures and the SOPs were sometimes not followed. However, the documentary indicated that the specific cases in question were not due to a lack of staff working in the pharmacies at the time.
69. The Commissioner has reviewed statistical information Boots has released to the complainant concerning dispensing incidents at Boots over a number of years. This information has not given the Commissioner any cause for concern.
70. The Commissioner is also aware that the GPhC carried out an 18 month investigation into four allegations concerning Boots, with the investigation concluding in December 2016. Two of the allegations that are of particular relevance to this case were that there were inadequate pharmacy staffing levels at Boots stores, and that as a result there was a risk to patients. The GPhC noted that it was satisfied that the evidence available did not show there was a systemic failure by Boots to provide sufficient suitably qualified and skilled staff within the pharmacy team, or that Boots stores specifically posed a risk to patients or members of the public.
71. GPhC issued a statement in January 2018, following the broadcast of the BBC's documentary, which included a reference to the above investigation and the investigation's findings.
72. The Commissioner recognises that the concerns about Boots that the complainant raised and which were discussed in the BBC documentary are serious ones, which merited investigation. Against a background of three deaths having occurred some four years' earlier, the complainant – on behalf of the BBC – is concerned that pharmacists working for

Boots are working under pressure, due in part to being understaffed. She considers that serious pharmacy and dispensing incidents may occur again in the future as a result. The information that the complainant is seeking relates to the timings Boots has apportioned to particular pharmacy and dispensing tasks and the model it uses to allocate staff (with associated costings) – which incorporates the time standards. This information would therefore indicate how Boots allocates its pharmacy staff.

73. The Commissioner has noted the complainant's wider public interest arguments which broadly concern funding, transparency and corporate matters. She has not been persuaded that these other arguments carry significant weight; it appears to the Commissioner that it is the matter of patient safety that is the focus of this case.
74. In coming to a decision on the balance of the public interest, the Commissioner has taken account of the fact that the public interest in the matter of past dispensing incidents at Boots (associated with the deaths of three individuals) was explored through the BBC documentary. That documentary concluded that the three cases in question, which occurred approximately four years prior to the request - were not due to understaffing. The GPhC also found – approximately five months before the complainant submitted her request – that Boots was providing sufficient suitably qualified and skilled staff and did not pose a risk to the public. In addition, from the information that Boots has previously released, and from her own, albeit not exhaustive, research, the Commissioner does not see a trend of dispensing incidents at Boots increasing, and such incidents remain extremely rare.
75. Lloyds Pharmacy may have released its time standards to the complainant; this does not place an obligation on Boots to do the same.
76. Having considered all the circumstances and all the public interest arguments provided, the Commissioner has decided that the public interest in the matter of safe pharmacy and dispensing practices at Boots has been met to a satisfactory degree by the BBC documentary and the GPhC investigation. The Commissioner also notes that Boots has released considerable related information to Boots during the course of the BBC's investigation. On this occasion the Commissioner therefore considers that there is greater public interest in Boots being able to compete fairly in the pharmacy market, and, as a provider of NHS pharmaceutical services, being able to offer the public a strong and efficient service. She is satisfied that the public interest on this occasion favours withholding the requested information under section 43(2) and, as such, it has not been necessary to consider Boots' application of section 43(1) to the information.

Right of appeal

77. 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

78. 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.
79. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF