

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2019

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Health and Social Care (DHSC) about the calculation of the concessionary prices of bicalatamide 50mg tablets and the manufacturers and wholesalers that provided the relevant information. The information was initially withheld by the DHSC under section 43(2) - commercial interests. At a much later date the internal review cited section 12(1) of the FOIA – the cost of compliance and withdrew its reliance on Section 43(2).
2. The Commissioner's decision is that the DHSC has not demonstrated that compliance with the request would exceed the appropriate limit and is therefore not entitled to rely on section 12(1). The DHSC breached section 16 of the FOIA, as it failed to provide the complainant with advice and assistance in order to understand what information the complainant was seeking. The DHSC also failed to comply with section 17(5) in that it did not provide a refusal notice citing its reliance on section 12 within 20 working days of receiving the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response to the request which does not rely on section 12(1) of the Act.

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 30 May 2018 the complainant made the following request for information under the FOIA:

"1. What information and data has been used to calculate the concessionary prices awarded for bicalutamide 50mg tablets for the following months: October 2017, November 2017, December 2017, January 2018, February 2018, and March 2018.

For each month, please provide:

- *Details of manufacturers that supplied information, including the information they provided and the dates upon and for which this information was provided*
- *Details of wholesalers that supplied information, including the information they provided and the dates upon and for which this information was provided*
- *The data and calculation upon which the price concessions were determined"*

6. The DHSC responded on 21 June 2018 and refused to provide the requested information citing section 43(2) of the FOIA - commercial interests.
7. The complainant asked for an internal review on 22 June 2018.
8. Despite several reminders, the DHSC did not provide an internal review to the complainant until 21 March 2019. It stated that it was amending its position from section 43(2) to section 12(1).
9. The DHSC's response to the Commissioner's investigation is the internal review that was finally provided after her investigation had started. The Commissioner has not been provided with the withheld information because the DHSC altered its position from section 43(2) to section 12(1) indicating that the information could not be provided within the fees limit.

Background

10. The Commissioner has been provided with most of the following background information by the DHSC. The Drug Tariff is produced by the National Health Service Business Services Authority (NHSBSA) on behalf of the DHSC. The Drug Tariff¹ outlines what will be paid to pharmacy contractors and this includes the reimbursement paid to them for generic medicines. Reimbursement falls under three categories - A, C and M.
11. Bicalutamide 50mg tablets were in Category M of the Drug Tariff when the request was received. The drug was readily available as a generic and its reimbursement price was calculated based upon information supplied by manufacturers under Scheme M.
12. Concessionary prices are granted for products which are not available to pharmacy contractors at or below the reimbursement price listed in the Drug Tariff. The reason for this is in order that contractors will be paid fairly and can access medicines when market prices increase even if they make a loss on the transaction. The concessionary price represents an in-month adjustment to the month's published Drug Tariff price. The DHSC provides an example of the tariff price for bicalutamide 50mg tablets in October 2017 as £1.73 and the concessionary price of £1.90.
13. The DHSC explained that the NHS relies on competition to drive down the prices of generic medicines. Competition between suppliers generally results in lower prices for the NHS. Prices do fluctuate due to market forces and low prices mean that medicines go to the countries that pay more when there is a shortage. Concessionary prices help protect against this. The Pharmaceutical Services Negotiating Committee (PSNC), which is the representative body for NHS community pharmacies, can submit requests for concessionary prices to the DHSC at any point during the month. Where agreement cannot be reached, the DHSC will impose a price, whether that is the current Drug Tariff price or at a lower adjustment than the PSNC has requested. When the request was submitted to the DHSC, it relied on information voluntarily submitted by participating manufacturers and wholesalers under

¹ www.nhsbsa.nhs.uk/sites/default/files/2019-02/Drug%20Tariff%20March%202019.pdf

Schemes M and W respectively, to support the concessionary price setting mechanism.

14. Scheme M is a voluntary agreement that was negotiated between the DHSC and the representative body of generics manufacturers which sets out the role and responsibilities of the DHSC and the generics industry in collecting data to inform Category M pricing reimbursement.
15. Scheme W was a parallel voluntary agreement between the DHSC and the representative bodies of pharmaceutical wholesalers.
16. The data used to set concessionary prices is provided by manufacturers and wholesalers under voluntary arrangements that state that the information will remain confidential to the DHSC and the organisations concerned. Documentation on these schemes is publicly available on The National Archives website and the NHSBSA website.² The information provided by suppliers is used by the DHSC to reach the calculation for concessionary prices. This is then discussed with the PSNC throughout the relevant month in which the item was requested. There is no information in the public domain regarding how this calculation is made, as it is confidential to the DHSC.
17. The type of information collected under Schemes M and W is income generated for each generic medicine by strength, pack size, volume, and trade price lists. However, the DHSC states that there is no publicly available information released by the DHSC on how the calculation for concessionary prices is arrived at.
18. The Health Service Products (Provision and Disclosure of Information) Regulations 2018 have made it a mandatory requirement (from 1 July 2018, subject to transitional arrangements) for this data to be provided to the DHSC by the manufacturers and wholesalers. Members of Scheme M will supply information under the regulations after the scheme expires.

Scope of the case

19. The complainant contacted the Commissioner on 20 September 2018 to complain about the way the request for information had been handled. She explained that Bicalutamide is a medicine supplied to patients on
-

² <https://www.nhsbsa.nhs.uk/pharmacies-gp-practices-and-appliance-contractors/drug-tariff/back-copies-drug-tariff>

the NHS and that the prices are determined by the DHSC. The complainant argued that sufficient weight had not been given to the public interest which favours disclosure.

20. The complainant has provided many reasons for disclosure both here and in a related request **FS50787920** but the Commissioner is only able to consider the matter of the fees limit as this is what the DHSC ultimately applied to the request.
21. The Commissioner considers therefore that the scope of this case is whether the public authority has correctly applied section 12 of the FOIA to this request. She will also consider whether the DHSC complied with its obligations under section 16 to provide advice and assistance to the complainant.

Reasons for decision

Section 12

22. Section 12(1) of the FOIA states that:

'(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

23. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 24 hours or £600 in respect of the DHSC. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
24. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance

with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be '*sensible, realistic and supported by cogent evidence*'³.

The DHSC's view

Part one of the request

25. The DHSC explained that "exhaustive searches" had been carried out on all the areas where information falling within the scope of the request was potentially to be found. It listed the areas as:

- NHS BSA Collection Sheets; and
- the mailbox used for communication between DHSC and the NHS BSA ('BSA mailbox').

The search of the NHSBSA collection sheets returned 24 items and the DHSC estimated that it would take an average of 15 minutes to identify whether each item was in scope. The total would then be six hours at a cost of £150. The search of the BSA mailbox returned 192 items requiring 8 minutes per item for scoping, a minimum of 25.6 hours at a cost of £640.

26. The DHSC then moved on to what it describes as the second part of the request – "*The data and calculation upon which the price concessions were determined*". Again "exhaustive searches" were carried out on the following:

- folders on the Department's shared drive; and
- a centralised electronic file storage system ('IWS').

This search returned 20 items and the estimate of one hour was given at a cost of £25. A search of IWS produced 127 returns. To identify whether these fell within the scope of the request would take three minutes per item and a minimum of 6.35 hours and a cost of £158.75 to extract the information requested.

27. This meant that this part of the request could be provided within the fees limit, though the information might be subject to exemption.

³ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> – (paragraph 12)

The complainant's view

28. Firstly, the complainant questions why the DHSC has applied the fees limit so late in the day and suggests that it is surprising that this has not been claimed previously, given the extent by which the cost of meeting the request exceeds the appropriate limit, according to the DHSC's calculations. The complainant argues that the DHSC has changed its reasoning and is seeking to avoid disclosing the information.
29. The view of the complainant is that the DHSC's figures are not an accurate reflection of the costs of meeting the request and that they have been inflated in order to defeat the request rather than to serve public access to information.
30. Specifically in relation to the first part of this request, the complainant disputes the amount of time it would take to identify information within the scope of the request from the NHSBSA collection sheets. The complainant suggests 30 seconds per sheet for identification and another 30 seconds per sheet (electronically) or another 2.5 minutes for a paper exercise to copy the information for disclosure. The total cost being somewhere between £10 and £30 on the assumption that all the sheets contain relevant information.
31. The complainant questioned the specific search terms in relation to this first part of the request. As the request only related to bicalutamide 50mg tablets and was confined to specific dates, the DHSC could have used more specific search terms to narrow the search.
32. The complainant queried the estimate of eight minutes to identify each item as within scope (or not) on the BSA mailbox but three minutes per item to identify items on a shared drive. This figure is questioned as arbitrary and it is pointed out that if the lower figure had been used as an estimate it would have brought the entire request in under the appropriate limit. The complainant supports this argument by explaining that the DHSC had used an estimate of one minute per item to make such an assessment regarding a similar mailbox on a different request.
33. Moving on specifically to "the data and calculation upon which the price concessions were determined, the complainant queries the length of the search time based on various methods such as using the "find/search" function, using file search software or a database query by the public authority's IT team. The complainant suggest that one minute per item would be sufficient.
34. The complainant estimates that the whole request could be provided for

between £151.25 and £171.25.

35. The fact that the DHSC must have collated the requested information for its discussions with the PSNC is underlined by a quote from the DHSC that the complainant drew the Commissioner's attention to:

"The Department uses the information provided by suppliers to reach The calculation for concessionary prices, which is then discussed with the PSNC throughout the relevant month in which the item was requested. There is no information in the public domain regarding how this calculation is made, as it is confidential to the Department."

The Commissioner's view

36. It would appear that the DHSC hadn't identified the requested information in order to withhold it previously under section 43(2).
37. The Commissioner is aware that the same complainant has made the same request to the NHSBSA, prior to making her request to the DHSC. This is the subject of a separate complaint to the Commissioner. She has therefore taken the decision to consider the DHSC complaint first. The Commissioner has however been provided with the withheld information in the NHSBSA case. Although there may well be other information held by the DHSC in relation to this request, it would indicate that a significant part of it has been compiled by the NHSBSA and provided to the DHSC which does suggest that it is reasonably accessible to the latter.
38. The last point made by the complainant is the most persuasive one. The requested information regarding the concessionary price of bicalutamide 50mg is surely available to the DHSC in order to both calculate and discuss that calculation with the PSNC without the necessity of conducting the extensive searches outlined in the internal review.
39. The speculative calculations provided by the complainant are understandable because they are clearly not in possession of all the facts and the methodology which is why the request was made. However they are based on sound reasoning. The calculations provided by the DHSC seem to the Commissioner to be based either on a misapprehension concerning the request that resulted in it broadening to the extent where it exceeded the fees limit.
40. The Commissioner considers the calculations to be based on far too wide an interpretation of the request. She is not convinced that the majority of this information could not be obtained from existing spreadsheets and therefore the DHSC has not proved that complying with the request would exceed the appropriate limit and cannot rely on section 12(1) of

the FOIA.

Section 16 – duty to provide advice and assistance

41. Section 16 of the FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

42. The complainant does not accept that the DHSC complied with its duty to provide advice and assistance. The original request invited the DHSC to contact the complainant for clarification at the time, rather than 11 months later.

43. The Commissioner agrees with the complainant. The problem with providing advice and assistance in this instance stems from the commercial prejudice exemption being applied originally and subsequently not relied on at review. It should also be noted that, although the DHSC was not relying on section 43(2), the public authority implied that commercial prejudice might well apply should a refined request be made. As the review was so delayed, any attempt to provide advice and assistance was by then rendered futile.

Section 17(5)

44. Section 17(5) of the Act states:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

45. The DHSC originally withheld the requested information under section 43(2). It did not provide the complainant with a refusal notice stating its reliance solely on section 12 within the statutory timeframe for compliance, consequently it breached section 17(5) of the Act.

Other matters

46. In order to conform with the section 45 Code of Practice, an internal review should take no more than twenty working days to complete and up to a maximum of 40 working days only in exceptional circumstances. The Commissioner considers that it is completely unacceptable that the DHSC provided its review nine months after it was requested. The Commissioner has previously commented on the DHSC's inability to complete reviews in a timely fashion and the situation has not improved.

Right of appeal

47. 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

48. 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.
49. 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**