

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2019

Public Authority: Dr Jefferies and Partners
Address: The Medical Centre
139 Lillie Road
London, SW6 7SX

Decision (including any steps ordered)

1. The complainant has requested information relating to a contract with 'Babylon and/or GP at Hand'.
2. The Commissioner's decision is that Dr Jefferies and Partners (the surgery) was entitled to rely on section 43(2) of the FOIA to withhold part of the requested information.
3. The Commissioner requires the public authority to disclose section C of Schedule 3 to ensure compliance with the legislation.
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 23 March 2018, the complainant wrote to the surgery and requested information in the following terms:

"Please supply me with the terms of the contract which the surgery holds with Babylon and/or GP at Hand, which was established via commissioning."
6. The surgery responded on 19 April 2018 and refused to provide the requested information. It cited section 43 of the FOIA as its basis for doing so. It stated:

"Please note that, pursuant to section 43 Freedom of Information Act 2000 (FOIA), we are unable to provide a copy of the sub-contract as this would commercially prejudice the parties' interests. This is because such information relates to how the parties conduct business which is not in the public domain. There is no public interest requirement that would require the disclosure to be made, for example, on the grounds of patient safety. This is because the parties operate in a regulated sector which protects the public through a statutory framework, by which the parties abide."

7. In her request for review the complainant stated:

"I am concerned about patient safety in view of the fact that the Advertising Standards Authority have now made at least 4 rulings against the app used for triage by Babylon and as part of this contract. This is not currently regulated by the CQC, who made no mention of it during their report, or the GMC, or the CCG."

I therefore request a review as this is in the public interest and it has been shown by the ASA's actions in upholding multiple complaints that there is inadequate regulation."

8. In further correspondence the complainant also stated:

"I would like to ask for an internal review of your decision to deny my request. You have cited section 43 as the relevant exclusion. The guidance from the Information Commissioner's Office relating to section 43 makes it quite clear that:

- it does not automatically follow that commercial information, including contracts with third parties, is exempt from disclosure under section 43(2)*
- that in order for it to be exempt, the public authority must show that disclosure would be prejudicial to the commercial activities of a person; moreover it is then necessary to apply the public interest test*
- that it is important for a public authority to consider each clause within a contract, rather than view the contract as a whole*

You go on to state that there is no public interest requirement for disclosure e.g. on the grounds of patient safety. The guidance makes it quite clear that under the public interest test, arguments in favour of disclosure are not limited to patient safety but include openness and transparency, and accountability for the spending of public money. In addition as there is little clinical evidence for supporting new services such as those covered by the sub-contract with Babylon, it is essential for the public interest (and by extension patient safety) that evidence is collected systematically and disclosed to all relevant parties.

Finally you make a comment about the parties operating in a regulated sector. You will be aware that operating in a regulated sector is not an exemption under the Freedom of Information Act."

9. Following an internal review the surgery wrote to the complainant on 24 May 2018. It revised its position and provided a redacted copy of the contract. However, it maintained that the redacted information was exempt by virtue of section 43(2).
10. The surgery stated that it was withholding purely commercial terms that do not relate to patient safety, and so are not within the public interest; any terms relating to patient safety have been disclosed. It also reiterated that both parties to the subcontract are regulated by the CQC which protects the public interest in respect of public safety through a statutory framework that both parties abide by.
11. The Commissioner provided the surgery with a link to her guidance on the public interest test and asked if it had anything to add.
12. The surgery stated that given the complainant's request for a review on 19 April 2018 being based on her concern about public safety, it considered the public interest of patient safety. As per its response of 8 November 2018, any terms relating to patient safety were disclosed.
13. It maintained that the information being withheld are terms relating to payment mechanisms and the structure of the service. These are purely commercial terms that do not relate to public safety and are therefore not within the public interest.
14. Given that any terms relating to patient safety have already been disclosed, it considered that the public interest of patient safety had been satisfied.
15. It reiterated that the complainant focused her request on patient safety. Disclosure of the remaining clauses, which are purely commercial terms would be separate to public safety, as well as presenting a real and significant risk to the commercial interests of the aforementioned parties.
16. The Commissioner contacted the surgery again to advise that the original request was for the 'terms of the contract' and that the matter of patient safety was first mentioned by the surgery itself. It was therefore the view of the Commissioner that this had caused some confusion when responding to her enquiries. The Commissioner provided the surgery with some further guidance to assist it in clarifying its position.

Scope of the case

17. The complainant contacted the Commissioner on 25 May 2018 to complain about the way her request for information had been handled.
18. During the course of the Commissioner's investigation the surgery disclosed some further information to the complainant. On 9 November 2018 the complainant advised the Commissioner that the further disclosure had still not met her request, therefore she wished the Commissioner to continue her investigation.
19. A very limited amount of information has been redacted under section 40(2) FOIA (personal data). The complainant has not indicated that she is concerned with this information and therefore the Commissioner has not considered it in this decision notice.
20. The Commissioner considers the scope of this case to be to determine if the surgery has correctly applied section 43(2) to the withheld information.

Reasons for decision

21. The Commissioner notes that the medical surgery itself is not a public authority for the purposes of the FOIA. Rather, each GP within the surgery is a separate legal person and therefore each is a separate public authority. The Commissioner acknowledges that when an applicant makes a freedom of information request to a medical surgery it is reasonable to expect for convenience that the surgery will act as a single point of contact. However, each GP has a duty under section 1 of the FOIA to confirm or deny whether information is held and then to provide the requested information, subject to the application of any exemptions. For ease and clarity, this decision notice refers to the surgery where appropriate in detailing the correspondence and analysis that has taken place.
22. Lillie Road Medical Centre is the trading name for GP at hand. The sub-contract in question, dated 26 May 2017, is between the partners of the surgery and Babylon Healthcare Services Ltd ("Babylon"). "GP at hand" is also the name of the service provided pursuant to this sub-contract.

Section 43 – commercial interests

23. Section 43(2) of the FOIA states that 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).

24. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43. This comments that:

...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

25. Section 43(2) is a qualified exemption and is therefore subject to the public interest test.
26. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, 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 to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met.
27. In relation to the first point the requested information comprises of a contract and the information describes the commercial relationship between the surgery and GP at hand. Therefore the Commissioner is satisfied that it is 'commercial' in nature.
28. It is now necessary to consider whether the surgery has demonstrated that disclosing the requested information could cause the prejudice claimed.
29. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur, or prejudice 'would be likely to' occur.
30. With regard to 'would be likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

31. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
32. The surgery considered that there is a real and significant risk that disclosure would be likely to prejudice the aforementioned parties' commercial interests by granting potential competitors an unfair advantage. This is evidenced by the facts that: (i) GP at hand is a unique and innovative service; (ii) the structure of the services that GP at hand provides would be of significant value to a potential competitor; and (iii) such information is not in the public domain.
33. The surgery consulted with Babylon about the potential disclosure of the sub-contract. Babylon seeks only to withhold information from the sub-contract that details (i) how its NHS services are structured, and (ii) the pricing mechanisms. Babylon maintains that those provisions are exempt under section 43(2) FOIA, because their disclosure to the public would be highly likely to cause real, actual or substantial prejudice to Babylon's commercial interests.
34. The Commissioner has considered the surgery's position and accepts that disclosure of the information would be likely to have a prejudicial impact on the commercial interests of Babylon/GP at hand.
35. The surgery explained that GP at hand forms a crucial part of Babylon's commercial success. Babylon is currently the only digital provider of a full NHS GP service (that is one that delivers the full spectrum of care under a General Medical Services contract, rather than one digital component of it e.g., video consultation). As is self-evident, the NHS is a large and attractive market for providers of digital medical services. The market for such services is highly competitive: Babylon has a number of rivals that would wish to enter the NHS market for full NHS GP services by securing similar contracts with NHS entities. At present, however, Babylon has a very strong competitive edge.
36. The surgery further explained that that edge comes in part through Babylon's innovative approach to structuring certain fundamental features of its arrangements with NHS entities. Babylon has invested its ingenuity and resources in crafting those features as part of its offering to NHS providers. Those features are crucial to both Babylon's and the surgery's success with the NHS.
37. Those features are not known by Babylon's competitors. If they become known, competitors will seek to replicate those features in their own offerings to NHS entities.

38. This will greatly assist them in securing contracts that Babylon seeks to secure, maintain or extend, and will be potentially detrimental to Babylon's negotiations to provide a similar service outside of London. That in turn will greatly reduce the competitive advantage in this market, with very serious consequences for their commercial interests.
39. In this respect, the surgery consider there is a strong analogy between this case and the very recent decision of the First-Tier Tribunal in *Bedfordshire Police v IC, Garden Productions and Cox* (EA/2018/0118) (decision promulgated on 5 December 2018). That case also concerned a contract between a private party and a public authority. The private party sought to redact certain provisions from the contract, relying on section 43(2) FOIA.
40. The Tribunal agreed. See in particular paragraph 33, where the Tribunal endorsed the central argument, as follows:

"This argument is that this document is a key road map that would allow competitors to 'see behind the curtain'. The publication of this document would significantly elevate the prospects for rivals in a highly competitive market".
41. The surgery acknowledge that each case must be assessed on its own facts, but this is precisely Babylon's case here. It considered that the reasoning of the Tribunal in that case applies squarely to the sections of the contract it sought to redact in this case, for the same reasons.
42. The surgery argued that there are very limited redactions from the body of the sub-contract itself. Those redactions concern the crucial innovative structural features of the offering that has been crafted and that has brought both parties success with the NHS. Disclosure would indeed provide both parties' competitors with a "road map" of how to replicate the innovative advantages of the sub-contract. This would help them to "steal a march" on Babylon as it could of course have no corresponding insights into their competitors' approach to such contracts.
43. The surgery noted that the Tribunal in the *Bedfordshire Police* case took the view that redaction by redaction analysis did not meet the central "road map" argument. Nonetheless, the surgery sought to assist the Commissioner by providing a table that summarised why each item of proposed redaction is a crucial and sensitive part of the "road map".
44. The second category of withheld information concerns the detailed pricing mechanism set out in Schedule 3 to the sub-contract. In part, the same concerns as discussed above apply here: the pricing mechanism is a key part of Babylon's "road map". In addition, pricing information is perhaps the quintessential example of commercially

sensitive information because of its impact on parties' positions in respect of future negotiations. In particular, if other entities to whom Babylon offers these (or equivalent) services in future were to learn via public disclosures how the agreed pricing arrangements worked in this case, they would use that information to strengthen their hand – and thus weaken Babylon's hand – in those negotiations. They would know what Babylon was prepared to offer here, and would not realistically settle for anything less. This would weaken Babylon's ability to secure the best possible prices in future.

45. The Commissioner sought further clarification from the surgery regarding the 'road map'. It explained that the 'road map' is not a separate document as such, but rather the contents of the contract. If disclosed in an unredacted form it could provide a competitor with a 'road map' on how to provide similar services via learning the structure of them.
46. That information on structure is the information that the surgery propose to withhold from disclosure as such information is vital to its own and Babylon's commercial interests.
47. The surgery also took the opportunity to reconsider the contents of Schedule 3 of the withheld information. Upon further review it agreed that it could in fact disclose section C of that Schedule.
48. This concern applies also to the commercial interests of the surgery. It could realistically seek to secure digital services from alternative private providers instead of or in addition to Babylon. Again, if the details of the agreed pricing mechanism in this case were in the public domain, the surgery's ability to secure the best price for itself in future would be weakened.
49. The surgery referred to the Commissioner's guidance on section 43 that supports that approach to the commercial sensitivity of pricing information. See for example paragraph 52:

"Impact on other negotiations – revealing information such as a pricing mechanism can, for example, be detrimental to a public authority's negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain."
50. In addition, with regards the sensitivity of pricing information, it referred to a further example given at paragraph 51 of the guidance, namely the case of Council of the Borough and County of the Town of Poole v IC EA/2016/0074.
51. Having considered the matter, the Commissioner is satisfied that the harm alleged 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 surgery and Babylon. The first criteria has been met and the Commissioner has gone on to consider the second.

52. 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.
53. The Commissioner is again satisfied that a causal relationship exists between disclosing the disputed information and prejudice to the surgery's and Babylon's commercial interests resulting from the disclosure. Disclosing the pricing information would clearly provide competitors or other clients with details that could weaken Babylon's position. The Commissioner considers that this alleged prejudice is 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 – e.g. 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. It is the Commissioner's view that there is a real and significant risk of prejudice to both parties commercial interests if the requested information was to be disclosed.
56. 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 test

Arguments in favour of disclosing the withheld information

57. Babylon acknowledges the importance of transparency in general, and in particular about commercial relationships between public authorities (such as those in the NHS) and private entities (such as Babylon).
58. 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.

Arguments in favour of maintaining the exemption

59. The surgery argued that the specific items of withheld information would not further the public interest to any significant extent. It referred to the Upper Tribunal that has made clear that the requester's interests can be relevant in assessing the public interest in disclosure. See *Department of Health v IC & Lewis* [2015] UKUT 159 (AAC) at [37]:

"the linkage between the contents of the information and the application of the general public interests in favour of disclosure will often be informed by the reasons for the request, which will normally be founded on what it is thought it contains or might contain or omit".

60. In the present case, the complainant made clear in correspondence that her primary interest concerned patient safety. The withheld information has no bearing on that issue. For those reasons, the surgery consider the incremental public interest in the disclosure of this particular information to be comparatively limited.
61. In contrast, the surgery considered that the public interest in maintaining the exemption is much weightier. This is in part because of the very substantial harm that disclosure would do to Babylon's commercial interests, as well as those of the surgery. Disclosure would also be unfair, in that it would provide both parties' rivals free access to valuable commercial tools in which both Babylon and the surgery have invested ingenuity and resources.
62. More broadly, the surgery also submitted that such harm would damage fair competition in this market, in that the leading commercial party (Babylon) would in effect be forced to forfeit key parts of its "road map", without corresponding access to its rivals' commercial thinking. That would be unfair in itself. It would also do damage to this market, which serves not only the commercial interests of Babylon, but an important public interest in the use of technology to improve healthcare services. In other words, disclosure will harm the aforementioned parties and this market, and harm to this market is very strongly contrary to the public interest.

Balance of the public interest

63. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority carries out its functions. This public interest is heightened where the information relates to the spending of public money.

64. The Commissioner considers there is a strong public interest in protecting a public authority's ability to negotiate with commercial organisations around the supply of services to patients using the NHS and to secure best value for money. The NHS is under significant pressure to stretch budgets to be able to deliver high service standards in the UK. If information is disclosed which would be likely to make the negotiation process more difficult, this would significantly hinder the surgery's negotiating position in this area which would not be in the public interest.
65. The Commissioner also considers that there is a public interest in not distorting the commercial playing field, by disclosing the detailed commercial arrangements of one party to the advantage of its competitors or other potential customers.
66. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.

Other matters

67. The Commissioner notes the continued reference to patient safety being a concern of the complainant at the outset.
68. Having reviewed all the correspondence provided the Commissioner further notes the surgery's response of 19 April 2018 which states:

*"Please note that, pursuant to section 43 Freedom of Information Act 2000 ("FOIA"), we are unable to provide a copy of the sub-contract as this would commercially prejudice the parties' interests. This is because such information relates to how the parties conduct business which is not in the public domain. There is no public interest requirement that would require the disclosure to be made, for example, **on the grounds of patient safety**. This is because the parties operate in a regulated sector which protects the public through a statutory framework, by which the parties abide."*

69. On 19 April 2018, the complainant wrote:

"I wish this to be reviewed, please."

*I am concerned about **patient safety** in view of the fact that the Advertising Standards Authority have now made at least 4 rulings against the app used for triage by Babylon and as part of this contract. This is not currently regulated by the CQC, who made no mention of it during their report, or the GMC, or the CCG."*

I therefore request a review as this is in the public interest and it has been shown by the ASA's actions in upholding multiple complaints that there is inadequate regulation."

70. The complainant then also requested an internal review on 23 April 2018, stating:

"I would like to ask for an internal review of your decision to deny my request. You have cited section 43 as the relevant exclusion. The guidance from the Information Commissioner's Office relating to section 43 makes it quite clear that:

- it does not automatically follow that commercial information, including contracts with third parties, is exempt from disclosure under section 43(2)*
- that in order for it to be exempt, the public authority must show that disclosure would be prejudicial to the commercial activities of a person; moreover it is then necessary to apply the public interest test*
- that it is important for a public authority to consider each clause within a contract, rather than view the contract as a whole*

*You go on to state that there is no public interest requirement for disclosure e.g. **on the grounds of patient safety**. The guidance makes it quite clear that under the public interest test, arguments in favour of disclosure are not limited to patient safety but include openness and transparency, and accountability for the spending of public money. In addition as there is little clinical evidence for supporting new services such as those covered by the sub-contract with Babylon, it is essential for the public interest (and by extension patient safety) that evidence is collected systematically and disclosed to all relevant parties.*

Finally you make a comment about the parties operating in a regulated sector. You will be aware that operating in a regulated sector is not an exemption under the Freedom of Information Act."

71. It is clear to the Commissioner that the complainant did not raise a concern about patient safety as part of her request, only mentioning it in subsequent correspondence in relation to ASA rulings. The Commissioner considers that this clouded the view of the surgery when carrying out the public interest test, as it maintained disclosure was not necessary in order to address patient safety concerns.
72. The Commissioner therefore suggests that in future, the surgery retains a clear focus of what information has been requested.

Right of appeal

73. 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

74. 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.
75. 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
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