Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about how the concessionary price of the drug bicalutamide (specifically 50 mg tablets) was calculated over the six months between October 2017 and March 2018 and other information related to Category M prices. The NHSBSA stated that some of the information was not held and withheld the remainder under sections 43(2), 41(1) and 36(2)(c) of the FOIA.

2. The Commissioner's decision is that the NHS Business Services Authority ("NHSBSA") does not hold information in relation to parts two, three and four of the request and has applied section 41(1) correctly to part one. As this applies to the whole of the requested information in part one she has not gone on to consider the application of section 43(2) or section 36(2).

3. The Commissioner does not require the NHSBSA to take any further steps.

Request and response

4. On 6 April 2018, the complainant wrote to the NHSBSA and requested information in the following terms:

> *"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*
>
> *2.What information and data has been used to calculate the current reimbursement price for bicalutamide 50mg tablets, which is in the April 2018 Drug Tariff as Category M at a value of £2.20.*
>
> *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 reimbursement price was determined'*
>
> *3. Please provide details of the manufacturers who provide data for the quarterly revision of Category M prices under the voluntary Scheme M which is backed by section 261 of the National Health Service Act 2006*
>
> *4.Please provide details of the wholesalers who provide data for the quarterly revision of Category M prices under the voluntary Scheme W which is backed by section 261 of the National Health Service Act 2006"*

5. The NHSBSA responded on 3 May 2018 and denied holding some of the requested information (parts two, three and four) directing the complainant instead to the Department for Health and Social Care ("the

DHSC"). The public authority confirmed that part one was held. However, it refused to provide that information, citing the following FOIA exemptions – section 40(2)(third party personal data) and section 43(2)(prejudice to commercial interests). The NHSBSA then took the extra statutory time allowed to consider the public interest test for section 43(2).

6. The complainant responded on the same day to say that she would contact the DHSC for the information in relation to parts two, three and four but disputed the application of section 40(2) to part one, stating that she was not requesting personal information and that if there was any personal data it could be redacted.

7. The NHSBSA explained that it just wanted to be clear that some of the information contained staff names (of the suppliers concerned) that would be withheld. This was accepted by the complainant.

8. On 29 May 2018 the NHSBSA wrote again to say that the information regarding part one was also not held. The complainant disputed this point and asked that it reconsider its position.

9. The NHSBSA provided an internal review on 27 June 2018 in which it revised its position, stating that the information at part one was in fact held but applied section 41 and section 43 to withhold the information. Parts two, three and four were not addressed, apparently because the NHSBSA believed that the complainant had accepted that the information was not held.

10. During the course of the investigation the Commissioner asked for further supporting argument from the NHSBSA regarding its application of section 43(2). Although the public authority did provide some further argument it did not seek the suppliers' views because it did not want to alarm them and run the risk of losing the future provision of information the NHSBSA required.

11. On 22 January 2019 the NHSBSA said that it was also applying section 36(2)(c)(prejudice to the effective conduct of public affairs) to the requested information at part one.

Scope of the case

12. The complainant contacted the Commissioner on 2 July 2018 to complain about the way her request for information had been handled. She argued that there is a lack of transparency about how the government calculates the prices the public pays for medicines supplied on the NHS.

13. The complainant, having originally accepted that the NHSBSA did not hold information relating to parts two, three and four of the request, asked that the Commissioner consider all parts of the request.

14. The Commissioner considers that the NHSBSA's various responses had made matters unnecessarily confusing for the complainant and agreed to consider all parts of the request for that reason. Therefore, the Commissioner considers the scope of this request to be the public authority's application of section 41(1), section 43(2) and section 36(2)(c) to part one of the request. Additionally the Commissioner has considered whether the NHSBSA holds any information relating to parts two, three and four.

15. The NHSBSA also cited section 40(2) – third party personal data for withholding part of the requested information but the complainant had made it clear that she did not require this and so the Commissioner has not considered it in this decision notice.

Background

16. The Commissioner has reproduced much of the following background information from a closely linked case FS50790878. The Drug Tariff is produced by NHSBSA on behalf of the DHSC. The Drug Tariff[1] 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.

17. 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.

18. 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

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

an in-month adjustment to the month's published Drug Tariff price. An example of the tariff price for bicalutamide 50mg tablets in October 2017 was £1.73 and the concessionary price was £1.90.

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

20. 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.

21. Scheme W was a parallel voluntary agreement between the DHSC and the representative bodies of pharmaceutical wholesalers.

22. 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.

23. 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.

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

24. 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.

Reasons for decision

Section 1(1) – general right of access to information

Parts two, three and four of the request

25. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exemptions that may apply.

26. The Commissioner asked the NHSBSA certain detailed questions to establish whether it held information concerning parts two, three and four of the request for the reasons provided earlier in this notice.

27. The NHSBSA responded to the Commissioner on 4 December 2018 by explaining that it does not collect and consequently does not hold the Category M information requested in parts two, three and four of the request. The NHSBSA speculated that it was possible that some of the information might be used by the DHSC for Category M purposes but that this is unknown. The NHSBSA repeated its view that the complainant needed to request the information relating to parts two, three and four from the DHSC.

28. The complainant had earlier accepted the fact that she would need to go to the DHSC to request this information. It was only after the confusion that arose in the course of the correspondence between the public authority and the complainant because the NHSBSA had changed its position as to whether information was held regarding part one of the request that some seeds of doubt arose. The fact that information was not held relating to parts two, three and four was not confirmed in the internal review which meant that the complainant remained in doubt. The complainant quite reasonably wanted this categorically stated. The Commissioner has received this categorical confirmation and accepts that the information requested in parts two, three and four of the request is not held.

Section 41

29. The Commissioner has gone on to consider part one of the request solely and whether the NHSBSA correctly withheld it.

30. Section 41(1) of FOIA provides that –

> *"(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and,*
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

31. The Commissioner's advice on section 41 states that "information will be covered by Section 41 if -

- *it was obtained by the authority from any other person,*
- *its disclosure would constitute a breach of confidence.*
- *a legal person could bring a court action for that breach of confidence, and*
- *that court action would be likely to succeed."* [3]

Section 41 is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request.

Was the information obtained from any other person?

32. Section 41(1)(a) states that the information must have been obtained from "any other person". The term means a 'legal person'. The Commissioner's guidance explains that this could be an individual, a company, another public authority or any other type of legal entity.

33. The requested information is information provided by third party suppliers in order to calculate concessionary prices. Categories of information are inputted by the representatives of those third parties onto a spreadsheet and provided to the NHSBSA. The Commissioner accepts that the organisations providing this information are for the purposes of this exemption "another person" in line with section 41(1)(a).

[3] https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf

34. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence?

35. The usual test for section 41 cases is set out in the case of Coco v Clark [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

36. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

37. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.

38. Bicalutamide is a generic drug which is primarily used in the treatment of prostate cancer. Dispensing contractors are paid for dispensing and providing certain drugs against NHS prescriptions. The Drug Tariff is produced monthly by the NHSBSA for the DHSC though category M prices generally change quarterly. As previously explained, 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 information is clearly more than trivial.

39. The Commissioner has considered whether the information is otherwise accessible. The concessionary price is calculated based on the information collated by the NHSBSA which is provided by the suppliers. Although the latter may publish their own price lists, the Commissioner accepts that there is no information in the public domain regarding how the calculation of the concessionary price is made, as it is confidential to the NHSBSA/DHSC.

40. The Commissioner therefore accepts that the withheld information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

41. The NHSBSA has argued that the section 41 exemption is fully engaged because the information provided by the suppliers was done so under voluntary arrangements. The principles governing these voluntary arrangements state that the information will remain confidential. The Commissioner is aware that this is set out in 'Revised long-term arrangements for reimbursement of generic medicines Scheme M, March 2010' at paragraph 25 as follows:

> *"The information submitted to the Department shall remain confidential to the Department and the Scheme member and shall be used for no purpose other than that envisaged in this agreement save with the consent of the Scheme member in respect of the Scheme member's specific information or the BGMA in respect of aggregated information."* [4]

Therefore the information was given with an expectation that confidentiality would be maintained.

Would disclosure be detrimental to the confider?

42. The nature of the information is professional rather than personal. Any disclosure has to be assessed against the detriment to the confider's commercial interests.

43. The NHSBSA's view is that, as the information relates to pricing, it warrants being held confidentially as its release would substantially prejudice the commercial interests of the suppliers, the NHSBSA and the DHSC. It would be detrimental to the supplier's commercial models because it would show pricing details (amongst other information) to competitors that would be useful in allowing them to undercut their commercial rivals.

Is there a public interest defence for disclosure?

44. The Commissioner's guidance on section 41 states that case law on the common law duty of confidence won't succeed and consequently won't be actionable in circumstances where the public authority (in this instance, the NHSBSA) can rely on a public interest defence.

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[4] https://webarchive.nationalarchives.gov.uk/20130124054649/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_115261.pdf

45. Recent case law (albeit concerning the Human Rights Act) means that it no longer has to be an exceptional case to override the duty of confidence and developments around the law of confidence have meant that the public interest test has been modified into a test of proportionality.

46. Generally when the Commissioner assesses the public interest test for qualified exemptions, the public interest in favour of disclosure has to be outweighed by the public interest in maintaining whatever exemption is in question. In other words, the default position is to disclose unless the public interest in non-disclosure outweighs it. The test in the case of section 41 though is the reverse and the public interest in disclosure has to outweigh the public interest in maintaining the duty of confidence.

47. The complainant has provided a great deal of argument in support of her position. Firstly, she states that the total NHS medicines budget was £17 billion per annum (2016-17). She provides figures for April 2018 for the category M (manufacturers') price of bicalutamide (£2.20) which was the price then being charged in October, November and December 2017. Wholesalers had been charging £1.90, £21.12 and £11.16 in each of those months respectively. These were the concessionary prices being paid by the NHS.

48. She contends that the manufacturers had the medicine available in quarter three of 2017 and the information may indicate that the wholesalers were potentially making a considerable profit margin from bicalutamide. None of this process is transparent to the public. She claims that pharmacists have expressed concerns that wholesalers may be rationing or withholding the medicine from pharmacies, resulting in a stock shortage to drive up prices.

49. Disclosure of the information would increase transparency and help establish whether prices are being driven up by explaining how they are calculated. A National Audit Office report 'Investigation into NHS spending on generic medicines in primary care' identified that *"there was a gap between wholesalers' selling prices and concessionary prices, meaning the prices it [the DHSC] granted were higher than necessary. It estimated that between June and November 2017 this amounted to £86.3 million, which would have been incurred by clinical commissioning groups in 2017-18."* She quotes the DHSC from the same publication saying that there is a lack of transparency when relying on voluntary arrangements to obtain market information which could lead to,

'"*gaming/manipulation of […] pricing"* or *"collusion"* between organisations in the supply chain'[5].

50. She further argues that disclosure is in the public interest because it is about how the government sets the prices of medicines paid for by the public from the drugs budget and she provided to the Commissioner the source of the prescribing costs.[6]

51. Providing this information would allow better scrutiny, inform the public of the activities carried out on its behalf, and allow it to have more influence. It would help to ensure clarity, fairness and value for money through better price control among suppliers and wholesalers and provide reassurance concerning price setting.

52. Costs to the taxpayer may decrease if prices were more transparent. The complainant is not aware of who exactly provides information to the DHSC but points out that the major wholesalers are owned by the same companies that own major pharmacy chains. To illustrate her point she provides examples such as the fact that Alliance Healthcare is owned by the same company that owns Boots. Three companies own 79% of medicines to the NHS. Each can find out the price that other wholesalers are charging because each of the pharmacies will have an account with each of the wholesalers and therefore access to the price list. The public does not have that access.

53. The NHSBSA acknowledges that releasing this information would serve transparency and accountability when there is an increasing spend on generic medicines in 2017-18.

54. Against this the NHSBSA sets the negative impact that it states is not in the public interest. Disclosure of the requested information would hinder its ability to set reimbursement prices. Disclosure would have a detrimental effect on the commercial models of suppliers which could lead to an extra cost to the public purse. Neither of these potential effects would be in the public interest.

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[5] https://www.nao.org.uk/wp-content/uploads/2018/06/Investigation-into-NHS-spending-on-generic-medicines-in-primary-care.pdf

[6] https://digital.nhs.uk/data-and-information/publications/statistical/prescribing-costs-in-hospitals-and-the-community/2015-16

55. The Commissioner's guidance on section 41 considers that,

> *"in respect of commercial impact, this is most likely to carry weight if the breach of confidence would damage the confider's competitive position or ability to compete, for example where disclosure would: reveal information that would assist competitors; undermine the confider's future negotiations with the authority or other organisations; or negatively impact on the confider's relationship with the authority or other organisations."*

56. The Commissioner has to look at the situation at the time of the request and cannot consider any changes in methodology and legislation that have subsequently transpired. At the time of the request the information was provided voluntarily and was considered to be confidential. The public interest arguments under section 41 come down to whether the public interest in disclosure outweighs the public interest in maintaining the exemption.

57. The complainant's views are strongly argued and it might appear that the potential to save on the vast NHS medicine bill would easily outweigh a promise of confidentiality to the organisations concerned and be easily defensible. However, as suppliers provided their information voluntarily with the expectation of confidentiality, any disclosure could be considered an actionable breach of confidence. Even though the information is now historic, if the information were to be released claims could be made at a potential cost to the public finances.

58. Any potential saving to the public that might be considered a defence is impossible to quantify and therefore cannot outweigh the public interest in maintaining confidentiality. The Commissioner finds that the NHSBSA was correct in withholding this information under section 41 of the FOIA.

59. As she has found section 41(1) applies to the whole of the requested information under part one, the Commissioner does not intend to look at the application of section 43(2) or section 36(2).

Right of appeal

60. 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@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.

62. 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 .....

Gemma Garvey
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SK9 5AF