

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2013

Public Authority: Dr Richard Hooke
Address: The Marlborough Medical Practice
The Surgery
George Lane
Marlborough
Wiltshire
SN8 4BY

Decision (including any steps ordered)

1. The complainant has requested information from the Marlborough Medical Practice (the "Practice") concerning the Practice and its expenditure for 2009-2011. The Practice provided some information and initially applied section 43(2) of the FOIA to the withheld information. During the course of the investigation it explained that it does not hold total GP pay, dispensary income and profit figures for the purposes of the FOIA as it cannot separate the NHS information requested from the combined NHS and private information which it holds. It has also argued that it does not hold any information in relation to one of the requests (question 9).
2. The Commissioner's decision is that the Practice does hold total GP pay, dispensary income and profit figures for the purposes of the FOIA. However he considers this information to be exempt under section 43(2) of the FOIA. The Commissioner is also satisfied that the Practice does not hold any information in relation to question (9). He does not require any steps to be taken.
3. The Commissioner notes that the medical practice itself is not for the purposes of the FOIA a public authority. Rather, each GP within the practice 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 practice it is reasonable to expect for convenience that the Practice will act as the 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 to the applicant, subject to the application of any exemptions.

4. For the purposes of this decision notice the senior partner has been named as the relevant public authority. The Commissioner notes that the senior partner has undertaken to respond to the request as the public authority given that the Practice holds the information on his behalf. However for clarity and ease of reading the notice refers to the Practice where appropriate in detailing the correspondence and analysis that has taken place.

Request and response

5. On 27 September 2011 the complainant wrote to the Practice and asked for eleven pieces of information:

"Please could you provide answers to the following questions:

Who we are and what we do

1. *Practice name*
2. *Number of registered patients at 1st October 2011*
3. *Number of GP sessions per month – please indicate how many sessions are taken by GP Registrars (if applicable)*
4. *Do you claim Rural practice payments (RRP)? If so, for how many patients?*
5. *Number of staff employed/contracted in the following categories (as FTE):*
 - *GP*
 - *Nursing*
 - *Administrative and Management*
 - *Dispensary*

What we spend and how we spend it

From your audited accounts:

6. *Actual total **NHS** income for 2009-10; 2010-2011 (excluding dispensary)*
7. *Actual total dispensary income for 2009-10; 2010-2011*

8. *Dispensary profit for 2009-2010; 2010-2011*
 9. *Percentage of dispensary profits invested into services for patients 2009-2010; 2010-2011*
 10. *Total GP pay for 2009-2010; 2010-2011 please include all partners, salaried doctors & locums*
 11. *Income received for GP training"*
6. The Practice responded on 10 October 2011. It provided a response to six of the questions (questions 1 to 4, and questions 6 and 11) but to the remaining five questions it informed the complainant that the requested information was commercially sensitive.
 7. Following an internal review the Practice wrote to the complainant on 31 October 2011. It confirmed that it had applied section 43(2) of the FOIA to the five outstanding questions: question 5 and questions 7 to 10.
 8. Subsequently the information requested at question 5 was provided to the complainant on 11 July 2012.

Scope of the case

9. On 15 March 2012 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
10. During the investigation of this case the Practice argued that it did not hold the information requested at questions 7, 8 and 10 for the purposes of the FOIA. It also argued that it did not hold any information in relation to request 9.
11. Therefore in relation to questions 7, 8 and 10 the scope of this case has been to consider whether this information is held for the purposes of the FOIA and, if so, whether it is exempt under section 43(2).
12. With respect to question 9, the Commissioner will consider whether the information is held.

Reasons for decision

Is the outstanding information held?

Question (9)

13. In situations where there is a dispute between a public authority and a complainant about whether the requested information is held, the Commissioner applies the civil standard of the balance of probabilities. The Commissioner must therefore decide whether, on a balance of probabilities, a public authority holds any information which falls within the scope of the request. In making this decision he will consider, where appropriate, the extent of the scope, quality and thoroughness and results of any searches and other explanations offered as to why the information is not held.
14. The Practice has confirmed that it does not hold the percentage of dispensary profits invested into services for patients. It has explained that this information does not exist and therefore cannot be extracted from the accounts.
15. In the absence of any evidence to suggest that this information is or should be held, by the Practice the Commissioner is satisfied that this information is not held by the Practice.

Question 7, 8 and 10

16. Section 1(1) of the FOIA states that –

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

17. The FOIA only covers GPs in respect of information relating to the provision of services under the National Health Services Act 2006. Therefore the complainant is only entitled under the FOIA to be provided with information relating to the provision of those NHS services.
18. With respect to questions 7 and 8, the Practice has confirmed that it does not hold the NHS dispensary income and profit as standalone figures for the specified years. It has confirmed that it cannot separate its total dispensing income or the profits into NHS and non-NHS elements.
19. It has argued that it therefore does not hold a separate figure for dispensary NHS profit, as it is not possible to separate the NHS profit from private dispensing profit.

20. Likewise the Practice has argued that it does not hold a figure for NHS dispensary income as it is not possible to separate the NHS dispensing income from private dispensing income.
21. With respect to question 10 the complainant has confirmed that she does not require the salary of any one individual doctor but requires the total for all doctors added together.
22. The Practice has explained that there are seven partners paid solely from its profits and two salaried doctors. The partners are therefore not paid a salary but share the profits of the practice. The Practice has explained that the profits are calculated from both NHS and private income, minus the expenses / overheads of the Practice. Therefore, it has argued, it cannot identify the NHS element from this profit figure.
23. Whilst it holds information to show the pay of the partners and salaried doctors, the partners' pay relates to the profits of the Practice which is derived from income received for both NHS and private healthcare work. Therefore, the Practice has stated that it does not hold any information about the pay of these individuals which relates to money that has only come from income for NHS work.
24. In order to consider whether this information is held, for the purposes of the FOIA, the Commissioner has to consider whether this information relates to the provision of medical services under the National Health Services Act 2006.

The provision of NHS Services

25. Paragraph 43A of Schedule 1 of the FOIA states that for the purposes of the FOIA a public authority is:

"Any person providing primary medical services, primary dental services or primary ophthalmic services—

(a) in accordance with arrangements made under section 92 or 107 of the National Health Service Act 2006, or section 50 or 64 of the National Health Service (Wales) Act 2006; or

(b) under a contract under section 84 or 100 of the National Health Service Act 2006 or section 42 or 57 of the National Health Service (Wales) Act 2006;

in respect of information relating to the provision of those services."

26. GPs are therefore covered by the FOIA in respect of information "relating to" services under an NHS contract.

27. However the words "relating to" are interpreted broadly by the Commissioner and are taken to mean "have reference to, concern; have some connection with". This is in accordance with the plain meaning of the phrase.
28. The Commissioner's starting point is therefore that the information must simply have some connection with NHS services. It does not need to relate exclusively or even primarily to NHS services, impart anything important about NHS services, or be held for the purpose of NHS services, as long as it has some connection with NHS services.
29. Therefore he considers that information that relates to both private and NHS practice does still relate to NHS services.
30. A GP may argue that the amount of NHS work undertaken was so small as to be insignificant, so the connection is too remote for the information to really relate to NHS services. However it seems likely that, in most cases, income, profit and earnings will actually relate mostly to NHS work.
31. In reaching this view the Commissioner has noted an annual report on GP Earnings and Expenses published by the NHS Information Centre. The report makes clear that split figures are not available and the earnings information it provides is also a combined NHS/private figure. However it notes that on average, 90.7% of earnings relate to NHS work. It therefore appears that on average the earnings of a GP will relate mostly to NHS work.
32. The FOIA gives the framework for a balance to be struck between the competing interests in withholding the information (particularly any private practice's commercial interests) and any public interest in NHS transparency. If combined NHS and private practice information were considered to be outside of the FOIA, the information would never be disclosed under the FOIA, even if it predominantly relates to NHS services and could serve a useful purpose in terms of transparency and accountability. However if such combined information is within the FOIA, an exemption may be applied and the public interest arguments for and against disclosure may then be considered.
33. In view of all of the above, the Commissioner is satisfied that income and profit which comprises both private and NHS figures combined, relates to NHS services and is covered by the FOIA.
34. For the same reasons he is also satisfied that GP earnings which include payment for both NHS and private work relates to NHS services and is covered by the FOIA.

35. Having found that the requested information is held for the purposes of the FOIA the Commissioner has gone on to consider below the Practice's initial argument that the information requested at questions 7, 8 and 10 is exempt from disclosure under section 43(2).

Section 43(2)

36. Section 43(2) provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
37. The term 'commercial interests' is not defined in the FOIA. However the Commissioner considers 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.
38. The Practice initially argued that dispensary income and profit is commercial information as it would essentially disclose the profitability of its business. As the income per prescription is fixed, the Commissioner considers that the disclosure of either the profit or the income of the dispensary would indicate the business potential of the dispensary, and would therefore be commercially sensitive. The Commissioner is therefore satisfied that information concerning the income and profits of the dispensary (questions 7 and 8) is commercial information.
39. The Practice initially argued that total GP pay is commercial information and has explained that the partners' are paid solely from profits. This is profit from private and NHS practice work and includes dispensary profit. As the Commissioner is satisfied that this information is held for the purposes of the FOIA, he has considered whether section 43(2) also applies to this information.
40. The Commissioner notes that the Practice is run as a business and that the partners share in the profits derived from the provision of medical services and the dispensary (NHS and private).
41. For this reason the Commissioner considers that the total salary information requested in question 10 relates to the profitability of the Practice as a whole and can therefore be considered as commercial information under section 43.

What is the nature and likelihood of prejudice?

42. The Practice has argued that disclosure of the dispensary income and profit would be likely to prejudice its commercial interests. It has

explained that the requested dispensary income and profit would effectively provide almost all the information needed to determine the potential viability of a new chemist setting up locally in competition with its dispensary. The total dispensary income minus the dispensary profit will be a fairly accurate reflection of the number of prescriptions processed as the average income per prescription is reasonably constant and the private element of dispensary profit is minimal. Having arrived at this number, a chemist or company looking for an opportunity could gain a valuable insight into the potential profitability of a dispensary in the area.

43. It has argued that disclosure would very likely lead to the establishment of a further chemist in competition with its dispensary. There are already two chemist shops in the local area and the Practice considers that the release of the dispensary income and profit would be likely to lead to an increase in that competition. The complainant has argued that in 2008/2009 the Practice was refused permission to open a chemist in the area and that the surgery itself is situated directly opposite another chemist.

44. In a similar case (case reference FS50420107), dealing with a request for identical information, another medical practice argued that there are many examples across the country where a chemist / pharmacy has opened up and this has resulted in a dispensing doctor's surgery having to close the dispensary which in turn impacts upon patient services. It provided the following link in support of this argument:

<http://www.perthshireadvertiser.co.uk/perthshire-news/local-news-perthshire/perthshire/2012/02/03/new-pharmacy-a-bitter-pill-for-gp-surgery-73103-30255318/>

45. The Commissioner notes that the article postdates the request for information. As the Commissioner must consider the circumstances that existed at the time the request was submitted, he has considered its content only to the extent that it reflects circumstances that existed in September 2011.

46. Having considered all of these points, the Commissioner is satisfied that the Practice's dispensary is operating in a highly competitive environment.

47. There is information held by NHS Wiltshire and the NHS Business Services Authority regarding practice prescribing data which is available online. This shows information per practice on a monthly basis and gives the:

- total number of items prescribed and dispensed;

- total net ingredient cost; and
 - the total actual cost.
48. In case reference FS50420107 the Commissioner considered the arguments of another medical practice concerning this publically available information. It argued that these figures would assist a competitor in calculating the profit from the income of a dispensary and explained that the income and profit of the dispensary depends on the size of the dispensary and the schemes it has in place with drug companies. As prescriptions are fixed at £7.65 per item, a dispensary can make a huge profit or loss on the drugs which are bought in.
49. It is therefore apparent that there is already publically available information which would enable a competitor to accurately estimate the potential income of the dispensary and then calculate any profits it may be able to make depending on schemes it may have in place or may be able to negotiate with a drug company.
50. The above information therefore provides the volume of prescriptions and their cost. However when considered with the income and profit of the Practice, the combined information clearly illustrates the potential profitability of setting up a new pharmacy in the area. The availability of prescription volumes means that both the income and the profit of the dispensary are of interest to a competitor.
51. The Commissioner is therefore satisfied that disclosing the income and profit of the dispensary would place further information into the public domain which would greatly assist a competitor in judging the viability of setting up in competition with minimal effort. Therefore the Commissioner considers that this information would be of interest to potential competitors who were considering whether to open a new pharmacy in the area.
52. If a competitor were granted a licence to open a new dispensary within the Practice's main catchment area, the Practice would legally be unable to dispense to any patient who lives within 1.6 miles of the new pharmacy. If this were to happen, the Commissioner considers that it is likely that this would be harmful to the commercial interests of the Practice's dispensary.
53. In relation to the total GP salary, the Practice has argued that this information would allow potential competitors to estimate its profitability. It has argued that private companies are interested in running such services and are actively pursuing such opportunities.

54. The Commissioner is aware that primary care health service contracts are currently being granted to private companies and that there are examples in the press of such NHS contracts granted over the past year.
55. Bearing these points in mind, the Commissioner is satisfied that the Practice is operating in a competitive commercial environment.
56. The Commissioner accepts that the total salary paid to the GPs would indicate the profitability of the Practice. It would be possible to deduct the average salary of the salaried GPs and the remainder would provide an approximate indication of the Practice profits (including the dispensary profits).
57. He is satisfied that to disclose information that provided an insight into both the dispensary's income and profit, and the overall profitability of the Practice, would put the Practice at an unfair disadvantage compared to any private competitors who may not be under such an obligation to publish this information. This would clearly give any competitors an unfair advantage.
58. Therefore, the Commissioner considers that the disclosure of the withheld information would be likely to prejudice the commercial interests of the Practice. Therefore this exemption is engaged.
59. In this case, the likely damage to the commercial interests of the Practice also applies to the commercial interests of the partners who own the Practice. As the partners derive their income from the profits of the business any damage to the business profits will also prejudice their commercial interests.

Public interest in favour of disclosing the information

60. There is a public interest in openness, accountability and transparency. The Practice provides a service to the public and is funded by the NHS. The Practice undoubtedly has an obligation to be transparent regarding its spending of public money and accountable to the public for the NHS service it provides. Its profitability would show how efficiently the Practice is running the dispensary and provide transparency concerning the service it is delivering. There is also a strong public interest in knowing the earnings of public servants such as GPs, particularly if this includes the profits of their dispensaries and practices.
61. There is undoubtedly a public interest in the provision of information concerning the debate about the delivery of dispensary services, which has been a controversial issue since 2005. The NHS (Pharmaceutical Services) Regulations 2005 prevents a doctor's dispensary (in a controlled locality) from dispensing medication to patients when they live within 1.6km of their nearest pharmacy.

62. Recent auditing in 2012 by PCTs has led to a tightening of the rule resulting in many patients being informed that their doctor's dispensaries can no longer provide their medicines. This in turn has led to a call for the regulation to be abolished. The Commissioner considers that disclosing information as to the profitability of existing dispensaries would contribute to this debate.
63. When considered within the context of wider NHS changes in which private providers may bid to run medical services, there is a clear public interest in information concerning the profitability of dispensaries run by GP surgeries and the profitability of the practices themselves. It could also be argued there is a public interest in encouraging competition which could result in better services to the public.

Public interest in favour of withholding the information

64. However, the Practice has already disclosed its total NHS income to the complainant and it considers that this fulfils its obligations with respect to transparency and accountability.
65. The Practice is operating as a business in a commercial environment and there is a strong public interest in preserving its ability to compete and to make a profit, some of which is paid to the partners and some of which is reinvested into the business.
66. In a commercial environment where there are competing private medical providers it is not in the public interest that the commercial interest of an existing provider should be unfairly compromised.
67. The Practice has argued that losing the dispensary would be financially significant as the Practice would struggle to manage. The Commissioner considers that this means that the loss of the dispensary would therefore be highly likely to prejudice the commercial interests of the Practice.
68. The Commissioner considers that this is a strong argument in favour of withholding the dispensary income and profit and the total GP salary. Although the Practice is providing NHS services and receives income from the NHS, it and its dispensary are effectively operating in a commercial environment. Both would suffer from the disclosure of their profitability to potential competitors. The Commissioner considers that there is a public interest in any public body avoiding unwarranted prejudice to its commercial interests.

Balancing the public interest

69. The Commissioner considers that there are strong public interest arguments both for and against disclosure in this case. He acknowledges

that there is a strong public interest in promoting the accountability of organisations which provide NHS services. There is also a public interest in knowing the earnings of public servants such as GPs if this includes the profits of their dispensaries and practices. The argument that GP practices should be transparent concerning the level of their profits has therefore been accorded some weight by the Commissioner.

70. However, the Commissioner considers that public interest in accountability and transparency has been somewhat met by the Practice disclosing the amount of NHS income it receives.
71. Given the increasingly competitive market that the Practice is operating in, the Commissioner is satisfied that the disclosure of information that would allow competitors insight into the profitability of the Practice, and its dispensary, would be likely to prejudice its commercial interests and may result in the closure of the Practice. Bearing this in mind, the Commissioner finds the public interest in avoiding unnecessary and unwarranted prejudice to the commercial interests of the Practice particularly weighty.
72. The Commissioner therefore considers that the public interest favours maintaining the exemption.

Conclusion

73. After considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the withheld information is exempt from disclosure under the section 43(2) commercial interest exemption and should not be disclosed.

Other matters

74. During the investigation of the case the complainant argued that the Practice should provide the NHS funding it receives for the dispensary along with its NHS expenditure since it must have to account for this to the NHS.
75. She has also asked for a total of the pensionable income submitted to Wiltshire Primary Care Trust with the salary figure for the locums and salaried GPs.
76. The complainant may wish to submit a new Freedom of Information request for this information, if she has not already done so.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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