ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50486218

Dated: **28th. January, 2014**

Appeal No. EA/2014/0045

Appellant: Daiichi Sankyo (UK) Limited ("DSUK")

First Respondent: The Information Commissioner ("the ICO")

Second Respondent: The Department of Health ("DoH")

Before

David Farrer Q.C.

Judge

and

Rosalind Tatam

and

Melanie Howard

Tribunal Members

Date of Decision: 11th September 2014

Date of Promulgation: 19th September 2014

Appearances: DSUK was represented by Victoria Wakefield

The ICO did not appear but made written submissions .

DoH was represented by Gemma White

Subject matter:

Scope of Requests

Information provided in confidence FOIA s.41(1)
Commercial Information FOIA s.43(2)
"Information" and "recorded information"
FOIA s.11(4) and s.84.

Reported Cases Innes v The ICO [2014] EWCA 1086

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 18th. day of August, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Pharmaceutical Price Regulation Scheme ("The PPRS")

1. This appeal involves a detailed request for information by DSUK, a substantial producer of branded medicines, as to the performance of other pharmaceutical companies pursuant to agreements relating to the pricing of their products.

2. The DoH negotiated three successive PPRS agreements with the Association of the British Pharmaceutical Industry ("the ABPI") in 2005, 2008 and 2009. Their objective was to control profits and prices relating to the sale of branded medicines, striking a balance between the interests of the NHS, the taxpayer and the pharmaceutical industry. Unchallenged evidence as to the operation of the agreements was given by Katy Peters, Head of the Pricing, Prescription and Supply team, on behalf of the DoH. She also testified, in open and closed sessions, as to matters of confidentiality and commercial prejudice.

3. The 2005 and 2009 schemes provided controls on such prices, generally requiring overall reductions in price. They allowed companies to achieve the requisite cuts by "modulation", that is, to use a combination of price increases and reductions across their product portfolio to produce the agreed result. The 2005 scheme required an overall cut of 7%. The 2008 scheme was an interim measure pending agreement on the 2009 scheme; as a result of a high court judgment DoH had found it necessary to terminate the 2005 PPRS before it had run its course

4. Membership of the PPRS schemes was voluntary. Their terms included a provision that membership did not create a binding contract between the company and the DoH. Companies that did not participate were subject to a statutory scheme which involved equal price reductions over the whole range of branded products, i.e., no possibility of modulation.

5. Nearly 75% of companies joined the 2009 PPRS, which controlled prices and profits relating to NHS annual purchases of about £10 billion pounds and produced annual savings exceeding £350 million

6. The price reductions required by the 2005 PPRS were monitored annually by the DoH. The PPRS included a process for an assessment of each company's performance - whether it had "under - delivered" or "over - delivered" on the net 7% price cut over the life of the PPRS. Companies that under - delivered were required to pay the DoH a sum equal to the amount of the under - delivery. Where a company over - delivered on price and profit cuts, a clause in the 2009 PPRS provided for recognition of such over - delivery in the terms of its membership of the 2009 scheme, provided that the DoH recovered 75% of the value of under - deliveries under the 2005 PPRS. This had the odd result that recoupment by one company of the value of revenue lost through over - performing on price reductions under the PPRS depended on under - performing competitors making good the value of their failures to deliver the cuts to which they also were committed. This problem was compounded by a court ruling which, in effect, deprived the DoH of any legal sanction for a failure to repay the value of under - delivery.

7. Aggregated information which answered some of the questions included in DSUK's request described below was served on all PPRS members. It was exhibited to Ms. Peters' witness statement.

8. The PPRS agreements involve the disclosure by pharmaceutical companies to the DoH of commercially sensitive information as to pricing and sales. Clause 2.6 of the 2005 PPRS and clause 3.7 of the 2009 PPRS expressly provided that the DoH would ensure confidentiality for such information. Reports to Parliament would provide aggregated, not specific information.

<u>The Request</u>

9. DSUK was a member of both the 2005 and 2009 schemes. It over - delivered on the 2005 PPRS and could therefore expect recognition of that achievement in the terms of its

membership of the 2009 PPRS, provided that under - delivering companies met the 75% repayment threshold referred to above. They failed to do so.

10. By letter of 18th. May, 2011 the DoH notified DSUK that it was unable to carry forward to the 2009 PPRS over - deliveries under the 2005 and 2008 PPRSs because the 75% repayment threshold had not been met. The notification letter further stated that a decision on the issue had been delayed because cases relevant to the calculation had been referred to the Dispute Resolution Panel set up under the schemes.

11. On 8th. June, 2011, solicitors for DSUK wrote to the DoH *"We request that the DoH provides us with all the information it is holding which led to it reaching the decision that it was not in a position to carry forward modulation over - deliveries under the 2005 and 2008 PPRSs to the 2009 PPRS because the repayment threshold of 75% by value of modulation under - deliveries under the 2005 and 2008 PPRSs to the DoH has not been met such that the DoH sent DS the notification letter ("the information").The information includes but is not limited to the following matters :"*

- eighteen specific requests for information followed.

12. The DoH replied on 30th. June, 2011, confirming that it held the requested information but asserting the exemptions from the duty to disclose conferred by s.41 and s.43(2) of FOIA. Following detailed argument in correspondence and an internal review, it disclosed a substantial volume of information, responding to more than half the specific requests. Further anonymised information, which was included in the open bundle of documents, was disclosed during the ICO's investigation, which followed a complaint by DSUK, through its solicitors, dated 16th. March, 2012. Most significantly for the purposes of this appeal, by email dated 6th. June, 2013, the ICO provided to DSUK a redacted version of a letter to the ICO from the DoH dated April, 2013 ("the April letter") responding to the apparently outstanding issues in respect of the numbered questions and including an Annex B containing anonymised information concerning non - repaying companies, which had been provided in response to a previous complaint leading to a decision by consent. As a result, the ICO's decision related only to information as to two mediation hearings.

13. Having compared the records of the meetings with the anonymised information disclosed in relation to them, the ICO concluded that, since only anonymised information had been requested, the DoH had discharged its duty of disclosure. He did not require the DoH to take any further steps.

14. DSUK appealed, setting out extensive grounds and identifying issues which did not entirely correspond to those which the Tribunal was eventually asked to determine.

15. The appeal was confined by the time of the tribunal hearing to three issues, as identified by DSUK, not all of them considered by the ICO -

(i) Was the disclosed material so disorganised that its disclosure did not discharge the duty imposed by FOIA s.1(1)(b) ?

(ii) Was the DoH entitled to withhold any record of what was referred to as "the third mediation meeting" ? (The ICO had only dealt with two).

(iii) As regards the reasons for refusals to repay the DoH for under - delivery, was the DoH justified in withholding a document submitted by one company featuring in Annex B which had refused to consent to its disclosure in anonymised form, given that the other "Annex B" companies had given such consent ?

16. Issues (ii) and (iii) were said by the appellant to arise from questions 3, 7 and 16 of the Request, which read as follows -

" 3. Please say if the 75% target has been modified (whether upwards or downwards) at any point during the life of the 2009 PPRS. If so, please give the reasons for any such modification(s) and say how much (in GB pounds) the 75% target has been modified.

. . . .

7 Please say what reasons have been given by the Non - Repaying Companies for not agreeing to make repayment to the DoH. Please also say what steps have been, and are intended to be taken against the Non - Repaying Companies by the DoH to recover the payments that the DoH considers to be due from them.

. . . .

16. In respect of the cases said by the DoH to have been referred to the Panel in respect of the calculation of the modulation under - payment under the 2005 and 2008 PPRSs, please :

(a) say how many cases were referred to the Panel; and

(b) what the outcome was of each case referred to the Panel ."

DSUK's case as presented to the Tribunal

17. As to issue (i), the point was a short one, namely whether the absence of cross - referencing of the redacted documents disclosed and exhibited in the open bundle to the numbering in Annex B or (possibly) of explanation as to the context in which the information in Annex B had been produced rendered them so unintelligible as to negate any claim that the information that they contained had been communicated to DSUK in accordance with FOIA s.1(1)(b).

18. As to (ii), this arose from the response of the DoH in the "April letter" to Request 3 - the modification of the 75% threshold during the lifetime of the 2009 PPRS. It related to modification following a case referred to the Disputes Resolution Panel which was concluded through mediation before a full hearing. DSUK argued that anonymised information as to this mediation was disclosable in the same way as that pertaining to the other two mediations featuring in Annex B. DSUK further submitted that such information fell within the scope of question 16. It was accepted that the figure for the modification of the target had been provided.

19. As to (iii), six out of seven non - repaying companies featuring in Annex B consented to the disclosure of anonymised documents relating to their reasons for refusing to pay the assessment of under - deliveries as summarised in Annex B. The seventh did not. DSUK submitted that neither that company's commercial interests nor those of the DoH would be prejudiced by similar disclosure and that, in any case, such disclosure was clearly in the public interest. The readiness of the other companies to give their consent demonstrated that there was no plausible risk of prejudice to commercial interests.

20. The DoH submitted as to (i), that the duty to disclose information does not include a duty to cross - reference documents, that the request did not require the identification of disclosed documents as relating to the summarised answers given in Annex B and that what was requested was "aggregated" information.

21. As to (ii), it contended that it did not hold the requested information at the date of the Request and that, even had it done so, the information was outside the scope of the Request.

22. As to (iii), the Request, it argued, had been satisfied by the provision of the information in Annex B. Alternatively, any further provision of information through the supply of a redacted document without the consent of the company concerned would amount to an actionable breach of confidentiality and the disclosure of sensitive information which would prejudice its own and the company's commercial interests

23. The ICO broadly supported those submissions.

24. We heard brief evidence in closed session relating documents in the closed bundle to other evidence and submissions advanced in open session. We were satisfied that such a session was unavoidable and created little or no disadvantage to DSUK.

<u>The Tribunal's reasons</u>

25. Two related and fundamental questions, relevant to issues (i) and (iii) are (a) what information was requested and

(b) in what form could it be provided so as to comply with the DoH's statutory duty under FOIA s.1(1)(b) ?

26. The starting point is s.1(1). What is required to be disclosed is information, which is defined in FOIA s.84, subject to immaterial exceptions, as "information recorded in any form". That does not automatically require the public authority to disclose it in that recorded form. FOIA s.11(1), recently analysed in depth by the Court of Appeal in *Innes v The ICO [2014] EWCA 1086*, entitles the applicant to specify the means by and/or the form in which he prefers the information to be communicated. Compliance with such a preference is, however, subject to it being reasonably practicable to give effect to it, a qualification which includes considerations of cost (s.11(2)). The Request in this case did not express a preference within s.11(1).

27. Subject to s.11(1), the authority *" may comply with a request by communicating information by any means which are reasonable in the circumstances"* - s.11(4). That clearly allows the authority to provide, if appropriate to the request, a digest or summary of information of the kind contemplated in s.11(2) in the context of the applicant's expressed preference.

28. Questions 3 and 7 (arguably also 16) were, in the Tribunal's opinion, clearly susceptible to summary disclosure, especially where it was accepted that anonymity must be preserved. Annex B was such a summary, setting out the reasons given by the seven under - delivering companies for their refusals to pay up. The fact that the DoH was subsequently willing to provide anonymised documents reflecting such summaries does not alter the fact that the communication of Annex B constituted compliance with the material parts of the Request, provided that the summaries were generally a adequate

29. Issue (i) involved the contention by DSUK that there was no communication because there was no cross - referencing of six of the summaries of the seven under - delivering companies' reasons for refusal to pay to the supporting documents later provided with those companies' consent. Question 7 was framed in terms which clearly sought an

aggregated answer. In the Tribunal's view the summaries correctly identified the reasons given though a complete account may have required the additional reason, linked to the High Court judgment referred to in paragraph 6, that the extent of under - deliveries could not be accurately calculated. They related the reasons to particular but anonymised companies, though it is far from clear that they needed to do so. As to each company, the summary stated what consideration had been given to recovery. (The answer generally was that the DoH was powerless as a result of the High Court judgment referred to in paragraph 6).That being so, the summaries in Annex B satisfied the s.1(1)(b) requirement without more, subject possibly to the omission identified above. If they could not be linked to particular anonymised documents submitted by those companies, that did not alter the fact of compliance. These matters are similarly relevant to the determination of issue (iii), which is dealt with below.

30. In fact, however, there was no obvious difficulty in matching documents to summaries anyway, even though no cross - referencing was provided. It is, no doubt, possible that, where no summary is available, information could be communicated in such a muddled manner as to be unintelligible to the applicant so that he could plausibly argue that it had not truly been communicated at all. That is not this case.

31. Issue (ii) raised a clear question of timing. The third mediation meeting took place on 27th. October, 2011, as Ms. Peters' evidence (as amended) made clear. The Request was made on 8th. June, 2011.The short answer of the DoH as to question 16 (and perhaps question 3) was that it did not hold the information at the date of the Request. There were "no pending cases" as at 18th. May, 2011, according to the notification letter of that date, no evidence of any subsequent referral by 8th. June, 2011 and the outcome of the third mediation meeting was self - evidently unknown. Moreover, the Request essentially sought information as to matters which led to the DoH decision, communicated to DSUK by the letter of 18th. May, 2011, not to carry over modulation deliveries to the 2009 PPRS (see paragraph 11 above). Those matters could not include the outcome of a meeting that took place months later.

32. The DoH relied on the subsidiary point that the company involved in the third mediation meeting was not an under - delivering company as specified in question 16 but an over - deliverer so that the meeting was outside the scope of the Request. We are far from sure that such a point, standing alone, would justify non - disclosure because requests should

not be too rigorously interpreted where their general intention is clear. *Innes* (see paragraph 49) encourages a reasonably liberal approach to their analysis.

33. Given the decisive answer of the DoH as to timing, the Tribunal does not rule on the applicability of exemptions under ss. 41 and 43(2).

34. Issue (iii) requires the Tribunal to revisit the matters considered at paragraphs 27 - 29. We compared the summary provided for company 4 in Annex B with the letter from company 4 to the DoH, dated 23rd. June, 2009 setting out its justification for a refusal to pay, which was contained in the closed bundle. We further studied the letter from company 4 to the Tribunal undated but received in May, 2014, also in the closed bundle, in which it outlined its reasons for refusing to consent to disclosure of a redacted version of the June 2009 letter.

35. In our opinion, the summary adequately identified the reason given by company 4 for its stance. It added further information which was not required by question 7. As with the other summaries, it answered the further inquiry as to steps taken to recover payment. That being so, the request for information was complied with and no consideration of exemptions is required. Since the matter was argued, however, we shall deal with it briefly, at least in relation to DoH.

36. Had the application of s.43(2) (prejudice to commercial interests) arisen for our decision, we should have found that the commercial interests of the DoH would be likely to suffer prejudice through disclosure of an anonymised version of the June 2009 letter , given the undertakings as to confidentiality contained in the 2005 and 2009 PPRSs and referred to at paragraph 8 above. There is, in our view, a clear risk, identified by Ms. Peters, that a company, which enjoyed the benefit of such assurances but saw its objection to anonymised disclosure of what it considered sensitive information overridden by the DoH, would be much less willing to impart such information in future negotiations with the DoH conducted for the purposes of future schemes. The result would be an impairment of the DoH's ability to create a scheme which safeguarded the public interest in controlling the prices of medicines. That would constitute a serious prejudice to the commercial interests of the DoH, the effective agent of the taxpayer.

37. If that is so, the public interest in protecting those interests by withholding the information clearly outweighs any interest in gleaning minimal further information from the withheld document.

38. Whether the commercial interests of company 4 would in fact be prejudiced by disclosure of such an anonymised version of the letter is less clear and does not demand determination.

39. For these reasons we conclude that the effect of the Decision Notice is correct and that it should be upheld, albeit the issues canvassed before the Tribunal do not in all respects correspond with those considered by the ICO.

40. Though the matter was not explicitly raised before us, we confirm the ICO's ruling that the provenance of Annex B and the exact circumstances in which it was created were not within the scope of the Request.

41. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge.

11th. September, 2014