

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 December 2017

**Public Authority:** NHS Norwich Clinical Commissioning Group

**Address:** Room 202 City Hall  
St Peter's Street  
Norwich NR2 1NH

#### Decision (including any steps ordered)

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1. The complainant has requested information on spend on delivering Personal Health Budgets and savings associated with a cut to these budgets. Norwich Clinical Commissioning Group ('the CCG') has withheld the information under section 43(1) of the FOIA (trade secrets) and 43(2) (prejudice to commercial interests).
2. The Commissioner's decision is that:
  - the requested information is exempt from disclosure under section 43(2) and the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### Request and response

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4. On 26 May 2017, the complainant wrote to the CCG and requested information in the following terms:

*"1. Please confirm that the same Cost Calculation Form / budget setting tool is used for all patients, regardless of their level of assessed need.*

- 2. Please confirm that all budgets are reviewed annually.*
  - 3. From PHB roll-out to present day, how much per annum has Norwich CCG spent on the PHB services for Continuing Health Care?*
  - 4. From PHB roll-out to present day, how much per annum has Norwich CCG spent on the provision of contingency funding for redundancy pay associated with the PHB?*
  - 5. From PHB roll-out to present day, how much per annum has been saved by applying the PHB 'cut' on the Cost Calculation Form?*
  - 6. From PHB roll-out to present day, how much PHB holder underspend has reverted to Norwich CCG per annum?"*
5. The CCG responded to these requests on 15 June 2017 (its reference FOI.17.NOR048). The complainant has confirmed to the Commissioner that the focus of her complaint regarding FS50700374 is the CCG's response to requests 3 and 5. The CCG said the information requested at requests 3 and 5 is exempt from release under section 43 and that the public interest favoured maintaining the exemption.
  6. During correspondence that followed, on 6 July 2017 the CCG asked the complainant to clarify request 3. The complainant replied the same day with the following clarification of this request:  
  
*"With reference to FOI Request (FOI.17.NOR019), Norwich CCG explained that 'All PHBs have a "cut" applied in order to ensure the Clinical Commissioning Group is able to fund the PHB services for Continuing Health Care.' These PHB services are provided by the public body, NHS NEL CSU, for the public body, NHS Norwich CCG. To clarify, how much per annum has NHS Norwich CCG spent on these PHB services for Continuing Health Care?"*
  7. The CCG provided an internal review of both requests on 2 August 2017. It confirmed that it considered the information requested in requests 3 and 5 is exempt under section 43(2), and that the information requested in request 5 is also exempt under section 43(1).

## Scope of the case

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8. The complainant contacted the Commissioner on 10 July 2017 to complain about the way her requests for information had been handled. She confirmed in correspondence dated 11 September 2017 that, with regard to the 26 May 2017 requests, her complaint is focussed on the CCG's response to requests 3 and 5.
9. The Commissioner's investigation has focussed on whether the information requested in requests 3 and 5 is exempt from release under section 43(2), in the first instance. If necessary she has been prepared to consider whether request 5 is exempt under section 43(1).

## Reasons for decision

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10. The CCG has provided the Commissioner with a background and context to the requests. It has told her that a personal health budget (PHB) is an amount of money to support the identified healthcare and wellbeing needs of an individual. This is planned and agreed between the individual, or their representative, and the local clinical commissioning group. A PHB is another way of delivering NHS continuing healthcare (CHC).
11. PHBs are one way to give people with long term health conditions and disabilities more choice and control over the money spent on meeting their health and wellbeing needs.
12. A personal health budget may be used for a range of things to meet agreed health and wellbeing outcomes. This can include therapies, personal care and equipment. There are some restrictions in how the budget can be spent.
13. The CCG says that personalised care and support planning is essential to making personal health budgets work well. A personalised care and support plan helps people to identify their health and wellbeing goals, together with their local NHS team, and sets out how the budget will be spent to enable them to reach their goals and keep healthy and safe.
14. This means that PHB holders can choose to have someone they know look after them, so that they are in control over who comes into their home and provides care for them. This differs from other forms of CHC where CCGs source and contract their care. However, it does not mean that PHB holders are entitled to any more, or less, care than someone who is not on a PHB.

### The role of the CCG and Commissioning Support Unit

15. Under the National Health Service (Direct Payments) Regulations 2013, CCGs are required to provide and manage CHC, which includes PHBs. However, the provision and management of CHC can be contracted out to third parties such as North East London Commissioning Support Unit ('NEL CSU/the CSU'). In this case, NEL CSU manages PHBs on behalf of NHS Norwich CCG and within the CHC budget envelope that is set by the CCG.
16. As part of the PHB care package approval process, the CCG says that the PHB team within the CSU will calculate the cost of the package, which involves calculating the cost of care as it would have been delivered via a brokerage team. However, an agency also charges the NHS an element of profit, overheads, administration and travel-time for carers. As a PHB-holder usually pays for care directly and therefore does not incur these costs, the CSU can reduce the price that they would have paid an agency via a sliding scale – from a 4% reduction for packages costing less than £30,000 a year to a 26% reduction for packages costing more than £120,000 per annum. This means the PHB-holder will still have sufficient money to meet the full costs of their care needs (10 hours per day at a Tier 1 level (ie low support needs) in the example above) and will be able to comply with all Employment Law requirements and PHB requirements.
17. As such, the CCG is fully compliant with legislation regarding PHBs, which state that “[a] *health body must ensure that the amount of the direct payments paid to or in respect of a patient is sufficient to provide for the full cost of each of the services specified in the care plan.*” In other words, there needs to be sufficient funding to pay for all costs of employment and training, amongst other things.
18. The Commissioner notes the clarification at paragraph 6 in which the complainant had confirmed that the focus of her request is the cost to the CCG of *delivering* the PHB service (through the CSU), and not the total cost of the PHBs delivered.

### **Section 43 – commercial interests**

19. The CCG considers that the information requested in requests 3 and 5 is exempt under section 43(2) and that the information requested in request 5 is also exempt under section 43(1).

### Section 43(2) – prejudice to commercial interests

20. Section 43(2) of the FOIA says 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).

21. The exemption is again subject to the public interest test set out in section 2(2)(b) of the FOIA.
22. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. Firstly, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
23. Second, 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.
24. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg 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.
25. In its initial submission to the Commissioner, the CCG explained that the disputed information relates to the calculations and methodologies that the CSU uses in calculating PHBs; disclosure of which it says would be likely to cause the CSU a commercial detriment. The Commissioner has noted that request 3 is for the amount of money spent on delivering PHB services over particular years, and request 5 is for the amount of money saved by applying a particular 'cut' to the PHB budget using a particular calculation tool.
26. The Commissioner has noted the CCG's references to the Information Tribunal decisions in EA/2008/0092, EA/2009/0034 and EA/2006/0014. In view of these, she agrees with the CCG's arguments that the interests in this case can be categorised as 'commercial interests'. The CSU provides continuing healthcare services to the CCG for a fee and the CCG maintains that disclosing the withheld information would be likely to result in a commercial detriment, including loss of income, to the CSU.

27. The CCG rightly noted that section 43(2) of the FOIA is a 'prejudice' based exemption, which requires the public authority to judge whether disclosure would cause a specific type of harm.
28. It has noted the three criteria above that it has been established must be met for a prejudice-based exemption to be engaged. With regard to the third criteria – the level of likelihood - the CCG has referred to the fact that the Court of Appeal in *DWP v ICO & Zola* [2016] EWCA Civ 758 has confirmed that the phrase 'likely to prejudice' does not mean more probable than not. Rather, it is sufficient that there 'may very well be' prejudice to commercial interests.
29. The CCG argued in its submission that disclosing information about methodologies that underpin information that is relevant to requests [3] and [5] would be likely to prejudice the commercial interests of the CSU. This is because it would enable rival CSUs and other competitors to calculate their own PHB and design a service around it.
30. The CCG said that this would allow competitors to use this information to determine what cost factors should be taken into account and what individual weight should be applied to each cost factor to formulate a reliable, realistic and reasonable level of funding for each PHB holder. In particular competitors would know the CSU's PHB unit price per patient and would exploit the use of this information to the competitive detriment of the CSU, by adjusting their own PHB service offering. This would, the CCG argues, give competitors an unfair advantage and place the CSU at significant disadvantage when bidding for contracts as their competitors would have key information available to them. This would in turn have a negative impact on the CSU's revenue streams and competitive edge.
31. The CCG has noted that it is currently reviewing the provision of its CHC services and that the likelihood of prejudice, and the prejudice elements themselves, should be read within that context.
32. Having reviewed the CCG's initial submission, it was not quite clear to the Commissioner how releasing information on the amount of money Norwich CCG has spent and saved with regards to PHBs – which is what the complainant has requested rather than the "methodologies that underpin information that is relevant to requests 3 and 5" – would give the CSU's competitors a commercial advantage.
33. The CCG confirmed to the Commissioner that Norwich CCG purchases its PHB service from NEL CSU. It went on to provide further information in

a submission dated 21 November 2017. The CCG explained that each CCG is required to submit national Markers of Progress to NHS England. These are published on the 'MyNHS' website<sup>1</sup>. The CCG has told the Commissioner that if the information published on MyNHS is combined with the information relevant to request 3, this would enable the CSU's competitors to establish how much funding is paid for delivering the (PHB) service.

34. For instance, the CCG says that if MyNHS is searched for the number of PHBs per 100,000 population and then this information is combined with census data, it would be possible to establish how many PHBs are in the NHS Norwich CCG area. If the information relevant to request 3 was then used, it would be possible to establish the CSU's unit cost per patient.
35. The Commissioner has reviewed MyNHS. She has noted that MyNHS records 13.3 PHBs per 100,000 population for Norwich CCG. She understands that the Census would provide a figure for the total population covered by this CCG and that, from this, it would be possible to generate a figure for the total number of PHBs in that area. Disclosing the information requested in request 3, which concerns the amount the CCG has spent on delivering PHBs, would give an indication of the CSU's unit cost for delivery per patient. The CCG has confirmed to the Commissioner that the unit cost for delivering each PHB would be the same for each patient, regardless of the value of each patient's PHB.
36. The CCG says that if competitors therefore had this information – that is, if the information requested in request 3 was disclosed – they could then create a competing PHB delivery service that undercuts the services the CSU provides. This would cause the CSU a commercial detriment in the form of loss of revenue.
37. Request 5 concerns the amount of money the CSU has saved by applying a particular 'cut' to the PHB budget. In addition to the arguments in its initial submission, the CCG has explained that if a competitor had access to information on how much money the CSU saves in reductions to PHBs, it could choose either to increase the reduction or to decrease charges in order to undercut the CSU. Again,

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<sup>1</sup> <https://www.nhs.uk/service-search/performance-indicators/organisations/ccg-better-health?ResultsViewId=1172&MetricGroupId=604&SortingMetricId=460&SortDirection=Descending&Latitude=0&Longitude=0&InShortList=False&LocationId=0&Radius=400&PageSize=10&CurrentSearchType=Full>

the CCG argues that this would cause the CSU a commercial disadvantage in the form of loss of revenue.

38. The Commissioner has considered the three criteria at paragraphs 21-23. She is satisfied that the actual harm that the CCG alleges would, or would be likely, to occur relates to the applicable interests within the relevant exemption; that is, the commercial interests that apply to section 43.
39. She is satisfied, too, that the CCG has demonstrated that a causal relationship exists between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect: disclosing the information may cause a real, actual or of substance prejudice to another organisation by putting it at a commercial disadvantage.
40. With regard to the final criteria, it seems to the Commissioner that the CCG's position is that the prejudice 'would be likely to' occur. She has noted the CCG's reference to the comment in the Court of Appeal decision, that an interpretation of 'would be likely to occur' is that there 'may very well be' prejudice to commercial interests. In this case, although it may not be possible to confirm that the CSU would definitely be put at a commercial disadvantage, the Commissioner agrees that if the requested information was to be disclosed, there 'may very well be' prejudice to its commercial interests.
41. As previously noted, the CCG has told her that it is currently reviewing the provision of its CHC services and that the likelihood of prejudice should be read within this context. It is not clear whether this review had begun at the time the complainant submitted her request. However, because the Commissioner has nonetheless found that the three criteria for prejudice have been met with regards to both request 3 and request 5, she finds that section 43(2) is engaged with respect to these two requests. She has gone on to consider the public interest test.

### **Public interest test**

42. With regard to requests 3 and 5, the CCG provided the complainant and the Commissioner with the following public interest arguments for disclosure:
  - Furthering the understanding of and participation in the public debate of issues of the day.
  - Promoting accountability and transparency by public authorities for decisions taken by them and in the spending of public money.

- Allowing individuals and companies to understand decisions made by public authorities affecting their lives.
43. The CCG provided the complainant with the following public interest arguments against disclosure:
- There is a strong public interest in ensuring that the commercial interests of the companies providing the services are not prejudiced. If such prejudice occurs it would enable competitors to undercut the organisations when bidding for contracts of a similar nature.
  - Disclosure of the withheld information into the public domain could decrease the differentiation between suppliers, as processes, practices and commercial offerings may become homogenised, thus endangering true and fair competition. This would further hinder the ability of suppliers to act competitively within the market. Internal processes that allow such suppliers to create and maintain a competitive advantage would be lost as they become public knowledge, creating unfair competition and stifling innovation and creativity.
  - The withheld information relates to legitimate economic interests. Disclosure would reduce the CCG's capacity to negotiate future contracts. The release of further individual costs could compromise the CCG's ability to secure good value in their future discussions with contractors by creating market expectations in key rates and allowances.
  - It is not in the public's best interests to jeopardise the ongoing discussions the CCG are having with NHS England with regard to how the Clinical Directorate is run.

#### Balance of the public interest

44. The Commissioner has taken into account that the requested information is of interest to the complainant. However, in her complaint to the Commissioner the complainant has not detailed any wider public interest in the requested information that might tip the balance in favour of the information's disclosure. In the absence of such arguments, the Commissioner finds that the CCG's public interest arguments for withholding the information are stronger than those for disclosing it, and are sufficient to persuade the Commissioner that there is greater public interest in withholding the information, on this occasion.
45. The Commissioner's decision is that the information requested in requests 3 and 5 is exempt from release under section 43(2) of the FOIA and that the public interest favours maintaining the exemption.

Because she has found that the information requested in request 5 is exempt information under section 43(2), it has not been necessary to consider whether section 43(1) applies to this request.

## Right of appeal

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46. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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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