

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2021

Public Authority: The Royal Marsden NHS Foundation Trust

Address: Fulham Road
London
SW3 6JJ

Decision (including any steps ordered)

1. The complainant has requested from The Royal Marsden NHS Foundation Trust (the Trust) the margin achieved in relation to income from private patients from 2015 to 2019. The Trust provided some information but refused to provide the information concerning profit margins, citing section 43(2) FOIA – commercial interests.
2. The Commissioner's decision is that section 43(2) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the information to the complainant that was withheld under section 43(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 August 2019 the complainant wrote to the Trust and requested information in the following terms -

1. In the Trust's annual report and accounts the following statement is made:

"The margin delivered on our private patient income remains a vital source of support for NHS services to patients."

(See page 36 https://shared-d7-royalmarsden-publicne-live.s3-eu-west-1.amazonaws.com/files_trust/s3fspublic/Annual%20Report%202018-19.pdf)

Please could you provide me with the margin achieved in relation to the Trust's private patient income for each of the following financial years:

2015/16

2016/17

2017/18

2018/19

(For the sake of clarity I am asking how much of the Trust's annual private patient income is available as a surplus for NHS care following deductions for staff costs, capital costs, etc. I would like this information to be presented as a % of total private patient income for each of the financial years set out above.)

2. Please could you provide me with the percentage of the Trust's total private patient income for each of the financial years 2015/16; 2016/17; 2017/18 2018/19 which is spent on fees for consultants who are employed by the Trust.

3. Please could you provide me with the number of consultants who received a payment by the Trust for carrying out private patient work for the financial years 2015/16 2016/17 2017/18 2018/19

4. Please could you provide me with the largest amount paid to an individual consultant employed by the Trust as a result of providing private patient services for each of the financial years 2015/16 2016/17 2017/18 2018/19

5. Please could you provide me with the total expenditure on consultants for the provision of NHS services in the financial years 2015/16; 2016/17; 2017/18 ; 2018/19 and the total number of consultants employed by the Trust in each of these years.

6. The Trust responded to the complainant on 23 September 2019. It provided a response to parts two, three, four and five of his request but refused to provide the information requested at part one. The Trust cited section 43(2)(commercial interests) as the reason for withholding this information.
7. The complainant requested a review which was acknowledged by the Trust on 30 September 2019.
8. The Trust provided an internal review on 30 October 2019 in which it maintained its original position, that section 43(2) applied to the withheld information.

Scope of the case

9. The Commissioner considers that the scope of this case is the Trust's citing of section 43(2) in relation to the requested information at part one of the request.

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
11. The Trust cited section 43(2) with regard to the information the complainant had requested at part one of his request - the margin achieved by the Trust in relation to private patient income.
12. The Commissioner has defined the meaning of the term "commercial

interests" in her guidance on the application of section 43 as follows:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity"¹

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

13. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. It provides the example of procurement where public authorities will be involved in the purchase of goods and services and will hold a wide range of information relating to it.
14. The exemption is subject to the public interest test which means that, even if it is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
15. Section 43 is a prejudice based exemption. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of the party. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real actual or of substance for it to be successfully engaged.
16. Firstly, the Trust needs to establish that 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 commercial interests. The Trust has provided the Commissioner with the withheld information which consists of the margin achieved in relation to its private patient income over four financial years. It maintains that its ability to generate essential income would be severely prejudiced if the requested information was disclosed. The Trust argues that its ongoing operations would be at risk of being unsustainable which would impact on its ability to deliver healthcare services to its patients at its current level. The Commissioner agrees that the withheld information relates to the Trust's commercial interests.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

17. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged - ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
18. Public authorities need to identify specific harm, link it to specific information and explain how disclosure would cause the ascribed harm. The Trust stated to the Commissioner that the release of this information 'would' be commercially prejudicial to itself.
19. The Trust is relying on the higher threshold. The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than a 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
20. The Trust maintains that evidence of the likelihood of prejudice already exists as it must negotiate on an ongoing basis with insurers and international embassies on the margins charged on services provided and on prescribed drugs. These margins are constantly under pressure. The Trust has standard mark-up percentages on specific services and provisions within its contracts that providers are able to compare across the market. This can lead to outliers (a value that differs significantly from other values in a set of data) being targeted and the Trust's margins being an area of focus in contract negotiations. Any driving down of prices consequentially means a drive down in the Trust's income. The Trust's view is that release of the requested information is more likely than not to weaken its negotiating position. This logic means that the Trust's competitors would use it to undercut its fees and as a bargaining tool, reducing its future margins to the detriment of the Trust.
21. The complainant's view is that the Trust's argument that disclosing the overall profit margin would damage it commercially is flawed, given that all commercial companies declare the profit on their income each year, including companies who are in competition with the Trust to provide services to patients who pay privately.
22. He states that there is no validity to the argument that the disclosure of the overall amount of profit made from the sales of services by the NHS would in any way damage the Trust's ability to compete. The complainant underpins his argument by saying that it is well-established that the disclosure of this information is a requirement for companies registered with Companies House under section 396 of the Companies Act 2006 and is therefore publicly available. These

companies compete with the Trust for the provision of cancer services in the UK. He provides the example of the Christie Clinic in Manchester (registered as 'The Christie Clinic LLP') which is a joint venture between The Christie NHS Foundation Trust and HCA Healthcare to provide private patient services.² He also provides the example of Basildon and Thurrock NHS Foundation Trust.³ The complainant suggests that these two examples make it possible to determine how much is available for re-investment in the provision of NHS services as a result of the sale of healthcare services to private individuals.

23. The complainant acknowledges that there may be an argument that disclosing the exact margin or level of profit in relation to individual items of sale would damage the commercial interests of the Trust, however he does not accept that disclosing the aggregate profit margin would cause commercial detriment. He is not seeking this granular level of information. The Trust would simply be adhering to the same standards of transparency adopted by its commercial competitors. The complainant states that this is standard accounting practice for all commercial organisations and that it has also been adopted by other NHS Trusts in relation to their private patient income.
24. By way of context the Trust explains that it operates in a buoyant and competitive market to provide specialist private patient care services. The Trust's contention is that disclosure of the requested information will impair its ability to generate essential income. It contends that disclosure would negatively affect negotiations with insurance companies and embassies when agreeing fees and other charges on behalf of their private patients. It argues that there is a

² References provided by the complainant - Christie NHS Foundation Trust Annual report and accounts 2018/19 <https://www.christie.nhs.uk/media/7459/the-christie-nhs-foundationtrust-annual-report-accounts-2018-19.pdf> (p.35) and

³ Basildon and Thurrock Annual report and accounts 2018/19 <http://www.basildonandthurrock.nhs.uk/trust-documents-and-declarations/annual-reports-and-accounts?download=2036:annual-report-and-accounts-2018-19> (p. 180)

significant commercial value attached to the requested information and that its disclosure would enable the Trust's competitors to undercut the fees it charges. This would then lead to reduced pricing and a likely loss of activity and, consequently, income. The Trust stresses that its operating model relies on the generation of private patient income in order to sustain services delivered to its NHS patients. Without returns from private patient care, it states that the Trust is financially unsustainable as an ongoing operation. The Trust cannot function without the funding from private patient care which is essential.

25. The Trust outlined its commitments to the Commissioner by stating that it is committed to future investments in infrastructure and IT. It needs to fund repayment loans for existing investments which include allowing NHS patients access to the latest equipment and technology supporting their cancer treatment and to the ongoing running costs of the buildings and equipment where investment has already been made. These commitments cannot be met without the funds that are generated by ongoing private patient care.
26. Additionally, the returns from the Trust's private patient care business enable it to invest in research and development such as genomic testing, robotic surgery and cutting edge technology that are essential fields in the treatment of cancer. The Trust also funds research and education that benefit Trust patients and others. The returns from private patient care also enable the Trust to attract and retain high calibre clinical staff.
27. The Trust states that its primary reason for providing private patient care is to maximise benefit for its NHS patients, as outlined above. Its view is that NHS resources are both stretched and scarcer during the pandemic and that additional revenue, such as that it obtains from private patient care services, is vital. The Commissioner notes that the request was made prior to the pandemic.
28. The Trust underpins its reliance on section 43(2) by referring the Commissioner to [EA/2016/0074](#) where the Tribunal noted that most section 43(2) cases which came before it arose in circumstances where the public authority was the commissioner of care. In [EA/2016/0074](#) the council was acting in a competitive market with the purpose of maximising its income. The Trust emphasises that it is of critical importance that it is able to maintain the income it derives from private patient care services it provides within a competitive market. It considers that disclosure would place it at significant risk of not being able to do so. The Trust does disclose its annual income which is

publicly available on its website in the Annual Report which also includes activities by source such as private patient care.

29. The Trust also provided a detailed argument concerning the likely misinterpretation of the requested information were it to be released. In brief, this is due to the way the information is calculated which would require an understanding on the part of the complainant/public of the Trust's approach to the calculations. By way of background, the Trust explained that it operated an 'integrated' care model – shared staffing and infrastructure supporting NHS and private patient care. Its view is therefore that the financial performance of either service cannot be considered in isolation from the other and that the financial performance would be materially worse if run in isolation. The Trust uses NHS costing standards to allocate the costs of shared resources but this is only one of several costing methods, many of which would produce materially different results.
30. This means that the only true margin in terms of measuring the Trust's financial performance is the margin calculated by combining its NHS and private patient care income relative to the total cost of services provided. The Trust stresses to the Commissioner that the way in which surplus margins are calculated by the Trust is different to private healthcare competitors and that there is no like-for-like comparison. The Trust points to LaingBuisson's (a private healthcare industry specialist which provides market insights, results and views on policies and healthcare strategy) 2020 report. The report includes a review of EBITDAR Earnings ("Earnings Before Interest, Tax, Depreciation, Amortisation of goodwill and Rent on leased land and buildings assets") performance for private providers. EBITDAR is considered a standard financial calculation, as it has a defined method of calculation to allow for comparison across private companies. There is no section in the LaingBuisson report showing profitability results for NHS Private Patient Units (PPUs) as it is accepted that NHS PPU are not able to calculate results in a similar manner, due to the integrated delivery models that they adopt. The Trust states that no NHS PPU margins are available in the public domain.
31. The Trust provided the Commissioner with some confidential information which cannot be reproduced here in support of its position. Although the Commissioner agrees that comparisons of this nature can be misleading this is not, in itself, an argument for not releasing this information. It is difficult to see how potential misinterpretation would be commercially prejudicial because the release of any set of figures can be subject to misinterpretation by individuals without sufficient knowledge and understanding. It is open to the Trust to provide some explanatory information, should it wish to do so.

32. The Trust pointed out in its internal review response that commercial companies are not subject to the FOIA, unlike itself which releases information about its private care activity eg the number of patients. Information that has been released under the FOIA when combined with other financial data would therefore be prejudicial to the Trust as it would weaken its position in negotiations and reveal commercial information to its competitors.
33. The Commissioner has considered whether the requested information, even if it not likely to be harmful on its own, may be harmful when combined with other information already in the public domain. This is sometimes referred to as a 'mosaic' or 'jigsaw' effect. Public authorities are entitled to look at the effect of the disclosure in the context of existing information already in the public domain.
34. In her guidance⁴ the Commissioner says that general arguments will not carry much weight. It is necessary to point to specific information already in the public domain, explain why it is likely that they will be combined, and explain how additional prejudice is likely to result from the combination.
35. Although the Trust has provided some detailed arguments the Commissioner considers these relate to the need for private care income and the benefits of that income to its NHS patients and ongoing commitments, rather than how these will be materially affected by the release of the requested information. The Commissioner does not agree that those arguments have sufficiently demonstrated the commercial prejudice that would follow its release. In other words, the Trust has not established a direct and clear enough link. She considers that this specific information would not, in itself, cause prejudice. The Trust has not explained what specific information is in the public domain, other than in its internal review where it gave the example of patient numbers, that could be combined with this information in the prejudicial way it has indicated. The case has not been made that this information in itself could be used to drive down margins, either by those negotiating for its services, or by competitors aiming to undercut the Trust in providing similar services.

⁴ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

36. The Commissioner does not therefore accept that the criteria have been met and that the level of prejudice is real, actual or of substance. Consequently, as the exemption is not engaged she has not gone on to consider the public interest.

Right of appeal

37. 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

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF