

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2022

Public Authority: NHS Hampshire, Southampton and Isle of Wight
Clinical Commissioning Group

Address: The Castle
Ground Floor
Castle Avenue
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant has requested from NHS Hampshire, Southampton and Isle of Wight Clinical Commissioning Group (the CCG) a contract between the CCG and Partnering Health Ltd (PHL) for out-of-hours services including the expectations/targets, the payment received, and the number of times (within specified dates) that PHL failed to meet the relevant timeframes passed on by the 111 service provider. The CCG provided some information but withheld the remainder, citing the exemption at section 43(2) – commercial interests.
2. The Commissioner's decision is that the CCG has correctly cited section 43(2) for the withheld information. However, he has concluded that it is in the public interest for this information to be disclosed, apart from the detailed financial figures in Schedule 4, Annex 1 which should not be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- The Commissioner expects the CCG to disclose the information it no longer considers exempt, as set out in its submissions and paragraph 19 of this decision notice.
 - Disclose the remaining withheld information from the contract (with the exception of the financial figures in Schedule 4, Annex 1).
 - Disclose the numbers that relate to the second part of the request.
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 FOIA and may be dealt with as a contempt of court.

Background

5. The CCG has explained to the Commissioner that PHL is the chosen provider for the delivery of out-of-hours clinical services to West Hampshire CCG, Southampton CCG and SE Hampshire populations. PHL arranges for patient call backs from GPs where advice is required out of hours via the NHS 111 service. The service provides call and clinical triage support from 6.30pm to 8am the following day and from 6.30pm on Fridays through the weekend to Monday morning. The service also covers bank holidays.
6. The contract information requested involves three original contracts – one each for Southampton City CCG, West Hampshire CCG and South Eastern Hampshire CCG, and Fareham and Gosport CCG. The CCGs merged in April 2021 to form the Hampshire, Southampton and Isle of Wight CCG. The only differences in the contracts are the financial details due to the size of the area covered.

Request and response

7. On 28 April 2021, the complainant made the following request for information:

“Would you be able to provide the contract between yourselves and

PHL (Partnering Health Limited), who operate some of the Out of Hours (OOH) services in Hampshire? With particular emphasis on the expectations/targets set by yourselves to PHL and the payment they receive in return for operating these services.

Would you also be able to provide the number of times, to your knowledge, that the PHL out of hours service failed to meet disposition timeframes passed on to them by the 111 service provider? Or failed to meet targets/expectations set in the contract between yourselves and PHL.

Would I be able to get this data please for the period: 1st October 2018 to 30th September 2019 and the 1st October 2019 to 30th September 2020?"

8. The CCG responded on 27 May 2021 providing some information in relation to the first part of the request (the contract for Fareham and Gosport, South East, West Hampshire and Southampton Areas) and explaining that other information was not held (there was no contract for the Isle of Wight and North Hampshire Areas). Part of the contract information was withheld (several appendices) under section 42(3) (commercial interests) as was the information within the scope of the second part of the request.
9. On the same day the complainant asked for an internal review of the information that the CCG had withheld under section 43(2).
10. The CCG provided an internal review on 21 June 2021 and maintained its position.

Scope of the case

11. The complainant contacted the Commissioner on 25 June 2021 to complain about the way his request for information had been handled. His view is that it is in the public interest to release this information.
12. The Commissioner considers the scope of this case to be the CCG's withholding of part of the requested information under section 43(2).

Reasons for decision

Section 43(2) – Commercial interests

13. 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.
14. The Commissioner has defined the meaning of the term “commercial interests” in his guidance on the application of section 43 as follows:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”¹

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

15. 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 hold a wide range of information relating to it.
16. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
17. 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 and of significance for it to be successfully engaged.
18. The CCG originally withheld the following information under this exemption:

From the contract (part one of the request)

- Schedule 4
- Schedule 6, Annex 2
- Schedule 6, Annex 3

¹ [Section 43 - Commercial interests | ICO](#)

- Schedule 6, Annex 4
 - Schedule 9
 - Schedule 11
-
- The numbers from the second part of the request.

The withheld information has been provided to the Commissioner.

19. After the Commissioner began his investigation, he suggested that some of the withheld information was generic. The CCG then said that it intended to disclose the following information:

- Schedule 4 Finance;
- Schedule 4 Insurance (minus the certificates); and
- Schedule 6, Annex 4 Information requirements.

20. The following parts of the contract remain withheld:

- Schedule 4, Annex 1
 - Schedule 6, Annex 2
 - Schedule 6, Annex 3
 - Schedule 9
 - Schedule 11
-
- The numbers from the second part of the request.

21. 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 commercial interests.

22. The CCG argues that the withheld information relates to its own commercial interests and those of the third party contractor, PHL. As this process concerns negotiation and payment for services, the Commissioner accepts that the contract for services from a third party clearly involves the commercial interests of the contractor and the contractee.

23. The CCG considers that the requested information is exempt by virtue of section 43(2). It contends that its disclosure under FOIA would be likely to prejudice its commercial interests by affecting its ability to participate effectively in a competitive market for this service which, in future, could also lead to a prospective provider gaining an advantage over others or seeming to gain such an advantage.
24. The CCG is relying on the lower threshold, that disclosure 'would be likely' to have a prejudicial effect. Evidence in the form of correspondence with PHL has been provided to demonstrate that there is more than a hypothetical possibility of prejudice occurring. However, even where the lower threshold for engaging the exemption is being relied upon (that disclosure would be likely to result in prejudice) public authorities need to identify specific harm, link it to specific information and explain how disclosure would cause the identified harm.
25. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (Tribunal at paragraph 15).
26. PHL has provided its own view to demonstrate the link between disclosure of the withheld information and the harm that would be likely to be caused to itself:

"We consider that if the information is disclosed to the world at large, this would be likely to prejudice the ability of PHL (and the CCG) to participate fairly in future procurements for similar services. PHL's ability to act commercially would be undermined if the financial arrangements and other information is released and our ability to be competitive would be severely curtailed if other providers are able to determine in detail the way in which the financial arrangements between us work, and other information about the way we provide the service and our KPIs. We consider that to disclose in full would distort competition."
27. In response to the Commissioner's further questions, the CCG and PHL provided the following arguments in support of the prejudice it believes would be likely to occur if some of the withheld information was released:

Schedule 6, Annex 2

This annex is commercially sensitive if required to submit performance data. The sharing of this information alongside financial information may severely, adversely and negatively affect PHL's ability to retain and secure new contracts. This information may be advantageous to competitors as disclosing KPIs under the contract when combined with other information to be released would allow competitors to determine how PHL delivers the services and would distort competition. Both PHL and the CCG would be commercially disadvantaged if the details of this annex are made public. PHL's ability to bid for other services is likely to be undermined if this level of specificity regarding service delivery is publicly available and known to competitors, allowing them potentially to negotiate more favourable terms. It would impact on the CCG's ability to obtain the most from any procurement. Details of PHL's performance has already been disclosed and therefore it considers the public interest has been satisfied.

Schedule 6, Annex 3

This annex is considered commercially sensitive if required to also submit performance and quality data. The sharing of the information contained in this annex alongside financial information is commercially confidential and may severely, adversely and negatively affect PHL's ability to retain and secure new contracts. It may be advantageous to competitors. Disclosing details of specific quality requirements when combined with other information to be released would allow competitors to determine how PHL deliver the services and would, in turn, distort competition. PHL's ability to bid for other services is likely to be undermined if quality metrics are already known to competitors who could potentially negotiate more favorable terms. There would also be an impact on the CCG's ability to obtain the most from procurement.

Schedule 9

It is acknowledged that much of the information in this schedule is anonymised, but shows items concerning benefits, pensions, contractual obligations which are all commercially sensitive. If it is combined with the release of detailed data, it would be of interest to PHL's competitors.

Schedule 11

This schedule includes plans for implementations of innovations that have been offered during the procurements/tenders and are to be implemented during the contract life. They also demonstrate plans for making improvements which may have been identified as being required by the previous year's activity and performance. This information could be used in competitive situations and impact on future

business opportunities, potentially negatively impacting on future tender scoring, removing its opportunity to score through innovation, and removing its competitive advantage.

28. The Commissioner agrees that the exemption is engaged at the lower level of prejudice as regards PHL and, by extension, the CCG as it could affect future negotiation or lead to a smaller pool of providers.

Public interest

29. Although the exemption is engaged, the Commissioner must go on to consider whether, despite this, it is in the public interest to disclose the requested information.

Public interest factors in favour of maintaining the exemption

The CCG's view

30. The CCG contends that the release of the requested information would likely impact on PHL's ability to participate fairly in future procurement for similar services.
31. Publication of information could give future potential providers an unfair advantage in negotiating contracts with the CCG which, in turn, could increase the cost of services provided under NHS contracts in the area. This would not be beneficial to the public.
32. The CCG is of the opinion that releasing the information would jeopardise its future relationship with PHL as it would be likely to negatively affect any future negotiations the CCG participates in with PHL and any available offers.
33. It is in the public interest to protect the ability of PHL and the CCG to participate in commercial activity because PHL is a big provider in the area. Without PHL, the CCG may have to commission from a more expensive, smaller provider.
34. The CCG believes that the release of such detailed information would constitute a breach of contract with the provider which would lead to lack of trust and a risk to public funds. This would also restrict future competition for tenders and prejudice the CCG's ability to obtain the best quality of service and value which would potentially impact on budgets set within the CCG which is not in the public interest. As detailed earlier, the CCG approached PHL to ask if they would support the release of the requested information and it confirmed that it would not agree to its release.

Public interest factors in favour of disclosing the information

The CCG's view

35. The release of the information would promote accountability and transparency for the CCG's decisions and its spending of public money. It would also assist the public to understand and challenge its decisions.
36. Disclosure would inform the public of the activities that are carried out on its behalf, allowing for more user involvement and collaborative decision-making.
37. Release of the information would help to ensure clarity around fairness, equity, value for money, and quality of care in its processes.

The complainant's view

38. The complainant argues that it is in the public interest to disclose the information that has been withheld "as it is quite literally...life and death if PHL fail to see patients within the clinical timeframes set by NHS England. His view is that "health outweighs monetary value" and that "taxpayers have a right to understand how decisions made by a private company will impact on their health".

Balance of the public interest

39. The CCG considers that the factors in favour of disclosure are outweighed by the risk to public funds as a result of the potential breach of contract the disclosure would give rise to. The CCG has also argued that release means damage to its reputation, a loss of confidence by potential business partners requiring confidentiality clauses, and an impact on its future procurement activities and ability to provide value for money and the highest quality services.
40. The Commissioner accepts these arguments regarding some of the information. He agrees that the disclosure of detailed financial payments to the contractor is not in the public interest because it is likely to lead to detriment to PHL as the rates of remuneration it receives would be in the public domain. Consequently, a competitor could undercut PHL to their commercial prejudice. It is also likely to affect the CCG's commercial interests, as what it has paid PHL each month would be in the open, possibly lessening its future negotiatory powers. The pool of those offering to tender might correspondingly diminish. None of this is in the public interest. Therefore the Commissioner agrees that the information at Schedule 4, Annex 1 should remain withheld.

41. However, the Commissioner is not persuaded that the remainder of the withheld information should remain so. The contract itself states "This document is a publication of a standard contract" and "Standard Alternative Provider Medical Services Contract 2017". Clearly the contract is then amended to include tailored clauses but some of the withheld clauses appear to be standard and the Commissioner can see no reason why the disclosure of these clauses would not be in the public interest.
42. The Commissioner does not agree that the CCG will lose potential service providers if the contract (minus the figures in Schedule 4, Annex 1) was disclosed. This would be within the expectation of any contractor entering into a contract with a public authority. The fact of FOIA legislation has been a known quantity for many years. The CCG states that details of PHL's performance have already been disclosed and therefore it considers that the public interest has been satisfied. The Commissioner notes that exactly what the details are that have been disclosed has not been provided.
43. The Commissioner's view is that these types of contracts are too lucrative for public authorities to be without tenderers. The Commissioner has also considered the age of the information as it relates to the second part of the request, some of which was over two years old at the time of the request, though some was only seven months old. Regarding the first part of the request, the contract was still in place (2018-2021), though much of it had passed by the time of the request.
44. The Commissioner accepts that putting together different pieces of publicly available information, including the details of specific quality requirements and how they are delivered might impact on PHL. If competitors can negotiate more favourable terms, this has the potential to impact both on PHL and the CCG. Whilst this remains a possibility, the contract is established, it is not a tender. When a contract comes up for renewal the terms may be different, much of it presumably dictated by the requirements of the CCG and compliance with relevant legislation, which would presumably have to be met by any contractor.
45. The service that PHL provides is a vital medical service and the Commissioner believes that targets should be disclosed as it is in the public interest to know in more detail whether these were being met or not. This may be of some detriment to PHL but the Commissioner's view is that this type of information is of little use to the public if too much time has passed. In this instance, the Commissioner has decided that the public interest in disclosure outweighs the public interest in

withholding the information. His view is that any disclosure can be set within context, should the CCG wish to do so.

Reasons for decision

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@justice.gov.uk
Website: 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF