Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2012

Public Authority: The Department of Health
Address: Room 317
Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested information relating to companies that under-delivered on price reductions under the 2005/2008 Pharmaceutical Price Regulation Scheme (PPRS). The Department of Health (DoH) provided the complainant with some of the requested information but withheld much of the requested information under section 43(2) of the Freedom of Information Act 2000 (FOIA).

2. The Commissioner's decision is that the DoH incorrectly applied section 43(2) FOIA to points 5 to 9 of the clarified request, except in relation to the information identified in paragraph 32.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the information relevant to points 5 to 9 of the request, with the DoH bank account details redacted.

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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant made a request to the DoH on 2 June 2011 for the following information:

    1. A copy (either in electronic or hard copy form) of all reasoned decisions of the Panels in the case of companies that under-delivered price reductions under the 2005/2008 PPRS.
    2. Any accompanying documents or notes to the reasoned decisions above; and
    3. Any documentation explaining how the Department of Health ascertained that it had not secured 75% of the monies due from under-deliveries under the 2005/2008 PPRS.

    She clarified that in relation to the request set out above, she wished to obtain the following:

    1. The Department's figure for the total value of under-deliveries under the 2005 and 2008 PPRS;
    2. The value of under-deliveries which under-delivering companies have agreed to repay, (whether by cash payments or by adjustments under the 2009 PPRS);
    3. The value of under-deliveries which were subject to dispute resolution procedures.
    4. The value of under-deliveries which the Department has been unable to recover as a result of an unfavourable decision of the dispute resolution panel;
    5. The value of under-deliveries that the Department has foregone as a result of compromise or settlement with under-deliveries, and the reasons why the compromise or settlement was entered into;
    6. The value of under-deliveries which the Department has been unable to recover for any reason other than those specified above;
    7. The value of under-deliveries which the Department has been unable to recover due to the under-delivering companies leaving the PPRS scheme, and in each case, whether the company left the scheme before or after a decision of the dispute resolution panel;
    8. All information detailing any steps which have been taken to recover sums other than through the dispute resolution panel; and

9. All information detailing any steps which have been taken to recover under-deliveries from companies who joined a statutory scheme, including in particular any steps taken under sections 261-266 of the National Health Service Act 2006 and/or regulations made thereunder.

6. The DoH provided a response to the complainant on 30 June 2011 in which it refused to disclose the information requested at points 1 to 9 of the clarified request on the basis of the exemption contained in section 43(2) FOIA.

7. The complainant requested an internal review of the DoH's decision on 12 July 2011. On 5 August 2011 the DoH wrote to the complainant with the details of the result of the internal review it had carried out. It provided the complainant with information which answered points 1 and 2 of the clarified request but upheld its application of section 43(2) FOIA to withhold the rest of the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 1 September 2011 to complain about the way the request for information had been handled.

9. On 1 November 2011, in relation to point 3 of the clarified request, the DoH confirmed that this information is publicly available. It communicated this to the complainant and directed the complainant to this information in the internal review response.

10. In relation to point 4 of the clarified request the DoH communicated the answer to this to the complainant on 27 January 2012.

11. The Commissioner will therefore consider whether the DoH was correct to apply section 43(2) FOIA to the information withheld in relation to points 5 to 9 of the clarified request.

Background

12. The requests relate to information and documentation provided under the 2005, 2008 and 2009 Pharmaceutical Price Regulation Schemes (PPRS). The PPRS is the mechanism which the DoH uses to control the prices of branded prescription medicines supplied to the NHS by regulating the profits that companies can make on their NHS sales. The DoH has explained that the scheme seeks to achieve a balance between reasonable prices for the NHS and a fair return for the industry to enable

it to research, develop and market new and improved medicines. The PPRS agreements were negotiated between the DoH and the Association of the British Pharmaceutical Industry (ABPI). The DoH has explained that under the PPRS agreements, pharmaceutical companies share their data with the DoH on a 'commercial in confidence' basis. The DoH has explained that the 2009 PPRS scheme is a voluntary scheme however companies that choose not to become scheme members are subject to a statutory scheme under sections 262(2) and 236(7) of the National Health Service Act 2006. Under-deliveries occur if pharmaceutical companies fail to deliver the branded medication to the NHS at the agreed level.

Reasons for decision

Points 5, 6 and 7 of the Request

Section 43(2)

13. 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.

14. In this case the DoH has stated that disclosure of the requested information would be likely to prejudice the commercial interests of the pharmaceutical companies as well as the DoH.

15. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the commercial interests of the pharmaceutical companies as well as the DoH.

16. The Commissioner considers that supplying branded prescription medication to the NHS by pharmaceutical companies is a commercial activity. It is in the DoH's commercial interests to obtain branded prescription medication at a competitive price and it is in the pharmaceutical companies commercial interest to make sufficient profit to continue to develop, research and market new and improved medicines.

17. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.

18. The Commissioner has therefore gone on to consider the nature of the prejudice claimed and the likelihood of the claimed prejudice occurring.

19. The information requested at points 5, 6 and 7 of the request is the total value of under deliveries that the DoH has been unable to recover for different reasons.

20. The DoH has provided the Commissioner with the withheld information. It has argued that disclosing the amounts involved would be likely to jeopardise the commercial confidentiality of PPRS members. It has also argued that disclosure may hinder the DoH's future negotiations with pharmaceutical companies. The Commissioner is aware that the amounts requested at points 5, 6 and 7 are high level figures made up of unclaimed amounts relating to under deliveries of a number of pharmaceutical companies. The high level figures do not appear to identify individual amounts of under deliveries relating to individual pharmaceutical companies.

21. The DoH has argued that even issuing anonymous data could endanger confidentiality because publicly available material, such as Prescription Cost Analysis data (data on prescriptions dispensed in the community in England), IMS data (commercially available data relating to purchases in primary care and dispensing in secondary care) and published company accounts could be used to identify companies from price changes and the levels of savings identified. It summarised that the more levels of data subsets released the more likely identification is.

22. The DoH has not explained how the information which is already in the public domain would enable the names of individual pharmaceutical companies along with their under delivery values which the DoH has been unable to recover to be identified. The Commissioner is therefore unable to conclude that disclosure of the value of under deliveries requested at points 5, 6 and 7 of the request would be likely to prejudice the commercial interests of the pharmaceutical companies. The Commissioner considers that the exemption is not engaged in relation to the pharmaceutical companies' commercial interests because there is no causal link between disclosure and the prejudice claimed.

23. The DoH has argued that even disclosing the results of the under-delivery negotiations in an amalgamated form would be likely to prejudice DoH's future negotiations on profit assessments, price reductions and the prices of new medicines. The Commissioner does not consider that disclosure of the value of under deliveries that were not recovered in an amalgamated format would be likely to prejudice future negotiations with pharmaceutical companies. Again the Commissioner considers that the exemption is not engaged in relation to the DoH's own commercial interests because there is no causal link between disclosure and the prejudice claimed.

24. The DoH did not explain why disclosure of the reason why the DoH did not recover the under deliveries would be likely to prejudice the commercial interests of the individual pharmaceutical companies or the DoH. The DoH did not explain why disclosure of whether pharmaceutical companies had left the scheme before or after the decision was made would be likely to prejudice the commercial interests of the individual pharmaceutical companies or the DoH. The Commissioner expects the DoH to supply fully reasoned arguments as to why the prejudice would be likely to occur, it is not for the Commissioner to draw his own conclusions as to how this might occur. In the absence of such arguments the Commissioner is unable to conclude that disclosure of this information would be likely to prejudice the commercial interests of the pharmaceutical companies or the DoH and therefore the exemption is not engaged in relation to this information.

Points 8 and 9 of the request

25. For the reasons given at paragraphs 12 to 17 above, the Commissioner considers that the withheld information falls within the scope of the exemption. The Commissioner has therefore gone on to consider the nature of the prejudice claimed and the likelihood of the claimed prejudice occurring.

26. The withheld information is copies of all documents held detailing all the steps taken by the DoH with the companies concerned. This includes requests, company responses, provision of company data, the DoH's assessment of the company data, notes of company meetings, papers relating to negotiation and mediation proceedings.

27. The DoH has argued that disclosure of the withheld information would be likely to prejudice the commercial interests of the DoH as well as the pharmaceutical companies.

28. It has explained that disclosure of the withheld information could provide valuable information for the companies' competitors and seriously inhibit the companies' ability to do business in the future. It said that this would be likely to prejudice the companies' commercial interests. It has also argued that disclosure may inhibit the companies' willingness to do business with the DoH in the future if this information were disclosed. It has said that this would be likely to prejudice the DoH's own commercial interests if its ability to obtain medicines at reasonable prices was inhibited.

29. The Commissioner accepts that the prejudice claimed is real and of substance and that there is a causal link between disclosure and prejudice. However the DoH did not go on to explain how competitors

of the companies would be likely to use the withheld information to the companies commercial disadvantage. The Commissioner does accept that the withheld information contains pricing information but it does not contain detailed information about how the prices were reached. Furthermore the information dates back to 2005-2009, and therefore the relevance of the pricing information at the time of the request in September 2011 was limited further. This is because the pharmaceutical market develops rapidly and information about prices and products from two or more years ago will have limited relevance to the marketplace as it existed in 2011. It also contains information as to whether companies had under-delivered on its products and pricing and if so the value of that under-delivery. Based upon the arguments provided by the DoH the Commissioner is unable to conclude that this information would be likely to prejudice the companies' commercial interests and would again note that the information dates back to 2005-2009. In terms of the letters and other relevant documents surrounding the negotiation process to recoup under-deliveries, these are based around a High Court judgement which is publicly available. Therefore this would limit any prejudice occurring as these negotiations or interactions are based upon this publicly available decision. Again based upon the arguments provided by the DoH the Commissioner is unable to conclude that this information would be likely to prejudice the companies' commercial interests as it has not explained how this would occur. As mentioned above the Commissioner expects the DoH to provide these detailed arguments to explain how this prejudice would be likely to occur.

30. If the withheld information were disclosed the Commissioner considers that there is a possibility that these companies may not wish to do business with the DoH in the future, which has the potential to prejudice the DoH's commercial interests in being able to obtain the medicines it wishes to purchase at a fair price. However he does not consider that this prejudice would be likely to occur as it is in the companies own commercial interests to supply medicines to the DoH. This is because, as the DoH explained earlier the companies make profit from these contracts for further research and develop new and improved products. Again as the information dates back to 2005-2009 this reduces further the likelihood of the prejudice occurring.

31. Based upon the limited arguments presented by the DoH in support of its application of section 43(2) in this case, the Commissioner considers that this exemption is not engaged in relation to the information requested at points 8 and 9 of the request.

32. The Commissioner would however note that some of the requested information does contain the DoH's bank account details. By the nature of this information the Commissioner considers that it would prejudice

the DoH's commercial interests if it were disclosed and section 43(2) is therefore engaged in relation to this information. As previously mentioned this is a qualified exemption and the Commissioner must therefore consider the public interest for and against disclosure. He considers that whilst there is a public interest in transparency this is outweighed by the risk of fraud should this information be disclosed and this would not be in the public interest. The DoH's bank details should not therefore be disclosed as section 43(2) is engaged in relation to this information and the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

33. 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

34. 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.

35. 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 ……

Gerrard Tracey
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