

Decision 181/2006 - Ms Helen Puttick of the Herald and Greater Glasgow NHS Board

Cost of orthopaedic operations in private sector hospitals

**Applicant: Ms Helen Puttick of the Herald
Authority: Greater Glasgow NHS Board
Case No: 200502904
Decision Date: 5 October 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
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Request for cost of orthopaedic operations in private sector hospitals – information withheld under sections 33(1)(b) and 36(2) of the Freedom of Information (Scotland) Act 2002

Facts

Ms Puttick wrote to Greater Glasgow NHS Board (the Health Board) seeking a range of information including a copy of 2004-2005 costs for sending orthopaedic patients to private sector hospitals. The Health Board refused this request, citing sections 33(1)(b) and 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Outcome

The Commissioner found that Greater Glasgow NHS Board complied with Part 1 of FOISA in its application of the exemption under section 36(2) of FOISA to the information requested by Ms Puttick.

The Commissioner did not require any action by Greater Glasgow NHS Board.

Appeal

Should either Greater Glasgow NHS Board or Ms Puttick wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 6 July 2005, Ms Puttick, a journalist with the Herald, requested by e-mail from Greater Glasgow NHS Board (the Health Board) details of the costs for sending orthopaedic patients to certain hospitals. Ms Puttick requested cost details for the financial year 2004-2005 for orthopaedic operations – knee and hip replacements – for the Golden Jubilee National Hospital and any private sector hospital used by the Health Board.
2. The Health Board responded by e-mail (7 July 2005) stating that the request was being dealt with as a FOI request. It responded in writing (4 August 2005) confirming that it held the requested information, providing some information (see paragraph 9 below), but withholding other information under sections 33(1)(b) and 36(2) of FOISA.
3. On 13 September 2005 Ms Puttick e-mailed the Health Board asking it to review its decision.
4. The Health Board wrote on 10 October 2005 to Ms Puttick confirming its original decision to withhold some of the information requested, and providing further details on previous answers.
5. On 24 October 2005 Ms Puttick applied to the Scottish Information Commissioner for a decision as to whether the Health Board had dealt with her information request in accordance with FOISA. She suggested that it was in the public interest that this information be available to allow the public to assess the efficiency of the Health Board in its use of public money for orthopaedic operations.
6. The case was allocated to an investigating officer.

The Investigation

7. Ms Puttick's appeal was validated by establishing that she had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to her request.
8. My Office then contacted (24 November 2005) the Health Board for its comments on the application and for the information withheld from the applicant in this case, in accordance with section 49(3)(a) of FOISA. The Health Board responded on 14 December 2005, providing its comments and copies of the following:

- Communications with Ross Hall and Nuffield on disclosure of the requested information
- Documentation on the tendering process including the pricing schedule relating to the operations and the Tender Report submitted to the Board
- Documentation relating to Ms Puttick's request and requirement of review.

Nuffield provided comments to my Office in a letter of 31 May 2006 on the application of section 33(1)(b) of FOISA.

9. Ms Puttick had asked (on 6 July 2005) for the following information:

- The sum of money spent on waiting list initiatives for orthopaedic patients by the Health Board in the financial year 2004-2005. This information was supplied.
- The cost of sending a patient to the Golden Jubilee National Hospital for (i) a knee replacement, and (ii) a hip replacement operation, and itemisation per patient. The cost for each operation was supplied. The Health Board stated that itemised bills were not held.
- The cost of sending a patient to a private sector hospital for a knee replacement or hip replacement operation, and an itemisation per patient per hospital. The Health Board declined to supply this information on the grounds of section 33(1)(b) and section 36(2) of FOISA.
- The private sector hospitals used by the Health Board for the operations and an itemised bill per patient. The names of the private sector hospitals used were supplied (Ross Hall and Nuffield).
- The cost of knee replacement and hip replacement operations performed within the Health Board in financial year 2004-2005 and itemisation per patient. The Health Board stated that it did not hold this information.
- The number of patients sent to the Golden Jubilee National Hospital for knee replacement and hip replacement operations in the financial year 2004-2005. This information was supplied.
- The number of patients sent to any private sector hospital for knee replacement and hip replacement operations in the financial year 2004-2005, with the names of the hospitals used and numbers of patients sent to each. This information was supplied.
- The number of knee replacement and hip replacement operations performed by the Health Board in the financial year 2004-2005, including the total sum invested. This information was supplied.

- Itemisation of orthopaedic services within the Health Board for the financial year 2004-2005. This information was at the time of request not published, but was due for publication in the Scottish Health Service Costs Book.

The Health Board explained that itemised bills per patient in respect of each enquiry were not provided because it did not hold this information, nor did it hold cost breakdowns for individual procedures.

The Health Board also explained that spending for orthopaedic services within the Health Board and the total sum were not available, but were to be published in the Scottish Health Service Costs Book.

10. The Health Board had delivered an Invitation to Tender (ITN) to Ross Hall and Nuffield on 12 November 2004. The submissions from Ross Hall and Nuffield were reviewed and evaluated by the Health Board in November/December 2004. The tenders for 2005-2006 were submitted by 12 September 2005. I was informed that the Health Board was currently considering whether to tender for private sector capacity in 2006/2007.

Submissions for the Health Board

11. The Health Board submitted that disclosure of the information withheld would breach the confidentiality exemption (Section 36(2) of FOISA). It stated that the information had been provided under circumstances which gave an obligation on the authority to maintain confidentiality (i.e. the information was provided as part of a tendering process). The cost price of the orthopaedic operations, it argued, was information which was not in general common knowledge. Both Ross Hall and Nuffield had requested that the Health Board not disclose the pricing information and that disclosure would cause damage to their respective commercial interests. Although not required to give consideration of the public interest test in applying this section, the Health Board argued that disclosure of the information would create a danger that the private sector would withdraw from working with the NHS with a consequent detrimental effect on patient care (which outweighed the benefit to the public in disclosing the information).

12. The Health Board also submitted that section 33(1)(b) of FOISA applied to the information. It claimed that disclosure would substantially prejudice the interests of the private sector hospitals and itself. It explained that the private sector hospitals operated in a competitive environment and disclosure of the information would damage their business. The small size of the private health sector, it was argued, meant that price information was sensitive and disclosure would result in substantial prejudice to both Ross Hall and Nuffield. For example, disclosure would disrupt the relationship between the private sector hospital and their insured customers. The Health Board argued that when the request was made it had been engaged in a procurement exercise (tenders being submitted by 12 September 2005) with the two private sector hospitals and disclosure of prices would have undermined this exercise. It also stated that disclosure of past prices would undermine future procurement, in particular a tender for private sector capacity in early 2006/2007 and any loss of a private contractor from competition would increase its costs.
13. In consideration of the public interest test, the Health Board argued that disclosure:
 - would create a danger that the private sector would withdraw from working from the NHS with a consequent detrimental effect on patient care (which outweighed the public interest in disclosing the information): the public interest was in the acceleration of the rate at which NHS patients had access to elective treatment;
 - would prejudice the interaction between public and private sector such that the Health Board would be unable to obtain best value through tendering (i.e. by loss of competition);
 - would not enhance scrutiny of decision making since only a fraction (26 of 1090 (hip) and 51 of 894 (knee)) operations were performed in the private sector hospitals and disclosure could give no information that would allow an assessment of whether there was effective expenditure of public funds;
 - was outweighed by the public interest in the provision of the appropriate level of health care at value for money.

Submissions for the applicant

14. Ms Puttick argued that it was in the public interest to be aware of how taxpayers' money was spent on the provision of healthcare. Additionally, it was in the public interest to compare the cost of a procedure provided by the NHS hospital and the private sector equivalent. This was especially the case in this instance due to the size of population covered by the Health Board and the increase of use of private sector hospitals to treat NHS patients, which was a new strategy and as such should be subject to scrutiny to allow evaluation of its efficacy.

Commissioner's Analysis and findings

Information Not Held

15. On the cost of a knee replacement or hip replacement operation performed within the Health Board in financial year 2004-2005 and itemisation per patient, the Health Board has stated that it did not hold this information. I accept that the Health Board does not hold the cost breakdowns for individual hip and knee replacements and that this information is not collected.
16. The Health Board has cited 2 exemptions with respect to the information which it does hold but has declined to disclose. These are section 33(1)(b) in respect of its commercial interests and those of the private sector hospitals, and section 36(2), Confidentiality. As section 36(2) is an absolute exemption, I will examine it first. If it is determined that the authority was correct in withholding the information under section 36(2), I shall not consider the section 33(1)(b) exemption and the public interest test which applies to it.

Application of section 36(2)

17. Section 36(2) of FOISA states the following:

“Information is exempt information if –

(a) it was obtained by a Scottish public authority from another person (including another such authority); and

(b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.”

Section 36(2) is an absolute exemption, and is not, therefore, subject to the public interest test.

18. There is a two stage test which must be fulfilled before the exemption can be relied upon. Firstly, the information must have been obtained by a Scottish public authority from another person. “Person” is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.

19. As cost details of the operations were supplied to the Health Board by the two private sector hospitals (Ross Hall and Nuffield), which have legal personality, the first part of this test can be considered to be fulfilled.

20. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. Although there was no discussion about the meaning of the word “actionable” when the Freedom of Information Bill was being considered in Parliament, I take the view that actionable means that the basic requirements for a successful action must appear to be fulfilled.

21. There are three main requirements which must be met before a claim for breach of confidentiality can be established. These are:

- the information must have the necessary quality of confidence;
- the public authority must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality; and
- there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.

22. Having considered the information requested by Ms Puttick and the arguments put forward by the Health Board, I am satisfied that it fulfils the criteria of having the necessary quality of confidence, in that the information is not common knowledge, and could not be readily obtained by Ms Puttick through any other means.
23. A public authority will be under an obligation to maintain confidentiality where the information was disclosed to the authority with an express statement that the information should be kept confidential, or where an obligation to maintain confidentiality can be inferred from the circumstances. An express statement of confidentiality may be in a formal contract or an accompanying letter. Although the Health Board initially claimed that there was an express confidentiality clause, this was not the case. The Health Board then stated that the tendering process was undertaken, as was usual practice, on the traditional basis of confidentiality of pricing information. At that time both that the Health Board and the private sector hospitals considered the information to be confidential. Whilst there is no confidentiality clause, I accept that the pricing information was supplied with the understanding that it was confidential information and I accept that there existed, at least at the time when tenders were invited and evaluated and the contract awarded, an obligation on the Health Board to maintain confidentiality.
24. Having accepted that the information submitted in the tender would have been confidential at the time of submission to and evaluation by the Health Board, the question is whether there still exists an obligation to maintain confidentiality. As I said in Decision 034/2006 - Mr David Smith of Pentland Homeowners Association and Dundee City Council (at paragraph 51) - pricing information will lose relevance (and therefore confidentiality) with the passage of time in all but exceptional circumstances. The tender information in this case formed the basis of a tender concluded in late 2004 and Ms Puttick's request was considered by the Health Board between July and September 2005. The Health Board and the private hospitals have said that this was insufficient time for this particular information to lose its confidentiality.
25. Nuffield submitted (31 May 2006) that it would consider 5 years a reasonable period for this information to lose its commercial sensitivity. It stated that to release this information would commercially damage not only it, but the Nuffield Hospital Group as a whole. It explained that ongoing negotiations with private medical insurers (its core business) would be affected if the tendering details were released.
26. It also highlighted the fact that the health care market was restricted and specialised with few "operators" within the market.

27. Whether or not it would take 5 years for the information to lose relevance, I accept that the sensitivity of the pricing information would not have decreased sufficiently significantly between the award of the contracts in late 2004 and the time Ms Puttick's request was considered by the Health Board: the prices quoted by the hospitals could at that time have remained a guide to the submission of prices for any similar tender in future and could have affected their dealings with private insurers: I cannot reject the view that the Courts would have been likely to uphold an obligation to maintain confidentiality for this information.
28. The third requirement is that there must be a disclosure which has not been authorised by the person who communicated the information, but which would cause damage to that person. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence: (in that respect it is different from the establishing, for example, whether disclosure would prejudice substantially the commercial interests of any person which would be the test when considering the exemption at section 33(1)(b)). Here, it is clear that the private sector hospitals do not wish the information to be disclosed and believe that release would in some sense be detrimental to their interests by providing information of value to direct competitors tendering for future and similar contracts and by providing information which may be of value to private medical insurers conducting negotiations with the private hospital over the costs charged to their clients for knee and hip replacement operations. The advantage gained by the competitors and insurers could be used to the detriment of the hospitals.
29. Having considered the submissions from the Health Board and Nuffield, and Ms Puttick, I am satisfied that there could be some detriment to the private sector hospitals, in the sense required for there to be an actionable breach of confidence, should the information be released.
30. Public interest considerations must also be taken into account when applying this exemption. However, the public interest considerations which have to be taken into account are different from the public interest test contained in section 2(1) of FOISA. The exemption in section 36(2) is not subject to the public interest test in section 2(1). However, the law of confidence recognises that there is a strong public interest in ensuring that people respect confidences and the burden of showing that a breach of confidence would be in the public interest is therefore a heavy one. Nevertheless, in certain circumstances the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure.

31. The courts have considered this public interest defence when deciding whether withholding information would cover up wrongdoing, whether it would allow the public to be misled or would unjustifiably inhibit public scrutiny of matters of genuine public concern. As I have said, this public interest test is different from the test in section 2(1) of FOISA – showing that a breach of confidence would be in the public interest therefore places a heavy onus on whoever is trying to argue that is the case. In this case the argument is that the contracting out of medical services is a matter of public debate and interest and it would be in the interest to know what the National Health Service is being charged for specific procedures, which might allow a comparison with cost incurred if the procedures were carried out by the NHS itself), although it would appear that such comparative costs are not readily available, and also to establish how those costs compare with what is being charged by the private hospitals for private clients to see whether the NHS is obtaining value for money. The merits of this argument however are not sufficient where I have determined that disclosure would constitute an actionable breach of confidence. In this case there is no suggestion of wrong doing or specific concern over the awarding of this contract and the price being paid for the operations and so I do not see that there is a strong argument for the release of the information on the public interest grounds applicable to this exemption.
32. I accept that the information withheld falls within the exemption in section 36(2) and consequently that the Health Board complied with Part 1 of FOISA in the application of the exemption under section 36(2) of FOISA to the information requested by Ms Puttick.

Decision

I find that Greater Glasgow NHS Board (the Health Board) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in its application of the exemption under section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) to the information requested by Ms Puttick.

I do not require any action by the Health Board.

Kevin Dunion
Scottish Information Commissioner
5 October 2006