

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 December 2019

**Public Authority:** Pharmacy2U  
**Address:** 1 Hawthorn Park  
Leeds  
LS14 1PQ

#### Decision (including any steps ordered)

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1. The complainant has submitted a 10 part request to Pharmacy2U. Pharmacy2U indicated that it was not a public authority for the purposes of the FOIA for nine parts of the request and relied on section 21 of the FOIA (information accessible to applicant by other means) to withhold information relevant to one part.
2. During the Commissioner's investigation Pharmacy2U reconsidered its position with regard to the request and issued a fresh response to the complainant. Pharmacy2U confirmed that it considers it is not a public authority for the purposes of the FOIA with regard to parts 1, 2, 3, 4 and 5 of the request.
3. Pharmacy2U says that information that it holds that is related to parts 7, 8, 9 and 10 is caught by the FOIA but is exempt information under section 43(2) (commercial interests) and the balance of the public interest favours maintaining this exemption.
4. Pharmacy2U has released information relevant to part 6 and directed the complainant to where other information related to this part is published. The complainant is satisfied with Pharmacy2U's fresh response to part 6 of the request but is dissatisfied with Pharmacy2U's response to the remaining nine parts.
5. The Commissioner's decision is as follows:

- If held, the information requested in parts 1, 2, 3, 4 and 5 of the request is held for the purposes of the FOIA. Pharmacy2U therefore breached section 1(1)(a) and section 10(1) of the FOIA with regard to these parts.
  - The information the complainant has requested in parts 7, 8, 9 and 10 is exempt information under section 43(2) of the FOIA and the public interest favours maintaining this exemption.
  - Pharmacy2U breached section 17(1) of the FOIA as it did not issue a refusal notice in respect of parts 7, 8, 9 and 10 within 20 working days of the request.
6. The Commissioner requires Pharmacy2U to take the following step to ensure compliance with the legislation:
- Provide the complainant with a fresh response to parts 1, 2, 3, 4 and 5 of his request that complies with the FOIA.
7. Pharmacy2U must take this step 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

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8. Pharmacy2U (P2U) is a distance-selling pharmacy. It offers a home delivery prescription service for NHS and private patients, online doctor consultations, and health and wellbeing retail products.
9. On 21 January 2019 the complainant wrote to P2U and requested information in the following terms:

*"[1] Please confirm or deny if Pharmacy2u has undertaken a Risk Assessment for the Provision of medicines through EPS (as an NHS Contractor) in line with the guidance of the GPC "registered pharmacies providing pharmacy services at a distance"*

*[2] If a risk assessment has been undertaken please provide a copy of this risk assessment.*

*[3] Please confirm or deny if Pharmacy2u has undertaken an Audit of Supply under EPS in line with the requirements for registered pharmacies providing pharmacy services at a distance/*

*[4] Please provide a copy of the last Audit report.*

*[5] Please confirm or deny if Pharmacy2u has undertaken an Audit of its third party delivery agents (e.g. Royal Mail)*

*[6] Please confirm the number of deliveries of NHS Prescriptions made to patients between 1st July 2018 and 31st December 2018.*

*[7] Please confirm the number of deliveries (for NHS Prescriptions) during the same time period where there was a reported failure to deliver to the correct address/patient. (i.e. the number of occasions that the wrong person received the delivery)*

*[8] Please confirm the number of deliveries in the same time period (for NHS Prescriptions) where the medicine was reported undelivered by the patient. (i.e. missing and unaccounted for)*

*[9] Please confirm or deny if Pharmacy2u has validated the temperature of their NHS Prescription distribution network (e.g. Royal Mail) to ensure medicines which:*

- Require ambient storage are maintained at ambient temperatures during summer months and winter months*
- Require refrigerated storage are maintained at 2-8C during summer and winter months*

*[10] Please provide a copy of any protocol for temperature validation in transit."*

10. P2U responded on 13 March 2019. It stated the information requested in all 10 parts of the request "does not concern an NHS contracted service" and that "this is not within scope of this request".
11. The complainant requested an internal review on 14 March 2019, providing arguments to support his position that the requested information is covered by the FOIA.
12. P2U provided an internal review on 2 April 2019. It maintained its position that it is not a public authority for the purposes of the FOIA with regards to the information requested in parts 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the request.
13. With regard to part 6, P2U said that this information is exempt from release under section 21 of the FOIA as it is already accessible to the complainant.
14. As a result of this complaint to the Commissioner, P2U revised its position and confirmed that it had communicated its new position to the complainant in correspondence dated 8 November 2019. As detailed

above, it considers it is not a public authority for the purposes of the FOIA with regard to parts 1, 2, 3, 4 and 5 of the request. P2U says that information that it holds that is related to parts 7, 8, 9 and 10 is caught by the FOIA but is exempt information under section 43(2) and the balance of the public interest favours maintaining this exemption. It released information relevant to part 6 and directed the complainant to where other information related to this part is published.

## **Scope of the case**

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15. The complainant first contacted the Commissioner on 4 April 2019 to complain about the way his request for information had been handled.
16. P2U did not provide the Commissioner with a submission by the required deadline or communicate adequately with her. It was therefore necessary for the Commissioner to serve P2U with an Information Notice on 8 October 2019 in order to be provided with the necessary submission.
17. Following P2U's fresh response to the complainant of 8 November 2019, the complainant confirmed that he is dissatisfied with P2U's response to parts 1, 2, 3, 4, 5, 7, 8, 9 and 10 of his request.
18. The Commissioner will first explain why she considers that P2U can be categorised as a public authority – and is therefore subject to the FOIA – for the purpose of the information requested in parts 1, 2, 3, 4 and 5 of the request. She will then consider whether P2U has complied with section 1 and 10 of the FOIA with regard to those parts.
19. The Commissioner will then consider whether the information requested in parts 7, 8, 9 and 10 is exempt information under section 43(2) of the FOIA, and the balance of the public interest, and whether P2U complied with section 17(1) with respect to those parts.

## **Why Pharmacy2U can be categorised as a public authority for certain parts of the request**

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20. The FOIA gives members of the public the right to access recorded information held by public authorities and places a duty on public authorities to respond to requests for such information.
21. The definition of 'public authority' is given in section 3(1) of the FOIA. In particular it states that under the FOIA a "public authority" means -

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which -
    - (i) is listed in Schedule 1, or
    - (ii) is designated by order under section 5, or
  - (b) a publicly-owned company as defined by section 6.
22. With regard to Schedule 1 of the FOIA, paragraph 44 lists as a public authority:
- “Any person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, in respect of information relating to the provision of those services.”*
23. That is to say that if a request is submitted to person providing pharmaceutical services under the National Health Service Act 2006 and the request is for information about the provision of those services, then the person can be categorised as a public authority.
24. In its submission to the Commissioner P2U has set out why it considers that the information the complainant has requested – which concerns a risk assessment and audit associated with its electronic prescription service (EPS) – does not fall under paragraph 44 of Schedule 1 of the FOIA.
25. P2U says that, as is the case with other commercial pharmacies, it provides pharmaceutical services under the National Health Service Act 2006. However, it says that this is only one part of its wider services. Quoting the wording of the Commissioner’s guidance *‘Guide to information provided by pharmacy businesses under the model publication scheme’*, P2U says it is only a public authority specifically in respect of information relating to those services.
26. P2U’s position is that the information requested by the complainant in parts 1, 2, 3, 4 and 5 of his request is not held in relation to an activity that is sufficiently related to its provision of NHS pharmacy services to render P2U a public authority in relation to such activities.

27. P2U drew the Commissioner's attention to her recent decision in FS50724790<sup>1</sup> dated 21 November 2018. In that case the Commissioner considered whether information requested from Boots Group Plc ('Boots'), another commercial pharmacy, was held by Boots in relation to its NHS pharmacy services.
28. It notes that in that case the Commissioner found that the information requested from Boots did relate to Boots' provision of NHS pharmacy services. However, P2U distinguished its relevant activities from those of Boots for reasons it set out by reference to the five requests in this case.
29. Parts 1 and 2 of the request are as follows:
  1. *Please confirm or deny if Pharmacy2u has undertaken a Risk Assessment for the Provision of medicines through EPS (as an NHS Contractor) in line with the guidance of the GPC "registered pharmacies providing pharmacy services at a distance"*
  2. *If a risk assessment has been undertaken please provide a copy of this risk assessment.*
30. P2U has summarised the relevant circumstances of the Boots case, as follows:
  - An individual had requested information from Boots about time standards associated with its dispensing services, and how Boots calculated community pharmacy staffing needs and associated costs (the "Time Standards Information").
  - Boots took the primary position that the Time Standards Information was not held in relation to its services under the National Health Service (Pharmaceutical Services and Local Pharmaceutical Services) Regulations 2013 (the "Regulations") and, by extension, was not information about the provision of services for which it should be categorised as a public authority.
  - The Commissioner disagreed and found that "In the Commissioner's view the time standards Boots uses to determine staffing levels for particular pharmacy tasks (request 13) and how

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553869/fs50724790.pdf>

Boots calculates staffing and funding (request 14) both relate to its provision of NHS pharmacy services." As such, Boots had an obligation to respond to the requests.

- In the case it appeared to be material that the NHS Terms of Service (at Schedule 4 of the Regulations) required it to have a "staffing and staffing management programme". In other words, the requestor could identify a legal obligation to which Boots was subject that directly related to the requested information. To that end, it did not matter that the legal obligation did not expressly require Boots to maintain the specific information that was requested, it was enough that there was a related legal obligation.
31. P2U notes that part 1 of the request does refer to information that may be held "*in line with the guidance of the GPhC [General Pharmaceutical Council] "registered pharmacies providing pharmacy services at a distance".*" (dated April 2015) (the '2015 Guidance'). P2U says that the 2015 Guidance is, however, voluntary in the sense that the Guidance notes that "*there are a number of ways to achieve...safe treatment, care and services*" and has directed the Commissioner to page 5 of the 2015 Guidance, where this is stated<sup>2</sup>. As such P2U says it may consider it inappropriate to follow the 2015 Guidance.
32. P2U argues that this is a very different position to the Boots case in which a failure by Boots to maintain a "*staffing and staffing management programme*" as required by the NHS Terms of Service would have amounted to a breach of the Terms of Service.
33. Parts 3 and 4 are as follows:
- 3. *Please confirm or deny if Pharmacy2u has undertaken an Audit of Supply under EPS in line with the requirements for registered pharmacies providing pharmacy services at a distance.*
  - 4. *Please provide a copy of the last Audit report.*
34. P2U considers that, in contrast to the Boots case (as summarised above), where the NHS Terms of Service set out a requirement for which the Time Standards Information related, in this case there is no

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[https://www.pharmacyregulation.org/sites/default/files/guidance\\_for\\_registered\\_pharmacies\\_providing\\_pharmacy\\_services\\_at\\_a\\_distance\\_including\\_on\\_the\\_internet\\_april\\_2015.pdf](https://www.pharmacyregulation.org/sites/default/files/guidance_for_registered_pharmacies_providing_pharmacy_services_at_a_distance_including_on_the_internet_april_2015.pdf)

equivalent requirement to which the requested information relates. P2U has put it this way: it considers that the complainant is requesting information that P2U has professional and commercial discretion as to whether it maintains or not. P2U argues that, as such, the information requested in parts 3 and 4 does not relate to its provision of NHS pharmacy services and is therefore not a designated FOIA function.

35. Part 3 refers to undertaking an Audit of Supply in line with the requirements under the 2015 Guidance. P2U notes that, as explained above, the 2015 Guidance is voluntary in the sense that it notes that "*there are a number of ways to achieve...safe treatment, care and services*" and as such P2U may consider it inappropriate to follow the 2015 Guidance. P2U again says that this is a very different position to the Boots case in which a failure by Boots to maintain a "*staffing and staffing management programme*" as required by the NHS Terms of Service would have amounted to a breach of the Terms of Service.

36. Finally, part 5 is as follows:

*5. Please confirm or deny if Pharmacy2u has undertaken an Audit of its third party delivery agents (e.g. Royal Mail)*

37. P2U says that it considers that, in contrast to the Boots case, where the NHS Terms of Service set out a requirement for which the Time Standards Information related, in this case there is no equivalent requirement to which the requested information relates. Again, P2U considers that the complainant is requesting information that it has professional and commercial discretion as to whether it maintains or not. As such, it is P2U's position that the information requested in part 5 does not relate to its provision of NHS pharmacy services and is therefore not a designated FOIA function.

38. The complainant has put forward arguments to support his position that the information he has requested in parts 1 to 5 are covered by the FOIA. He has noted that in his request for an internal review he had argued that the "*National Health Service (Pharmaceutical Services) Regulations 2012 form part of the legislation defined by the National Health NHS Act 1977*" and that these regulations are therefore within the scope of the FOIA.

39. The Commissioner understands that the National Health Service (Pharmaceutical Services) Regulations are the National Health Service (Pharmaceutical Services) Regulations<sup>3</sup> 2013 ('the Regulations') rather

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<sup>3</sup> <https://www.legislation.gov.uk/ukxi/2013/349/regulation/2/made>

than 2012, and that the National Health Service Act 2006 has superseded the National Health Service Act 1977. On the opening page of the Regulations it is stated that they have been made by the Secretary of State in exercise of powers conferred by certain sections of the National Health Service Act 2006.

40. Paragraph 29 of Schedule 4 of the Regulations requires that:

*"An NHS pharmacist must provide pharmaceutical services and exercise any professional judgement in connection with the provision of such services in conformity with the standards generally accepted in the pharmaceutical profession."*

41. The complainant says that, as he had stated in his request for an internal review, the 2015 Guidance *"must surely be 'generally accepted' standards"*. Therefore, to comply with the Regulations *"a pharmacy must comply with the GPhC standards, and so information relating to the compliance with those standards (for patients receiving NHS Services) must be within the scope of the Regulations and since the Regulations are within the scope of the NHS Act, and the FOI Act 2000 is within the scope of the NHS Act, vis-à-vis compliance with GPhC standards is within the scope of the FOI Act 2000."*

42. The complainant notes that P2U considers that parts 1 – 5 of this request relate to voluntary guidance (rather than mandatory standards), and therefore are not covered by the requirement to provide services *"in conformity with standards generally accepted"*. He considers it somewhat disingenuous to consider that the 2015 Guidance from the relevant UK regulator (ie the GPhC) is not generally accepted standards.

43. The complainant says, notwithstanding that, the regulatory requirement at Standard 1.1 of the GPhC's guidance *'Standards for registered pharmacies'*<sup>4</sup> (revised June 2018) is that *"The risks associated with providing pharmacy services are identified and managed"*.

44. The complainant notes that the GPhC requires that risks are identified and managed. Part 1 and 2 of his request asked if a risk assessment had

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[https://www.pharmacyregulation.org/sites/default/files/document/standards\\_for\\_registered\\_pharmacies\\_june\\_2018\\_0.pdf](https://www.pharmacyregulation.org/sites/default/files/document/standards_for_registered_pharmacies_june_2018_0.pdf)

been undertaken, and for a copy of the risk assessment to be provided. The complainant considers parts 3 – 5 of his request also fall within the scope of risk assessment discussed in the guidance. In his view it is impossible for this – that is, a risk assessment and audit that would identify and manage risks as required by the GPhC - not to be a generally accepted standard. He considers that a risk assessment (and the requested audit) is therefore a requirement of the Regulations, which he says are included within the scope of the FOIA, by way of being part of the National Health Services Act 2006.

45. The Commissioner has noted the complainant's point that the Regulations oblige a pharmacy delivering NHS Services to conform with "*the standards generally accepted in the pharmaceutical profession.*" And she has noted the complainant's point that one of the standards in the GPhC's '*Standards for registered pharmacies*' is that pharmacies must identify and manage risks associated with providing pharmacy services.
46. The associated 2015 Guidance from GPhC discusses how the risks associated with providing a prescription service at a distance might be identified and managed. P2U may follow the 2015 Guidance and undertake a formal risk assessment (and audit) for its electronic prescription service; a process that the 2015 Guidance advises pharmacies to carry out. Alternatively, it might follow the 2015 Guidance and ensure it achieves "safe treatment, care and services" through another way. Either way, it appears to the Commissioner that P2U is following the 2015 Guidance.
47. But the matter here is not whether P2U has or has not maintained a risk assessment or carried out an audit, or is specifically required to do so. It concerns whether, under the 2013 Regulations, P2U is required to follow the generally accepted pharmaceutical standards; one of which is that pharmacies must identify and manage risks.
48. P2U may consider it has professional and commercial discretion as to whether it follows the 2015 Guidance and maintains a risk assessment, specifically, in order to comply with the above standard. But the Commissioner does not consider that P2U has professional and commercial discretion as to whether it follows the general pharmaceutical standard to identify and manage risks.
49. The Commissioner agrees with the complainant that appropriately identifying and managing the risks associated with its EPS is a generally accepted standard that P2U is required to follow under the 2013 Regulations which are associated with the National Health Service Act 2006.

50. Furthermore, the Commissioner considers that the five parts of the request concern the delivery of NHS services because they are for information associated with the safe management of the EPS through which P2U manages NHS prescriptions ie P2U's delivery of an NHS service. The Commissioner therefore disagrees with P2U that, if held, the information requested in parts 1 – 5 is not held in relation to an activity sufficiently related to its provision of NHS pharmacy services to render P2U a public authority in relation to such activities.
51. The Commissioner finds that P2U can be categorised as a public authority for the purposes of the information requested in those parts and so is obliged to provide a response to those parts under the FOIA.

## Reasons for decision

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### **Section 1 – general right of access to information held by public authorities / section 10 – time for compliance**

52. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.
53. Section 10(1) of the FOIA obliges a public authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
54. P2U did not consider it was a public authority for the purpose of the FOIA with regard to parts 1, 2, 3, 4 and 5 of the request, and considered that, therefore, it was not obliged to comply with section 1 of the FOIA with regard to those parts.
55. As has been discussed above, the Commissioner considers that P2U **is** a public authority with regard to the information requested in the above five parts. It therefore had a duty to comply with section 1 and section 10 of the FOIA with regards to parts 1, 2, 3, 4 and 5; because it did not, the Commissioner finds that PS2 breached section 1(1)(a) and section 10(1) with regard to those parts.

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

56. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

57. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, 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.
58. 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.
59. 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 authority. The anticipated prejudice must be more likely than not.
60. Section 43(2) is subject to the public interest test.
61. P2U is relying on section 43(2) with regard to parts 7, 8, 9 and 10 of the request. Part 7 is a request for the number of occasions over a particular period when medicine was delivered to the wrong person. Part 8 is for the number of occasions when the patient reported their medicine undelivered. With regard to both these parts, P2U has said in its submission that its delivery service levels are confidential (as they are in almost all distance selling businesses). It says that its position in the retail pharmacy sector could be undermined if competitors were able to determine P2U's service levels, and so adapt their own plans, tenders and marketing information accordingly.
62. In correspondence to the Commissioner, the complainant has disputed that P2U's commercial interests would be prejudiced if the information requested in parts 7 and 8 was to be disclosed. He says that he has not asked P2U to provide details of its operational requirements or its agreed service levels. However he says he has, to a degree, asked for the service level P2U is achieving, acknowledging that there may be factors other than the logistics provider associated with the accuracy of deliveries. The complainant considers that this service level may be better than contractual levels, the same as or worse. It is therefore not clear to him that releasing the information would prejudice P2U's commercial interests. He considers that, at best, it should have

concluded there was a lower risk of its commercial interests being prejudiced.

63. The complainant has argued that, without this information, patients cannot select a competitor who offers the level of service they wish. There can be no scrutiny of the service, and there is a lack of transparency, which, the complainant says, causes feelings of [P2U] having something to hide. He considers that if every provider of NHS prescriptions services releases this information, it would be possible to compare and benchmark.
64. In the complainant's view P2U seems to have determined that it could be detrimental to it to release this information without knowledge about their competitors' performance. Therefore "they" (by which the Commissioner understands the complainant to mean P2U) do not know if they could also use this to improve their own market position. The complainant says that NHS hospitals regularly contract "homecare providers" to deliver medicines to patient homes. He says the service levels of these providers were shared publicly at conferences and that the service level seems poorer than might be expected. The complainant considers that service levels from on-line pharmacy services (such as P2U) would provide a useful contrast to help those hospitals ensure they are providing best value for NHS money when they award such contracts.
65. Part 9 of the request is for confirmation or denial that P2U has validated particular temperatures at which Royal Mail distributes medicines for P2U. Part 10 of the request is for a copy of any temperature validation protocol.
66. In his correspondence to the Commissioner, the complainant has disputed that P2U's commercial interests would be prejudiced if the information requested in parts 9 and 10 was to be disclosed. With regard to part 9, he has noted that the request is not for commercially sensitive data. The request is for a simple "Yes" or "No" response and that there is no commercially sensitive data in the response requested. The complainant considers that the only way this binary response can be used against an on-line pharmacy business is if the response is "No". If the response is "No" then the complainant considers there is a public interest case to be made. Namely, if medicines being transported to patients' own homes cannot be assured of correct temperature storage, because the process has not been validated, then the public should have a right to be aware of this as this may present a patient safety concern.
67. With regard to part 10, the complainant says he accepts that the protocol he has requested is likely to contain information that could be useful to a competitor company, for instance by saving it having to

perform the same validation. However, the complainant considers it would be possible to provide a suitably redacted copy of a protocol. For instance, a protocol would be likely to state the nature of the packaging materials. The complainant says that these, for instance, can be redacted to prevent the protocol being used by another company. Likewise, the protocol can be redacted to remove the information about the duration of adequate temperature protection for which any packaging was tested.

68. P2U has confirmed to the Commissioner that it considers that it holds information falling within the scope of part 9, despite this part appearing to require simply a Yes/No answer. With regard to both parts 9 and 10 P2U has said in its submission that the specific operational requirements it imposes on its logistics providers are confidential (again, as they are in almost all distance selling businesses). It again says that its position in the retail pharmacy sector could be undermined if competitors were able to determine P2U's service levels, and so adapt their own plans, tenders and marketing information accordingly.
69. The Commissioner has considered the positions of both P2U and the complainant, and the criteria from paragraph 57. With regard to the first of the criteria, the Commissioner is satisfied that the actual harm that P2U alleges would, or would be likely to occur if the withheld information relating to all four parts was disclosed relates to interests applicable to section 43(2) ie it relates to P2U's commercial interests.
70. For the second criteria to be met, P2U 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.
71. P2U has said that if it was to disclose particular service levels and particular operational requirements that it imposes on its logistics providers, its position in the retail pharmacy sector could be undermined. This is because competitors would be able to adapt their own plans, tenders and marketing information in order to make their tender or service appear more attractive.
72. The Commissioner accepts that if P2U was to disclose the level of service it achieves in terms of the number of occasions when medicine was delivered to the wrong person and the number of occasions when undelivered medicine was reported, P2U's competitors could use this information to market their own organisations, or to use in competing tenders for services, and P2U could therefore potentially lose customers.

73. Similarly, the Commissioner accepts that if a protocol that P2U has in place with its delivery agent was released, competing organisations might either use the information to adapt their own existing or future protocol or, again, use the information in the protocol to market their own organisations, or to use in competing tenders for services. P2U has provided the Commissioner with a copy of the protocol in question. The Commissioner does not consider the protocol could be redacted in such a way as to be left with any meaningful information that could be released.
74. With regard to the complainant's point that other pharmacy providers had shared their service levels at conferences, the Commissioner makes two points. First, P2U does not appear to have been one of those providers sharing their service levels. And second, service levels may have been shared at conferences but that is a relatively restricted arena. This is in contrast to releasing information under the FOIA in which information is, in effect, released to the world at large.
75. The final criteria concerns the level of likelihood that the envisioned prejudice to P2U's commercial interests will occur. The Commissioner has interpreted its references to 'could' in P2U's submission as meaning that it considers that the envisioned prejudice would be likely to occur, rather than would occur. Although it is a lower level of risk, the Commissioner is satisfied that prejudice to P2U's commercial interests is more than a hypothetical possibility and is a real risk.
76. The Commissioner is satisfied that the three criteria at paragraphs 57 – 59 have been met. She has decided that the information being withheld with regard to parts 7, 8, 9 and 10 engages the exemption under section 43(2) of the FOIA, including the protocol in its entirety, and she has gone on to consider the public interest test associated with section 43.

### **Public interest test**

#### *Public interest in disclosing the information*

77. With regard to all four parts of the request, P2U has said that there is a public interest in being able to analyse failures to deliver NHS prescriptions and in analysing the conditions under which NHS prescriptions are transported.
78. With regard to parts 7 and 8 of the request, the complainant has argued that there is public interest in the effectiveness and safety of on-line pharmacy businesses. He says this has been the subject of much speculation, hearsay and criticism in the pharmacy profession; high street pharmacies have suggested that on-line business is preventing

fair commercial competition and will result in the loss of a mixed economy.

79. The complainant says that specifically in this case, there is a public interest in understanding any safety and transparency issues and accountability and loss of confidentiality issues that might be associated with medicines that are delivered to the wrong person. He says such issues pose a risk for those who do receive the medicines, who may take them in error, and a risk for those who should have received the medicines who may have a resulting delay in receiving replacement supplies.
80. The complainant considers that by "hiding behind" section 43(2), P2U is failing to uphold standards of integrity and transparency. He says patients should have a right to select services based on information about the quality and safety of the service. Additionally, the public should have a right to know if there is a genuine safety concern or if such concern is actually hearsay and speculation.
81. With regard to part 10, the complainant considers that through disclosing a (redacted) protocol P2U would be able to demonstrate that it has adequately considered the issue of temperature validation. He has argued that this would be of public interest because currently P2U's position that implies that it "has something to hide".

*Public interest in maintaining the exemption*

82. PS2 has argued that if the requested information is disclosed, and so becomes available to its competitors, this might be detrimental to the overall competition in the marketplace, as well as to its own position in the marketplace. It says that if competitors discover details of P2U's delivery service levels and the specific operational requirements imposed on its logistics providers (including instructions on storage temperature), there is a risk that competitors will react by adapting their own commercial and trade practices accordingly. This may, in turn, affect the end-customers of pharmaceutical products in general (ie not just customers of P2U). P2U argues that the effect on those customers might not necessarily be positive. For example, P2U's commercial and trade practices are unique to it. If a competitor chooses to copy those practices (once they have been made available to the public by releasing the information under the FOIA in response to this request), first, there is a very likely risk that P2U will lose a component of its unique selling point that differentiates it from other companies in the market-place. Second, there is also a possibility that customers will be adversely affected (for example, the service to the customer may suffer in the time that a competitor takes to adjust their commercial and trade practices).

83. P2U has also argued that releasing the requested information could set a precedent for future FOIA requests. It says that private businesses should not need to be concerned that their commercial practices might be made available for public consumption and scrutiny, to the extent that any part of that private business has a public function crossover. PSU considers that if the line is drawn here, private businesses could resist entering into contractual relationships with public bodies – because of the risk of their commercial and trade practices being made available for public consumption. The wider policy argument is the risk of discouraging private companies to work and cooperate with public sector organisations.

*Balance of the public interest*

84. In addition to the public interest arguments he has given from paragraph 78, the Commissioner has noted associated arguments the complainant provided in his submission: that without disclosure of the requested information potential patients cannot: scrutinise P2U's service; compare services; select a service that best suits their needs or be reassured that the P2U service is safe. The complainant also considers that disclosure would evidence whether NHS money is being used efficiently.
85. From her own research the Commissioner is aware that P2U had been the subject of somewhat negative news articles and surveys in 2015 concerning its marketing campaigns and technical problems it experienced. And in 2017 the Care Quality Commission found issues with aspects of P2U's service.
86. However, the complainant submitted his request in January 2019, some two years after the most recent news story that the Commissioner has identified. The Commissioner has not been made aware of any concerns about P2U's service levels or performance (in relation to the aspects of its service covered by the complainant's request) that were current at the time of the request. In addition there are a number of bodies who monitor and regulate the P2U – as they do with any other pharmacy related service – such as the GPhC and the Royal Pharmaceutical Society.
87. The Commissioner is aware that a concern exists about the impact that distance-selling pharmacies such as P2U have on more traditional, 'high street' pharmacies. This would appear to be commercial concern rather than a wider public interest concern. The Commissioner has not been presented with evidence to suggest P2U has "something to hide" with regard to the aspects of its service that are the focus of the four parts of complainant's request; she has found that it can rely on section 43(2) to

withhold information requested in those parts in order not to prejudice its commercial interests.

88. Having considered all the circumstances and all the public interest arguments provided, the Commissioner has decided that there is insufficient wider public interest in the matter of P2U's prescription delivery service at the time of the request or currently to warrant possible prejudice to its commercial interests through disclosing the requested information. On this occasion the Commissioner considers that there is greater public interest in P2U being able to compete fairly in the pharmacy market, and, as a provider of NHS pharmaceutical services, to be able to offer the public a strong and efficient service. The Commissioner considers that there is a stronger public interest in the public benefitting from NHS services being delivered by a range of providers, in different way ways to suit different individuals. In her view, the public interest in disclosure in this case is not sufficiently strong to override the risk that private companies, such as P2U, may choose not to contract with public bodies if they thought their commercial interests could be prejudiced as a result, thus narrowing consumers' choice.

### **Section 17 – refusing a request**

89. Under section 17(1) a public authority that is relying on a claim that the requested information is exempt information must issue an appropriate refusal notice to the applicant within the time for complying with section 1(1) ie 20 working days.
90. In this case, the request was submitted on 21 January 2019 and P2U did not refuse parts 7, 8, 9 and 10 under section 43(2) until 8 November 2019. P2U therefore breached section 17(1) of the FOIA with regard to those parts.

## Right of appeal

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91. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

92. 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.
93. 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**  
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**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**