

Reference:	FOI.16175.24
Subject:	Audits on agency workers
Date of Request:	11 December 2024

Requested:

For the last 24 months, I kindly request access to any reports, findings, or data resulting from audits or investigations carried out by the Health Board on agency workers with limited companies registered on Companies House.

Response:

Hywel Dda University Health Board (UHB) is issuing a Refusal Notice under section 17 of the Freedom of Information Act 2000 (FoIA), as it is applying the exemptions set out below.

Section - Law enforcement

The UHB considered that the information requested is exempt from disclosure under Section 31(1)(d), which provides that:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice —

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature.”

In addition, it can be claimed by any public authority. The UHB is relying upon this exemption as it considers that releasing this information would impact on the UHB’s ability to apply its investigatory powers and would likely prejudice the assessment or collection of any tax or duty. The UHB has a responsibility to ensure that all necessary checks are undertaken when processing payments, including applying statutory deductions.

Section 31 is a qualified exemption and is subject to the public interest test. Information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The UHB has considered the following as part of the public interest test:

In favour of disclosure: There is a legitimate public interest in transparency and accountability of the ways in which public bodies operate and manage their services and operational functions. Disclosure would demonstrate that the UHB takes its duties and responsibilities seriously, and that it recognises that the responsibility of tax deductions changes, dependent on individual status. Therefore, disclosure would demonstrate to the public that the UHB undertakes the required audits to ensure tax liability is applied appropriately.

Against Disclosure: The UHB requires the ability to conduct audits and investigations, and disclosure of these documents would inhibit the UHB’s ability to effectively process and manage the recruitment of agency staff, and undertake checks, audits and investigations, in order to be compliant with its legal responsibilities. Disclosure of this information to the wider public domain could inform those incorrectly operating of the processes undertaken and in turn, inadvertently assist with incorrect practice. This would further impede the UHB from being able to undertake through investigations to establish where the responsibility of tax payments sits for agency staff.

Decision: The UHB has considered that releasing the information under the FoIA could inhibit the UHB's ability to conduct effective investigations, which could, in turn, hinder the UHB's ability to review practices. Where the responsibility for the payment of an individual's tax contributions shifts when utilising private companies, the UHB has a duty to ensure that all relevant checks are completed, to ensure that any duty that sits with the UHB for the payment of tax contributions is fulfilled. Whilst the public interest in openness and transparency is strong, it is outweighed by the UHB's need to undertake audits and investigations of its agency staff without the information being released into the public domain.

Therefore, the public interest in withholding the requested information is greater than its disclosure, and the UHB is applying Section 31(1)(d). This will enable the UHB to maintain its requirement to determine the manner in which agency staff are recruited and who carries the responsibility of tax payments.

Section 36 – Prejudice to the effective conduct of public affairs

The UHB has also considered applying an exemption under Section 36(2)(c) of the FoIA, to the disclosure of the information requested. This states that:

*“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”*

Information being considered under this exemption would or would be likely to prejudice the effective conduct of public affairs, in the reasonable opinion of the UHB's qualified person; in this case, the UHB's qualified person is the Chief Executive.

The UHB considers that the disclosure of the requested information would be likely to prejudice the effectiveness of the UHB's processes and its duty to be compliant with regulations and legislation, and would likely inhibit the UHB from undertaking any necessary enquiries and due diligence required to fulfil its duties and obligations. The UHB relies on maintaining clear open communication with its partners, in this case the agencies that supply nursing staff. There are clear requirements for the UHB to understand who holds the responsibility for the payment of an individual's statutory deductions. We therefore rely on the agencies' cooperation to comply and participate in any investigations and audits the UHB undertakes to regulate this.

Undermining this relationship by disclosing the manner in which the UHB and its partners share information, and the type of information being shared, could breach the trusting relationship that has been built and prevent the agencies from working as closely with us in the future. This, in turn, would be detrimental to the UHB's abilities to undertake such audits and investigations and could lead the agencies to withdraw from supplying us with staff, which would impact upon our services by impeding our staffing levels and ability to provide safe patient care.

The Section 36 exemption is qualified and is subject to the public interest test. Information can only be withheld if the public interest in maintaining this exemption outweighs the public interest in disclosure. The UHB has considered the following as part of the public interest test:

In favour of disclosure: There is a legitimate public interest in transparency and accountability of the ways in which public bodies operate and manage their services and operational functions. Disclosure would demonstrate that the UHB understands its duties and has policies and procedures in place to ensure its compliance. This would enhance the public's understanding of the UHB's processes, and the due diligence required in recruiting agency staff and building trust between the public and the UHB.

Against Disclosure: When engaging agency staff, the UHB has a duty to understand whether that person is employed in an individual capacity or as a Limited Company, as their status determines who is responsible for paying the tax deductions to His Majesty's Revenue and Customs (HMRC). The UHB requires the ability to conduct audits and investigations and reserves the right to determine the appropriate time to undertake such checks. This is in order to ensure the UHB's fulfilment of its duties and responsibilities for the protection and maintenance of its staffing levels, to secure adequate provision for safe and sustainable service delivery.

Decision: The UHB strives to be open and transparent with the public and share its practice and policies by way of reassurance and to strengthen relationships with its service users and members of the public. However, it maintains that the public interest in protecting the UHB's ability to conduct investigations and audits by way of the effective conduct of public affairs in its role as a Public Authority outweighs the public interest in disclosure of the requested information. This is because the UHB must be able to make appropriate and adequate enquiries with contracted agencies, to ensure that it can determine which party carries the responsibility of paying tax. The inability to conduct these effective audits and enquiries could result in the non-payment of tax by the correct party.

Therefore, the public interest in withholding the requested information is greater than its disclosure, and the UHB is applying Section 36(2)(c) of the FoIA to the requested information. This will enable the UHB to maintain the provisions of its services and the welfare of its patients through their confidence in its service delivery, whilst providing assurance that the UHB is compliant in its duty when recruiting agency staff.

Section 41 - Information provided in confidence

The UHB considers that some of the information requested is exempt from disclosure under Section 41 of the FoIA, which provides that:

41(1) Information is exempt information if —

- (a) it was obtained by the public authority from any other person (including another public authority), and,*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Section 41(1)(a) requires that the requested information must have been given to the authority by another person. This would include any documents imparted to the UHB by the agency that were provided in confidence by a third party.

Section 41 is an absolute exemption, so there is no public interest test to be carried out under FoIA. However, a test to determine whether it would have a public interest defence for the breach of confidence is required. The test assumes that the public interest in maintaining confidentiality

will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence. Therefore, the UHB has set out its considerations below.

As set out by the Information Commissioner's Office, the UHB has used the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 as a framework for assessing whether a disclosure would constitute a breach of confidence. It is suggested that the following three (3) elements are usually required to bring an action for a breach of confidence:

- the information must have the necessary quality of confidence,
- it must have been imparted in circumstances importing an obligation of confidence, and
- there must have been an unauthorised use of the information to the detriment of the confider.

The UHB believes it has satisfied the three (3) elements and is justified in withholding some of the requested information in accordance with Section 41 (1)(a) of the FoIA. The UHB believes that disclosing the documents identified relating to your request would put third party private information into the public domain, which would be an unauthorised use of the information and may cause distress, demonstrating to the wider public that the UHB has no regard in protecting third parties and their personal information. The UHB also considers that this confidential information was only disseminated to a limited number of recipients, the agency and subsequently shared with the UHB for audit and investigation purposes and can therefore retain its quality of confidence.

Section 41(b) provides that the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person.

The UHB has considered whether disclosure would constitute a breach of confidence and the expectations of, and the impact on, both:

- the person who gave the information directly to the UHB, and
- any other previous confiders of confidential material within the requested information.

There is legitimate public interest in being transparent, accountable and open to scrutiny, thus providing public understanding in the UHB's processes and the way it conducts its affairs and its accountability of spending of public money. However, the UHB has a duty of confidence to protect a person's private interests and their individual privacy.

The ICO states '*Any disclosure of confidential information will to some degree, undermine the principle of confidentiality and the relationship of trust between public authorities and confiders of information. Individuals and organisations may be discouraged from confiding in public authorities if they don't have a degree of certainty that this trust will be respected.*'

Additionally, the UHB relies on the free flow of confidential information to perform its statutory functions in the undertaking of thorough audits to comply with tax legislation, whereby the relationship of trust serves to maintain that flow of information. Should the UHB breach this trust, then the flow of information could diminish, making it more difficult to carry out its duties effectively.

When considering the public interest in favour of maintaining the confidence, the UHB has paid particular regard to:

- the wider public interest in preserving the principle of confidentiality, and

- the impact of disclosure on the interests of the confider.

The disclosure of private, personal information will be an infringement of the confider's privacy, and there is a strong public interest in protecting the privacy of individuals.

Therefore, the UHB deems that the third parties, to whom this requested information relates, would be able to take court action against the UHB for breaches of their confidence.

Additionally, as some of the documents contain confidential and personal identifiable information, the Section 41 exemption overlaps with the Section 40 exemption, which has been applied below.

Section 40(2) by virtue of Section 40(3)(a) – Personal information

*“(2) Any information to which a request for information relates is also exempt information if—
(a) it constitutes personal data which does not fall within subsection (1), and
(b) the first, second or third condition below is satisfied.*

*(3) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—
(a) would contravene any of the data protection principles.”*

Furthermore, the UHB is withholding the personal information relating to third parties. This decision has been made as it is not within the reasonable expectations of these individuals that their personal data would be released into the public domain by the UHB. This information is classed as personal data of a third party. Therefore, it is being withheld in accordance with the exemption set out in section 40(2) of the FoIA, by virtue of section 40(3)(a) of the FoIA, which permits a public authority to withhold personal data other than the requestor's where the disclosure would breach Data Protection principles.

This information is protected by the Data Protection Act 2018 (DPA)/UK General Data Protection Regulations, as its disclosure would constitute unfair and unlawful processing and would be contrary to the principles and articles of the UK GDPR. This exemption is absolute and therefore, there is no requirement to apply the public interest test.

In reaching this decision, the DPA and UK GDPR define personal data as data that relates to a living individual who can be identified solely from that data or from that data and other information, which is in the possession of the data controller.