

<b>File reference</b>	W17FOI220
<b>Key words</b>	Viscosupplementation injections
<b>Date of release</b>	09/05/2017
<b>Attachments</b>	Yes – Exemption rationale 43 (2)

## Freedom of Information Act Disclosure log - Reply Extract

### You asked

- 1) **Does your organisation use/perform Viscosupplementation injections?**

Yes

- 2) **How much has your organisation spent in the financial year 2015/16 and 2016/17, on Viscosupplementation?**

The Trust, whilst happy to provide volume, is refusing to supply spend information. The disclosure of such information is considered commercially sensitive and therefore exempt from supply in accordance with section 43(2) of the Freedom of Information Act. The Trust is providing a detailed rationale as an attachment to this response.

- 3) **Which (brands) Viscosupplements have been use in the financial year 2016/17?**

**To make your research easier, I have added an excel document for you to capture your responses and listed all commonly used viscosupplements that you can cross reference:**

**Arthrum H**

**Cingal**

**Durolane**

**Euflexxa**

**Fermathron**

**Orthovisc**

**Ostenil**

**Ostenil Plus**

**RenehaVis**

**Suplasyn**

**Synocrom**

**Synocrom Mini**

**Synolis**

**Monovisc**

**Synopsis**

**Synvisc (Hylan G-F20)**

**Synvisc ONE (Hylan G-F20)**

	2015-16	2016-17
Arthrum H	0	0
Cingal	0	0
Durolane	10 syringes	8 syringes
Euflexxa	0	0
Fermathron	0	0
Orthovisc	0	0
Ostenil	0	0
Ostenil Plus	0	0
RenehaVis	0	0
Suplasyn	0	0
Synocrom	0	0
Synocrom Mini	0	0
Synolis	0	0
Monovisc	0	0
Synopsis	0	0
Synvisc (Hylan G-F20)	0	0
Synvisc ONE (Hylan G-F20)	0	0

### **Refusal Notice - Section 43:**

The Trust has declined to provide you with the information requested under exemption 43, section (2) of the Freedom of Information Act, which states that:  
*2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)*

Under Section 2, information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person; in this instance the Trust considers that it would compromise the Trust itself and the broader NHS. The Trust will outline below the factors which have led the Trust to this conclusion.

The Information Commissioner's guidance explains that organisations compete by offering something different to their rivals; this difference can include the information being sought in this request (ie pricing details). The company has used their experience and knowledge to develop their business model (including pricing structure) - the information that has been requested details this and would be described as business intelligence. The Trust considers that the information requested is intrinsically sensitive to our business. It is unique and is not in the public domain, and would be beneficial to competitors in the commercial market place; and therefore carries significant commercial value. Placing the requested information into the public domain would reveal these potential trading advantages (especially if combined with other information available, such as annual usage) and would provide a rival with an understanding which would afford them a distinct advantage with regards to any similar future business they look to win; as it would provide details that would inform and influence them. This would have the ability to undermine any future business opportunities. As such, the Trust considers that the release of the information would have a real and significant potential to detrimentally affect the ability to participate competitively in future commercial activity, and could consequently cause irreparable damage to our commercial interests in relation to future business.

By providing the requested details to potential rivals, a competitor would have information that could influence their business plans and ultimately the offers available to the Trust. This would have a negative knock on effect on the Trust in a number of ways; these have been outlined below.

Firstly, the release of such sensitive information would limit the Trust's future purchasing position. Any companies in possession of competitors pricing/costing details would be able to submit an informed bid and this would have the effect of limiting the Trust's bargaining power. As such the Trust's choice of more favourable tender submissions/offers in the future may be limited, which would mean that the Trust is not able to achieve best value for public money.

Secondly, potential rivals furnished with this commercially sensitive information, may submit artificially formulated proposals/offers solely designed to outperform their rivals, that may not be sustainable in practice. The organisations/rivals then potentially awarded activity may not provide the most efficient and effective service in practice and may not provide the best value for money.

Thirdly, the unfair advantage held by a competitor would have the real potential to jeopardise the company's future business opportunities and their ability to compete in the commercial market place would be damaged. This would be likely to have a negative knock on effect on the quality and choice available to public authorities (including the Trust) when attempting to procure the most efficient and effective products/services in the future. In the longer term if companies fail, this may reduce the competition in the market generally, and therefore the choice available to the Trust would be further reduced, and again this will hamper the Trust's ability to achieve value for public money, quality and efficiency. Competition is required to ensure that efficiency and quality is maintained.

Fourthly, the Trust is of the opinion that to release the information would jeopardise the Trust's future relationship with the provider, and this in turn would be likely to negatively affect any future negotiations the Trust participates in with that company and any offers ultimately available.

The Information Commissioner's guidance explains that very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made, and circumstances (for example market conditions) will change over time, and through this passage of time information generally becomes less commercially sensitive. The Trust recognises the justification for this argument, however in this instance it is considered that a potential rival could use the information to their advantage, as they could benchmark the information against themselves. Therefore the Trust believes that the information would be valuable commercially as it would give a rival an insight which would assist with informing and formulating their own business plans.

The Trust is satisfied that the information requested would be likely to prejudice the commercial interests of the the Trust, however the exemption can only be maintained if the Trust believes the public interest in withholding the information outweighs the public interest in disclosing it. Please see details of the public interest test below.

The Trust recognises that the release of such information would facilitate Trust transparency and demonstrates the use of, and accountability of resources; therefore enabling the public to have an increased understanding of the Trust (and is therefore of benefit to the community), which in turn would generate confidence in the integrity of the procedures involved in decision making. Instances that strengthen the argument for release are situations where there is evidence or suspicion of wrongdoing (must be more than mere allegation – ie there must be a plausible basis for suspicion), however in this instance there is no wrongdoing (or suspicion). The release of raw information can also provide the public with details which would allow for scrutiny and removes the potential for spin and manipulation of facts.

The Trust however believes that there is also a strong public interest in ensuring the Trust is able to operate effectively and in a fair environment, and that there is a level playing field for all parties and that there is fair competition for public sector purchases and contracts; as this in turn has an effect on the products/services available and ultimately patient care. The Trust has detailed in the paragraphs above how it considers that the release of the information requested would undermine this ability, and how it would detrimentally affect the Trust, briefly:

- Restricted purchasing position and bargaining power
- Artificially formulated offers may be submitted that are not sustainable or effective in practice
- Damage to the wider market place, therefore limiting choice

The above factors would lead to difficulties obtaining quality, efficiency and value for public money, which would have a direct knock on effect on the products/services available and ultimately patient care.

To summarise the public interest test: The Trust has considered all the relevant factors in the public interest test and has reached the conclusion that the benefit to the public in applying the exemption outweighs the public interest in releasing the information requested, as a result of the prejudices and losses that would potentially affect the Trust and patients. The release could jeopardise our future position, which would cause a detrimental knock on effect on the market place, and would potentially limit the choices available to public authorities, including the broader NHS. This would potentially threaten the quality of products and services available to the Trust. The Trust considers that it is not in the public interest to do anything to undermine the competitive nature of the procurement process, and the disclosure of key information, as has been requested, could have that affect. The Trust believes that the consequences of releasing the information are serious and the likelihood of this occurring is high.

Therefore in conclusion, the Trust has reached the decision that the release of the information requested would be likely to be prejudicial to the commercial interests of the company concerned and the Trust, **and** that the public interest in withholding the information is greater than the public interest in releasing the information, and as such the information is being withheld under section 43 of the Freedom of Information Act.