

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 7 January 2010**

**Public Authority:** Camden Primary Care Trust  
**Address:** St Pancras Hospital  
4 St Pancras Way  
London  
NW1 0PE

### Summary

---

The complainant requested a copy of the contract that was entered into by the public authority with a contractor to provide medical services at a GP's surgery. The public authority provided a copy of the contract except for the pricing information which it withheld under section 43(2). The Commissioner has concluded that section 43(2) was not engaged and has consequently ordered the disclosure of the withheld information.

### The Commissioner's Role

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

---

2. On 20 June 2008 the complainant requested "...a copy of the contract(s) that has/have been entered into with United Health in respect of the Camden Road surgery, including any side letters or other documentation that formed part of the contract(s)."
3. On 18 July 2008 the public authority disclosed a copy of the contract to the complainant but withheld certain financial information related to the price per patient to be paid by the public authority to the contractor on the basis that it was exempt from disclosure under section 43(2) of the Act.
4. On 28 July 2008 the complainant requested that the public authority carry out an internal review of its decision not to disclose the prices contained in the contract.

He also provided arguments as to why he did not believe that section 43(2) was applicable to the withheld information.

5. On 13 August 2008 the public authority wrote to the complainant to inform him that the result of the internal review was to uphold its original decision.

## The Investigation

---

### Scope of the case

6. On 20 September 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He confirmed to the Commissioner that his complaint was that he did not agree with the public authority's refusal to supply the financial information from the contract on the basis that it was exempt under section 43(2).

### Chronology

7. There were a number of communications between the Commissioner and the public authority, the most significant of which are outlined below.
8. On 2 July 2009 the Information Commissioner wrote to the public authority to ask it to provide him with a copy of the withheld information and its arguments as to why it believed the information was exempt from disclosure.
9. On 13 August 2009 the public authority provided the Commissioner with a copy of the withheld information, its arguments as to why it believed the information was exempt from disclosure and evidence in support of its arguments. The public authority's arguments are considered in the "Analysis" section of this notice.
10. On 20 August 2009 the Commissioner asked the public authority to provide him with further evidence in relation to some of the arguments that it had raised.
11. On 8 September 2009 the public authority provided responses to the Commissioner's queries. It included details of arguments provided by the contractor as to why it believed its commercial interests might be prejudiced by the disclosure of the withheld information. The public authority also indicated that, in light of the passage of time, it was considering whether the withheld information could now be disclosed.
12. On 18 September 2009 the public authority wrote to the Commissioner and informed him that the issue of the disclosure of financial and contractual information for contracts it had commissioned was being discussed at its Board Meeting later in the month. It confirmed that following the Board Meeting it would contact the Commissioner to update him on when and how the withheld information associated with the request may be released.

13. On 29 September 2009 the public authority explained to the Commissioner that following its Board Meeting it was considering placing details of all its contracts on its website, rather than just those in relation to specific contracts. It believed that this was the fairest approach in relation to all of its contractors.
14. On 12 October 2009 the Commissioner sent an email to the public authority to ascertain whether the requested information had been disclosed.
15. On 19 October 2009 the public authority informed the Commissioner that the issue of the disclosure of primary care contract information in relation to contracts for GP practices, including the Camden Road surgery, was to be discussed further at a Board Meeting that day.
16. On 2 November 2009 the public authority informed the Commissioner that no decision had been taken at its Board Meeting about whether to disclose the information that had been withheld. It intended to seek legal advice that day on its position and would contact the Commissioner once it had received this.
17. On 17 November 2009, having received no further update, the Commissioner contacted the public authority to ascertain the current position. From his discussion with the public authority, he was unable to determine whether there was any clear timeframe for the disclosure of the withheld information.
18. The Commissioner pointed out to the public authority that, given the significant amount of time that had passed since the contractor had submitted its original tender; it was difficult to identify a basis on which it could be concluded that the withheld information would be exempt from disclosure if a request were made for it now. Given the lack of any clear timeframe for voluntary disclosure in order to try and resolve the complaint informally, he indicated that he would have to start drafting a Decision Notice.
19. On 24 November 2009 the Commissioner had a further discussion with the public authority. He was provided with copies of internal correspondence between staff within the public authority which suggested that the disclosure of the withheld information was "imminent".
20. On 9 December 2009 the Commissioner contacted the public authority to ascertain whether the withheld information had been disclosed. He was informed that it had not and was not provided with any clear timeframe as to when it would be disclosed.

## Analysis

---

21. The full text of the provisions of the Act which are referred to can be found in the Legal Annex at the end of this notice.

## Exemption

### Section 43(2) – Prejudice to commercial interests

22. The Commissioner considered whether the information that had been withheld by the public authority was exempt from disclosure under section 43(2) at the time of the request.
23. Section 43(2) provides an exemption from the disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
24. The Commissioner accepts that the information withheld related to the commercial activities of the public authority and the contractor and therefore fell within the scope of the exemption contained in section 43(2). He then went on to consider whether the release of the information would have been likely to prejudice the commercial activities of either of the two parties to the contract.
25. The Commissioner is aware that the public authority consulted with the contractor in preparing its arguments. He was provided with a statement from the contractor related to the commercial prejudice that it believed it would have been likely to suffer if the withheld information had been disclosed.
26. The public authority informed the Commissioner that it believed that disclosure of the withheld information would have been likely to prejudice its own commercial interests and those of the contractor and other PCTs around the country.
27. In dealing with the issue of whether disclosure would be likely to prejudice commercial interests of the public authority, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
28. The Commissioner has also taken into account the view of the Tribunal in the same case that, “the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction.” (para 15). However, the Tribunal noted that certain factors should be considered in such cases, stating that whether or not prejudice was likely, “would depend on the nature of the information and the degree of similarity between the two transactions.” (para 15).
29. The Commissioner considered the potential prejudice to the contractor and the public authority in turn.

## **Prejudice to the commercial interests of the contractor**

30. The public authority argued that PCTs, other than itself, may, during the twelve months following the request, have been inviting tenders for contracts with specifications that were similar to that for the Camden Road surgery. If the contractor were bidding for any of these, release of the withheld pricing information may have put the contractor at a disadvantage by revealing its bottom line price. This would put it at a disadvantage against organisations whose commercial strategy had not been made public.
31. The public authority provided the Commissioner with details of correspondence it had received from the contractor. In that correspondence the contractor stated that it supported the public authority's conclusions that the release of information related to the pricing of APMS (Alternative Providers of Medical Services), GMS (General Medical Services) or PMS (Personal Medical Services) contracts could prejudice the commercial interests of contractors and specifically the release of commercially sensitive information could have an impact on other contracts for similar services both within and outside the public authority's responsibility.
32. By way of example, the contractor stated that it had been successful in winning APMS contracts for similar services in the period following the original request for information. It attached a note providing an example of the service specification for one such contract.
33. The Commissioner notes that the withheld information constitutes a specified price per patient to be paid by the public authority to the contractor for each patient on the practice's list for each of the five years of the contract, starting in 2008/9. The price contained in the contract changes for each year of the five years of its duration. The price is not broken down into component parts and no indication is provided as to how it was calculated.
34. The contractor's tender for the contract was submitted by October 2007. The prices contained in the tender were the same as those which were eventually included in the contract which was signed on 31 March 2008.
35. The Commissioner believes that a wide range of factors would have influenced the prices in the contractor's tender. These include the stipulations contained in the service specification provided by the public authority such as the range of core services to be provided, how those core services were to be delivered, for example opening hours of the surgery and the provision of out of hours of services, and the number of registered patients. It would also be affected by factors such as the length of the contract, the geographic location of the surgery, the contractor's projected costs, such as number and salaries of staff and the cost of medical supplies, how it would generate the necessary capital for the project and the returns it expected on its investment. Only a limited number of these variable factors could have been ascertained from the information contained in the contract.
36. In order for the contractor's competitors to be able to predict with any certainty the prices it might include in tenders for future similar contracts they would need to be

able to identify the pricing mechanism or model that the contractor was using, assuming that it was using the same, or similar, mechanism or model for future tendering exercises. The contract contains no indication of the pricing mechanism or model used by the contractor to calculate the prices contained in its bid.

37. The Commissioner examined the example of service specification that had been provided by the contractor. However, it was by no means clear that the contract identified by the contractor was sufficiently similar to the contract for the Camden Road surgery to be able to draw direct comparisons in areas such as the services to be provided, the number of patients and the location.
38. In addition, it appeared from the specification that was provided to the Commissioner that the final service specification for bidders was not to be made available until the middle of July 2008. This would have meant that it was unlikely that any tenders would have been submitted until August or September 2008. By that point the prices in the Camden Road surgery contract would have been nearly 12 months old, consequently reducing any possible sensitivity from the disclosure of the withheld information.
39. The Commissioner notes that at the time the request was made the pricing information contained in the contractor's bid was approximately eight months old. He is aware that the market for this type of work is highly competitive. This is reflected in the fact that 80 organisations submitted expressions of interest in tendering for the contract, 31 subsequently submitted initial tenders and 21 were judged suitable to be invited to submit full tenders. This figure was eventually reduced to a shortlist of 10 bidders for the final stage of the process.
40. In light of the highly competitive market for this type of work, the Commissioner is of the view that the prices for providing the type of services agreed in this contract would vary considerably with time. As a consequence, even if the contractor had been able to demonstrate that it was tendering for contracts that were very similar to the Camden Road contract at the time of the request, which the Commissioner is not convinced has been done, he is not convinced that those prices would necessarily be replicated in those future tenders.
41. Taking into account the above factors, the Commissioner is not persuaded that the disclosure of the prices contained in the contract would have been likely to allow bidders for future similar contracts to draw any definite conclusions about what prices they might need to include in their bids in order to put them in a more favourable position than the contractor. He does not therefore accept that disclosure would have been likely to have had the prejudicial effect on the contractor's commercial interests suggested by the public authority.

### **Prejudice to the commercial interests of the public authority**

42. The public authority argued that, along with other PCTs, it was offering to tender, and planning to offer to tender, other similar contracts to the one for the Camden Road surgery. It was therefore of the view that the withheld information was highly sensitive as it was considered to be both current and relevant to other such contracts. It believed that disclosure would have been likely to lead to its



negotiating positions, and that of other PCTs, being known and as a result put them at a disadvantage in trying to obtain best value in future tender exercises.

43. When asked by the Commissioner to provide details of similar contracts for which it was inviting tenders in the twelve months following the request, the public authority informed him that it was considering inviting tenders for a homeless and substance misuse APMS GP contract, a GP led health centre contract and polyclinics including musculo skeletal services, dermatology services and a dental access facility.
44. The Commissioner questioned whether the potential contracts that the public authority had identified were for the provision of similar types of medical services to those required for the Camden Road surgery. If this was not the case, in his view, any potential bidders for those contracts would not have been able to use the prices contained in the contract for the Camden Road surgery as a basis for the bids that they would make for those contracts as they would not have been comparable in terms of the services which needed to be provided.
45. The public authority subsequently confirmed that the contracts that it had identified had different specifications to the contract for the Camden Road surgery. As a result it accepted that any potential bidders for the contracts it had identified would have been unlikely to make use of the price details contained in the Camden Road surgery contract.
46. Based on the information provided to him by the public authority, the Commissioner can find no basis to conclude that disclosure of the withheld information would have been likely to prejudice its commercial interests by giving away its potential negotiating position in later tendering exercises. He can also find no basis, in the absence of any actual relevant examples, to find that disclosure would have been likely to prejudice the commercial interests of other PCTs.
47. In addition, the public authority argued that the release of commercially sensitive information would make contractors more reluctant to bid for similar contracts in future. This would lead to a smaller pool of bidders for this type of contract, not just in Camden but across the country, resulting in poorer services and choice and greater cost. The effect would be to compromise the public authority's and the NHS's commercial interests.
48. The provision of medical services within the NHS is regarded by many as a lucrative market in which contracts, such as this one, are awarded for very significant amounts of public money. Organisations which are competing within this market will have made large investments in order to do so. They may stand to make very significant profits. As a result, the Commissioner is not convinced that the disclosure of this information would have been likely to deter them from bidding in future for contracts of this type, particularly as he is not convinced that it would require the disclosure of commercially sensitive information.
49. Having considered the arguments presented to him by the public authority, the Commissioner is of the view that there is insufficient evidence to support the

application of section 43(2) to the withheld information. He has therefore decided that the exemption was not engaged and the information should have been disclosed.

## **Procedural Requirements**

50. By not providing the withheld information to the complainant within 20 working days of the request, the public authority breached sections 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

## **The Decision**

---

51. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:

- it incorrectly applied section 43(2) to the withheld information; and
- it breached section 1(1)(b) by not providing the complainant with the withheld information by the time of the completion of the internal review and section 10(1) by not providing it within 20 working days of the request.

## **Steps Required**

---

52. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the withheld information.

53. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

---

54. Failure to comply with the steps described above 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.



## Other matters

---

55. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
56. During the course of the Commissioner's investigation the public authority appeared to acknowledge that, due to the passage of time, it should no longer regard the withheld information as exempt from disclosure and, as a consequence, it could now release it to the complainant. However, it did not do this despite several indications to the Commissioner that it was preparing to do so.
57. The failure of the public authority to disclose the withheld information within a reasonable period after the start of his investigation resulted in the Commissioner having to spend a considerable amount of time seeking updates and discussing relevant issues in order to try and informally resolve the complaint. The Commissioner hopes that in any future engagements with his office the public authority will display a more expeditious approach to that adopted in this case.

## Right of Appeal

---

58. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 7<sup>th</sup> day of January 2010

Signed .....

Jo Pedder  
Senior FOI Policy Manager

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## Legal Annex

### General Right of Access

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

### Time for Compliance

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### Commercial interests.

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

“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).”