

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2012

Public Authority: NHS Warrington
Address: Millennium House
930-932 Birchwood Boulevard
Millennium Park
Birchwood
Warrington
WA3 7QN

Decision (including any steps ordered)

1. The complainant made a request to NHS Warrington (the "PCT") for copies of information relating to a tender for extra NHS dental services in Warrington in 2010. Specifically, the complainant asked for all bids placed. This information was withheld by the PCT under the commercial interests exemption (section 43(2)).
2. The Commissioner's decision is that the PCT has correctly withheld this information under section 43(2).
3. Therefore the Commissioner does not require the PCT to take any steps.

Request and response

4. On 27 September 2011 the complainant wrote to the PCT and made the following request:

"I would like full disclosure of the commissioning/procurement procedure carried out by the PCT in early 2010 for extra NHS dental services in Warrington.

- *I would like minutes of meetings prior to the process where the amount of dental services to be commissioned was decided upon and how that service was to be split up into different areas.*

- *I would like copies of all consultation with providers and patients.*
 - *I would like copies of all tenders and bids placed. Obviously all identifying data will need to be removed prior to disclosure."*
5. The PCT responded on 26 October 2011. It referred the complainant to a briefing paper that was referred to the PCT Board on 5 May 2010 that was publically available.¹ It also confirmed that it held other information that fell under the scope of the request. However, this information was withheld under section 43(2), as it considered that disclosure would be likely to prejudice the commercial interests of the PCT and the preferred bidder.
 6. The complainant requested an internal review of the use of section 43(2) on 1 November 2011.
 7. On 22 November 2011 the PCT wrote to the complainant with the details of the result of the internal review. It provided information that fell under the first two bullet points of the request. However, it refused to disclose the information that fell under the third bullet point of the request, stating that it was exempt under section 43(2).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way her request for information had been handled.
9. During the investigation of the case the complainant agreed that bidding information from one of the bidders (that would fall under the third bullet point of the request) would not be considered for possible disclosure. This was confirmed by the Commissioner in emails to both parties on 22 March 2012.
10. Therefore the scope of this case has been to consider whether the PCT was correct to rely upon section 43(2) to withhold the remaining information it holds that falls under the third bullet point of the request – namely the tenders and bids placed in relation to the dental services procurement exercise that was carried out in 2010.

¹ http://www.warrington-pct.nhs.uk/default.asp?page=Public_Info/Board.asp

Reasons for decision

11. Section 43(2) provides an exemption for information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
12. In this instance the information in question relates to the tenders and bids placed in relation to a procurement exercise for the provision of additional dental services in Warrington.
13. The PCT undertook this procurement exercise in 2010. A briefing paper was submitted to the PCT's Board in May 2010, which made recommendations on the award of the preferred bidder status.² This resulted in one of the bidders being awarded preferred bidder status.
14. The PCT has argued that the disclosure of this information would be likely to prejudice its commercial interests, and those of the preferred bidder.
15. The Commissioner has first considered whether the disclosure of this information would be likely to prejudice the commercial interests of the PCT.
16. In reaching a view on the application of this exemption the Commissioner has first considered whether the potential prejudice argued by the PCT relates to the interest identified in this exemption – i.e. if the prejudice were to occur, would this prejudice relate to its commercial interests?
17. In this instance the information relates to a procurement exercise, in which the PCT tendered for the provision of additional dental services in Warrington. This involved the drawing up of a contract between the PCT and the successful bidder. The Commissioner considers that this contract would be of a commercial nature, as it would relate to how much the PCT would pay for the provision of a service. As noted below, the Commissioner has considered whether the disclosure of the withheld information would be likely to prejudice the PCT's ability to obtain value for money in this contractual relationship. Bearing this in mind, the

² This briefing paper is available in the papers of the PCT's Board meeting for 5 May 2010, and is listed as agenda item 121 A/10. This can be found at http://www.warrington-pct.nhs.uk/default.asp?page=Public_info/Board.asp

Commissioner is satisfied that this potential prejudicial effect would relate to the PCT's commercial interests.

18. Bearing in mind the above arguments, the Commissioner is also satisfied that there is a causal relationship between the potential disclosure of the withheld information and prejudice to the commercial interests of the PCT. Furthermore, he is satisfied that the resultant prejudice (if it were to occur) would be real and of substance.
19. Next the Commissioner has gone on to consider whether the disclosure of this information would be likely to prejudice the commercial interests of the PCT.
20. In reaching a decision on the question of the likelihood of prejudice the Commissioner considers that the expression 'likely to prejudice' means that the chance of prejudice being suffered should be more than a hypothetical possibility – there must be a real and significant risk.³
21. The PCT has explained that although a decision had been made to award the preferred bidder status, the procurement exercise in question was incomplete. Following the award of the preferred bidder status, the final stage of the exercise would be to enter into negotiations with the preferred bidder to see if a contract could be drawn up and agreed. Once this was done, the procurement exercise would be complete. However, in this instance the award of the preferred bidder status had been disputed by an interested party. This has resulted in an appeal first being made to the PCT, and then to the relevant Strategic Health Authority. Subsequently, a complaint had been made to the NHS Co-Operation and Competition Panel – which was currently considering this appeal.
22. The PCT stated that as a result of this dispute the procurement exercise in question was incomplete, as it had not been able to enter into negotiations with the preferred bidder in order to draw up a contract for the additional dental services.
23. The PCT has stated that depending on the outcome of the appeal to the NHS Co-Operation and Competition Panel it may have to review the tenders again, or to undertake the tender submission process again, which would lead to it inviting new bids to be submitted.

³ *John Connor Press Associates Limited v ICO* [EA/2005/0005], para 15.

24. During the investigation the complainant disputed this. In particular, she queried whether the appeal to the NHS Co-Operation and Competition Panel was still ongoing. She suggested that instead the appeal had resulted in the PCT being ordered to begin the tendering process again. The Commissioner put these comments to the PCT. In response the PCT stated that it had not been informed by the NHS Co-Operation and Competition Panel of any outcome of the appeal. Therefore the procurement exercise was still on hold, pending the outcome of the appeal.
25. Bearing the PCT's comments in mind, and in the absence of any evidence to the contrary, the Commissioner is satisfied that the procurement exercise in question was incomplete at the time of the request (and remains so), pending the outcome of the appeal to the NHS Co-Operation and Competition Panel.
26. The PCT has argued that all the elements of the withheld information relate to the business plans and bids provided as a result of the tendering process. This gives a detailed insight into the bids submitted for the tender in question. Therefore, it has argued, this information is commercially sensitive. If, as a result of the appeal to the NHS Co-Operation and Competition Panel, the tendering process were to be reopened, this would give an insight into the tender that the PCT had chosen for preferred bidder status. This would give an unfair advantage to other bidders. It would also damage the PCT's reputation, and potentially affect its ability to attract bids in the future.
27. Given that the procurement process is not yet completed, the Commissioner is satisfied that this information is commercially sensitive. Although the PCT has not provided him with any detailed arguments as to how the disclosure of this information would be likely to harm its commercial interests (other than the argument that disclosure would potentially damage its reputation), the Commissioner considers that were the appeal Panel to order the procurement exercise to be undertaken again, the disclosure of this information would potentially negatively affect the competitiveness of that process. If the tender were to be reopened, the disclosure of this information may set a standard to which bidders would aim, which would potentially limit the drive for the bids to be made as competitive as possible. If this were to occur, the Commissioner considers that this would be likely to have a prejudicial affect on the PCT's ability to obtain the best value for money bid for the tender in question.
28. The Commissioner considers that this argument also reads across to the details of the bids submitted by the parties who were not awarded Preferred Bidder status. If the tender process were to be reopened, the Commissioner considers that it is possible that other parties might bid

for the tender. The disclosure of this information - giving a detailed insight into all the previous bids - might have a somewhat negative effect on the competitiveness of new bids - as, again, these would be aimed at simply undercutting the competition, rather than aiming for the most competitive bid possible. Again, the Commissioner considers that this would be likely to have a prejudicial affect on the PCT's ability to obtain the best value for money bid for the tender in question.

29. Bearing this in mind, the Commissioner is satisfied that the disclosure of the withheld information would be likely to prejudice the PCT's commercial interests. Therefore the exemption is engaged.
30. However, the commercial interest exemption is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
31. In respect of the public interest in disclosure the Commissioner considers that there is a public interest in increasing the transparency and accountability of the actions of public authorities. This is particularly the case when these actions involve the expenditure of public money, especially when this spending comes from the budget of NHS bodies, and the potential knock on effect this will have in other areas of health spending.
32. In this instance, the Commissioner notes that this tendering process has been disputed by one of the interested parties. He considers that it is in the public interest to increase the transparency of this disputed process (although this should not be taken to mean that the Commissioner considers that this process was worthy of dispute). As this dispute has resulted in a delay in a contract being agreed for the provision of additional dental services in Warrington, the Commissioner also considers that there is a public interest in increasing the understanding of the local community in the reasons for this delay. The Commissioner considers that by giving an insight into the bids received by the PCT for this tender, the disclosure of the withheld information would increase the transparency, and public understanding of, this process.
33. As regards the public interest in maintaining the exemption the Commissioner has been mindful of his conclusions that disclosure of the withheld information would be likely to prejudice the commercial interests of the PCT. He considers that there is a strong public interest in avoiding unwarranted prejudice to the commercial interests of public bodies.
34. In balancing the public interest arguments in this case, whilst the Commissioner acknowledges that there is a strong public interest in

promoting the accountability of the expenditure of public money (especially in the health sector), this has to be counterbalanced by the public interest in avoiding unnecessary prejudice to the commercial interests of an NHS Trust.

35. In particular, the Commissioner considers that the public interest in the PCT's ability to obtain the best deal possible in its procurement exercise is particularly weighty. Whilst he acknowledges that this procurement exercise has been disputed by one of the interested parties, he considers that the appeal processes in place (which the interested party has, and continues to, follow) somewhat satisfy this public interest factor. In addition, he notes that whilst the award of the preferred bidder status in this procurement has been disputed, this complaint was not upheld by the local Strategic Health Authority – and the NHS Co-Operation and Competition Panel has yet to reach a finding on this.
36. Therefore, after considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the withheld information is exempt from disclosure under the commercial interest exemption and should not be disclosed.

Right of appeal

37. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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
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