

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 June 2013

Public Authority: The Royal Marsden Foundation Trust
Address: Fulham Road
London
SW3 6JJ

Decision (including any steps ordered)

1. The complainant requested information concerning the tender applications for the hospital's taxi and courier contracts.
2. The Commissioner's decision is that by withholding the information under section 43(2) the hospital trust did not deal with the request for information in accordance with the FOIA.
3. The Commissioner requires the public authority to disclose:
 - (a) the award grid
 - (b) all sections of the Pre-Qualification Questionnaire completed by the two successful companies
 - (c) all sections of the successful tender applications other than their pricing information.
4. He requires the authority to disclose the information within 35 calendar days of the date of this decision notice.
5. 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

6. On 13 September 2012 the complainant requested the following information in relation to the tender process for a hospital taxi contract and a hospital courier contract:
 - (i) Who were the 6 companies to make it through to the ITT stage.*
 - (ii) What was their mark on the award grid that was sent with the contract award notice.*
 - (iii) Of the 6 companies did some only bid for Lot 1 the taxi contract and did some only bid for Lot 2 the courier contract.*
 - (iv) Regardless of whether the 6 companies bid for just Lot 1 or Lot 2 or both Lots, did any of the companies just bid for the work from either of the Chelsea or Sutton Hospitals.*
 - (v) As per page 5 of 5 of the PQQ section 1.10 please forward a copy of the whole of the GT cars and City Sprint bids."*
7. The duration of each contract was three years with provision to extend for a further two.
8. The Royal Marsden Hospital (RMH) responded on 1 October 2012. It refused disclosure of items (i), (ii) and (v) under s44(1)(b) FOIA on the grounds that the Public Contract Regulations 2006 prohibited release. It answered the queries in items (iii) and (iv).
9. On 2 November 2012 RMH's internal review upheld its decision to withhold the information under s44(1)(b) FOIA. The review suggested that the exemptions at s41 and s43 FOIA might also be applicable.

Scope of the case

10. The complainant contacted the Commissioner on 15 November 2012 to complain about the way his request for information had been handled.
11. On 25 January 2013 the Commissioner asked RMH for a copy of the award grid, copies of the tenders requested by the complainant and copies of the PQQ (Pre-Qualification Questionnaire) referred to in item (v) of the request.
12. RMH supplied him with copies of the award grid and the following documentation:
 - (a) GT Car's completed PQQ and tender for the hospital's Lot 1 taxi service

- (b) City Sprint's completed PQQ and tender for the hospital's Lot 2 courier service.

Both companies were successful in their tenders and were awarded the contract for which they had applied.

13. RMH required the PQQ to be completed by each company that tendered for the contracts. The companies' responses to the PQQ were used to assess their suitability in terms of technical knowledge and experience, capability/capacity and their organisational and financial standing. The intention of the PQQ was to enable RMH to determine a short list of companies that would proceed to the final stage of the procurement. The Commissioner therefore considers the completed PQQ to be an integral part of each company's application.
14. The Commissioner advised RMH that the Public Contract Regulations did not bar the information in this instance from disclosure. He asked RMH to clarify whether it was reliant instead on the exemptions at s41 or s43 FOIA as referenced in its internal review or both in order to withhold the information and if so to provide the necessary arguments. RMH confirmed reliance on s43(2) FOIA and provided its argument to support the exemption.
15. This decision notice addresses the withholding under s43(2) FOIA of:
 - (a) the award grid containing the names of the companies shortlisted to the final tender stage and the final scores awarded to each of these companies
 - (b) the completed PQQs and final tender applications of the two companies that were awarded the contracts.

Reasons for decision

16. Section 43(2) FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person holding it.
17. RMH considered all the information within the award grid, the PQQs and the tenders to be exempt under s43(2). Its argument to the Commissioner maintained that disclosure of the information would be likely to provide a commercial advantage to the competition whilst causing a loss of supplier confidence. RMH did not explain why supplier confidence might be lost when its tenderers were informed about the public right of access to information unless it is covered by a valid exemption.

The award grid

18. The award grid outlines the percentage scores of five companies which were shortlisted to compete for the contracts and a further company which was successful in a related tender. The scores relate to five criteria:
- (i) The companies' proposed approach to service delivery
 - (ii) Their proposed staffing arrangements, training and development
 - (iii) Quality assurance, customer care and complaints management
 - (iv) Management of risk including health and safety
 - (v) Cost
19. RMH submitted that disclosure of the bidders' scores may hinder their commercial interests as other potential purchasers might allow the scoring to influence and judge a company's capability. RMH submitted that other purchasers might consider the unsuccessful bidders to be inferior to the successful bidder.
20. The Commissioner notes that RMH is relying on s43(2) on the basis that disclosure of the requested information would prejudice the company's commercial interests. The Commissioner would normally expect a public authority to obtain arguments from the third parties themselves and does not accept speculative arguments from the public authority.
21. The Commissioner considers that public authorities are aware that bidding companies do not always come first in every tendering process that they enter into. Public authorities are also aware that the requirements and specifications of each tender will vary. In the Commissioner's view successful bids will depend upon the effectiveness of a company's demonstration that it is capable of meeting the particular specification set by the contracting authority at the time.
22. In considering the matter the Commissioner has taken into account the civil procurement policy and guidance of the Office of Government Commerce (OGC). The OGC has been re-named as the Efficiency and Reform Group (ERG). The ERG's publications¹ refer to and are drawn

¹ [Cabinet Office ERG Guidance Note December 2010 - "Publication of Tender Documentation"](#) and [Guidance Note January 2011 - "Publication of New Central Government Contracts"](#)

from the OGC guidance. Whilst primarily aimed at central government departments the guidance has application across the wider public sector in relation to civil procurement.

23. The guidance underpins the Commissioner's view that once a public authority's procurement competition has been completed there is a strong public interest in demonstrating the criteria that was used to select the winning supplier. There is also a strong public interest in demonstrating that the process was fair and that the best overall bidder was selected. The OGC guidance is clear that tender evaluation information on unsuccessful bidders including their ranking should generally be disclosed except for sensitive information.
24. Once a contract has been awarded the identity of the successful bidder requires disclosure not least because of the large amounts of public money that the service provider will often be in receipt of. The identity of unsuccessful bidders can also be disclosed after award of contract as there is no longer any risk to the commercial interests of the public authority from possible collusion of bidders.
25. Having considered the arguments put forward by RMH the Commissioner has concluded that the information contained within the award grid is not exempt under s43(2). As the exemption is not engaged he has not proceeded to consider the public interest test in respect of the exemption.

The PQQs and tender applications

26. Section 1.10 in the PQQ informed potential service providers that the information submitted in their applications may be disclosed by RMH under FOIA. It required applicants to clearly identify any information within their submission that they considered to be commercially sensitive and to explain the potential implications of disclosure.

City Sprint – courier service

27. The Commissioner notes that in response to the PQQ requirement outlined above, City Sprint restricted commercial sensitivity to its price information. This restriction was confirmed on page 14 of the company's tender application.
28. The suggestion that prejudice might arise from disclosure of City Sprint's entire PQQ and tender response originates from RMH and not the company itself. However, no evidence has been provided by RMH to support its suggestion. In line with the Information Tribunal's decision in *Derry Council v Information Commissioner* (EA/2006/0014), the Commissioner does not consider it appropriate to take into account

speculative arguments advanced by public authorities about how prejudice may occur to third parties.

29. He considers that the exemption at s43(2) applies to City Sprint's pricing information set out in pages 57 to 67 of its tender response. In the Commissioner's view disclosure of this information would reveal the company's pricing strategy and enable competitors to undercut it when bidding for contracts of a similar nature elsewhere.
30. As s43(2) is a qualified exemption the Commissioner has considered the public interest test as to whether the company's pricing information should be disclosed. Disclosure would assist the promotion of openness and transparency in the public procurement process. However, he does not consider it to be in the public interest that companies entering into contracts with public authorities should be commercially prejudiced as a result. He has concluded therefore that the public interest in maintaining the exemption in relation to the company's pricing information outweighs the public interest in disclosure.
31. The Commissioner has taken into account the civil procurement policy and guidance of the OGC (now ERG) in relation to the remaining information. In the case of successful bids the working assumption of the guidance is that unless it is sensitive the information should generally be disclosed. In keeping with that guidance, the Commissioner has concluded that the exemption at s43(2) is not engaged in relation to the remaining information. As the exemption is not engaged there is no requirement to consider the public interest test in relation to the exemption.

GT Cars – taxi service

32. In response to the PQQ requirement to identify information within its submission which it considered to be commercially sensitive, GT Cars said all its tender information was commercially sensitive. However, the company did not provide any explanation or evidence that would support this blanket exemption.
33. Whilst RMH argued for blanket withholding of the information supplied by the successful bidder it provided no evidence to support this position.
34. In order for the exemption at s43(2) to be engaged the causal relationship between disclosure and the resulting prejudice must be

demonstrated. The Information Tribunal has stated that any reliance on 'prejudice' should be rejected if this relationship is not demonstrated.²

35. The Commissioner advised RMH that the causal relationship between disclosure and the likelihood of prejudice required specific demonstration. However, such demonstration was not provided by the company or RMH.
36. The Commissioner considers that the exemption at s43(2) is engaged in relation to the company's costings on pages 20 and 21 of its tender application, its sample extract on page 35 and the related Excel spread sheet that the company supplied to RMH. In the Commissioner's view disclosure of this information would reveal GT Cars' pricing strategy and enable competitors to undercut the company when bidding for similar contracts elsewhere.
37. For the reasons indicated in relation to the pricing information of City Sprint the Commissioner has concluded that the public interest in maintaining the exemption in relation to GT Cars' pricing information outweighs the public interest in disclosure.
38. In relation to the remaining information in the company's PPQ and tender response, as referenced earlier in this notice the Commissioner has taken into account the civil procurement policy and guidance of the Office of Government Commerce (OGC) now ERG. In the case of successful bids the working assumption of the guidance is that this information should generally be disclosed.
39. In the absence of any compelling argument or evidence from the company to support the proposition that commercial prejudice would be likely to arise from disclosure of the remaining information, the Commissioner has concluded that the exemption at s43(2) is not engaged. As the exemption is not engaged there is no requirement to consider the public interest test in relation to the exemption.

² [Hogan v Information Commissioner and Oxford City Council \(EA/2005/0030\)](#)

Right of appeal

40. 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

41. 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.
42. 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

Rachael Cragg
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