

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 January 2014

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** Room 2252, White City  
201 Wood Lane  
London  
W12 7TS

### **Decision (including any steps ordered)**

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1. The complainant has requested the names of all companies that submitted a request to participate and the names of all companies that submitted tenders for a particular contract. The BBC confirmed that it did not hold the names of companies that had submitted tenders as no tenders had been submitted at the time of the request. It withheld the names of companies that submitted a request to participate under section 22 and section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the BBC has correctly applied 43(2) FOIA in this case.
3. The Commissioner requires no steps to be taken.

### **Request and response**

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4. On 28 April 2013 the complainant requested information of the following description:

"I wish to make a request under the Freedom of Information Act 2000 for the following information.

Background:

Security Guarding Services for the BBC are currently in procurement as project\_18049

The original Contract Notice is available here:

<https://bbc.bravosolution.co.uk/esop/toolkit/notice/showPublic.do?noticeId=212598&opportunityId=18668&oppList=PAST#>

The original Time-limit for receipt of tenders or requests to participate was 23/04/2013

Subsequently, the listing deadline was shown as 25/4/2013

[https://bbc.bravosolution.co.uk/esop/toolkit/opportunity/opportunityDetail.do?oppList=PAST&opportunityId=18668&\\_ncp=1367174282113.168889-1](https://bbc.bravosolution.co.uk/esop/toolkit/opportunity/opportunityDetail.do?oppList=PAST&opportunityId=18668&_ncp=1367174282113.168889-1)

Questions:

- 1) Please supply the names of all companies which have submitted a tender for this contract as of 26/4/2013
- 2) Please supply the names of all companies which have submitted a request to participate in this procurement as of 26/4/2013"
5. On 22 May 2013 the BBC responded. It refused to provide the complainant with the requested information as it said it was exempt from disclosure under section 43(2) and section 22 FOIA.
6. The complainant requested an internal review on 27 May 2013. The BBC wrote to the complainant with the outcome of the internal review on 29 November 2013. It explained that it did not hold the names of companies which had submitted tenders as no tenders had been submitted at the time the request was made. It withheld the names of companies that submitted a request to participate under section 22 and section 43(2) of the Freedom of Information Act 2000 (FOIA).

### **Scope of the case**

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7. The complainant contacted the Commissioner on 23 August 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether section 22 or section 43(2) FOIA have been correctly applied in this case.

## Reasons for decision

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### Section 22

9. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:
- the public authority holds it with a view to its publication;
  - the public authority or another person intends to publish the information at some future date, whether determined or not; and
  - in all the circumstances it is reasonable to withhold the information prior to publication.
10. In reviewing the BBC's application of this exemption, the Commissioner has considered each of the above requirements and reached the following conclusions. He has also referred to his own guidance *Information held at the time of the request*<sup>1</sup>.
11. The Commissioner has considered the application of section 22 only in relation to the name of the successful company, which would also have registered an interest to participate.
12. The BBC has confirmed that the name of the successful bidder was held at the time the request was made however the BBC did not know the identity of the company at that time. The Commissioner is however satisfied that the information was held at this time.

### *Intention to publish at the time request received*

13. The BBC said that there was a clear and settled intention at the time of the complainant's request to publish the successful bidder's name in the Official Journal of the European Union (OJEU) by way of a Contract Award Notice once the tender was complete. It said that the complainant was informed of this fact in the initial response. Further, it said it is a statutory requirement under European Procurement rules

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<sup>1</sup> Published on the ICO website  
here: [http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_22\\_information\\_intended\\_for\\_future\\_publication.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_22_information_intended_for_future_publication.ashx)

for public bodies to publish the details of winning bidders by way of a Contract Award Notice in the OJEU.

*With a view to publication*

14. The Commissioner interprets the words in section 22 of 'with a view to' to indicate an intention has been made to publish or at the very least that the information is held in the settled expectation that it will be published.
15. Publication requires the information to be generally available to the public. It is not enough if the intention is to make it available to a restricted audience. If during the course of the preparation of the information for publication some material will be redacted, section 22 will not apply to the redacted information. This is because the public authority will no longer hold the information with a view to publication in the future.
16. In this instance, the information is intended to be published in the Official Journal of the European Union (OJEU) by way of a Contract Award Notice once the tender was complete, which is a statutory requirement.

*At some future date (whether determined or not)*

17. The publication date does not need to be definite for the exemption to apply. As long as a decision has been made that the information requested will be published at some time in the future or there is a settled expectation that this will happen, the exemption can be considered.
18. In this case the BBC has explained that the successful bidder's name will be published once the contract has been sent out, which at the time of responding to the Commissioner, was due imminently.

*Reasonable in all the circumstances to withhold the information prior to Publication*

19. In order to engage section 22 of the FOIA, a public authority must first determine whether or not it is reasonable in all the circumstances to withhold the requested information prior to publication before considering the public interest test.
20. In considering the reasonableness of withholding the information, the Commissioner's guidance states that authorities should first give separate consideration to whether or not such an approach is "...sensible, in line with accepted practices, and fair to all concerned to withhold the information prior to publication."

21. The Commissioner's guidance also advises that, in considering what is reasonable in all the circumstances, authorities may also wish to consider:
  - Is it the right decision to manage the availability of the information by planning and controlling its publication?
  - Is it necessary to avoid any advantage that would be obtained by the requester in obtaining the information prior to general publication?
  - Does the timetable properly require internal or limited consideration of the information prior to its public release?
22. The Commissioner considers that it was reasonable to withhold the information requested in this case until the tendering process was complete.
23. As the Commissioner considers that it would be reasonable in all of the circumstances to withhold the information prior to publication, he has gone on to consider the public interest arguments in this case.

**Public interest factors in favour of disclosure**

24. There is a public interest in promoting accountability and transparency in decision making particularly in relation to the expenditure of public money.

**Public interest factors in favour of maintaining the exemption**

25. It would not be in the public interest to disclose the name of the successful bidder until the tendering process has been completed and finalised.

**Balance of the public interest arguments**

26. Taking all of the above into account, the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption.
27. The Commissioner considers that section 22 was correctly applied in this case to the name of the successful bidder.
28. The Commissioner has gone on to consider whether the names of the unsuccessful companies, who registered an interest to participate, were correctly withheld under section 43(2) FOIA.

## **Section 43(2)**

29. Section 43(2) FOIA provides an exemption from disclosure of information 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.
30. The BBC has explained that the withheld information consists of the names of companies that submitted a request to tender for a particular contract. It said that putting a contract out to tender and bidding for that contract are commercial activities. It therefore said that the withheld information relates to a commercial activity of the named companies as well as the BBC.
31. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the named company's or the BBC's commercial interests.
32. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
33. The Commissioner considers that making a request to participate in a tendering process is a commercial activity and therefore the requested information does fall within the remit of section 43(2) FOIA.
34. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
35. The BBC has stated that, in withholding the information it considers that disclosure of the information would be likely to prejudice the companies which made a request to participate in the tendering process and its own commercial interests.

36. The Commissioner has gone on to consider how any prejudice to the commercial interests of the companies which submitted a request or the BBC would be likely to be caused by the disclosure of the requested information.
37. The BBC has explained that public disclosure of a potential bidder's identity at a stage of procurement pre-qualification would be likely to prejudice their commercial interests as they rely on being competitive in the market. It would be likely to weaken a potential bidder's position in a competitive environment by revealing market sensitive strategic information of potential usefulness to competitors. This is a particular risk in the event of non-selection for the invitation to tender stage, which could have a detrimental effect on external factors affecting third parties, such as share price and reputation in the market place. As a consequence, disclosure could cause damage to a third party's business reputation or the confidence that customers, suppliers or investors may have in it.
38. The BBC also said that a material risk to the BBC's commercial interests also exists in that potential bidders could be deterred from competing for contracts and sharing commercially sensitive information with the BBC. Setting a precedent by publishing information provided by a potential bidder, in confidence, could significantly harm the tender process. The BBC would be seen as a higher risk to tenderers, whilst early disclosure could leave the BBC open to future legal challenge in not properly following strict procurement rules and processes. Therefore, disclosure of the withheld information would also likely prejudice the BBC by negatively impacting upon the quality of its service provision and damaging public confidence in its processes.
39. The BBC summarised that it believes there is a clear causal link between the disclosure of the withheld information and future likely prejudice to the commercial interests of both prospective tenderers, (who must remain competitive in the market place) and to the commercial interests of the BBC itself, (who must retain the confidence of third party bidders when entering into contractual relations.)
40. In this case the BBC has not contacted the company to obtain its views on disclosure and whether it considers the prejudice would be likely to occur. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". In this case the Commissioner is satisfied the prejudice claimed is real, actual and of substance despite the fact that it has not obtained the company's views on disclosure in this case.
41. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". In this case, the Commissioner is satisfied

the prejudice claimed is real, actual and of substance. He considers that if the names of the companies who made a request to participate at such an early stage of the process were disclosed, it would be likely to undermine confidence in the unsuccessful companies. This in turn would also be likely to have an effect on a company's confidence in the BBC, in terms of disclosing a private company's name as an unsuccessful potential participant in a tendering process. The BBC has confirmed that the name of the successful bidder will be published once the tendering process is fully complete. The Commissioner considers that the companies are competing against one another in a competitive market and there may be a perceived weakness in the unsuccessful companies which submitted a request to participate if this information were publicised. If the BBC were to disclose the names of companies who registered an interest at a very early stage in the process, it would be likely to undermine confidence in the BBC and therefore may impact upon a company's decision to make a request to participate in future tendering exercises. The Commissioner therefore considers that section 43(2) FOIA was correctly engaged in this case.

42. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

### **Public interest arguments in favour of disclosing the requested Information**

43. The BBC submitted the following public interest arguments in favour of disclosure:
  - There is a general public interest in the transparency and accountability of the BBC in its use of public funds. In this case, the public interest relates to the BBC's ability to demonstrate that it is obtaining value for money when tendering for the supply of services contracts. However, it is submitted that the BBC is unlikely to achieve its value for money objective if damage to the general contract tender process arises due to disclosure of the identity of prospective tenderers. This would inevitably result in nervousness amongst third parties when weighing up whether or not to bid for BBC contracts; a factor that would be likely to prejudice the BBC's commercial interests.
  - In any event, the BBC submits that the general public interest in the transparency and accountability of the BBC in respect of its use of the licence fee is served by a broad range of oversight mechanisms, internal and external. These include the BBC Trust, whose responsibilities cover commissioning value for money investigations into specific areas of BBC activity (Article 24(2)(i) of the Charter), and the Executive Board, whose responsibilities



include conducting the BBC's operational affairs in a manner best designed to ensure value for money), and the fair trading regime and competition law in general (Article 38(1)(h) of the Charter).

### **Public interest arguments in favour of maintaining the exemption**

44. The BBC submitted the following public interest arguments in favour of maintaining the exemption:

- There is a public interest in ensuring the competitive position of companies in their particular market is not disadvantaged by doing business with the BBC. It would not be in the public interest to disclose sensitive information about a particular company if that information would be likely to be used by competitors to gain a competitive advantage, or by clients to undermine that company's commercial negotiating position. There is a public interest in companies and individuals providing the BBC with commercially sensitive information, so that the BBC is able to make robust decisions regarding its suppliers of goods and services, ensuring that the BBC obtains the best value for money from each transaction.

### **Balance of the public interest**

45. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the carrying out of a tendering process to ensure it is undertaken fairly and that the BBC is obtaining value for money. The Commissioner also considers that there is a public interest in disclosure of information which will inform the public about how decisions are made. The Commissioner acknowledges however that disclosing the names of companies that registered an interest to participate at a very early stage of the process would only go a very limited way to meeting the public interest arguments in favour of disclosure.
46. The Commissioner considers that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies nor disclosing information which would be likely to have a negative impact on the BBC's future tendering processes.
47. On balance, the Commissioner considers in this case that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption.

## Right of appeal

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48. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**