

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 May 2014

Public Authority: University of Sussex
Address: Sussex House
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested the University of Sussex (the university) to disclose the final contract between it and Chartwells, the service provider responsible for providing catering services to the university over a 10 year term.
2. Initially, the university applied section 22 of the FOIA. However, it later changed its position and published certain sections of the contract but withheld other sections under section 41 and 43 of the FOIA. During the Commissioner's investigation the university decided to release further information to the complainant.
3. The Commissioner has considered the remaining withheld information. It is the Commissioner's decision that sections 41 and 43 of the FOIA do not apply.
4. The Commissioner therefore requires the university to take the following steps to ensure compliance with the legislation:
 - the university should disclose Schedule 2 Part 8 – the content of the column entitled 'Strategy Deliverables' and Schedule 4 paragraphs 4.2 and 4.1 and Appendix 1 to the complainant.
5. The university must take these steps within 35 calendar days of the date of this decision notice. 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 2 July 2013, the complainant wrote to the university and requested information in the following terms:

“Please send me an electronic copy of your contract with Chartwells in which they are contracted to provide outsourced catering services.”
7. The university responded on 29 July 2013. It stated that it did not hold the requested information, as the contract referred to had not been finalised. It confirmed that it expected the final contract to be in place by the end of August 2013.
8. The complainant resubmitted his request on 8 September 2013.
9. The university responded on 4 October 2013. It confirmed that the requested information was exempt from disclosure under section 22 of the FOIA. The university confirmed that it was currently undertaking a procurement process to find professional partners to deliver catering conference and facilities management services. It informed the complainant that once the procurement process had been completed it intended to formulate a publication plan for the major documents involved in the process.
10. The complainant requested an internal review on 4 October 2013. He rejected the application of section 22 of the FOIA. He stated that the outsourcing of catering services had now been completed and the university had failed to confirm a date for the information's intended publication.
11. The university carried out an internal review and wrote to the complainant on 4 November 2013. It upheld the application of section 22 of the FOIA and informed the complainant that it intended publishing the information towards the end of January 2014.

Scope of the case

12. The complainant contacted the Commissioner on 5 November 2013 to complain about the way his request for information had been handled. Specifically, the complainant raised concerns about the university's application of section 22 of the FOIA to the requested information. He remained of the opinion that there was no firm intention on the university's behalf to publish the requested information at the time of the request and therefore section 22 of the FOIA could not apply.

13. Information was finally published on the university's website on 27 February 2013. However, this was a redacted version of its contract with Chartwells not the complete contract. During the Commissioner's investigation it was established that the university wished to withhold certain sections of the contract under section 41 and 43 of the FOIA.
14. The contract was reviewed in depth and the Commissioner recommended that further information be released. The university agreed to do so and forwarded this additional information to the complainant on or around 10 April 2014.
15. The university confirmed that it still considered the following information was exempt from disclosure under sections 41 and 43 of the FOIA:
 - (a) Schedule 2 Part 5 – referred to as the 'Service Provider Solution'. This is Chartwells' original tender submission to the university.
 - (b) Schedule 2 Part 8 – the content of the column entitled 'Strategy Deliverables'.
 - (c) Schedule 4 paragraphs 4.2 and 4.1 and Appendix 1.
16. The complainant has confirmed that he is not interested in seeing Chartwells' original tender submission – only the final contract itself. The remainder of this notice will therefore address items (b) and (c) and the university's application of sections 41 and 43 of the FOIA to each of these items.
17. This notice will also address any procedural breaches of the FOIA.

Reasons for decision

18. Section 43 of FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of the university, Chartwells or both.
19. Section 43 of the FOIA is a qualified exemption. Therefore, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the university, Chartwells or both, the university also needs to apply the public interest test. For this, the university needs to consider the public interest arguments for and against disclosure and establish whether the public interest is best served by maintaining the exemption or by disclosure.
20. The university has stated that it considers disclosure of the remaining information would be likely to prejudice the commercial interests of the

university itself and Chartwells. It provided a copy of a letter it received from Chartwells which outlines Chartwells' objections to the disclosure of the remaining withheld information.

21. Referring to item (b) first, the university stated that this information was produced by Chartwells alone without any input from the university itself. It contains Chartwells' service offering and its unique methodology. It argued that this information is one of the main ways that Chartwells is able to 'offer something different to its rivals' and compete in a competitive environment. It stated that this information was some of the information that secured Chartwells' success in the tendering exercise. If this information became available to Chartwells' competitors a competitor could utilise this intellectual property to either improve their own service offering or to distinguish their own service offering from that of Chartwells and gain an advantage in a competitive situation. This could be achieved by a competitor without committing any further resources of its own to improving its competitive edge. This would be likely to lead to either competitors outbidding Chartwells in future tenders or result in Chartwells having to invest more into its service offering to enable it to continue to have the same success in future tenders as it has recently experienced.
22. The university stated that disclosure would be likely to give Chartwells' competitors an advantage, as they would be aware of Chartwells' methodologies and specific service offering and could use such information to better their position and to give them the upper hand.
23. The university also argued that disclosure would be likely to prejudice its own commercial interests too. It explained that disclosure would be likely to prejudice the university's ability to participate competitively in commercial activities of this nature in the future, as disclosure would impact on the way service providers interact with it and their willingness or otherwise to provide such services. The university felt that future service providers would be reluctant to supply similar information to it in the future and could potentially opt out of engaging with the university altogether. The university would then have a smaller pool of potential suppliers, which would hinder its ability to secure goods and services competitively in the future.
24. In relation to item (c), the university explained that these redactions detail the agreed financial return to the university over the first five years of the contract and the agreed financial threshold over which the university receives an additional financial return. It stated that this is a significant and novel financial commitment which Chartwells made to the university and is unique to this deal. It believes that if this information was disclosed it could be used by Chartwells' competitors to outbid it in future tendering exercises. The university also argued that this

information could be used by other public authorities interested in outsourcing catering facilities as a benchmark to negotiate the same or even more favourable terms in future agreements with this supplier.

25. The university also felt that disclosure of item (c) would be likely to prejudice its own ability to secure similar or better terms from future suppliers. It stated that future suppliers would be unlikely to offer more favourable minimum returns than those agreed under this contract, which would stifle the university's ability to negotiate and to ultimately receive the most favourable cost effective services.
26. The Commissioner has given this matter careful consideration and he has reached the decision that section 43 of the FOIA does not apply to items (b) and (c). He will now explain why.
27. The university has not explained in sufficient detail exactly what item (b) contains. It has stated that it contains Chartwells' methodology and service delivery but it has not provided any more detail to the Commissioner to explain exactly what this redaction is. The Commissioner has reviewed this redaction and it appears to him to be a set of agreed criteria between Chartwells and the university against which Chartwells will be reviewed and monitored on annual basis. The agreed criterion seems to detail individual service commitments Chartwells is willing to make.
28. The Commissioner cannot see from a review of the information itself or from the submissions supplied exactly how such information could be commercially sensitive or used by one of Chartwells' competitors. As stated above it appears to the Commissioner to be a list of agreed terms which Chartwells has promised to deliver. Information already released from this element of the contract confirms that the contents of the redacted information will be reviewed annually. The redacted information therefore seems to be similar to Key Performance Indicators which are often used within contracts of this nature against which the service provider will be monitored.
29. The redacted information appears to be contract specific – in other words specific to the service Chartwells' has agreed to provide over the 10 year term to the university. The Commissioner considers that other catering contracts that may come up in the public sector in future will be specific to the needs of that authority and therefore not directly comparable. As such he remains unconvinced from a review of the information itself and the arguments supplied by the university that disclosure of this information would be likely to prejudice the commercial interests of Chartwells.

30. It is also noted that this is a 10 year contract – therefore a medium length contract during which requirements may change. When this contract comes up for tender again the university environment will have moved on significantly and it is likely that different terms and requirements will be necessary going forward. The Commissioner feels it is therefore unlikely that this information would be useful to service providers in this field in 10 years' time. And, again the university has provided insufficient arguments to the Commissioner to the contrary.
31. In terms of prejudice to the commercial interests of the university itself, the university's arguments appear to focus on its own fears that disclosure would be likely to result in less providers wishing to engage with it in the future and providers being reluctant to share what it believes to be commercially sensitive information.
32. As stated above, the Commissioner does not agree that this information is commercially sensitive. It is also the Commissioner's view that public sector contracts are a lucrative source of business to many private companies and that transparency and accountability where contracts have already been signed and a provider agreed would not deter them from engaging in the future.
33. It should be highlighted that at the time this request was made the contract between Chartwells and the university had already been signed. There was therefore no room for further negotiation at this point or any possibility of other providers being able to alter or amend their tender in order secure this contract. Disclosure of the information is therefore unlikely to have the effects the university has described.
34. Turning now to item (c), the Commissioner notes that the redactions here are financial figures detailing the minimum return the university will receive over the first five years and the financial threshold over which the university would receive an additional return.
35. However, these redactions are single figures stating the university will received £X amount at the end of year one, two and so on and if net sales income exceeds a particular amount (amount redacted) that the university will be entitled to a particular percentage of that income (percentage redacted) which exceeds the stated threshold. The redactions do not contain any sort of breakdown of how these figures have been agreed, how these have been priced by Chartwells or detail what level of profit or loss Chartwells will make.
36. It is this sort of breakdown or detail that would be likely to be commercially sensitive – not the agreed terms between the university and Chartwells. The redacted information provides no indication of how these figures have been calculated and provides no in depth analysis of

Chartwells' costing or pricing structure for this contract. The figures also do not provide any indication of the level of profit Chartwells may achieve.

37. For these reasons, the Commissioner cannot see how disclosure of this information would be particularly useful to one of Chartwells' competitors or how it could be used to outbid Chartwells in future contracts. The figures are representative of the contract as it stands at present. As stated above, the Commissioner considers that any re-tendering exercise that may arise when this contract ends will be for a fresh set of circumstances and requirements and therefore these financial returns will not be directly comparable.
38. For similar reasons, he does not agree that disclosure of this information would be likely to prejudice the commercial interests of the university. These agreed returns are specific to this contract and the specific terms the university has negotiated with Chartwells. This contract would not be comparable to others and in 10 years' time it is likely that the situation will have changed considerably and so purely indexing the figures would not be sufficient to stifle the university's bargaining position at any future re-tender.
39. For above reasons, the Commissioner has concluded that section 43 of the FOIA does not apply to items (b) and (c).
40. As the Commissioner is satisfied that section 43 of the FOIA does not apply to the remaining withheld information (items (b) and (c)), there is no need for him to go on to consider the public interest test.
41. He will however go on to consider the university's application of section 41 of the FOIA.
42. Section 41(1) of FOIA states that information is exempt from disclosure if –
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
43. It is the Commissioner's view that a written agreement between two parties does not constitute information provided by one of them to the other, and therefore a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act.

44. He recognises that there are exceptions to this – for example, information relating to the third party's pre-contractual position or technical information either contained within the body of the contract or attached as a schedule which is more than just the mutual obligations and joint agreements of the contracting parties.
45. However, the Commissioner does not consider the information in question here falls into these exceptions.
46. Although the university has claimed that item (b) was solely provided to it by Chartwells, the Commissioner does not agree. As he explained in his analysis of section 43 of the FOIA above, the Commissioner considers the redactions made to this element of the contract contain *agreed* terms between the university and Chartwells. The redacted information contains a list of terms Chartwells will provide and this section of the contract confirms that this list will be regularly reviewed. Considering the contents of the redactions, the Commissioner considers it is fair to say that Chartwells and the university will have discussed these terms, negotiated on certain points and then agreed the final list which has been redacted here. The list details the services Chartwells will provide in given contexts – it is fair that both parties will have negotiated at length exactly what services will be provided during the term of the contract and for the financial returns documented.
47. Even if the Commissioner is incorrect on this point and it can also be argued that the information was imparted in circumstances giving rise to a duty of confidence, the university still has to demonstrate that disclosure would have a detrimental impact on the commercial interests of the confider concerned (Chartwells) for the exemption to be engaged.
48. As he has explained above, the Commissioner does not accept from reviewing the information himself or from the submissions he has received from the university that the information is commercially sensitive. In his section 43 analysis, the Commissioner could not see how disclosure of this information would be likely to be prejudicial to the commercial interests of Chartwells.
49. So, even if it can be argued that this information was provided by Chartwells to the university and that it was imparted in circumstances giving rise to a duty of confidence, the Commissioner does not agree that there would be any likely detriment to Chartwells' commercial interests as a result of disclosure. And, as this is a requirement for this exemption to be engaged, section 41 of the FOIA cannot apply to item (b).
50. Item (c) is quite clearly agreed terms between the university and Chartwells. Item (c) details the minimum financial returns the university

will receive over the first five years. It is fairly obvious that such terms will have been negotiated heavily prior to being agreed *between* the two parties. This information is clearly not information provided to the university by Chartwells and therefore section 41 of the FOIA cannot apply.

Procedural issues

51. Section 22 of the FOIA states that information is exempt from disclosure if the public authority intends to publish it at some future date (whether determined or not).
52. It is quite clear in this case that the university had no intention of making the *entire* contract available to the public. It had clear intentions to publish some sections of the contract at the time of the request but not all of it. When the university did finally publish the information it was willing to make available, it redacted sections and informed the Commissioner that it now wished to rely on sections 41 and 43 of the FOIA.
53. It is the Commissioner's view that section 22 of the FOIA was incorrectly applied to this request. Although the university had clear intentions to publish *some* of the information, the university did not know what that information was at the time of the request. In order to apply section 22 of the FOIA correctly, a public authority must be able to clearly point to the specific information intended for future publication. In this case, the university did not do this and made no attempt to go through the contract to establish what would be published and what would not until the Commissioner became involved.
54. Section 22 of the FOIA can also only apply to the sections of the contract the university intended to publish not to those sections it intended to redact.
55. This then leads on to a breach of section 17 of the FOIA. The university clearly intended to redact certain sections of the contract under sections 41 and 43 of the FOIA. It had no intention at the time of the request to make the entire contract publically available. The university should therefore have issued a refusal notice to the complainant under section 17 of the FOIA within twenty working days of his request that stated that it was withholding information under sections 41 and 43 of the FOIA.

Right of appeal

56. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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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