

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2015

Public Authority: Bradford City Clinical Commissioning Group (BCCCG)

Address: Douglas Mill
Bowling Old Lane
Bradford
BD5 7JR

Decision (including any steps ordered)

1. The complainant has requested information about the full details of the rejected Care UK contract bid for the Eccleshill NHS treatment centre that was not renewed and has led to the closure of the centre. BCCCG provided the complainant with some information relevant to the scope of the request but refused to provide a piece of information under section 43 and 44(1)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the BCCCG correctly applied section 44(1)(a) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 30 July 2014 the complainant made the following request for information under the FOIA:

"Could you send me the full details of the rejected Care UK contract bid for the Eccleshill nhs treatment centre that was not renewed and has led to the closure of the centre?"
5. BCCCG responded on 10 October 2014. It provided some information within the scope of the request and refused to provide the remainder, citing the exemptions under sections 40(2) and 43(2) as the basis for doing so.

6. The complainant was not satisfied with the BCCCG's application of section 43 to the request and it provided the outcome of the internal review on 28 November 2014. BCCCG upheld its original position with regard to this exemption.
7. During the course of the Commissioner's investigation BCCCG provided the complainant with some further information, but additionally applied section 44(1)(a) FOIA to the piece of information it had withheld in its entirety. It did not however provide any arguments in relation to the application of section 40(2) FOIA so the Commissioner has treated this exemption as withdrawn.

Scope of the case

8. The complainant contacted the Commissioner on 10 December 2014 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether BCCCG was correct to apply section 43 or section 44(1)(a) FOIA to the piece of information it withheld in its entirety.

Reasons for decision

Section 44

10. Section 44 FOIA provides that

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."

11. The BCCCG has explained that section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law.

12. The BCCCG has claimed that the request is for 'confidential information', and if it were held, the release of which under FOIA is prevented by regulation 43 of the Public Contract Regulations 2006 (PCR).

13. Regulation 43 of the PCR states that –

"(1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders."

14. The PCR apply to certain procurement exercises, and regulation 43 only protects information supplied by an economic operator. The onus is on the public authority to first satisfy the Commissioner that the information relates to a relevant procurement exercise. BCCCG has therefore confirmed, and provided significant explanation, that:

- it is a contracting authority as defined by regulation 3 PCR;
- the contractor is an economic operator as defined by regulation 4 PCR;
- the contract is one that falls within the PCR by virtue of regulation 5 PCR;
- the contract meets the financial thresholds established in regulation 8 PCR; and
- none of the general exclusions set out in regulation 6 PCR apply.

Based upon BCCCG's submissions the Commissioner is satisfied that the information relates to a relevant procurement exercise.

15. In order for information to fall within regulation 43 the information must:

1. be forwarded to the public authority by the tenderer and
2. be reasonably designated by the tenderer as being confidential.

16. BCCCG has confirmed that the withheld annex was forwarded to it by Care UK as part of their submission in response to the Invitation to Tender. The annex is not a document jointly 'provided' by the BCCCG and Care UK and is not a document which forms part of the online ITT submission. The annex was provided solely by Care UK and submitted to BCCCG as part of their supporting documentation within the bid.

17. The Commissioner is satisfied that the withheld information was provided to BCCCG by the tenderer.

18. The inclusion of the word "reasonably" in Regulation 43 means that the tenderer cannot simply designate anything it chooses as confidential. There must be some legitimacy to this claim of confidentiality. The Regulations do not define "reasonably" and therefore it is necessary to look at Directive 2004/18/EC, on which the regulations are based, for guidance as to the intention behind Regulation 43. The presence of the words "in accordance with the law" in Article 6 of the Directive, from which Regulation 43 is derived, suggests that the way in which confidentiality should be determined in these circumstances is by reference to national law to which the contracting authority is subject. It is therefore necessary to apply the law of confidence in order to determine whether the information is within scope of the regulation.
19. It will therefore be necessary to establish:-
 1. that the information was imparted in confidential circumstances – this will virtually always be met as the information has to be forwarded to the public authority by the tenderer and reasonably designated as being confidential in order to come within Regulation 43 in the first place;
 2. whether the information has the necessary quality of confidence;
 3. whether there is some overriding public interest (under the law of confidence not FOIA) which negates the duty of confidence.
20. BCCCG said that the withheld information is regarded by Care UK as its Intellectual Property and therefore it is a valuable asset of Care UK. It contains details of Care UK's forecast income and profits/losses, projected costs and expenditure and cash flows. It argued that the information has most clearly been designated as confidential.
21. It said Care UK has three times stated this information is commercially confidential. First on the 'Technical Evaluation' document where this annex is covered by the generic statement that all information submitted is confidential and should not be shared or published 'without our explicit permission at any time'. The second time was in September 2014 when the CCG requested Care UK to be more specific as to which information they felt was commercially sensitive and why. Care UK responded in a letter dated 17th September stating that 'The Financial Model as submitted in the bid is commercially sensitive and is to be treated as private and confidential. The intellectual property rights of this Modelling Tool are the sole property of Care UK. Care UK would therefore insist on the Modelling Tool itself not to be released. The third time was during a telephone call with Care UK's Senior Commercial Manager who stated the annex remains commercially sensitive and confidential. Care UK's views were confirmed in an email dated 17th March which again reminds the BCCCG that the annex must remain 'withheld'.

22. As a result, BCCCG believes the information contained within the 'Annex' has been designated as confidential. The annex has the necessary quality of confidence, it was imparted in circumstances giving rise to an expectation of confidence and BCCCG believes it is under an explicit common law duty of confidence, which would be breached if the annex were to be released.
23. The BCCCG acknowledged that regulation 43 regards technical or trade secrets and the confidential aspects of tenders as confidential information. It considers that the information withheld, details of Care UK's forecast income and profits/losses, projected costs and expenditure and cash flows, is a confidential aspect of its tender.
24. Taking into account BCCCG's submissions and after viewing the withheld information, the Commissioner is satisfied that it was imparted by Care UK to BCCCG in confidential circumstances and by its nature, the withheld information has the necessary quality of confidence.
25. The Commissioner has therefore considered whether there is some overriding public interest under the law of confidence which negates the duty of confidence in this case.
26. The Commissioner considers that whilst there is a general public interest in public authorities operating a tendering process, transparently and openly, in this case BCCCG has disclosed some of the requested information to the complainant which it does not consider to be a confidential part of the tender. This therefore goes some way to meeting this public interest. In any event, the Commissioner does not consider that this would constitute an overriding public interest which would negate the duty of confidence owed to Care UK by it providing BCCCG with confidential financial information.
27. The Commissioner considers that Regulation 43 of the Public Contract Regulations 2006 does provide a statutory bar to disclosure of the withheld information and therefore section 44(1)(a) FOIA was correctly applied by BCCCG.
28. As the Commissioner considers that section 44(1)(a) FOIA was applied correctly in this case, he has not gone on to consider the application of section 43 FOIA any further.

Right of appeal

29. 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: 0870 739 5836

Email: informationtribunal@hmcts.gsi.gov.uk

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

30. 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.
31. 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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