

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 May 2015

Public Authority: Department for Transport (DfT)

Address: Zone D/04, Ashdown House
Sedlescombe Road North
St Leonards on Sea
East Sussex
TN37 7GA

Decision (including any steps ordered)

1. The complainant has requested the completed Part D (Health and Safety Management and Culture) of the Pre-Qualification Questionnaires received from all bidders for the 2016 Northern Franchise including how each section scored. The DfT refused to disclose the requested information under section 41(1), 43(2) and 44(1)(a) FOIA.
2. The Commissioner's decision is that the DfT has correctly applied section 43(2) FOIA to all of the withheld information in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 25 November 2014 the complainant requested information of the following description:

I request the release to me of the completed Part D (Health and Safety Management and Culture) of the Pre-Qualification Questionnaires received from all bidders for the 2016 Northern Franchise, including how each section scored.

5. On 19 December 2014 the DfT responded. It refused to disclose the requested information under section 21, 41 and 43(2) FOIA.

6. The complainant requested an internal review on 22 December 2014. The DfT sent the outcome of its internal review on 22 January 2015. It said that the completed Part D questionnaires submitted by the applicants are exempt from disclosure under Sections 41, 43(2) and 44 of the FOIA. It said that information on how the applications were scored is exempt from disclosure under Section 43(2) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 22 December 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DfT correctly applied any of the exemptions to the withheld information.

Reasons for decision

9. Section 43(2) of the 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.
10. 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."¹
11. Upon viewing the withheld information the Commissioner considers that it is information submitted in a bid to win a contract to provide services and does therefore fall within the scope of the exemption.
12. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.

Whose commercial interests and the likelihood of prejudice

13. 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.
14. The DfT has stated that disclosure of the information would be likely to prejudice the commercial interests of the applicants who submitted the bids as well as their own.

The nature of the prejudice

15. The DfT explained that it shortlisted applicants in August 2014. At the time of the request the tendering process was at the stage where the DfT conducted bilateral meetings with applicants on draft sections of the ITT. It confirmed that the DfT announced the publication of the ITT in February 2015. It therefore said that whilst the pre-qualification stage had now completed, the competition for the franchise remains live.
16. The DfT said that the withheld responses contain detailed descriptions of applicants' business methods, processes, operations and procedures relating to their management of health and safety risks and the resulting culture they have developed. This includes details of the contractual relationship they have with their suppliers and how they work with them to improve the health and safety culture throughout their operations and supply chain. This information is backed up with case studies provided by the applicants, usually taken from live and existing contracts that they hold with other third parties. The market in which train operating companies operate consists of a small number of operators providing similar services at a comparable level. It said that small differences between operators can be significant and therefore disclosure of the Part D responses would be likely to provide a competitive advantage to the applicants' competitors.
17. The DfT acknowledged that the complainant also sought information on 'how each section scored'. The DfT confirmed that it withheld this information on the basis that disclosure would be likely to prejudice both the commercial interests of the applicants and the DfT's own commercial interests. It said that the scores awarded to each application are information generated within the DfT; rather than the contents of Part D itself, which is provided by the applicants (third party information). Nevertheless it argued that disclosure of the scores will impact on the commercial position of these third parties. It said there is a risk that the knowledge of the difference between the party's scores would impact on

their ability to participate in future competitions, both within the rail sector and in other sectors, including those outside of transport. That is to say that, the release of applicants' scores would be likely to prejudice the views of future potential partners, suppliers and vendors about their approach to health and safety culture and management and their ability to pre-qualify for competitions. It said that in the longer term this would be likely to impact on their ability to secure financial backing for future investments and as bonding to participate in future competitions.

18. It explained that release of these scores would be likely to also prejudice the commercial interests of the DfT. It is likely that PQQ for future franchise competitions would require similar information from applicants. It said disclosure of applicant's responses and, particularly, the DfT's assessment of those responses, would give parties considering bidding in future Franchise Letting processes an indication of the processes and business methods that the DfT considers favourable. It said this would be likely to result in a narrowing of submissions and a decrease in innovation as applicants seek to adopt already proven processes and methods. That in turn would be likely to lead to a reduction in the DfT's ability to secure value for money from the franchise letting process. In addition to this, the release of the scores would reduce the competitive tension that is maintained within the franchising programme. Revealing these scores would be likely to distort the market, by reducing the desire of Applicants to participate in future competitions and thereby lowering the competitiveness of future competitions.
19. The Commissioner acknowledges that the withheld information consists of detailed information relating to the management of health and safety risks, individual to each applicant depending upon the culture they have developed and the contractual relationship with suppliers. This includes specific case studies provided by the applicants, taken from live and existing contracts they hold with third parties. He is also aware that the market in which the applicants operate consists of a small number of operators providing similar services at a comparable level and that the DfT has indicated that small differences between operators can be significant. The Commissioner considers that the withheld information, Part D of the pre-qualification questionnaire, if disclosed would provide the competitors of the applicants with commercially sensitive information which would be likely to put them at a commercial advantage. This is particularly so at the time of the request, as the pre-qualification stage was still ongoing and whilst this stage is now complete the tendering process is still very much live and ongoing.
20. In relation to the scores awarded by the DfT to this aspect of the questionnaire, again as at the time of the request the pre-qualification stage was still ongoing and furthermore the tender process is still live,

disclosure of this information would be likely to prejudice the applicant's commercial interests both now and in the future. As the tender process is ongoing, it may distort competition to disclose the scores of the companies involved at this stage and may provide a commercial advantage to know the parallel scores of the competition. The Commissioner also considers that disclosure of this information would be likely to reflect on each of the applicants and how they are perceived in relation to their potential for taking part in future similar tendering processes with other partners. As the Commissioner considers that disclosure of the scores would be likely to prejudice the applicant's commercial interests, he has not gone on to consider whether disclosure would be likely to prejudice the DfT's commercial interests any further.

21. As the Commissioner does consider that section 43(2) FOIA was correctly engaged and this is a qualified exemption, he has gone on to consider the balance of the public interest in this case.

Public interest test

Public interest arguments in favour of disclosure

22. The DfT considers that there is a public interest in openness and transparency with regard to rail franchise competitions.

Public interest arguments in favour of maintaining the exemption

23. The DfT considers that there is a strong public interest in avoiding prejudice to the commercial interests of applicants, both now and in the future, particularly as at the time of the request the pre-qualification stage was still ongoing and even now the tender process remains live and ongoing.

Balance of the public interest

24. The Commissioner considers that there is a public interest in openness and transparency surrounding rail franchise competitions, particularly in relation to the health and safety aspect of a bid, as ultimately the service provided will have a significant affect/impact on rail users.
25. However the Commissioner is mindful that at the time of the request, the pre-qualification stage was still ongoing and even now the tender process is still very much live. This therefore increases the public interest in protecting the commercial interests of the applicant's involved.
26. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of

maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly engaged in relation to all of the withheld information.

27. As the Commissioner has found that section 43(2) FOIA was correctly engaged in this case, he has not gone on to consider the application of any of the other exemptions any further.

Right of appeal

28. 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: GRC@hmcts.gsi.gov.uk

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

29. 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.
30. 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

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