

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2016

Public Authority: Department for Work and Pensions

Address: 6 -12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information pertaining to the funding of the government's Work Programme (South West).
2. The Commissioner's decision is that the Department for Work and Pensions ('DWP') has correctly relied on section 43(2) to withhold the requested information.

Background

3. Job centres in the UK had the power to refer people in receipt of unemployment benefit (Job Seeker's Allowance) to attend Mandatory Work Activity (MWA). These are work placements with local businesses and organisations where claimants work 30 hours a week for four weeks. The work is unpaid and failure to attend can result in loss of benefit.
4. The MWA programme divides the UK into 11 contract package areas (CPAs). Each area is run by a contract provider. These are private firms paid by the government to arrange the work placements within their area. The contract providers source the placements with companies.
5. Prospects Services Limited is contracted to DWP to deliver the Work Programme in CPA 11 - South West (Gloucester; Wiltshire & Swindon, West of England).

Request and response

6. On 14 July 2015, the complainant wrote to the DWP and requested information, via the FOIA, in the following terms:
 - 1) How much government money ('funding') Prospects receives per individual on its Work Programme (South West) as of Present?
 - 2) How much funding Prospects receives for the duration of, and upon completion of, the aforementioned Work Programme as of Present?
 - 3) How many complaints Prospects have received in the period 2014-15 in relation to the aforementioned Work Programme?
7. The DWP responded on 5 August 2015 and said as follows;

Request (1)

"... the information you have requested is commercially sensitive and is therefore exempt from release under Section 43 of the Freedom of Information Act.

Section 43(2) of the Act exempts information which, if disclosed, would be likely to prejudice the commercial interests of any person. It protects not only the commercial interests of third parties but also the commercial interests of the Department. It is intended to protect the ability of a public authority like DWP to obtain goods or services on the best possible commercial terms and to protect the legitimate commercial interests of its suppliers. The information you seek falls into this category.

As required by the FoI Act the use of this exemption requires the public interest for and against disclosure to be assessed. Generally speaking there is a public interest in the disclosure of commercial information to ensure transparency in the accountability of public funds and to show that public money is being used effectively. Conversely, there is a public interest in ensuring that disclosure does not compromise an existing competitive market environment or the Department's ability to secure best value for money for the taxpayer. On balance we are satisfied that, in this instance, the public interest in applying the exemption outweighs the public interest in disclosure.

Request (2)

The estimated value of the Work Programme contract held by Prospects Services Ltd in the South West in their role as a Prime Provider is

£54,132,930. The contract commenced on 13 June 2011 and will end on 31 March 2017.

Request (3)

3) The number of complaints received by Prospects Services Ltd in relation to the Work Programme between 1 January 2014 and 1 January 2015 was 121.”

8. Following an internal review the DWP wrote to the complainant on 27 August 2015. It stated that it partly upheld its original decision, in that some of the requested information, relating to certain fixed payments, was in the public domain¹. However any further held requested information remained exempt information by virtue of section 43(2).

Scope of the case

9. The complainant contacted the Commissioner on 13 August 2015 to complain about the way his request for information had been handled.
10. The Commissioner has to determine whether the information as per request 1 was properly withheld.

Reasons for decision

11. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.
12. The DWP has informed the complainant that it holds the requested information. However it relies on section 43(2) of FOIA not to communicate it to him.
13. Section 43(2) of FOIA states that:

¹ <http://data.gov.uk/data/contracts-finder-archive/contract/192354/>

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

14. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure ‘would be likely’ to result in prejudice or disclosure would result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge.
15. The DWP submissions, regarding its reliance on section 43(2), are laid out in paragraphs 16 to 22 below.
16. This information consists of a detailed payment schedule relating to Job Outcome Payments, which are paid after a participant has remained in work for a qualifying period of 13 or 26 weeks depending on their Payment Group.
17. Providers were asked to offer a discount on a supplied maximum price for this fee. As a result the level of discount and subsequently the amount payable per job outcome varies by contract and the amount of discount offered. The level of discount is also varied by contract year. Prospects’ contract is one of 41 similar contracts which deliver the Government’s Work Programme across GB.
18. DWP estimates that the value of the Work Programme contracts will be around £3 billion. Instead of funding this directly via departmental expenditure (as has always been the case with past welfare-to-work programmes), the Work Programme is funded from the money saved from future benefit spending as people find work. This is known as the

DEL/AME switch as the funding will come from Annual Managed Expenditure (AME), which is used to pay benefits, instead of the Departmental Expenditure Limit (DEL).

19. Up to June 2015, it is estimated that a total of £2001 million had been paid to Work Programme providers, including:
 - £510 million in attachment fees;
 - £503 million in job outcome payments; and
 - £992 million in sustainment payments.
20. Since the Work Programme operates on a payment by results basis, this total will increase as more participants spend the necessary length of time in employment to qualify for job outcome or sustainment payments. Given the scale of this investment it is essential that the tax payer's interest is protected by ensuring a competitive market place when contracts are tendered and retendered.
21. As a result of requesting discounts on Job Outcome Payments, DWP generated millions of pounds in savings to the tax payer. A decision to permit disclosure of this element of the bid would have serious implications for DWP's commercial activities going forward. Disclosure would remove the price competitive element from procurement competitions increasing the cost to Government, adversely affecting DWP's commercial interests and compromising its remit to secure value for money for the taxpayer. DWP agreed that this, along with other areas of their bid, were either commercially or financially sensitive and should not be published, as part of the Government's transparency agenda, on Contractfinder².
22. Prospects Services Ltd identified clearly prior to contract award that their entire pricing proposal is a trade secret and, as such, disclosure of their Pricing Proposal would cause significant detriment to their commercial interests. This position was accepted by the DWP as price competitiveness was a major consideration when awarding the contract.
23. As a result, the DWP's opinion is that details about Prospects Services Ltd Job Outcome Fee are exempt from disclosure. It is relying on the

² Contractfinder is a public domain website containing contract details of all Public Sector procurements will a value of more that £10,000 per annum.

higher threshold of disclosure as this “would” have a prejudicial effect on their commercial interests.

24. The Commissioner has viewed the withheld information and the contractual agreement between the DWP and Prospects Services Ltd. The Commissioner notes that Prospects Services Ltd obtained the contract for Work Programme (South West) after a competitive tendering exercise and that there is not a set fee or fees payable to a contractor. The agreement also stipulated that pricing information, which is now the withheld information, was confidential.
25. The Commissioner accepts, on a balance of probabilities, that releasing the withheld information would have a prejudicial effect on the commercial activities of the DWP. Specifically, that disclosing the withheld information would undermine future tendering exercises as companies are concerned about sensitive pricing terms being divulged to their competitors. This would likely hamper the number and type of tenderers for future similar contracts. A reduction in competitors in future tendering exercises would be detrimental to the DWP commercially.
26. The Commissioner also accepts that the withheld information would be useful to Prospects Services Ltd's competitors who would like to outbid it or offer more favourable terms in future tenders. The usefulness being that competitors would be aware of the monetary values that secured or helped secure Prospects Services Ltd's contract with the DWP. This would provide Prospects Services Ltd's competitors, for future similar contracts, with a distinct advantage. Accordingly the Commissioner is satisfied that releasing the withheld would be likely to prejudice the commercial interests of Prospects Services Ltd.
27. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.
28. The Commissioner has accepted the DWP's argument that section 43(2) is engaged and that, consequently, that disclosure of the withheld information would be likely to prejudice the commercial interests of the DWP and Prospects Services Ltd.
29. Public interest factors favouring the release of the withheld information, in the Commissioner's view, include;
 - The general public interest in greater transparency to improve accountability of, and trust in, government. The greater the

impact on the country or on public spending the greater the public interest may be in government being more transparent.

- Help to establish that the public authority in achieving value for money for tax payers.
30. Public interest factors favouring the maintenance of the exemption, in the Commissioner's view, include;
- Publication of the withheld information would likely discourage suppliers from participating in the government's employment programmes, undermining delivery of Welfare to Work policies.
 - Revealing a supplier's pricing policy would affect future procurements and thus the DWP's ability to achieve the best value for the government by encouraging suppliers to bid on the basis of the published prices of their competitors rather than on the basis of their best price.
31. The public interest is well served by ensuring that companies have faith in a tendering process whereby commercial information it (and the other contracting party) considers confidential, remains confidential. The DWP has contracted out, to the private sector, the provision of certain services. It is to the public's advantage that Prospects Services Ltd is not dissuaded from participating in future tendering exercises (and thereby reducing competition) by an undue release of commercially sensitive information
32. The decision of the (then) Information Tribunal in *Visser v ICO EA/2011/0188* found (at paragraph 20) that prejudicing the commercial interests of one player in the market would distort competition in that market, which in itself would not be in the public interest. There is therefore a public interest in protecting the commercial interests of individual companies:
- "If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded."
33. The Commissioner, taking cognisance of the above, accepts that there is a strong public interest in organisations being able to provide commercially sensitive information, which includes pricing information, to a public authority as part of a tender. This allows the organisation to set out in the clearest possible terms the benefits of its bid over others, which ultimately results in a more competitive tendering environment. If however there is a risk that that information might be disclosed in

response to a request at a time when that information will still be of value to competitors, then companies may feel disinclined to provide a level of detail which might ultimately be copied and disadvantage its competitive position within the market. This is particularly the case where the company concerned considers some parts of its bid to contain elements it considers to be its trade secrets.

34. There is a risk, albeit slight, that some companies might decide that they are unable to bid for a tender where detailed information is required which amount to a company's trade secrets or is highly commercially sensitive and there is a possibility that this information may subsequently be disclosed.
35. The Commissioner believes that there is an inherent public interest in ensuring fairness of competition; in that respect he concurs with the DWP that it is firmly against the public interest for the commercial interests of third parties to be undermined simply because they have submitted a tender to a government department.
36. Conversely the public interest is also well served by the tendering process and full disclosure of the contracts being open to public scrutiny. This would ensure that the public authority is achieving value for money for tax payers.
37. In a case such as this, where large sums of public money are being paid and there has been considerable public debate as to the merits of the MWA programme, it is a delicate balancing act in which the competing interests are difficult to reconcile. However the Commissioner takes cognisance that there is a high degree of scrutiny of the awarding of government contracts by bodies such as the National Audit Office³.
38. In view of the reasons explained above, the Commissioner finds that, on balance, in all the circumstances of this case, the public interest in maintaining the exemption at section 43(2) outweighs the public interest in disclosing the withheld information. Although he accepts that there is a notable public interest in disclosing the withheld information, in reaching his conclusion the Commissioner in particular takes into account that he has found that the exemption is engaged in that the commercial interests of a third party will be prejudiced by the releasing of the withheld information and that there is an existing degree of scrutiny in the awarding of contracts. The Commissioner was further

³ <https://www.nao.org.uk/about-us/>

swayed by the public interest in having a strong tendering process that benefits the DWP's commercial activities.

Right of appeal

39. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

40. 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.
41. 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

Alexander Ganotis
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