

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2016

Public Authority: Barking and Dagenham Clinical Commissioning Group

Address: Barking Community Hospital
Upney Lane
Barking
Essex
IG11 9LX

Decision (including any steps ordered)

1. The complainant has requested various documents relating to the decision to award a contract for elective care services. The public authority aggregated parts of the request as it would exceed the cost limit to respond but did disclose some information with redactions made under section 43(2) as well as withholding scoring information and tender documents under this exemption.
2. The Commissioner's decision is that the public authority has correctly applied section 43(2) to the withheld information and the balance of the public interest lies in maintaining the exemption. He requires no steps to be taken.

Request and response

3. On 3 July 2015, the complainant wrote to NEL Commissioning Support Unit ("the CSU") to request information from four Clinical Commissioning Groups ("CCGs"). NEL CSU provides freedom of information services to these four CCGs and therefore responded on their behalf. For the purposes of this notice any reference to the CSU should be taken as referring to the CCG in question – in this case Barking and Dagenham CCG.
4. The request was for information on the decision to award a contract for elective care services to Barking, Havering and Redbridge University

Hospitals NHS Trust ("the Trust"). The request was in the following terms (numbering added for ease):

- 1) the scores awarded by each evaluator to Care UK's submission, and that of the Trust, in respect of each individual question, including details of the scores allocated for each question;
 - 2) the notes or minutes of any meetings between the evaluator during which scores were discussed, moderated or finalised;
 - 3) any evaluation reports;
 - 4) a description of the composition of the evaluation panel, including the job title of each member and details of which questions they scored;
 - 5) emails or other correspondence between the evaluation team regarding evaluation of Care UK's and the Trust's bids;
 - 6) details of any communication between CCG officers and the Trust about the process; and
 - 7) a copy of the tender submission provided by the Trust, subject to redaction in respect of genuinely commercially confidential material.
5. The CSU responded on 30 July 2015. It stated that it held some information within the scope of the request and disclosed this to the complainant but withheld some information on the basis of section 43(2) and 40(2) of the FOIA. For the requests numbered 2, 5, 6 and a subsequent request made on 13 July 2015 for similar information (referred to in this notice as (8)), the CSU considered that section 12 applied as complying with the requests relating to correspondence would exceed the appropriate cost limit to comply with.
6. Following an internal review the CSU wrote to the complainant on 4 September 2015. It stated that it maintained its position with regard to the use of the section 43(2), 40(2) and 12 exemptions.

Scope of the case

7. The complainant contacted the Commissioner on 9 October 2015 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation he requested further details from the CSU regarding the use of section 12 and whether the CSU was aggregating the requests for the purposes of

determining if complying would exceed the cost limit. Following confirmation from the CSU that it was aggregating requests 2, 5 and 6 in the correspondence of 3 July and request 8 in the correspondence of 13 July 2015 the Commissioner considered the more detailed arguments presented by the CSU to demonstrate how it had reached its cost estimate.

9. The Commissioner was satisfied that the cost of complying with these requests would significantly exceed the cost limit and after explaining this to the complainant it was agreed that the focus of the Commissioner's investigation would be to look solely at the use of the section 40(2) and 43(2) exemptions to withhold information within the scope of the remaining parts of the request.
10. The withheld information consists of the tender submission documents provided by the Trust (made up of the ITT (invitation to tender) submission document, financial modelling and a number of attached policy documents), the information redacted from the procurement outcome report (a redacted version has been provided to the complainant), and a spreadsheet containing the scoring for each of Care UK's submissions.

Reasons for decision

Section 43 – commercial interests

11. 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.
12. 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

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freed

13. Upon viewing the withheld information the Commissioner considers that it relates to a process to procure elective care services and the evaluation of the bids for this contract. This does therefore fall within the scope of the exemption as it relates to a commercial activity.
14. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone on to consider the prejudice that disclosure would cause and the relevant party or parties that would be affected.

Whose commercial interests and the likelihood of prejudice

15. 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.
16. The CSU has not explicitly stated the level of prejudice it is relying on and has referred to both 'would' and 'would be likely' in its submissions. As such the Commissioner has firstly considered if the CSU has sufficiently demonstrated that disclosure would be likely to prejudice the CCGs commercial interests and the commercial interests of the Trust.

The nature of the prejudice

Prejudice to the CCGs commercial interests

17. The CSU has argued that the information, particularly that relating to scoring and evaluation, shows the internal evaluative process and plays an integral role in ensuring the CCGs contract with the best provider.
18. The CSU has also highlighted the fact there is an ongoing Monitor investigation into the procurement and, as the procurement had not, and the Commissioner understands still has not, concluded with a contract being executed the disclosure of any information relating to the procurement exercise would be prejudicial to the CCGs. This is because it would prejudice the current procurement exercise and any future procurement.

19. As the tender process is still live and ongoing, the CSU argues that the release of any scoring and evaluation information would be likely to prejudice the CCGs commercial interests. It is likely that similar information would be required from applicants in any future procurement. Disclosure of applicant responses and the CCGs assessment of these responses could give parties considering bidding in future processes an indication of the business methods and processes considered as favourable by the CCGs. This could result in a narrowing of submissions and a decrease in innovation as applicants seek to adopt already proven processes and methods.
20. Additionally, were the CCGs to disclose evaluation comments made in relation to other bidders' tenders it may become possible for competitors to build up a detailed picture of the other bidders' responses to criteria, which may undermine the fairness of this procurement or procurements in the future. Disclosure of this information could 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.
21. The CSU has stressed that the CCGs are aware that their arguments must be more than tenuous and that information submitted in response to a tender will become less sensitive once the successful award of that tender has occurred. The CSU therefore argues that given the stage of the procurement in this case, releasing information on the bidders, their tenders, and the evaluation and scoring by the CCGs of those tenders could adversely impact the procurement process both in this case and in the future.
22. The burden upon the public authority is to demonstrate that the prejudice claimed is 'real and significant'. In this case the argument that there would be a real and significant risk or prejudice to the CCGs commercial interests is much stronger in relation to the information on scoring and evaluation of the bids.
23. The Commissioner is not minded to accept the CSU has sufficiently argued or demonstrated that disclosure of the tender submission would be likely to prejudice the CCGs commercial interests beyond simply suggesting it would impact on the fairness of the procurement process. It is not clear how disclosure of the tender submissions would do this.
24. However, for the scoring information and the evaluation reports which in this case take the form of a spreadsheet and a procurement outcome report, the arguments are better rounded. The CSU has argued this would impact on the procurement which was ongoing at the time of the request and any future procurement and the Commissioner can accept this as it would provide an insight into how the CCGs score various questions. It is likely that similar information would be required from

applicants in any future procurement and disclosure of the scores and evaluation would lead future bidders to tailor their answers to score more favourably. The Commissioner believes this would impact on the quality of future procurement exercises and would be likely to prejudice the commercial interests of the CCGs. There is, therefore, a causal link between disclosure and the potential prejudice claimed.

Prejudice to the commercial interests of third parties (the Trust)

25. For the tender submission documents the CSU argued that the information would prejudice the commercial interests of the bidders taking part in the procurement or who may submit tenders in the future for similar work. Information in other bidders' tender documentation is commercially sensitive, especially at this stage in the procurement, as it contains detailed descriptions of working practices, business methods, processes and operations to efficiently deliver services. These are unique to the individual bidders and disclosure would present a clear and identifiable risk to their commercial interests and would provide competitors with an unfair opportunity to use another bidder's time, effort and skill to their own advantage.
26. The CSU argues that disclosure at a stage when the tender had not been awarded would be very disadvantageous to the bidders, particularly the Trust who had not yet been awarded the tender, as it could pose a real risk to their commercial interests and harm their chances of winning any future tenders. The CSU has consulted with the Trust on this matter and they confirmed their view that disclosure would be likely to prejudice their commercial interests.
27. As already stated, the Commissioner has to consider whether the prejudice claimed is 'real or significant' in relation to the tender submission documents and the commercial interests of the Trust. The Commissioner accepts the argument that these documents are unique to the Trust and the procurement was still technically ongoing as the tender had not been awarded at the time of the request (albeit it was known the Trust had 'won').
28. The Commissioner accepts there is a possibility that competitors may be able to utilise the tender submission of the Trust as they could identify the areas of strengths that had led to the decision to choose the Trust as the preferred candidate, this combined with the scoring and evaluation information would almost certainly provide competitors with an advantage in future tenders. The tender submission documents do contain detail of business methods, processes and operations that the Trust has proposed and, at this stage of the procurement, disclosure of this information could be prejudicial to the Trust as the ongoing Monitor investigation into the decision to award to the Trust had not concluded.

There is a risk that if the Monitor investigation found anomalies in the decision by the CCGs that the contract could be re-tendered and disclosure of the tender submissions would be likely to prejudice the Trust's commercial interests as it could inhibit their chances of succeeding if competitors had their submissions to view before entering into a new tendering process.

29. The Commissioner does therefore accept there is a causal link between the disclosure of the tender submission documents and the prejudice to the Trust's commercial interests in this case. He therefore accepts that section 43(2) is correctly engaged in relation to these documents.
30. As the Commissioner has already accepted the exemption is engaged in relation to the scoring and evaluation documents and the CCGs own commercial interests he has now gone on to consider the public interest test.

Public interest test

Public interest arguments in favour of disclosure

31. The CSU recognises that disclosure of the information could assist in further understanding of the procurement process by allowing the public and tenderers to understand more about the bidding process.
32. The CSU also acknowledges that there is a need for transparency to ensure the public have faith in the manner in which goods and services are procured.

Public interest arguments in favour of maintaining the exemption

33. The CSU has argued that as the procurement process had not yet concluded it would not be in the public interest to disclose the information. Disclosure would pose a real and significant harm to the commercial interests of the CCGs and the provider.
34. The CSU believes that there is a public interest in ensuring that public procurement can be conducted effectively and that organisation bidding for public work should be able to do so without fear that their commercially sensitive information will be released. There is a public interest in ensuring that future procurements proceed in an environment where free and fair competition is possible, and achieve the best value for public funds.

Balance of the public interest arguments

35. The Commissioner considers that there is a strong public interest in disclosure of information relating to public procurement exercises to

demonstrate that the process is fair and achieving value for money and efficient provision of services within the NHS. It can be argued the public interest is particularly strong in this case due to the Monitor investigation into the commissioning of services in this case.

36. Conversely, the Commissioner also accepts that the public interest in maintaining the exemption can also be argued as equally strong due to the Monitor investigation as, at the time of the request, it was reasonable to allow this to conclude without the scrutiny that would no doubt have come from disclosure of the tender submission documents and the scores and evaluation information.
37. The Commissioner has determined in a number of cases that withholding entire tender submission documents is excessive and an effort should be made to identify only that information which is truly unique and reveals business or financial models. However, in this case as the procurement had not concluded and an independent investigation was ongoing he considers it was reasonable to continue to withhold all documents relating to the tender until such time as a decision had been made and it was clear there would be no re-tendering.
38. Disclosure before this time would have been likely to impact on the CCGs ability to procure by showing the scoring it used and the Trust's commercial interests by disclosing its full submissions before the conclusion of the procurement.
39. Disclosure of the scoring and submissions of a potentially successful bid would provide the strengths and weaknesses of this and could therefore be used to gain a commercial advantage by competitors, potentially by using the strongest elements of the bid. There is a strong public interest in not distorting commercial competition whilst the body concerned is an ongoing concern with potential to tender for services.
40. 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) was therefore correctly engaged in relation to the scoring information, evaluation report and tender submission documents.
41. As the Commissioner considers section 43(2) to be correctly engaged he has not gone on to consider section 40(2) in relation to any names withheld from the documents.

Right of appeal

42. 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

43. 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.
44. 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

Jill Hulley
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