

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2017

Public Authority: NHS Guildford and Waverley Clinical
Commissioning Group

Address: 3rd Floor
Dominion House
Woodbridge Road
Guildford
GU1 4PU

Decision (including any steps ordered)

1. The complainant has requested the criteria used and scores awarded to bidders for an Adult Community Health Services contract. NHS Guildford and Waverley CCG disclosed the criteria used but refused to provide the scores on the basis of the section 43(2) exemption.
2. The Commissioner's decision is that the section 43(2) exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the scores awarded to each bidder for each of the criteria used to select the preferred bidder for the contract referred to in the request.
4. The public authority 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

5. On 20 September 2016, the complainant wrote to NHS Guildford and Waverley Clinical Commissioning Group ("the CCG") and requested information in the following terms:

"Please provide me with the criteria that were used to select the preferred bidder for the Adult community Health Services contract, the result of which was announced on 10 August 2016.

Please provide me with the scores awarded to each bidder for each criterium that were used to select the preferred bidder for the Adult community Health Services contract, the result of which was announced on 10 August 2016."

6. The CCG responded on 18 October 2016. It provided information on the criteria used to select the preferred bidder but refused to provide the scores awarded to each bidder on the basis of section 43 of the FOIA as it would be likely to prejudice the commercial interests of the CCG and the other bidders. However, the CCG stated it required additional time to consider the public interest test relevant to the exemption.
7. A second response was sent on 23 November 2016 after the CCG had considered the public interest arguments relevant to the exemption and the information in question. The CCG found that the public interest favoured maintaining the exemption.
8. Following an internal review the CCG wrote to the complainant on 7 December 2016. It stated that it upheld its decision but considered it might be possible to disclose the information once the procurement exercise had been fully completed. The CCG has since withdrawn this comment as it has recently announced that the procurement exercise which the information related to has been discontinued and will be re-run by the CCG.

Scope of the case

9. The complainant contacted the Commissioner on 12 January 2017 to complain about the way his request for information had been handled.

The Commissioner considers the scope of her investigation to be to determine if the CCG has correctly applied the provisions of section 43(2) of the FOIA to withhold the scores awarded to each bidder for the Adult community Health Services contract.

Reasons for decision

Section 43(2) – commercial interests

10. 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.
11. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her 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
12. The information in this case relates to the scores awarded to the bidders for the Adult Community Health Services contract. The Commissioner is satisfied that the information relates to a commercial interest as it is information on a contractual bidding process. However, the information will only fall within the scope of the exemption if its disclosure would, or would be likely to, prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the CCG has argued the disclosure would create.

The nature of the Prejudice

13. In investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice.
14. 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

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

15. At the internal review stage, the CCG argued that since CCG's came into being in 2013 there has been an increase in the number of similar contracts subject to tender and this has led to increased competition between eligible providers. The CCG noted there were a number of procurement exercises for similar services being undertaken in various parts of the country. The CCG's position was that releasing the scores for the procurement exercise when it had not completed and other procurement exercises were taking place elsewhere that may involve organisations who submitted tenders in this case would be likely to lead to bidders being at risk of loss or damage as a result of this disclosure.
16. The CCG went on to further argue that it could lead to bidders being unfairly scored in procurement exercises for similar services as it may influence how information provided by bidders is interpreted and scored during on-going procurement exercises. The CCG believed that bidders could argue that the perception of evaluators for other procurement exercises was impacted by this disclosure and this could result in sanctions being applied by the regulator. The CCG also argued that members of the public could infer from any low scores that the organisation was in some way deficient in that area leading to individuals choosing not to access the services provided by them.
17. The CCG wrote to the complainant and the Commissioner in May 2017 to update its position, explaining that it had recently announced that the procurement exercise to which the request related had been discontinued and was to be re-run and releasing the scores whilst the procurement process was being re-run may influence the outcome.
18. The Commissioner appreciates the procurement exercise to which this information relates has been discontinued and the reasons why the CCG considers this strengthens the case for refusing to provide the information, so as not to influence the new procurement process. However, the Commissioner notes that at the time of the request the CCG stated the procurement exercise had not been fully completed so she does not consider the situation now to be significantly different than it was at the time of the request. Therefore, her concern is to determine if the CCG has sufficiently demonstrated that the disclosure of the specific withheld information – the scores awarded to each bidder – would be likely to have prejudice either the CCG's or the bidders commercial interests.
19. The Commissioner notes that the CCG's submissions only make brief reference to the specific elements of the withheld information and only

by stating that knowing the specific scores awarded to the bidders may influence the opinions of others or infer weaknesses in certain areas. The remaining arguments presented by the CCG are more generic in nature.

20. The Commissioner has viewed the withheld information and it contains broad categories that have been scored alongside a number score for each of the bidders (who are not named). Whilst the Commissioner understands the successful bidder is publicly known she is not aware that unsuccessful bidders have been named. The withheld information would therefore potentially reveal the scores awarded to the successful bidder and provide a comparison of this against the scores awarded to an unsuccessful bidder but without that bidder being identified it is difficult to see how this would be disadvantageous to any of the parties involved.
21. In terms of the stated prejudice to the CCG's own commercial interests; the CCG has put forward arguments that:
 - Organisations that submitted bids could take legal or regulatory action against the CCG if they believe this disclosure damaged their reputation or commercial interests;
 - Any successful legal or regulatory action by third parties would be likely to damage the CCG's reputation with stakeholders, therefore impacting on its ability to successfully procure best value services; and
 - Any subsequent reduction in available funds due to increased costs of services or fines would be likely to impact on the CCG's ability to put in place health and social care services that meet the needs of the local patients.
22. The Commissioner considers that these arguments are speculative and entirely based on hypothetical consequences that could only arise if there was a genuine prejudice to the commercial interests of third parties who could then take action against the CCG. As such, she does not accept that the CCG has demonstrated a causal link between disclosure of the specific information that has been withheld and the potential prejudice to the CCG's commercial interests.
23. In terms of the stated prejudice to the commercial interests of third parties; the CCG argued that:
 - Competitors could gain an unfair advantage in other procurement exercises for similar services as the information could be misrepresented in competitor's bids;

- The release of the information during an ongoing procurement process could impact on public perception of the quality of services provided by the organisations which submitted the tenders and lead to lower uptake of these by service users; and
 - Organisation may be unfairly scored as assessor's may be unable to make an objective assessment based solely on information in tenders.
24. In considering the potential prejudice to third party interests the Commissioner is mindful of the part IV of the code of practice issued under section 45 of the FOIA which recommends that, where requests for information potentially relate to the interest of third parties, authorities should consider consulting with such parties and seeking their views as to the disclosure of the information².
25. Ultimately, the decision whether to disclose requested information rests with the public authority to which a request is made, however, the Commissioner considers that it is in keeping with the best practice identified in the code to ensure arguments about prejudice to a party or parties' interests reflect the views of those to which the prejudice relates.
26. In this case the CCG confirmed that it did consult with the potentially affected parties. The CCG provided evidence of this to the Commissioner and the Commissioner notes that one of the potentially affected parties agreed with the CCG that the information could be used by competitors in future procurement processes and it could prejudice the objective assessment of any future submission. However, one of the other parties noted that the requested information was only the scores and did not extend to the bid submissions or any commentary or explanation for the scores. This party did still object to disclosure.
27. On this basis, the Commissioner acknowledges the CCG has based its arguments about the potential prejudice to third party commercial interests on knowledge of the views of the third parties. However, she is still not convinced that the CCG has made the link between disclosure of the actual information and the proposed prejudice. As one of the parties themselves pointed out; the information in question is the scores awarded to the bidders, it does not contain any further detail explaining

² The code is published online here:

<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

the scores and going into detail of the strengths and weaknesses of each bidder in each area. Nor does the information contain any assessment of the detailed bid submissions. This information would be much more likely to contain information which would be of use to competitors and might reveal unique selling points which would put a third party into a commercially disadvantageous position in future tenders. The Commissioner does not agree that disclosing scores awarded in broad categories when the bidders themselves are not identified could be seen to be prejudicial to any party involved in the procurement exercise as it does not reveal anything about its bid.

28. Having considered the submissions the Commissioner has concluded that the council has failed to clearly define the actual prejudice and to make concrete the causal link between the information being disclosed and the prejudicial effects occurring. In light of this, she has concluded that the CCG has not shown that disclosure of the information would result in prejudice to the commercial interests of the any of the parties identified or to itself.
29. As she has found that the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

Right of appeal

30. 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

31. 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.
32. 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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