

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2019

Public Authority: Cardiff and Vale University Local Health Board
Address: Executive Headquarters
University Hospital of Wales
Health Park
Cardiff
CF14 4XW

Decision (including any steps ordered)

1. The complainant has requested information relating to the contract most recently awarded for the provision of kidney dialysis services. Cardiff and Vale University Local Health Board (the UHB) disclosed some information but refused to disclose other information citing section 43 of the FOIA. It also confirmed that some of the requested information is not held.
2. The Commissioner's decision is that the UHB is entitled to rely on section 43 of the FOIA for the non disclosure of the remaining withheld information. She has however found the UHB in breach of section 10 of the FOIA, as it failed to respond to the complainant's request for information within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 15 July 2017, the complainant wrote to the UHB and requested information in the following terms:

"Please supply me with information you hold (emails, documents, data stored in information management systems and/or databases) in relation to the awarding of the most recent contract for provision of

kidney dialysis services, including any contracts you may hold in relation to the transportation of patients from their home to the service premises. Specifically, I am looking for:

- The award letter for the contract
- The criteria used to determine the successful tenderer
- The evaluation of the successful tender application
- A copy of the successful tender application
- The current contract for the provision of dialysis services
- The total cost of the contract and monies paid to date
- Any documentation or emails relating to patient consultation as part of the award process, including the weighting of patient views when awarding the contract
- The contract arrangements for provision of transportation services, including the financial arrangements around these services.

Furthermore, I also request information relating to the use of Caradoc House to provide these services. In particular, I am looking for any information you hold in relation to:

- The selection of Caradoc House as the location for the dialysis service
- The consideration of other locations for this purposes
- The views of current and existing patients in relation to the location of the dialysis service
- The financial arrangements for the use of Caradoc House (eg rental, lease or tenancy agreements) along with monies paid to date and any planned changes to these arrangements in the future."

5. The UHB responded on 28 November 2017. Instead of using bullet points (as the complainant did in his request), the UHB numbered each element of the request 1 to 12. In relation to questions 1 to 8 the UHB advised the complainant that it does not hold the information. For questions 9 to 11, the UHB provided a brief response to each. For question 12, it refused to disclose the information citing section 43 of the FOIA.
6. The complainant requested an internal review on 7 December 2017. He stated that the UHB had misinterpreted the scope of questions 1 to 7, as only concerning information relating to the provision of transport. He pointed out that the request also related to the tender and award of the renal services contract. Regarding question 8, the complainant confirmed that he was happy with the response received. In respect of questions 9, 10 and 11, the complainant confirmed that the brief response to each was not satisfactory and he was seeking all the

information the UHB holds in relation to the matters these questions raised. In respect of question 12, the complainant understood some information may be commercially sensitive but did not expect all of it to be exempt under section 43 of the FOIA.

7. The UHB carried out an internal review and notified the complainant of its findings on 20 March 2018. It revisited questions 1 to 7 and disclosed some further information. In relation to questions 9 to 12 it stated that the UHB does not hold this information. It commented that the information would need to be obtained from the Renal Network and the 'Project Team'. In respect of the application of section 43 of the FOIA, it confirmed that it remained of the opinion that the information was exempt from disclosure.

Scope of the case

8. The complainant contacted the Commissioner on 6 June 2018 to complain about the way his request for information had been handled. He stated that he is unhappy that he has not been given the information he has asked for and that he has experienced considerable delays. With regards to the UHB's response that some of the information is held by another 'network', he questioned whether the 'network' referred to held the information on behalf of the UHB.
9. During the Commissioner's investigation further information was disclosed to the complainant. With regards to questions 9, 10 and 12 the UHB undertook further searches of its own records and made the necessary enquiries to the Welsh Renal Network Manager, who it considered may hold the requested information. The UHB concluded that no information is held for questions 9 and 10 and no additional information to that already identified for question 12. This information was fed back to the complainant and he confirmed that he was now satisfied with the responses to these questions. In respect of question 11, the UHB did however identify some information falling within the scope of this question. It disclosed this to the complainant, which again resolved this element of the request.
10. The remainder of this notice will therefore focus on the remaining withheld information and the UHB's application of section 43 of the FOIA.

Reasons for decision

11. Section 43 of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the public authority itself or a third party.
12. The exemption is also qualified. So, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority, a third party or both, the public authority must consider the public interest arguments for and against disclosure and demonstrate in a given case that the public interest rests in maintaining the exemption.
13. The UHB explained that the contract covers the provision of satellite renal care services for South East Wales for a 7 year period with a 3 year extension option. The contract was awarded to Braun by the UHB on behalf of the Welsh Renal Network. The remaining withheld information consists of Braun's overall bid for the contract; its commissioning plan, the Community Benefit Plan it presented, the financial element of its bid including the proposed cost of equipment and its unique statement on how its proposed to staff the dialysis unit.
14. It argued that disclosure of the remaining withheld information would be likely to damage its own commercial interests and those of Braun. With regards to Braun it advised that Braun has made it clear to the UHB that it would be inappropriate to disclose the remaining withheld information to the world at large. The UHB stated that disclosure would reveal confidential and commercially sensitive information to the company's competitors which would then give Braun's competitors a commercial advantage in future negotiations. Specifically, it stated that knowledge of the company's pricing structure would allow competitors to undercut the company and successfully outbid it in future negotiations.
15. Furthermore the UHB confirmed that competitors would also gain a valuable insight into any innovative elements of the company's bid and how it framed the successful bid. It stated that the remaining withheld information details Braun's unique ways and approach to delivering the contract, which amongst other things, made it successful in this tendering exercise. Access to this information would allow competitors to replicate the approach of Braun in future negotiations thereby negating Braun's commercial advantage and competitive edge. Disclosure would be likely to prejudice Braun's ability to compete fairly and competitively in future negotiations and potentially lead to less competitive and unique proposals being put forward. One element of the withheld information is a financial spreadsheet which details the pricing and financial structure of Braun's bid. The UHB stated that access to this

information would enable Braun's competitors to replicate Braun's approach and produce a bid which would undercut the company. This would place Braun at an unfair commercial disadvantage in future negotiations and prejudice its ability to compete in future contracts.

16. The UHB also argued that disclosure would be likely to prejudice its own commercial interests. Disclosure would be likely to have a detrimental effect on the UHB's capacity to pursue its function to bring forward development in the area and obtain value for money. It stated that if it was expected to disclosure commercially sensitive information to the world at large, which could be used by those companies which were unsuccessful in the bidding round and others wishing to bid for the first time, it would deter companies from contracting with the UHB in the future.
17. The Commissioner has reviewed the remaining withheld information and notes that it comprises of Braun's overall bid for the renal services contract. It details how Braun intended to and envisaged delivering the services over the contract term and what experience and innovative and unique provision it could offer. One element of the remaining withheld information contains Braun's unique pricing structure and the financial elements to the bid. The Commissioner understands that procurement commenced in February 2015 with the final tender being submitted on 2 July 2015. The contract was awarded to Braun on 1 April 2016 with a staggered implementation. It is a 7 year contract with a 3 year extension option. The complainant's request was made in July 2017 when the contract had been running for just over a year.
18. The Commissioner considers at the time of the request Braun's bid and financial proposal was still fairly current and reflective of the service needs and costs of providing such services at that time. Disclosure would reveal Braun's overall bid, how this was put together and how it sold itself. It would reveal Braun's individual proposals for meeting the requirements of the contract and how it priced them. The Commissioner accepts that the information would be very useful to Braun's competitors. It would enable them to tailor any future bids they make accordingly and to use this information to outbid and undercut Braun. This would be likely to prejudice Braun's commercial interests and damage its ability to compete for future contracts on a fair and level basis.
19. The UHB confirmed that Braun is a global company that regularly competes for contracts of this nature. It stated that very recently Braun has competed for very similar contracts within Wales. The UHB acknowledged that the contract in question here is a 7 year contract with the possibility of it being extended up to 10 years and service needs and cost will alter with time. But it remained of the opinion that

despite such changes the remaining withheld information would provide a useful indication of the service needs and costs of future contracts for some time to come and assist Braun's competitors in working out more precisely how Braun may compete and on what basis in future tendering exercises.

20. The Commissioner considers the timing of the request plays an important part in the consideration of an exemption and the public interest test. At the time of the request she accepts the information contained in Braun's overall bid was still 'live' and current and would be reflective of the types of services and the costs of those that would feature in other tenders in the market place. Disclosure of their unique bid, how this was put together, what it promised to deliver, how and for what cost would be very useful to Braun's competitors. It would enable its competitors to use this information to their advantage and to outbid and undercut Braun in future contracts. Its competitors would have prior knowledge of what Braun was likely to present and for what cost and would use this information to the commercial detriment of Braun. It would damage any competitive edge Braun has and has worked hard to achieve and would result in the clustering of bids rather than bids being presented based on what they are actually able to offer. The Commissioner is therefore satisfied that disclosure would be likely to prejudice Braun's commercial interests and therefore that section 43 of the FOIA is engaged on this basis.
21. As she is satisfied that disclosure would be likely to prejudice the commercial interests of Braun, she has not gone on to consider the commercial interests of the UHB itself.
22. The Commissioner will now consider the public interest test.

Public interest test

23. The UHB stated that it acknowledged the public interest in openness and transparency and in the public having access to information which enables them to understand more precisely why certain decisions are made and how public authorities are utilising public funds for the provision of services. It also accepted that there is a public interest in ensuring that public authorities are obtaining value for money and the best possible deal.
24. However, in this case it stated that there is a risk of disclosure prejudicing the commercial interests of the UHB and Braun by negatively affecting their future bargaining positions. This in turn could lead to less effective use of public funds in future which is not in the interests of the public. It stated that it has a duty to protect sensitive commercial information it holds about any company it deals with and in this case it

has demonstrated that disclosure would be likely to have prejudicial effects on Braun and itself. The UHB confirmed that there is a wider public interest in ensuring that companies and public authorities are not being prejudiced by the disclosure of sensitive information and in particular in companies being prejudiced merely because they have contracted with a public authority subject to the FOIA. The UHB therefore ended by saying that it considers in this case that the public interest in withholding the information is greater than the public interest in disclosing it.

25. The Commissioner recognises the public interest in openness, transparency and accountability and in members of the public having access to information to enable them to understand more clearly why certain decisions are made. She also notes that there is a public interest in disclosure where the information concerns the expenditure of public funds. It is accepted that members of the public should be able to scrutinise the expenditure of public authorities and be in a position to evaluate for themselves whether value for money is being achieved.
26. The Commissioner notes that the complainant has also stated that many of the patients in the Gwent area are unhappy with the most recent award of the renal service contract to Braun. He stated that many patients have given feedback to the procurement project but consider their feedback has either been ignored or not given the weighting it deserves. Additionally many patients are dissatisfied with the patient ambulance provision, which can sometimes add 4 hours to the treatment process. The Commissioner acknowledges that the complainant and patients affected feel that they need access to the remaining withheld information to assist with these matters.
27. However, in this case the Commissioner is of the opinion that the public interest rests in maintaining the exemption. She has accepted that disclosure of the remaining withheld information would be likely to prejudice the commercial interests of Braun. She has accepted that the information would be very useful to Braun's competitors and enable them to utilise the information to the detriment of Braun in future tendering exercises. It would enable competitors to structure their bids in a similar manner, know in advance what Braun is likely to present and for what cost and this would be likely to damage Braun's ability to compete fairly and competitively.
28. The Commissioner does not consider it is in the public interest to damage third parties' abilities to compete fairly and on a level playing field in the market place. It would be likely to result in less competitive and less innovative and unique deals being put forward for consideration, which would not be in the interests of the wider public or the patients it serves. It would be likely to hinder the UHB's ability to

secure the best possible deal at the right cost and again such consequences are not in the interests of the wider public.

Procedural matters

29. Section 10 of the FOIA requires public authorities to respond to requests for information promptly and in any event no later than 20 working days from receipt. In this case the complainant's request was made on 18 July 2017 and the UHB did not respond until 28 November 2017; over 4 months later. The Commissioner has therefore found the UHB in breach of section 10 of the FOIA in this case.

Other matters

30. The section 45 code of practice recommends that public authorities carry out internal reviews within 20 working days of receipt. This can be extended to 40 working days in particularly complex or voluminous cases. In this case the complainant made his request for internal review on 7 December 2018. However, the UHB did not respond until 20 March 2018; over 3 months later.
31. The Commissioner would like to take this opportunity to remind the UHB of the requirements of the section 45 code of practice and the need to carry out internal reviews in a timely manner in the future.

Right of appeal

32. 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

33. 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.
34. 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

Samantha Coward
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