

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2021

Public Authority: King's College Hospital NHS Foundation Trust

Address: King's College Hospital

Denmark Hill

London

SE5 9RS

Decision (including any steps ordered)

1. The complainant has requested information relating to expenditure for the pathology department for the financial years 2017-18, 2018-19 and 2019-2020.
2. The Commissioner's decision is that the Trust has failed to demonstrate why section 43(2) (commercial interests) of the FOIA is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
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 24 June 2020 the complainant wrote to King's College Hospital NHS Foundation Trust ('the Trust') and requested information in the following terms:

'How much has the Trust expended on equipment for pathology services in total for the financial years 2017-18, 2018-19 and 2019-2020. I would like the information limited to expenditure on physical equipment only and not new tests, buildings or training. Where possible, expenditure on general information technology equipment and software should be shown separately from particular equipment and software used in pathology services. The expenditures may include leasing or hiring of contracted-out pathology services using automation and new technologies.'

6. The Trust responded on 22 July 2020, confirming it held the requested information. However, the Trust refused to disclose this information, citing section 43(2).
7. The complainant requested a first stage internal review and the Trust provided its outcome on 18 August 2020, upholding its original position. The Trust explained that it was withholding the requested information in order to provide all bidders with an even playing field.
8. The complainant then requested a second stage internal review and the Trust provided its outcome on 25 September 2020, upholding its original position.

Scope of the case

9. The complainant contacted the Commissioner on 29 September 2020 to complain about the way their request for information had been handled. The complainant was specifically concerned that the Trust had failed to demonstrate its application of the prejudice test as outlined in paragraph 15 of the Commissioners guidance 'The Prejudice Test'¹.
10. As part of her established processes, the Commissioner contacted the Trust on 17 May 2021 and asked it to reconsider the way that it had handled this request or provide its full and final submissions as to why section 43(2) was engaged.
11. On 14 July 2021 the Trust contacted the complainant directly and explained that, upon reviewing the matter, the Trust's rationale behind

¹ [the_prejudice_test.pdf \(ico.org.uk\)](https://ico.org.uk/the-prejudice-test.pdf)

its application of section 43(2) had shifted. The Trust explained that, at the time that the complainant made their request, a preferred bidder had been identified and therefore it was inaccurate to cite an even playing field for all bidders as it did.

12. The Commissioner therefore considers the scope of her investigation to be to determine if the Trust was entitled to withhold the requested information, citing section 43(2) as its basis for doing so.

Reasons for decision

13. Section 43(2) of the FOIA states that:

'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. The Commissioner's guidance '*Section 43 - Commercial interests*² states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity', for example the purchase and sale of equipment, goods or services.
15. The Trust outsources its equipment for pathology services and this outsourcing exercise is designed to secure the Trust the best value for money. With this in mind, the Commissioner is satisfied that the withheld information constitutes commercial information.
16. In order to engage a prejudice based exemption such as section 43 three criteria must be met. This is what is known as the prejudice test referred to within paragraph 9:
 - 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; and,

² [Section 43 - Commercial interests | ICO](#)

- 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.
17. Consideration of the exemption at section 43 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
 18. As part of her investigation into this matter, the Commissioner has been provided with the withheld information. The Trust has also provided the Commissioner with a copy of a Best and Final Offer (BaFO) tender document dated November 2019 and a copy of the Record of Public Interest Test that the Trust carried out in relation to this request.

The applicable interests

19. The Trust has explained that it is in the process of agreeing an asset purchase agreement with the successful bidder and it considers disclosure of the requested information would be likely to prejudice its own commercial interests as it would prejudice post-tender negotiations. The Commissioner is satisfied therefore that the first criteria as outlined in paragraph 15 has been met.

The nature of the prejudice

20. The Commissioner must therefore now consider if the Trust has successfully demonstrated a causal relationship between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect.
21. The Commissioner accepts that it will not be possible for the Trust to provide concrete proof that the prejudice would be likely to occur as a result of disclosure. In order to do so disclosure would be required which would undermine the point of the exemption and the FOIA. However, the Commissioner must be satisfied that this causal relationship is based on more than mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.
22. The Commissioner's guidance outlines the factors that a public authority must take into account when considering requests for procurement information and any prejudice that may occur. Firstly, when considering commercial interests, the timing of a request is crucial.
23. The Trust has explained to the Commissioner that, had the procurement process not been ongoing at the time of the request, it would have actively considered disclosing the requested information. However, the

Trust is concerned that if the requested information is disclosed, 'which is effectively to the world at large, it could have potentially found its way to the preferred bidder for the contract and thus potentially compromise the post tender negotiation with the preferred bidder.'

24. The Commissioner acknowledges that there are ongoing asset purchase negotiations between the Trust and its preferred bidder. However, the Commissioner does not see how disclosure of the requested information could prejudice ongoing asset procurement negotiations and the Trust has failed to explain to the Commissioner how or why this prejudice would occur.
25. Furthermore, a public authority must also consider how the requested information relates to any procurement negotiations that it envisages would be prejudiced by disclosure.
26. Whilst the Trust has explained to the Commissioner that the withheld information is not included within the tender documents provided to the successful bidder, it has failed to explain how it envisages the requested information would prejudice ongoing negotiations.
27. The Trust has explained to the Commissioner that, at the end of the negotiations in question, the successful bidder will be required to provide and finance all equipment required to run the Trust's pathology services. Expanding on this, the Trust has confirmed to the complainant that 'it has incurred expenditure linked to the purchase of equipment to support Pathology services provided to the Trust and that the equipment remains the property of the Trust.'
28. As these negotiations occur, a bidder will provide a tender specification which considers any changes that may occur during the contract period or any future iterations of the contract. The Trust has explained that it is required to keep the financial information found within such tender specifications confidential, so as to protect the commercial interests of the bidders.
29. Revisiting the complainant's request as outlined in paragraph 5, the request is for global figures relating to the Trust's expenditure on pathology equipment for the financial years 2017-2018, 2018-2019 and 2019-2020. The request does not ask for tender specific documentation, details of specific bidders or managed service contracts and furthermore, such confidentiality clauses do not offer a guarantee that information is exempt from disclosure under the FOIA.

30. The Trust has explained that, whilst tender specification information is kept confidential, the Trust is required to proactively publish details of any expenditure that exceeds £25,000³ and the complainant was directed to this resource during the second stage internal review process.
31. The Commissioner notes this information is within the public domain. Bidders, including the preferred bidder, will have used this information to inform their proposals to the Trust. The Commissioner notes that this information goes some way to providing an approximate figure relating to the Trust's expenditure on pathology equipment for the financial years 2017-2018, 2018-2019 and 2019-2020 and yet the Trust does not consider that this information would affect ongoing asset procurement negotiations.
32. The Trust has explained that any organisations wishing to provide services to the Trust will submit a bid using information that is available within the public domain, rather than a detailed knowledge of past tender specifications. The Commissioner accepts the Trust's explanation that disclosure of tender specifications would hinder the Trust in negotiations and its ability to obtain the best value for money for equipment. However, this is not what the complainant has requested.
33. The Trust has also explained to the Commissioner, 'The Trust treated the request as 'applicant blind'. The timing and language of the request and the appeal emails however suggested a specialised interest in the contract.' Again, the Trust appears concerned with disclosing tender specification information which it believes would prejudice ongoing negotiations.
34. The Commissioner would note that the FOIA is applicant and purpose blind and, revisiting the original request, this is not what the complainant is requesting.
35. The Trust has drawn the Commissioner's attention to the BaFO document which would have been issued to all bidders, including the preferred bidder. This document states 'Any increase/decrease in Asset cost would trigger an adjustment to the contract price.' The BaFO document that the Commissioner has been provided with has the 'final bid return date' of November 2019.
36. The Commissioner notes that the Trust's expenditure on pathology equipment for the financial years 2017-2018, 2018-2019 and 2019-

³ [Publication of spend - King's College Hospital NHS Foundation Trust \(kch.nhs.uk\)](https://www.kch.nhs.uk/foia/publication-of-spend)

2020 is not subject to fluctuation. Again, the Trust has failed to explain to the Commissioner how it envisages disclosure would prejudice ongoing negotiations or how this information would inhibit the Trust from gaining the best value for money.

37. The Trust has explained that disclosure of prior years' expenditure costs could allow bidders, including the preferred bidder, to make planning assumptions based on the bidder's own commercial interests rather than submitting a best and final offer designed to provide the Trust with value for money.
38. The Commissioner, having reviewed the withheld information, has considered whether such a conclusion could be drawn from the requested information. She has concluded that, even an individual who works within pathology services, would be unable to do so from the global figures held for the financial years of 2017-2018, 2018-2019 and 2019-2020.
39. The Trust has confirmed to the complainant that 'it has incurred expenditure linked to the purchase of equipment to support Pathology services provided to the Trust and that the equipment remains the property of the Trust.'
40. The Commissioner acknowledges that equipment purchased during previous financial years represent ongoing assets and are therefore relevant to ongoing asset negotiations. However, the requested information does not provide a granular breakdown of all equipment used by the Trust for pathology services during previous financial years – only a global figure.

The likelihood of prejudice

41. Though the Trust has not specified this to the Commissioner, it has explained to the complainant that it considers disclosure 'would be likely to' result in the prejudice that section 43(2) is designed to protect against. The Commissioner's guidance defines this lower threshold as 'the probability of the harm occurring is less than 50%. However, the risk of prejudice occurring must be real and significant, and it must be more than hypothetical or remote⁴.'
42. The Trust has failed to explain to the Commissioner what rationale it is relying upon to rely on this lower threshold.

⁴ [Section 43 - Commercial interests | ICO](#)

The Commissioner's view

43. The Trust has asserted on several occasions that disclosure of the requested information would affect ongoing asset procurement negotiations but has failed to sufficiently detail how it could do so or on what basis the Trust has reached the opinion that the risk or prejudice is real or significant.
44. Ultimately, the Commissioner does not consider that three global figures relating to year priors' expenditure on pathology equipment would affect the best and final offer submitted by the preferred bidder, or any ongoing asset procurement negotiations, without any further breakdown as to how this money was spent.
45. The Trust has confirmed that asset procurement negotiations are ongoing and the Commissioner recognises a detailed breakdown of global figures for the financial years of 2017-2018, 2018-2019 and 2019-2020 may prejudice such negotiations.
46. However, when it comes to demonstrating a causal link between the withheld information and any prejudice that may occur the Trust has only offered vague assertions that the Commissioner considers speculative in nature and not founded on any evidential or logical grounds .
47. The Commissioner considers that the Trust has failed to sufficiently demonstrate the causal relationship between disclosure of the requested information and the prejudice that the exemption is designed to protect it from. This raises the concern that section 43(2) has been applied as a blanket exemption in relation to all commercial information, without any regard for the prejudice test outlined within paragraph 16.
48. It is the Commissioner's decision that the Trust has failed to demonstrate why disclosing the information would or would be likely to affect its own commercial interests. As the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

Right of appeal

49. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

50. 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.

51. 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

Alice Gradwell
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