

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 March 2023

Public Authority: King's College Hospital NHS Foundation Trust
Address: Denmark Hill
London
SE5 9RS

Decision (including any steps ordered)

1. The complainant has requested information about a contract with the Good Governance Institute (GGI). The above public authority ("the public authority") provided some information, but stated that no further information was held – with the exception of a proposal document that was exempt under section 43 of FOIA (commercial interests).
2. The Commissioner's decision is that the public authority has identified all the information it holds within the scope of the request. The proposal document engages section 43 of FOIA and the balance of the public interest favours maintaining the exemption. The public authority breached sections 10 and 17 of FOIA as it failed to disclose all the non-exempt information or issue an adequate refusal notice within 20 working days.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 17 May 2022, the complainant wrote to the public authority and requested information in the following terms:

"Please may you provide me with:

- [1] A copy of the recent Good Governance Institute (GGI) brief and required deliverables including dates for delivery.

- [2] GGI full diagnostic report, recommendations, and Board and or executive agreed action plan including due dates.
 - [3] Details of the selection criteria for GGI selection related to the tender process including the brief. Include number of bidders, prices submitted and basis for decision. Include list of bidders. Please provide details of decision-making forum and chair of forum and minutes or other evidence to support decision to progress the programme/plan.
 - [4] The value of the GGI contract and details of what that covered including number of days and GGI consultants. Please provide copies of the CVs/biographies of the consultants engaged.
 - [5] Details of the benefits realisation evaluation or equivalent and details of all and any outstanding actions to include details of the executive lead for each action and reasons for any delays or slippage. Please include details of the committee or forum overseeing delivery. This would usually be in the form of a programme or project plan and action tracker or report already produced. Please state if this information is not available and the reason why.
 - [6] Any related action plan following delivery of the GGI report including all minutes of all Board and executive discussions, updates, and action completion if different to questions 4.
 - [7] Who is the executive lead for the Care Quality Commission (CQC) compliance and assurance?
 - [8] Who is the executive lead for the GGI programme?
 - [9] Details of the executive lead sponsor for the bid for work that resulted in selection of the GGI being engaged."
5. Following the Commissioner's intervention, the public authority eventually responded on 10 August 2022. It provided information within the scope of all but elements [3] and [4] of the request. In respect of element [3], it stated that the information was "still being sought" and in respect of element [4], the information was "still being considered."
6. A further response was issued on 12 September 2022. Most of the information within the scope of element [3] was disclosed – with the exception of the identities of one of the bidders. In respect of element [4], the public authority stated that it was relying on section 43(2) of FOIA to withhold the information.

7. Following an internal review the public authority wrote to the complainant on 8 December 2022. It provided the name of the second bidder and upheld its stance in relation to the remainder of the request.
8. Following further correspondence from the complainant disputing the extent of the information the Trust held within the scope of element [3], the Trust carried out a further internal review. It upheld its previous stance and attempted to respond to some of the complainant's challenges to the extent of the information that was held.

Scope of the case

9. The Commissioner contacted the complainant on 7 March 2023 to ask her to confirm the scope of her complaint as being:
 - The reliance on section 43 to withhold information
 - Whether further information within the scope of element [3] is held
 - The procedural handling of the request
10. The Commissioner asked the complainant to respond by 14 March 2023 if there were any other matters that she wished to be included. No response was received, so the Commissioner has proceeded on the basis that the scope set out above is acceptable to the complainant.

Reasons for decision

Is further information held?

11. The complainant has noted that the minutes of the Risk and Governance Committee she has received contain substantial redactions. The public authority has explained that the names of junior staff members have been redacted, but the majority of the information within each document has been redacted as it simply does not fall within the scope of the request.
12. The complainant has not taken issue with the public authority's reliance on section 40(2) of FOIA. The Commissioner has viewed unredacted copies of each set of minutes and is satisfied that none of the other redacted information would fall within the scope of the request. The complainant could of course request complete copies of each set of minutes, should she wish to do so.

13. The complainant argued that the public authority should hold further information within the scope of element [3] besides the minutes. Because a procurement exercise had been run, she argued that there should have been a written brief, copies of correspondence and records of discussions. She indicated that, in her view, the absence of such information would indicate that the public authority had failed to comply with procurement rules.
14. The complainant also raised issues around potential conflicts of interest – these fall outside the scope of the complaint.
15. The Trust, in its responses, maintained that it had followed the procurement rules that were in place at the time. In its response of 8 December 2022, it stated that:

“On further investigation I can confirm that there was no written brief and the Trust does not hold this information. The anticipated value of the contract was below the Public Contract Regulations threshold, therefore the procurement approach given the circumstance was proportionate to the value and urgency, in line with national policy. The Trust requested proposals from appropriately competent suppliers (from frameworks) following phone conversations, proposals were submitted on the basis of these conversations. Given the pressures facing the Trust as a direct result of responding to COVID-19 and Reset and Recovery, this was deemed an appropriate method to ensure that the Trust secured the services to enable the Trust to progress continuous improvement and challenges around financial year end. This was also consistent with the recognition in Procurement Policy Note (PPN) 01/20 and subsequent PPN’s that there would be a need to procure goods, services or works with urgency...

“...The respective proposals were discussed by members of the Trust Executive in March 2021. GGI were chosen on the basis that their proposal was much more focused on coaching and teaching the Care Groups to do Governance well themselves and this was considered to be a more sustainable model offering better value for money.”

16. The Public Contracts Regulations threshold for a contract of this type is roughly £123,000. The withheld information discussed below contains a range of pricing options – all of which fell below this threshold.
17. The Commissioner is also aware that, during the pandemic, public sector bodies were made aware of provisions in the Public Contracts Regulations that allowed for contracts to be awarded without the usual competitive process where the situation demanded urgency.

18. It is not the Commissioner's role to determine whether the public authority has or has not complied with the Public Contract Regulations. However, given the anticipated value of the contract and the circumstances of the time, the Commissioner does not consider that the Public Contract regulations would have required the public authority to hold more information in recorded form than it says that it does. In any case, the Commissioner is required to determine what information a public authority **does** hold, not what it **ought** to hold.
19. The public authority has explained that it has searched email accounts and shared hard drives, as well as consulting with relevant staff. The information that has been disclosed is the relevant information that the public authority holds.
20. On the balance of probabilities, the Commissioner is satisfied that the public authority has identified all the information it holds within the scope of the request.

Section 43 – commercial interests

21. Section 43 of FOIA allows a public authority to withhold information whose disclosure would harm its own commercial interests or those of another party.
22. The public authority has relied on this exemption to withhold a copy of GGI's proposal.
23. The public authority has not, in any of its responses, provided a comprehensive explanation of why the exemption was engaged. Despite being offered a further opportunity to do so by the Commissioner, the public authority did not provide its own explanation, but it did provide a copy of the correspondence it had received from GGI.
24. In its response, GGI stated that:

"the proposal itself is commercial in confidence and we would consider it a **significant breach of trust** for King's to disclose the proposal with details of our day rates, methods and staff." [original emphasis]
25. The Commissioner considers that such a response falls short of what he would consider to be helpful – although he notes that the instructions from the public authority (which sought "comments" on a possible disclosure) did not assist in this regard.
26. It is good practice for a public authority to consult relevant third parties prior to disclosure. However, when a public authority does so, it should make the following clear:

- a) That it will make the final decision on disclosure and that it will make a decision with or without input from the third party.
 - b) What the deadline for responding to the request is (and the deadline for providing feedback).
 - c) Where a prejudice-based exemption might apply, the third party needs to explain what the prejudice is and why it might occur.
27. In this case, the public authority informed GGI of points a) and b), but failed to set out what it required in respect of point c).
28. That being said, the Commissioner recognises that GGI has identified that the withheld information contains details about its "day rates, methods and staff" and this is information that he has generally agreed, in previous cases, is commercially sensitive.
29. Disclosure of this sort of information would undermine GGI's ability to compete with other similar organisations on a level playing field. It would reveal information about the sort of services that GGI offers (in greater detail than would be publicly available) and what it charges for them. That would allow competitors to undercut GGI's offering and reduce its ability to compete in future procurement processes. Section 43 is therefore engaged.

Public interest test

30. In this case the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.
31. There is a reasonably strong public interest in allowing firms to compete with each other on a level playing field and in ensuring that public authorities have a diverse range of options to choose from when procuring goods and services. This ensures that the taxpayer receives good value for money.
32. The Commissioner notes in this case that the procurement was run during the Covid-19 pandemic and that the usual standards of record-keeping were not always adhered to. However, the public interest in this particular case is diminished because GGI has noted that what it originally proposed to the public authority is very different to what was eventually procured – meaning that disclosure would shed little light on the process itself. He also notes that the final report and the actions arising out of it have been disclosed.
33. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Procedural matters

34. Section 10 of FOIA requires a public authority to provide any information that it holds, falling within the scope of a particular request for information, that is not subject to an exemption, within 20 working days of receiving the request.
35. It took the public authority three months to provide any sort of substantive response to the request and seven months to provide all the non-exempt information.
36. The Trust apologised “unreservedly” to the complainant, in its first internal review, for the delay. It also offered some explanations for the delay. The adequacy of any explanations is of no concern to the Commissioner. Either the requirements of FOIA have been complied with or they have not.
37. In this case, information was provided well outside of the 20 working day timeframe, meaning that the Trust breached section 10 of FOIA in its handling of the request.
38. Section 17 of FOIA requires a public authority that wishes to withhold information to inform the requester of: the exemption(s) on which it wishes to rely; why the exemption(s) apply and; if an exemption is subject to the public interest test, details of its consideration of the balance of the public interest. In most cases this must be done within 20 working days.
39. The public authority’s refusal notice was not provided within 20 working days and, when it finally was provided, it did not include details of any public interest considerations. The refusal notice merely informed the complainant that the public interest considerations were available on request.
40. As the public authority’s refusal notice was both late and inadequate, the Commissioner finds a breach of section 17 of FOIA.

Right of appeal

41. 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

42. 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.
43. 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

Roger Cawthorne
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