

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2024

Public Authority: Oxford Direct Services Limited
Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant requested information held by Oxford Direct Services Ltd (ODSL) relating to all tender exercises that have involved 1st Choice Scaffolding.
2. ODSL disclosed only part of the information requested by the complainant. It refused to provide the remaining information held, citing section 21 – information reasonably accessible by other means, section 43(1) – trade secret, and section 43(2) – commercial interests, of FOIA. At the internal review stage, ODSL withdrew its reliance on the exemption at section 43(1) of FOIA.
3. The Commissioner’s decision is that whilst ODSL is entitled to refuse part of the request under section 21, it did not comply with its section 16 obligation to offer advice and assistance.
4. The Commissioner has also decided that ODSL is entitled to rely on section 43(2) in respect of only part of the withheld information.
5. As ODSL also failed to confirm that it had considered the public interest test in respect of section 43(2), both in its original response to the request and its internal review response, the Commissioner has found a breach of section 17(3) of FOIA.

6. The Commissioner requires ODSL to take the following steps to ensure compliance with the legislation.
 - Disclose that part of the withheld information provided separately to this decision notice, with the exception of that information that is either highlighted in green (which ODSL is entitled to withhold under section 43(2)), or contains the name or contact details of any individual (personal information).
 - Provide appropriate advice and assistance to the complainant which will allow them to reasonably access the information published on ODSL's website that is relevant to part 2 of the request.
7. ODSL must take these steps within 30 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

8. On 30 August 2023, the complainant wrote to ODSL and requested information in the following terms:

“1st Choice Scaffolding has been awarded work by ODS costing in excess of £1 million. Please provide the following information.

 1. Details of all tenders submitted for work by 1st Choice Scaffolding Ltd.
 2. For each tender provide a contract reference number, date submitted, cost of work and details of competing tenders from other suppliers.
 3. Please provide any other documents you hold relating to the tenders.”
9. On 22 September 2023, ODSL provided its response to the request, and attached copies of some documents relating to the tender process.
10. ODSL advised the complainant that information relevant to part 1 of the request was being withheld under section 43(1), and section 43(2), of FOIA.
11. With regard to part 2 of the request, ODSL confirmed that the contract reference numbers and the estimated works value for the Scaffolding Framework Tender are available on the contracts register, published on its website. ODSL said that the “date submitted” was the deadline date

for the tender bids, and that this was contained within one of the documents attached to its response.

12. ODSL also advised that it considered all the documents which it had attached to its response to the complainant were relevant to part 3 of the request and went on to say that:

“All other related documentation would be considered commercially sensitive for the involved third parties or ODS as it would reveal our business strategy to our competitors.”
13. On 22 September 2023, the complainant requested an internal review, and on 20 October 2023, ODSL provided its response.
14. With regard to part 1 of the request, ODSL confirmed that only one tender exercise had taken place for scaffolding, and that prior to April 2023, scaffolding services were purchased on a “Request for Quote” basis. ODSL also said that the documents it had previously released contained details which provided an answer to part 1 of the request.
15. ODSL maintained its original position that some information relevant to part 2 of the request was already publicly available. However, it now provided a link to its website which it said would direct the complainant to the relevant information.
16. Whilst ODSL confirmed that it was no longer relying on section 43(1) of FOIA as its basis for withholding the remaining information relevant to parts 2 and 3 of the request, it advised that it still considered that section 43(2) was engaged. ODSL said that the withheld information is commercially sensitive as it reveals its commercial strategy, and that the release of “pricing schedules” and “work methodologies” of third party companies could make such companies uncompetitive in the marketplace.
17. ODSL also confirmed to the complainant (in response to an additional question that they had raised in their internal review request), that 18 suppliers had expressed an interest in the scaffolding tender, four suppliers submitted bids, and two were appointed to the Framework.

Scope of the case

18. The complainant has said that they consider ODSL’s responses to their request to be evasive and unhelpful, and that more information should have been disclosed.

19. The Commissioner, having considered the bundle of withheld information provided for his consideration by ODSL, has determined that information contained within a small number of the withheld documents either does not relate to, or postdates, the complainant's request. Therefore, the Commissioner considers such information to fall outside the scope of the request.
20. The Commissioner will decide whether ODSL was correct to rely on section 21 as its basis for refusing to provide information relevant to part 2 of the request. He will then go on to consider whether ODSL is entitled to rely on section 43(2) as its basis for refusing to provide the withheld information relevant to the remaining parts of the request.

Reasons for decision

Section 21 – information reasonably accessible to the applicant by other means

Section 16 – advice and assistance

21. Section 21 of FOIA can be applied when part, or all, of the requested information is reasonably accessible to the applicant. It is an absolute exemption and so there is no public interest test.
22. Under section 16 of FOIA, a public authority has a duty to provide advice and assistance to those requesting information, so far as it would be reasonable to expect the authority to do so.
23. ODSL applied section 21 to information relevant to part 2 of the request which it said was included within the contracts register already published on its website.
24. ODSL's response to the Commissioner provides a direct link to the published contract register (an excel spreadsheet), which it states is the same link it provided to the complainant. ODSL explained to the Commissioner that there are filters which allow for various searches, including by supplier, which provides access to the relevant information.
25. The Commissioner, after enabling the edit option on the spreadsheet, was able to use the filter option to easily access the published details of the award of the tender for scaffolding services. However, when using the link provided in ODSL's response to the complainant, the Commissioner found he was directed to the main page of its website.

26. The Commissioner considers that ODSL failed to provide sufficient advice and assistance when directing the complainant to the information published on its website that was relevant to part 2 of their request. Even if ODSL were able to provide evidence that the link provided to the complainant was correct at the time it was issued, the Commissioner considers that it would have been appropriate to explain the process of access (enabling editing of the spreadsheet and then how to use the filters next to each heading) to ensure that the complainant was able to reasonably access the information that they had specifically requested. The Commissioner would expect such steps to be taken in this case in order to fulfil ODSL's duty to provide advice and assistance as set out in section 16 of FOIA.

Section 43(2) – commercial interests

27. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
28. When relying upon the exemption at section 43(2) to withhold information, the public authority must be able to demonstrate a clear link between disclosure and the prejudice to the commercial interests of either itself, a third party, or both. The risk of the prejudice to commercial interests occurring must be real and significant for the exemption to be engaged.
29. The exemption is subject to the public interest test. This means that even if the exemption is engaged, the Commissioner will need to decide whether it is in the public interest to release the information.
30. ODSL states that it considers the withheld information to be commercially sensitive as it reveals its commercial strategy. ODSL has also said that it considers the information to be commercially sensitive to the third party companies that were involved in the tender process, stating that disclosure would release pricing schedules and work methodologies that could make them uncompetitive in the marketplace.
31. ODSL has also said that it would not release information about the unsuccessful competing tenders as it is "third party information and commercially sensitive to both ODS and unsuccessful third parties."
32. For section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to commercial interests;

- 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 to those commercial interests; and,
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely to, occur.
33. The Commissioner notes that tenders are part of a commercial procurement process; a competitive process to provide services to another party. Having considered the withheld information, he is satisfied that it relates to the tender process to award a contract for scaffolding services, and that the first criterion set out within paragraph 32 of this decision notice is met.
34. When considering the second criterion of the three-limb test, the Commissioner must decide whether there is a clear link between the prejudice that has been described by ODSL and the disclosure of the withheld information.
35. ODSL has not explained which parts of the withheld information it considers would reveal its commercial strategy. Furthermore, it is the Commissioner's view that ODSL has failed to demonstrate why the disclosure of any of the withheld information that might relate to its commercial strategy would, or would be likely to, cause harm to its commercial interests.
36. The Commissioner's published guidance on section 43 states that not all commercial information will be subject to the exemption. A public authority must show a causal link between the disclosure of the commercial information requested and prejudice to either its commercial interests, or the commercial interests of third parties.
37. In the absence of adequate submissions in support of ODSL's position, it is not for the Commissioner to speculate as to why the disclosure of the withheld information would, or would be likely to, cause harm to ODSL's commercial interests.
38. Furthermore, whilst ODSL has argued that the disclosure of information about "pricing" and "work methodologies" would prejudice the commercial interests of the companies involved in the tender process, as it would make them uncompetitive, the Commissioner considers that some of the withheld information about the companies is not about pricing, or work methodologies.

39. Given the above, it is the Commissioner's view that ODSL has failed to demonstrate that the second criterion of the three-limb test is met in respect of part of the withheld information. The Commissioner therefore finds that the exemption at section 43(2) of FOIA is not engaged in respect of such information.
40. The Commissioner has considered the remaining withheld information which he has determined relates to the "pricing" and the "work methodologies" of the companies who submitted the bids. This includes the costs and charges, the tender application forms and supporting information submitted by the companies. In addition, the Commissioner has considered the withheld information which relates to ODSL's analysis, and the "scoring", of each bid. This is because, in his opinion, this information directly relates to, and would reveal information about, the costing and the work methodology of the companies who submitted bids. In addition, such information provides a clear picture of the strengths and weaknesses of the bidding strategies of each company.
41. The Commissioner accepts that information relating to the pricing and work methodology of a company that submits a tender bid could be scrutinised by competitors in order to consider that company's unique business model, its bidding strategy, and also its strengths and weaknesses. He also accepts that this would provide competitors with an unfair advantage in the marketplace as the relevant companies would become less competitive, as claimed by ODSL.
42. The Commissioner therefore considers that ODSL's arguments are sufficient to demonstrate a causal link between the disclosure of information which relates to the pricing and work methodologies of companies who submitted tender bids, and the described prejudice to the commercial interests of such companies.
43. The Commissioner therefore finds that the second criterion of the three-limb test is met in respect of part of the withheld information.
44. With regard to the third criterion, ODSL was specifically asked by the Commissioner to clarify whether it considers that disclosure of the withheld information 'would' or 'would be likely' to have a prejudicial effect on any party; it responded to advise that it considers it to be "highly likely". Given the ambiguity of this response, the Commissioner has considered only whether the lower threshold of "would be likely" has been met in this instance.
45. The Commissioner accepts that should part of the withheld information be disclosed, it would be likely to prejudice the commercial interests of the companies who submitted tender bids for the reasons outlined in paragraphs 40-42 above.

46. The Commissioner therefore considers that the exemption at section 43(2) is engaged in respect of part of the withheld information, and will go on to consider the public interest test in relation to such information.

Public interest test

47. ODSL has confirmed that it considers that there is a public interest in transparency and accountability in order to promote public understanding and to safeguard democratic processes.
48. However, it has said that the public interest is not always the same as what interests the public, and the fact that a topic may have been discussed in the media does not automatically mean that there is a public interest in disclosing information that has been requested about it. It also says that it is relevant to consider that a requester's private interests and what may serve such interests does not necessarily serve a wider public interest.
49. ODSL said that it understands that there may be public interest in the tendering exercises it carries out because it is a limited company whose sole shareholder is a council.
50. ODSL states that suppliers who are successful understand that information will be published on the contract register whilst unsuccessful tenders remain confidential.
51. ODSL states that the public interest favours nondisclosure, as releasing the pricing schedules and the work methodologies of the companies involved in the tender process could make them uncompetitive in the marketplace.
52. The Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about how money is spent.
53. The Commissioner notes that there has previously been some interest from the public in the matter of scaffolding works, and questions raised about the costing figures published on ODSL's website.
54. However, the Commissioner has already acknowledged that prejudice would be likely to occur, should part of the withheld information be disclosed.
55. The Commissioner considers that the release of the information would undermine both the ability of ODSL and also the companies which submitted tender bids, to compete in the marketplace when inviting, or bidding for, future tenders. If ODSL were to release the unique pricing and work methodologies of companies, it would give other companies in

the marketplace an unfair advantage. Given this, the Commissioner considers that there is a real risk that companies will be deterred from bidding for future tenders offered by ODSL. This would affect ODSL's ability to get best value for money, which would not be in the public interest.

56. The Commissioner has also had regard to the information which ODSL actively publishes on its website about payments made for scaffolding works on its contract register which he considers goes some way in meeting the public interest in transparency regarding the use of public money in this instance.
57. The request was also made within a few months of the completion of the tender process. The Commissioner therefore considers that, at the time of the request, disclosure of information about any one company's pricing and business model is likely to have a significant impact on that company's ability to compete in the marketplace.
58. In the Commissioner's opinion, there is a very strong and inherent public interest in ensuring fairness of competition and it would be firmly against the public interest if a company's commercial interests were harmed because they have bid for a public service contract.
59. The Commissioner therefore concludes that, where section 43(2) has been found to be engaged in respect of the withheld information, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Procedural matters

60. The Commissioner regards it to be relevant to record that ODSL, when citing section 43 of FOIA, failed to refer to the public interest test either in its refusal notice, or its internal review response. The Commissioner therefore finds a breach of section 17(3) of FOIA.
61. The Commissioner would remind ODSL that where required by FOIA, it must convey its consideration of the public interest test when issuing a refusal notice.

Other matters

62. The Commissioner's guidance on section 43 states that where a public authority is considering withholding information about a third party under section 43, on the basis that it would, or would be likely to,

prejudice a third party's commercial interests, it should, in most instances, be able to evidence that this accurately reflects the third party's concerns.

63. In this case, ODSL confirmed to the Commissioner that it did not contact any of the companies involved in the tender process about the potential disclosure of information relating to their businesses in response to the request. Given this, the council was not in a position to submit any representations or evidence received about any concerns that these companies might have about the disclosure of any of the withheld information.
64. Therefore, when considering the application of section 43 to future requests which concern third party information, the ODSL should take reasonable steps to consult with the relevant third parties.
65. The Commissioner, when requesting further information from a public authority as part of his investigation, would expect a public authority to respond to all of the questions he has asked and to set out detailed arguments in support of its position. The Commissioner considers that ODSL failed to do this in this instance, and he was therefore unable to fully understand its position.
66. The Commissioner acknowledges that ODSL responds promptly to his communications. However, he expects ODSL, upon receipt of future letters of investigation from the ICO, to carry out a thorough review of its handling of the relevant request, and also the withheld information. ODSL should consider the Commissioner's published guidance for organisations, and provide detailed explanations to the Commissioner which clearly set out its position.

Right of appeal

67. 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

68. 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.
69. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF