

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2014

Public Authority: Salford Clinical Commissioning Group

Address: St James's House,
Pendleton Way
Salford
M6 5FW

Decision (including any steps ordered)

1. The complainant has requested information relating to a procurement exercise for the NHS Salford Community Consultant Led Ophthalmology Service. Salford Clinical Commissioning Group (the CCG) confirmed that some of the requested information was not held, it provided the complainant with some information relevant to the scope of the request but refused to disclose some information under section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that Salford Clinical Commissioning Group correctly applied section 43(2) FOIA to some of the withheld information in this case. It has however incorrectly applied this exemption to the questions/responses within the ITT and PQQ which the successful bidder does not consider to be commercially sensitive. The Confidential Annex attached to this Notice sets out which questions/responses the successful bidder does consider to be commercially sensitive.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The CCG should disclose the successful bidder's responses to the questions in the ITT and PQQ at Part 1 of the request where the successful bidder has not indicated that it deems those questions/responses to be commercially sensitive.

- Disclose the information at Part 4 of the request or issue a refusal notice explaining why it is not obliged to do so.
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 21 July 2013 the complainant requested information of the following description:
- The entire PQQ and ITT submitted by the Preferred Bidder for the NHS Salford Community Consultant Led Ophthalmology Service (ID 13781:2)
 - Minutes of meetings between the procurement lead (whether [name individual], yourself or another person) / the Contracting Authority and both the Preferred Bidder and the Reserve Bidder (ourselves) for the above tender. This should include all aspects of the tender interview and marking scheme for both the preferred bidder and ourselves.
 - The marking scheme used, as well as marks actually awarded and deducted during the assessment of the ITT submitted by the Preferred Bidder and Reserve Bidder question by question.
 - Any emails relating to the above tender involving either ourselves or the preferred bidder between individuals in the contracting authority.
6. On 24 July 2013 and 20 August 2013 NHS England, via Greater Manchester Commissioning Support Unit (GMCSU), responded. It provided the complainant with information relevant to part 3 of the request, a copy of the marking scheme used in the evaluation was provided in the ITT documentation and a breakdown of the bidders scores against the breakdown of scores for the winning bidder. It said it was considering whether further information could be provided as it was commercially sensitive.
7. The complainant requested an internal review on 20 August 2013 as he explained that the remaining information should be provided.
8. An internal review was carried out on 31 January 2014. No further information was provided as it was deemed to be commercially sensitive.

Scope of the case

9. The complainant contacted the Commissioner on 21 August 2013 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation the GMCSU confirmed that it did not hold the information requested at parts 2 and 4 of the request.
11. The Commissioner's investigation has looked at whether Salford Clinical Commissioning Group correctly applied section 43(2) FOIA to the information withheld at part 1 of the request and whether or not the CCG held information relevant to parts 2 and 4 of the request.
12. GMCSU is engaged by the CCG to handle FOIA requests and subsequent complaints investigated by the ICO.

Reasons for decision

Section 1 – held/not held

13. In relation to the information requested at part 4 of the request, the CSU initially said that this information was not held. During the course of the Commissioner's investigation, the CCG carried out a search and information falling within the scope of this part of the request was discovered. This information was provided to the Commissioner however no exemptions have been applied. So far as this information has not been provided to the complainant, the CCG must now either disclose this information or issue a refusal notice explaining why it is not obliged to do so.
14. In relation to part 2 of the request, the CCG has confirmed that this information is not held. It explained that one meeting was held between the procurement team and bidders, it confirmed this was a bidder event held on 30 July 2012. It said that the purpose of the event was to share the aims of the service with potential bidders and to provide an overview of the procurement process. It said that no minutes were taken and there were no minutes of any meetings between the Procurement Team and the bidders. It clarified that the procurement process was handled through the ITT and PQQ documentation.
15. Other than this it explained that the outcome of the procurement was communicated to the complainant on 23 April 2013 and a number of messages were subsequently exchanged with the intention of arranging

a face-to-face de-brief. No meeting was subsequently held between the complainant and the procurement team.

16. On the balance of probabilities the Commissioner is satisfied that no further information is held in relation to this part of the request which has not been covered by the other parts of this request or which has not already been provided to the complainant.

Section 43 – commercial interests

17. 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.
18. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his 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

19. This exemption has been applied to the information withheld relevant to part 1 of the request. Upon viewing the withheld information the Commissioner considers that it relates to a tendering process for the awarding of a contract for the provision of services. He considers that this is a commercial activity and does therefore fall within the scope of the exemption.

Whose commercial interests and the likelihood of prejudice

20. Section 43(2) consists of two 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 hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

¹ See here:

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

21. The CCG has stated that disclosure of the information would be likely to prejudice its own commercial interests, the CSU's, Wigan CCG's, Tameside CCG's and the commercial interests of the winning bidder.

The nature of the prejudice

22. The CSU explained that it understood the CCG would normally be expected to disclose much of the information contained within a successful tender submission in the interests of transparency and accountability and demonstrating that value for money has been achieved once that procurement was complete.
23. It therefore said it was necessary to consider whether the procurement is complete. It explained that the tenor of some of the complainant's correspondence with the CSU indicated that he is contemplating a challenge to the procurement process. The CSU considers that whilst any such challenge would be unmerited, while such a challenge remains a real, rather than fanciful, possibility, the procurement process cannot be regarded as complete. It said that details of tender bids are highly commercially sensitive while a procurement process is on-going, as disclosure of such information will be likely to distort free and fair competition.
24. The CCG has also taken into account whether such disclosure would affect any other similar procurement processes elsewhere. In particular, similar procurements of community ophthalmic services will be commencing in the Wigan CCG and Tameside CCG areas in the near future. It said it is likely that the successful bidder in this case will also be a bidder in relation to these procurements and the degree of similarity between the Salford procurement and the Wigan and Tameside procurements is likely to be such that sight of the winning bidder's tender submissions for the Salford procurement is likely to provide considerable assistance to its competitors in these forthcoming procurements.
25. The CCG considers that disclosure of the successful bidders submissions as requested would place the successful bidder at a disadvantage compared to all other bidders in the forthcoming procurements and this in turn will be likely to cause a distortion of free and fair competition in these procurements. It also said that if it were to provide details of the winning bid to unsuccessful bidders this would prejudice against

innovative ways of working therefore depriving them of any competitive edge they may have.

26. The CCG contacted the successful bidder to determine whether it considers the withheld information is commercially sensitive. The successful bidder has marked the PQQ and ITT to clarify which responses it considers to be commercially sensitive. The CCG has not however disclosed the information which the successful bidder has not marked as commercially sensitive.
27. The Commissioner considers that in relation to the information contained within the PQQ and ITT covered by Part 1 of the request which the successful bidder does not consider is commercially sensitive, the CCG has also failed to demonstrate why disclosure of this information would be likely to result in the prejudice claimed. This is because its arguments are heavily based upon the commercial disadvantage that would be likely to be caused to the successful bidder if the withheld information were disclosed. Disclosure of the parts of the PQQ which the successful bidder itself does not consider to be commercially sensitive and therefore unlikely to it at a commercial disadvantage, are unlikely to result in the prejudice claimed. The Commissioner is aware that there is a wider argument surrounding the possibility of the result of the Salford CCG tendering process being challenged or whether disclosure would have a negative impact on the forthcoming procurements for Wigan and Tameside CCG. However if the successful bidder does not consider its own commercial interest would be likely to be damaged by disclosure of this information it is unlikely to prejudice the commercial interests of these other parties.
28. The Commissioner does not therefore consider that section 43(2) FOIA is engaged in relation to the responses in the successful bidders PQQ and ITT where the successful bidder has not indicated that those responses are commercially sensitive. This information at part 3 of the request should therefore be disclosed to the complainant. For clarity this is all the responses other than those outlined in the confidential annex.
29. In relation to the remaining information contained within the successful PQQ and ITT the Commissioner considers that section 43(2) FOIA was correctly engaged. As section 43(2) FOIA is a qualified exemption, he has gone on to consider the public interest test in relation to this information.

Public interest test

Public interest arguments in favour of disclosure

30. It said that there is a clear public interest in the scrutiny of how public money is spent as a result of a procurement process for the purchase of services on behalf of the NHS from private sector companies.
31. It said that there is a strong public interest in demonstrating transparency, accountability and that value for money has been achieved in a procurement process.

Public interest arguments in favour of maintaining the exemption

32. It is important to ensure that companies are able to compete equitably and fairly and that there is competition for public sector contracts.
33. There is a public interest in ensuring that the forthcoming procurements proceed in an environment where free and fair competition is possible.
34. Information has been disclosed to the complainant on how the process has operated, scoring and feedback of the successful bidder, which goes some way to meeting the public interest in favour of disclosure.

Balance of the public interest

35. The Commissioner considers there is a public interest in openness and transparency when conducting a procurement process such as in this case. There is a strong public interest in demonstrating fairness and that value for money is being achieved.
36. The Commissioner considers that there is a strong public interest in the successful bidder not being commercially prejudiced by disclosure of sensitive information where similar procurements in nearby geographical areas are forthcoming.
37. The Commissioner has taken into account the fact that the CCG has disclosed some information about the scores and procurement process in this case which goes some way to meeting the public interest in favour of disclosure.
38. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case.

Right of appeal

39. 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: 0116 249 4253

Email: grc@hmcts.gsi.gov.uk

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

40. 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.
41. 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

Pamela Clements
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