

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2018

Public Authority: NHS Commissioning Board (NHS England)
Address: 22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested all information which makes up a successful bid for community dental services in Hertfordshire. NHS England refused to provide this information on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that NHS England has correctly applied the section 43(2) exemption and the public interest favours maintaining the exemption. She requires no steps to be taken.

Request and response

3. On 9 December 2017, the complainant wrote to NHS England and requested information in the following terms:

"We, Mobile dental Ltd, have recently bid and have been unsuccessful in the itt_760_Hertfordshire Domiciliary Dental Service. We believe that Hertfordshire commissioners have been biased towards their preferred bidder, Hertfordshire community dental service. We request under the freedom of information act, to see Hertfordshire community dental services bid as we wish to take legal action against NHS England."

4. NHS England responded on 5 January 2018 and stated that it considered the information exempt on the basis of section 43(2) of the FOIA.

5. The complainant requested an internal review on 6 January 2018 stating he had no interest in seeing financial details but wanted to see remainder of the information in the bid documents.
6. Following an internal review NHS England wrote to the complainant on 29 January 2018. It stated that it upheld the decision to refuse the request on the basis of section 43(2).

Scope of the case

7. The complainant contacted the Commissioner on 8 January 2018 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine whether NHS England has correctly applied the provisions of the section 43(2) exemption to withhold this information and, if so, where the balance of the public interest lies.

Reasons for decision

Section 43 – prejudice to commercial interests

9. 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).
10. NHS England has argued that disclosing the documents that make up the successful bid in the procurement exercise would be likely to prejudice both its own commercial interests and those of the successful bidder.
11. The withheld information consists of the documents submitted as part of the tender by the successful bidder. This includes but is not limited to the bidding model, details of financial and economical standing, technical and professional abilities of the bidder, data security information, service delivery information and financial sustainability information.
12. In order 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 has to relate to the 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.
13. The requested information clearly relates to a commercial activity. In broad terms, NHS England has argued that disclosing the information would undermine the ability of the successful bidder to compete successfully for other such contracts and would undermine its own ability to secure quality services in future, or ongoing procurement exercises. The Commissioner is therefore satisfied that the first of the three criteria listed above has been met.
14. It is now necessary to consider whether NHS England has demonstrated that disclosing the information would cause both its own and the successful bidder's commercial interests to be prejudiced. The Commissioner will start by looking at the successful bidder's interests.

Prejudice to the preferred bidder's commercial interests

15. In relation to the commercial interests of third parties it is not appropriate to take account of speculative arguments which are advanced by public authorities about how any prejudice may occur. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects arguments advanced by the public authority to be based on its prior knowledge of the third party's concerns. In this case the Commissioner is satisfied that NHS England did ask the successful bidder, and in fact all bidders, to clearly indicate what information they considered to be commercially sensitive in the context of the FOIA and what information they considered may be prejudicial to them should it be disclosed.
16. The successful bidder did not expand on its reasons for considering there may be prejudice to its commercial interest from disclosure of the bid documents but NHS England has put forward arguments on its behalf. In doing so, NHS England has explained that in this particular procurement all bidders were offered the same contract price so were only assessed on the basis of quality. Therefore, the winning bid documentation contains details of how the successful bidder has used innovation and efficiencies to improve the specification. To reveal this information would result in a significant commercial disadvantage to the winning bidder, by revealing information to the public (including potential competitors) which would not ordinarily be available.

17. The Commissioner accepts that if the tender submitted by one party was disclosed revealing information of use to its rivals in the same, or similar procurement exercises, there would be a prejudice to the commercial interests of that party. It is therefore important to consider what procurement exercises were either still live, or prospective at the time of the request.
18. However, as NHS England has not specifically consult with the successful bidder on this point beyond simply getting an indication they consider prejudice to be likely, no specific details of prospective, ongoing or future procurement has been provided. Whilst the Commissioner can speculate that it is likely the successful bidder is, or will be, engaging in procurement exercises again this is purely speculation and it is therefore difficult to argue that the prejudice stated to the successful bidder's commercial interests would be likely to occur based simply on whether there are upcoming or ongoing tendering exercises.
19. That being said, the sensitivity of information will not depend solely on whether the successful bidder will be involved in bidding for similar contracts in the future, but also on whether the information reveals something about how the bidder intends to deliver services under the contract which sets its bid apart from other competitors.
20. The Commissioner has reviewed the bid documents, particularly the technical information and although it is difficult to say with certainty that the information in these documents is unique without comparing them to submissions from other bidders, they do appear to detail the individual position of the preferred bidder and their approach to the contract.
21. The Commissioner is satisfied that the tender submission details an approach to the contract which would be individual to the bidder. As explained by NHS England, to release this information would put sensitive commercial information in the public domain allowing competitors access to it so placing the successful bidder at a competitive disadvantage to its rivals by allowing those rivals to enhance their own bids in respect of the services offered. However, again the Commissioner must point out that although there is merit to this argument it is based on the idea that there is or will be further bids or tendering by the preferred bidder. As already stated it can be assumed that this would be the case but the Commissioner cannot speculate or accept speculative arguments from the public authority unless there is evidence it has knowledge of the third party's commercial situation.
22. The Commissioner is therefore unable to accept that there is causal link between disclosing information from the bid documents and a prejudice to the preferred bidder's commercial interests.

Prejudice to NHS England's commercial interests

23. NHS England has also claimed that disclosing the requested information would prejudice its own commercial interests. It believes that disclosing the information would risk its ability to procure effectively
24. NHS England has stated that at the time of the request although a winning bidder had been selected the contract had not yet been finalised. As such the procurement was still 'live' and if there had been any issues with regard to the signing of the contract it would have been necessary to go back out to the bidding organisations.
25. More generally, NHS England argues its commercial interests would be disadvantaged by allowing competitors to simply copy (in whole or in part) previous successful bids, when tendering for NHS England contracts which would negatively impact on NHS England's ability to gain value for money. Such 'copied' bids would not be based on the genuine expertise or value of the bidding organisation, and would therefore skew the procurement process.
26. This, in turn, would undermine the procurement process more generally. Releasing winning bid documentation would be likely to negatively impact on NHS England's relationships with bidding organisations, dissuading them from fully engaging with NHS England in future procurement processes. Again, this would impact on NHS England's ability to secure value for money.
27. The Commissioner also notes that when arguing that the successful bidders commercial interests would be likely be prejudiced, NHS England put forward the argument that disclosure would allow rivals to enhance their bids. In the short term at least, this would seem to be an argument that NHS England would receive higher quality bids but not necessarily based on bids that could genuinely achieve the level of quality being offered. If the bids are potentially not as robust NHS England will need to become more effective at evaluating and appraising the quality of submissions. The Commissioner accepts that there is the possibility that the tendering process would become distorted as a consequence of the requested information being disclosed and that this could make it more difficult for NHS England to identify and select the bid that truly offered the greatest quality service.
28. Having accepted the link between the disclosure and the alleged prejudice to NHS England's interest it is necessary to consider the likelihood of that prejudice arising. The Commissioner is satisfied there is a real and significant risk of the prejudice occurring, even though the probability of prejudice occurring is less than 50%. Therefore she

accepts that disclosing the information would be likely to prejudice NHS England's commercial interests.

Public interest arguments in favour of disclosure

29. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority such as NHS England carries out its functions. This public interest is heightened where the information relates to the spending of public money as is the case here. In line with this NHS England accepts there is a public interest in providing information which would demonstrate its procurement processes are fair, open and transparent.

Public interest arguments in favour of maintaining the exemption

30. NHS England argues there is a much stronger public interest in ensuring that it is able to run fair procurement processes. To skew the process, or allow bids to be tailored/amended by copying elements of successful bids would be likely to negatively impact on NHS England's commercial interests. There is a very strong public interest in preventing this, as to dissuade organisations from fully engaging with NHS England in future procurements or to allow bids to be artificially improved in order to sway decision making would seriously limit NHS England's ability to secure value for money for the taxpayer.
31. NHS England further states that to release the requested information to the complainant at the time of their request, when the procurement was still 'live' would have been likely to have jeopardised the procurement as a whole. This would risk NHS England having to re-run the procurement, at additional expense to the taxpayer, which again would not be in the public interest.

Balance of the public interest arguments

32. The Commissioner is aware that the complainant is challenging the awarding of the contract to the preferred bidder. To some extent this raises the public interest in making information on the procurement process available. However, the Commissioner is not aware of any of the grounds for challenging the award of the contract or whether these have been substantiated. She must therefore be careful not to confuse the private interest of the complainant with the wider public interest.
33. Although there may have been a challenge to the award of the contract there is nothing to suggest this was due to the preferred bidders conduct, rather it seems that it related to NHS England's evaluation process, over which the bidders had no control. Furthermore it is important to consider the public interest in disclosing the actual

information from the bid documents. This information would add little to ones understanding of how the competing bids were evaluated.

34. Although there is some public interest in disclosing the requested information these are not particularly compelling arguments and have to be weighed against the public interest in maintaining the exemption.
35. In terms of the public interest in maintaining the exemption the Commissioner can only take into account the arguments which are relevant to the prejudice to the NHS England's commercial interest. On this point there is a clearly a public interest in it being able to obtain best quality services that it can be assured can be delivered as this has implications for the tax payer. The Commissioner is satisfied that disclosing the information would distort the procurement process and so could make it more difficult for NHS England to ensure it selected those bids which can provide the best quality services. This argument carries significant weight and when balanced against the arguments in favour of disclosure which are more general, it is clear the public interest in this case favours maintaining the exemption.

Right of appeal

36. 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

37. 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.
38. 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

Jill Hulley
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