

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2014

Public Authority: University of Sussex
Address: Sussex House
Falmer
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested the university to disclose a copy of its contract with Interserve; a supplier contracted to provide facilities management to the university. The university responded. It disclosed the majority of information but withheld certain elements of the contract under sections 41 and 43 of the FOIA.
2. The Commissioner has reviewed the remaining withheld information and he is satisfied that section 43 of the FOIA has been correctly applied by the university. As a result he has not gone on to consider the application of section 41 of the FOIA and requires no further action to be taken.

Request and response

3. On 7 March 2014, the complainant wrote to the university and requested information in the following terms:
"...please send me a copy of your contract with Interserve..."
4. The university sent an initial response on 4 April 2014. It stated that it intended to release some information to him but required extra time to consider the application of sections 40, 41 and 43 of the FOIA to certain elements.

5. The university responded again on 11 April 2014. It disclosed some information but informed the complainant that some information has been withheld under sections 40, 41 and 43 of the FOIA.
6. The complainant requested an internal review on 9 May 2014.
7. The university carried out an internal review and wrote to the complainant again on 9 June 2014. It informed the complainant that it remained of the opinion that the outstanding information is exempt from disclosure under sections 40, 41 and 43 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 9 June 2014 to complain about the way his request for information had been handled. Specifically, the complainant was unhappy that the university had failed to disclose all requested information to him and wished the Commissioner to consider the application of the exemptions cited.
9. During the Commissioner's investigation it was established that the complainant had no complaint with regards to the university's application of section 40 of the FOIA (this was applied to schedule 7, appendix 6 and schedule 18, appendix 1). It was therefore agreed that the Commissioner's investigation would focus only on the application of sections 41 and 43 of the FOIA and the requested information withheld under these two exemptions.
10. The withheld information being considered in this notice is therefore:
 - Schedule 2 - paragraph 8 of each Service Specification.
 - Schedule 4 - the information in the columns marked 'KPI' and 'Weighting' in Appendix 1; the information in the column marked 'Weighting' in Appendix 2.
 - Schedule 7 - figures in paragraphs 2.4.3, 2.4.4 and 2.7.
 - Schedule 7 - Appendix 4 and 5.
11. The Commissioner will first consider section 43 of the FOIA to each of the four bullet points above. He will only go on to consider the application of section 41 of the FOIA if he finds that section 43 does not apply to one or more of the above four bullet points.

Reasons for decision

12. Section 43 of FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of the university, Interserve or both.
13. Section 43 of the FOIA is a qualified exemption. Therefore, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the university, Interserve or both, the university also needs to apply the public interest test. For this, the university needs to consider the public interest arguments for and against disclosure and establish whether the public interest is best served by maintaining the exemption or by disclosure.

Schedule 2 – paragraph 8 of each Service Specification (Added Value)

14. The university explained that paragraph 8 of each Service Specification set out in Schedule 2 contains the specific detail of Interserve's own methodology and service offering in respect of each element of the services provided. This information is not known outside of Interserve's own employees and the content has been produced entirely by Interserve with no input from the university.
15. The university stated that while added value elements of facility management services are generally found in contracts of this nature, the details of the added value services are unique to each contract and the requirements of the customer at that time. The university explained that they differ from those that another supplier may offer as they describe the unique elements of Interserve's service offering that set Interserve apart from other suppliers that bid for the contract. It advised that these added value elements was a material factor in securing Interserve's success in the competitive tender situation and were notably distinct from the other suppliers' submissions which were provided to the university as part of the tender process.
16. The university explained that the provision of facilities management services is founded around two key elements; pricing and service delivery. Suppliers compete based on their pricing but also their ability to provide high quality services and new, innovative and unique services – setting them apart from their competitors. The fine detail of Interserve's proposals for its added value activities fall within the scope of its unique and differentiating service provision, and release of this information would enable its competitors to remove any competitive edge that Interserve might enjoy based on this information.

17. The university argued that disclosure of this information would therefore be likely to prejudice the commercial interests of Interserve. The university stated that this specific information played a significant part in Interserve securing this contract and demonstrated that it was able to offer something different to the other suppliers that bid. This information would therefore be extremely useful to Interserve's competitors if it was disclosed. It would enable Interserve's rivals to see exactly how it set itself above the other firms competing and could be utilised by such rivals to improve their future service offering and to present a more persuasive submission. This would be likely to damage Interserve's commercial interests, as it would enable rivals to compete against Interserve with knowledge and a good insight into its methodologies and specific service offering.
18. The university also stated that disclosure would be likely to prejudice its own commercial interests. If the university was to disclose commercially sensitive information to the world at large, its suppliers and future potential suppliers would be likely to be more reluctant to provide such information in the future and possibly opt out of engaging with it in the future. The university would then be left with a smaller pool of suppliers and it would be less likely that the university would be able to effectively secure competitive and value for money goods and services in the future.
19. The Commissioner has considered this information together with the submissions he has received from the university and Interserve. He is satisfied that disclosure would be likely to prejudice the commercial interests of Interserve and therefore that section 43 of the FOIA applies to these elements of the withheld information. He will now explain why.
20. Although the concept of added value elements is not unique to this particular contract and such added value elements are often found in other contracts of this nature, the Commissioner accepts that such elements will be specific to the requirements of the customer at a given time. There is the option to end the contract early subject to certain penalties and if this does not happen the contract will come up for renewal and be subject to a fresh tendering exercise. The university's requirements will change but equally with the management of specific known facilities there will be elements that will not.
21. The university has explained that together with Interserve's pricing of the contract it was this specific information which set Interserve apart from its competitors and which swayed the university to offer the contract to Interserve. The university stated that Interserve was able to offer something different to the other suppliers that bid and this information played a large part in the overall decision to award the contract to it.

22. The Commissioner accepts that given the importance of this specific information during the university's decision making process disclosure would be likely to prejudice the commercial interests of Interserve. When this contract comes up for tender again or similar contracts are available in the facilities management market, Interserve will wish to maintain its competitive edge and rightly so considering the expertise and resource it has invested in developing its competitiveness. Disclosure of this information would enable Interserve's rivals to see exactly how it framed this element of its tender and how it was able to set itself above others. The information could be used by Interserve's competitors to improve their own service offering and present a more competitive and persuasive tender in future bids.
23. Given that the Commissioner accepts that disclosure of this information would be likely to prejudice the commercial interests of Interserve, he accepts in this case, that disclosure would also be likely to hinder the university's ability to secure competitive and value for money contracts with service providers in the future. If truly commercially sensitive information was disclosed, private suppliers would be put off from supplying such information to the university in future and even be potentially swayed from competing for future contracts.

Schedule 4 – KPI's and Weightings

24. The university stated that it made minimal redactions to this element of the contract and only withheld the detail of the percentage KPI level that Interserve is required to achieve and the percentage weighting assigned to each service measure. The details of the service levels and the performance measurement mechanism have been otherwise disclosed to the complainant.
25. The university believes that the disclosure of the exact percentage of each KPI level and the percentage weighting assigned to each would be likely to prejudice the commercial interests of the university and Interserve. It stated that the precise weightings were determined by the university pursuant to a lengthy deliberation process including substantial investment in legal and professional advice. The weightings go to the essence of the university's commercial strategy in terms of getting the most from its suppliers and were its competitors to understand its approach and strategy in this regard they would be able to leverage such information for their own projects without investing the resource and funds that the university had to commit to this novel project.
26. The KPI's have different associated percentage weighting; some with more and some with less. Across the entire table of information from which this information has redacted, the weightings give a true and

accurate insight into the university's strategy in respect of where it places more or less emphasis on delivery. If the specific weightings were disclosed, this could hinder the university from securing as favourable or even better terms with a future supplier. If a future supplier was aware of the specific weightings associated with each KPI, it would be less likely to agree to more favourable weightings for the university and disadvantage the university in subsequent negotiations.

27. The university explained that the KPI levels go to the heart of the commercially agreed deal and pricing of the services. Should this information be released, the redacted information would be likely to enable bidders in the context of re-procurement to expect the same or similar requirements in any contract they secure in the future. The university argued that this would be likely to occur, as it would commercially benefit future suppliers and would be likely to have the effect of reducing the competitiveness of future bids, which, absent from this information, may have been proposed on terms more favourable to the university.
28. The Commissioner accepts that disclosure of this specific information would be likely to be prejudicial to the commercial interests of the university and therefore that section 43 of the FOIA applies. He will now explain why.
29. The Commissioner agrees with the university's submissions that the exact percentage of each KPI level and the associated weighting applied to each would release an accurate picture to other potential suppliers of the strategy the university adopted for the delivery of the contractual services and importance attached to certain KPI levels. He notes the contract was awarded for an initial period of 7 years, at which time the university will review the performance of the contract and either extend it for a further 3 years or terminate it and begin a fresh tender exercise. Although some requirements will inevitably change, it is possible that other elements will not and both the university and Interserve (if it wishes to bid for the renewal) will wish to conduct and take part in a fair and competitive future tender process.
30. The Commissioner accepts that if this information was disclosed it would be likely to hinder the university's ability to secure more favourable terms when the contract comes up for re-tender. As stated above, the Commissioner understands that some aspects of the contract and the services required will remain the same and if this information was released into the public domain future suppliers would have a good picture of the exact agreed KPI levels and weightings applied to them. The university has explained that the weightings differ – with more weighting applied to some than others. If future suppliers knew the exact weightings, it would be likely to hinder the university's ability to

secure more favourable terms in future. If competitiveness is reduced this will in turn impact upon the value for money that can be achieved.

31. The arguments presented by the university mainly relate to the likely prejudice to the university's own interests rather than the commercial interests of Interserve, although the university has stated that disclosure would be likely to prejudice both. There are insufficient arguments for the Commissioner to consider the commercial interests of Interserve here. However, the Commissioner notes that this makes no material difference to the overall application of section 43 of the FOIA, as he is satisfied that disclosure would be likely to prejudice the commercial interests of the university alone and this is sufficient for the application of this exemption.

Schedule 7 – figures within paragraphs 2.4.3, 2.4.4 and 2.7

32. The university explained that the figures redacted from paragraphs 2.4.3 and 2.4.4 relate to the cost of running the East Slope hall of residence and the figure represents the exact amount Interserve has priced the provision of services for this facility. The university confirmed that it considers the disclosure of this information would be likely to prejudice the commercial interests of Interserve. It believes disclosure would enable Interserve's competitors to understand its pricing strategy for this type of work, specifically providing the suite of services for a hall of residence of the size of East Slope. Disclosure would also enable rivals to reverse engineer the breakdown of fees that the supplier charges through understanding the exact amount charged for this hall. If a rival knew the total floor area of the estate and that of the East Slope residences, disclosing these figures would allow a rival to work out with some degree of accuracy the overall cost of Interserve's solution.
33. The university also stated that disclosure would provide competitors with a good understanding of Interserve's charges for facilities management in university residences, which is valuable information in this sector. It stated that the facilities management market largely works on benchmark data, as client data is often poor so any information of this nature is valuable to others competing in the same market.
34. The university advised that the information contained in paragraph 2.7 relates to the mobilisation charge. This figure is the exact amount Interserve has priced the cost of transitioning services from incumbent suppliers to it, and it represents Interserve's specific strategy for pricing this form of outsourcing arrangement. If this information was disclosed to the world at large it could be used by Interserve's rivals to undercut it in future contracts. The university stated that if Interserve's competitors were able to understand Interserve's arrangements in this regard they would be able to accurately evaluate Interserve's total cost and also

breakdown of cost proposals for a tender based on the services involved.

35. The university argued that the charges 'per' hall of residence go to the heart of the commercially agreed deal and the pricing of the services. Disclosure would be likely to enable bidders in the context of re-procurement to expect the same or similar requirements in any contract they secure in the future. Disclosure would therefore be likely to have the effect of reducing the competitiveness of future contracts which, absent this information, may have been proposed on terms more favourable to the university.
36. The Commissioner accepts that such financial information would be very useful to Interserve's competitors. He notes Interserve's comments that the facilities management market usually operates on benchmark data and accepts that the information being considered here would provide rivals with supplier specific costings of a large well publicised public sector contract. The Commissioner acknowledges that the contract has an initial 7 year term and it is therefore possible that if specific terms and conditions are not met that the contract could come to an end and be subject to a further tender process. The information of consideration here would be very useful to rival bidders. It would reveal how Interserve priced specific elements of the contract. This information could be used by rivals to improve their own service offering and ultimately outbid Interserve. Such consequences would be likely to be prejudicial to the commercial interests of Interserve. It would be placed at a disadvantage during future tender exercises – whether for this contract or very similar and would essentially stifle the competitiveness of the process on which clients and public authorities rely to achieve the best value for money.
37. The Commissioner is also of the view that disclosure of this specific information would be likely to prejudice the commercial interests of the university too. If suppliers wishing to bid for this contract at renewal knew the agreed costs between the university and Interserve they would have a good insight into the terms and conditions the university is willing to accept. This could lead to suppliers offering less favourable bids to those they would have otherwise offered had they not had access to this information. It would stifle competition, potentially lead to less favourable terms being available to the university and value for money being harder to achieve.
38. As stated in paragraph 23 above, disclosure of truly commercially sensitive information would also be likely to discourage suppliers from engaging with the university in the future. Suppliers would be reluctant to put in bids containing commercially sensitive information due to the fear of this information being disclosed. It is possible that this could then

lead to a reduction in the pool of suppliers available to the university for the provision of future services.

Schedule 7 - Appendix 4 and 5

39. The university explained that it has redacted the detailed breakdown of the supplier's pricing; the detailed 'line by line' pricing at a micro level under section 43 of the FOIA. It is of the view that disclosure of such financial information would be likely to prejudice the commercial interests of Interserve.
40. It explained that disclosure of this information would be likely to hinder Interserve's ability to succeed in competitive tenders in the future. A supplier's tender submission is based primarily on cost, high quality service and innovation. The specific charges which a supplier allocates to its individual services are a highly sensitive element of its service offering and essential to its ability to compete within the industry and for contracts of this nature. If Interserve's competitors had access to such information they would be able to accurately evaluate Interserve's total cost proposals for this tender based on the services involved and then undercut it when competing for similar work in the future.
41. The Commissioner accepts that Interserve's detailed breakdown of pricing and costs is sensitive commercial information. He also accepts that the most important factors considered when deciding which supplier to use are cost, the quality of service to be offered and innovation.
42. The Commissioner agrees that if this information was released into the public domain, Interserve's competitors would be in a position to work out with a high degree of accuracy how it structured its tender to the university and exactly how it priced the services required. He acknowledges that such information would be extremely useful to rival firms and could be used by those rival firms to outbid Interserve in future tendering exercises, whether with the university when this contract comes up for renewal or with other clients with similar needs. The Commissioner is therefore satisfied that disclosure of this specific information would be likely to be prejudicial to the commercial interests of Interserve and therefore that section 43 of the FOIA applies.
43. As the Commissioner is satisfied that section 43 of the FOIA applies to all remaining withheld information, he now needs to go on to consider the public interest test.
44. The university stated that it understands the public interest test in the FOIA requires public authorities to apply a presumption in favour of disclosure. It stated that this is why it has disclosed the majority of information to the complainant already and has only withheld a limited

amount of specific commercial information it believes would be likely to prejudice the university and Interserve if it was released into the public domain.

45. The university confirmed that it understands there is a public interest in openness and transparency and that information should be made available to the public in relation to large commercial contracts of this nature so they can understand and potentially challenge the decision making of the university. It however believes it has already met these public interest requirements by disclosing as much information as it possibly can.
46. It explained that the remaining information is commercially sensitive and disclosure would be likely to prejudice the commercial interests of Interserve and the university. The university is of the view that such consequences are not in the public interest and the public interest is best served by maintaining a competitive environment for the future tender of similar services. It stated that it is not in the public interest to stifle competition and hinder the ability of the university to secure the best possible deals it can. Less favourable terms and conditions would be likely to hinder the university's ability to achieve value for money.
47. The university also argued that there is a stronger public interest in ensuring suppliers are able to compete fairly, that they are not prejudiced by their engagement with the public sector and that there is true unbiased competition for public sector contracts.
48. The Commissioner has given the arguments for and against disclosure detailed consideration. He notes this contract along with a very similar contract awarded by the university to another provider for the provision of catering services has attracted a lot of local interest. He is aware many locals, students and existing staff have had strong views on the outsourcing of such facilities and there has been opposition to these arrangements. The Commissioner therefore accepts that considerable weight should be afforded to the public interest in favour of disclosure. It is the Commissioner's view that the more information that is made available the easier it will be for those that are very concerned about these agreements to understand more clearly why such decisions have been made.
49. The Commissioner also accepts that disclosure would allow members of the public to assess more easily whether the university is receiving the most favourable terms available and achieving value for money.
50. However, it is noted in this case that the majority of the contract has now been released into the public domain. The only information that remains is limited sections of the contract which the Commissioner has

agreed would be likely to prejudice the commercial interests of the university and Interserve if they were disclosed.

51. While he accepts there is a strong public interest in favour of disclosure due to the apparent local opposition to the university's decision making, the Commissioner considers the public interest in maintaining the exemption for the remaining withheld information is stronger in this particular case. As stated above, the Commissioner has accepted that disclosure would be likely to prejudice the commercial interests of the university and Interserve and he does not consider the likely consequences of such disclosure would be in the public interest.
52. He has accepted that disclosure would stifle competition, would be likely to result in the university being unable to secure more favourable terms and conditions in future tender exercises, could lead to a reduced pool of suppliers being available for the university to use in future and would be likely to reduce the value for money the university is able to achieve. The Commissioner has also accepted that disclosure would be likely to hinder Interserve's ability to compete fairly in the market place, would unfairly reduce any competitive edge it enjoys at present and would enable its competitors to gain a valuable insight into how it structures and prices this sort of work resulting in competitors then being in a more favourable position in future bids and being able to out price Interserve unjustly.
53. The public interest is best served by maintaining a competitive environment. This will enable Interserve to compete fairly and unbiasedly in future bidding exercises and will ensure that the most competitive submissions are made to the university in future tender processes. Disclosure of the commercial information being considered here would enable competitors to see exactly what the university was willing to accept and the pricing structure put forward by Interserve. This would be likely to result in future suppliers possibly offering less favour terms than they would have done had they not had access to this information. The Commissioner is of the opinion that the consequences outlined above are not in the public interest.

Right of appeal

54. 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

55. 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.
56. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF