

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 December 2014

**Public Authority:** Dorset County Hospital NHS Foundation Trust  
**Address:** Williams Avenue  
Dorchester  
Dorset  
DT1 2JY

#### **Decision (including any steps ordered)**

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1. The complainant has requested confirmation as to whether a particular company had tendered for work at Dorset County Hospital NHS Foundation Trust ("the Trust"). The Trust stated it considered this to be commercially sensitive and therefore exempt on the basis of section 43 of the FOIA.
2. The Commissioner's decision is that the section 43 exemption is engaged and the public interest favours maintaining the exemption. He does not require the Trust to take any steps.

#### **Request and response**

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3. On 2 July 2014, the complainant wrote to the Trust and requested information in the following terms:

*"I have asked [name redacted] if they will be tendering, or have tendered for this work. They referred me to your department. Therefore, please would you tell me if they have bid for this work, or, if not, if they have indicated their intentions to do so."*

4. The Trust responded on 16 July 2014. It stated that it considered the requested information to be commercially sensitive and exempt from disclosure under section 43 of the FOIA. The Trust also stated it had considered the public interest and believed it favoured maintaining the exemption.

5. Following an internal review the Trust wrote to the complainant on 26 September 2014. It stated that it upheld its decision to refuse the request under section 43.

## Scope of the case

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6. The complainant contacted the Commissioner on 2 October 2014 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine if the Trust has correctly refused to confirm if the named company has tendered for a contract on the basis of section 43.

## Reasons for decision

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8. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

9. In determining whether this exemption has been applied correctly the Commissioner has first considered whether the potential prejudice argued by the Trust relates to the interest identified in the exemption. When considering this the Commissioner has looked at whether, if the prejudice occurred, it would relate to the Trust's commercial interests.
10. The Trust has argued that identifying whether a company is a bidder for tender would be likely to damage the commercial reputation and therefore the commercial interests of the Trust.
11. The Commissioner is satisfied that the potential prejudice relates to the interest identified in the exemption as revealing whether a company has bid for a tender does relate to a commercial activity. He has now gone on to consider the nature of the prejudice and whether the Trust has sufficiently demonstrated a causal link between the potential disclosure and the prejudice. When evidencing a causal link between the potential disclosure and the prejudice a public authority should be able to demonstrate that the prejudice would be "real, actual or of substance"<sup>1</sup>.

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<sup>1</sup> Hansard HL (VOL. 162, April 20, 2000, col. 827)

12. In this case the Commissioner has considered the potential prejudice to the Trust and the arguments put forward by the public authority to support the view that disclosure, in this case, "would be likely to" prejudice its commercial interests.
13. The Trust explained that it considered serious reputational damage could be done to it if it provided the requested information. It considered disclosure would be likely to damage its relationships with the company concerned, other companies who have bid for tenders with the Trust in the past, companies currently holding contracts with the Trust for services, and any companies who may consider bidding for tenders in the future.
14. The Trust believes that this reputational damage could lead to potential bidders being deterred from tendering for contracts with the Trust in the future, leading to the Trust being unable to access the best services at the best cost for the hospital. If the Trust were to be placed at a disadvantage when tendering in the future and had more limited options to choose from this would be likely to prejudice its commercial interests.
15. The Commissioner understands that the tendering process was ongoing at the time of the request and as such the Trust has argued it had to be mindful of revealing who had or had not tendered for the services in question. Whilst the Trust acknowledges there was a need to be as transparent as possible it stated it had to also comply with its duties under the Official Journal of the European Union (OJEU) regulations on the tendering process<sup>2</sup>.
16. As the tendering exercise was still in the early stages and it was at the point of initial bids being made, the Commissioner accepts that disclosing the identity of companies who had or had not bid would be likely to impact on the Trust's commercial activities in the future. He acknowledges that disclosing information on bidders at an early stage of the process is likely to undermine the confidentiality with which bidders provide information to the Trust. The Commissioner accepts that this may deter potential bidders in the future and impact on the Trust's ability to provide the best services at the best value. Whilst the Commissioner does acknowledge that the information requested in this case is simply whether or not a bid has been received from a particular company, at an early stage in the tendering process there is a need for confidentiality so as to allow for negotiations and achieving the right outcome. Therefore, undermining this process by disclosing the identity

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<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

of bidders whilst the tendering exercise is still underway would be likely to prejudice the commercial interest of the Trust.

17. As the Commissioner considers the section 43(2) exemption to be engaged he has next gone on to consider the public interest test in relation to this exemption.

*Public interest arguments in favour of disclosure*

18. The Trust acknowledges the public interest in transparency and accountability, particularly where information relates to the spending of public money. The complainant has also argued there is a strong public interest in disclosing the names of tenderers. He believes that the money involved in outsourcing services is public money and changes to the service will affect the public, therefore the identities of organisations involved in the process are matter of public interest.

*Public interest arguments in favour of maintaining the exemption*

19. The Trust has argued that the circumstances of the case and the timing of the request are of importance in this case. At the time of the request the tendering process was underway and a decision had not been reached. Conversations with companies who had bid were ongoing and the Trust argues that under OJEU regulations it was permitted to withhold information whilst the tender process was "in phase".
20. The Trust considered that at the time of the request there was the likelihood of a negative impact on the tendering process should the identities of bidders be revealed. The potential damage to the Trust's commercial reputation by revealing the bidders at a point when discussions were ongoing and there was an implied duty of confidentiality to the bidders would not have been in the public interest as it would have affected the Trust's bargaining position both in this case and in future tendering exercises.
21. The Trust considered this to be highly commercially sensitive due to the potential reputational and commercial damage it may have suffered. As such it believed the public interest in withholding the information to be greater.

*Balance of the public interest arguments*

22. The Commissioner is aware of the need for public authorities to be transparent about how they spend public money and to actively disclose information which demonstrates how they are achieving the best services at the most competitive prices.

23. The Commissioner has taken into account the fact that the only information requested in this case is confirmation as to whether a company has bid, or has indicated its intentions to bid for a tender. This would not necessarily be revealing a significant amount of information about the company but the Commissioner accepts the more likely reputational and commercial damage would be to the Trust due to the potential deterrent to other companies bidding should they believe there is a possibility the Trust will disclose their intention to bid. The Commissioner recognises this would not be in the public interest as the Trust needs to be able to consider bids from as many companies as possible in order to obtain best value for money and maintain a strong negotiating position.
24. The Commissioner has to factor in the timing of the request when determining where the balance of the public interest lies. In this case the tendering process was underway at the time of the request and in fact when the internal review was carried out. As such the likelihood of the potential prejudice to the Trust's commercial interests was higher as there is a real and genuine argument that the initial tendering process needs to maintain a degree of confidentiality to allow for effective negotiations to take place. This argument is also strengthened by the OJEU regulations on tendering which the Trust has attempted to comply with in this case. The Commissioner therefore considers there is significant weight to the public interest in maintaining the exemption.
25. Taking into account all of the above factors the Commissioner's decision is that the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the information. This is despite the fact that the information requested is limited and is based primarily on the fact that the information was requested at an early stage of the tendering process. As such he considers the Trust has correctly applied the section 43(2) exemption to withhold the requested information.

## Right of appeal

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26. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**