

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2017

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to the ConsultancyONE framework agreement. The Cabinet Office relied on sections 14 (vexatious request) and 43 (commercial interests) not to communicate the requested information to the complainant.
2. The Commissioner's decision is that the Cabinet Office's reliance on sections 14 and 43, as to the totality of the requested information, was incorrect. However its reliance on section 43 was correct as to a small proportion of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the withheld information save that it is not required to disclose the information contained in column "M" of the withheld information .
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.

Background

5. The Cabinet Office states that it is:

"... leading the transformation of central government procurement through the centralisation, standardisation and aggregation of spend on common goods and services, to deliver sustainable cost reductions across central government.

The ConsultancyONE framework agreement is the procurement vehicle for this transformation for business and management consultancy and related services and is the mandatory route for projects within scope between £100k and £2m for Central Government customers¹".

Request and response

6. On 21 April 2016, the complainant wrote to the Cabinet Office and requested information in the following terms:

"...relating to the ConsultancyONE framework agreement, I would like to receive a list of all those projects commissioned to date under the ConsultancyONE framework agreement (i.e. RM1502:<http://ccs-agreements.cabinetoffice.gov.uk/contracts/rm1502>).

The following information is required:

1. Government department
 2. Title of project
 3. Contract fee
 4. Date commissioned
 5. Lot under which the project was commissioned
 6. Contractor appointed"
7. On 20 May 2016, the Cabinet Office responded. It released a small amount of requested information, described as "a list of all contracting authorities that have called off individual lots". However it refused to provide the majority of the requested information. It cited the following exemption as its basis for doing so:
- Section 43(2) (prejudice to commercial interests)

¹ <https://ccs-agreements.cabinetoffice.gov.uk/contracts/rm1502>

8. The complainant requested an internal review on 23 May 2016. The Cabinet Office sent him the outcome of its internal review on 16 July 2016. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 1 August 2016 to complain about the way his request for information had been handled.
10. As part of her investigation the Commissioner wrote to the Cabinet Office on 21 September 2016. In that letter the Commissioner said, *inter alia*, as follows:

“Having revisited the request, you may decide to apply a new exemption. We will consider new exemptions but it is your responsibility to tell the complainant why the new exemption applies and to provide us now with your full submissions”.
11. The purpose of the above instruction is to avoid any unnecessary and avoidable delays to the Commissioner reaching her decision.
12. During the course of the Commissioner’s investigation the Cabinet Office informed her² that it also relied on section 14 to withhold the requested information. It further averred that sections 21, 24 and 26 may also be engaged but did not actually apply them.

Reasons for decision

13. Section 1(1) of FOIA states that any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
14. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.

² Letter dated 9 March 2017

15. The term "vexatious" is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield. The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
16. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
17. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed the:

"...importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).
18. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
19. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
20. An authority cannot claim section 12 (cost limit) for the cost and effort associated with considering exemptions or redacting exempt information.
21. Nonetheless, it may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.

22. However, the Commissioner consider there to be a high threshold for refusing a request on such grounds. This means that an authority is most likely to have a viable case where:

- The requester has asked for a substantial volume of information

AND
- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO

AND
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

23. The Cabinet Office's submissions³, regarding its use of section 14, are laid out below.

"The requester has asked for a substantial volume of information".

- i. The withheld information in question consists of details of 6,189 call-off contracts dating from August 2012 to April 2016. It has details of 50 suppliers, 538 customers and 1594 projects. These contracts include provisions relating to confidentiality of management information (Clause 13), provisions relating to Freedom of Information (Clause 21) and schedules of commercially sensitive information (Schedule 8).

"The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner".

- ii. The Cabinet Office initially refused this request under section 43(2) and it is primarily this exemption about which it has real concerns. (However, in light of the nature of the contractual relationships, it is likely that amongst others sections 21, 24 and 26 may also be engaged.)
- iii. The Cabinet Office is currently undertaking a live procurement exercise for the successor contract to ConsultancyONE. In its view, the Cabinet Office would be prejudiced as both the sponsor of

³ Contained in its letter to the Commissioner dated 9 March 2017

Crown Commercial Service (CCS)⁴ and as a customer on the framework if the information contained in the attached material was released.

- iv. The prejudice includes suppliers potentially building additional costs into proposed rates for the future framework in light of the disclosed information; suppliers and/or customers deciding to not use the framework due to concerns relating to their confidential information, including information subject to confidentiality clauses, being published; and the risk of loss of revenue to CCS by reduced income from the levy CCS places on suppliers providing services to customers through the framework.

"Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material".

- v. The Cabinet Office has also consulted 7 of the framework suppliers to seek their view as to whether the release of the information would be prejudicial. It is clear from their responses that a number of the suppliers consider that it would be. The Cabinet Office would need to consult the other 43 suppliers to investigate any prejudice they consider might result from publication of this information. It believes this process would be unduly burdensome on the suppliers, the customers and the Cabinet Office.
- vi. Concerns expressed by suppliers included:
- That this information is commercially sensitive and would be prejudicial to their commercial interests. This is because the data would enable competitors to derive both their rate card and also their commercial strategy on ConsultancyONE bids. This is the case as the data links dates, clients and contract values.
 - Any matter that is sensitive (national security) should be redacted so only the client name and total fees show, but not the project title if it gives anything away.
 - Supplier B does consider that this data should not be disclosed in this current form as it was provided in confidence to the client and provides in detail the total amount spent with each of the clients listed which would be of great interest to competitors as it is broken down to specific assignments. Even if all data was disclosed by all competitors this does have and would have a

⁴ <https://www.gov.uk/government/organisations/crown-commercial-service/about>

tendency to distort competition as it would be possible to work out how an assignment has been priced and affect what actions might be taken by a competitor to win a repeat or similar assignment against the competitor. In this supplier's view, this could act against the public interest if it caused a provider not to offer a discount which it would otherwise have offered because the provider had information about the level of fees paid for similar work previously undertaken by competitors.

- vii. To be certain that there are no client confidentiality clauses that preclude publication, the Cabinet Office would need to review and contact each client organisations that has been identified. This cannot be undertaken at pace or easily as some of the data goes back to 2013.
- viii. From a commercial perspective the Cabinet Office would need to review each contracted piece of work to check whether they contained requirements for seeking prior approval to publish commercially sensitive data. This could involve the client and / or any third parties the Cabinet Office may have engaged in undertaking the work. The Cabinet Office would need this authority before considering publication.
- ix. Suppliers have contracted with the CCS under this framework and agreed to submit monthly management information on the understanding that this will be kept confidential by the CCS, and any relevant public sector bodies, and on the basis that the data is not more widely or publicly disclosed due to its sensitive nature - this is reflected in clause 13.3 of the Framework Agreement.
- x. The Cabinet Office's view is that it would be inappropriate and misleading for the CCS to disclose this raw data in this format, which gives details about levels of spend by each contracting authority on suppliers under this framework, and which has not been prepared for wider distribution. It suggests that the named contracting authorities should have the discretion about whether and how such information should be publicly disclosed and are given the opportunity to provide further descriptions and comments relating to the rationale and context for each procurement, in line with value for money testing, and how the provision of services has delivered impact.
- xi. The Cabinet Office considers that many of its clients would be concerned that their specific projects were made visible through this process. In many cases, the work it does is of a sensitive nature and the data takes it to Project level, where many of the descriptors could be connected to specific work. Much of what it does as a business is to remediate problems, often aligned to

failing projects, and/or to progress very complex/ contentious work where specialist input is required. Revealing this level of detail might be very embarrassing to some clients; it is often not allowed to specify publicly (on its website for example) much of the work it does for clients, it can only talk about them being a client of supplier C. Sometimes, a few clients do not give permission for it to state that it has worked for them at all. Before any release, it would want assurances that clients were also content that this level of detail was acceptable for release by them.

- xii. Central government currently operates a transparency regime in which each Contracting Authority is required to publish information on Contracts Finder⁵ for call-off contracts with a value exceeding £10,000 for central government customers or £25,000 for wider public sector customers. Contracts Finder is the publically accessible website detailing all government contracts, tenders and framework agreements”.
24. The Commissioner is not persuaded that section 14 is applicable on the facts of the matter.
25. The Commissioner has viewed the withheld information. The withheld information is essentially a spreadsheet. It includes the names of commercial organisations supplying a service to varying government departments or other public bodies and the cost of those services. The actual services are not described. Accordingly, in the Commissioner’s view, the complainant has not requested a “substantial volume of information” and therefore this militates against section 14 being engaged.
26. In any event, on viewing the information, the Commissioner could not discern what apparently could be said to be commercially sensitive so as to entail a detailed consideration to determine whether information could be exempt information as suggested by the Cabinet Office. As said above, the information does not contain any detail as to nature of the service or services provided but merely gives a figure for the service provided.
27. The lack of detail also undermines the suggestion that that sections 21 (information reasonably accessible to the applicant by other means), 24 (safeguarding national security) and 26 (defence) may also be engaged.

⁵ <https://www.gov.uk/contracts-finder>

28. The public authority provided no further detail regarding this probable/possible reliance on these exemptions. Again, having viewed the information, the Commissioner cannot discern with any clarity that the withheld information could likely engage these late referred to exemptions by the Cabinet Office.
29. Having found that the exemption provided by section 14 is not engaged, the Commissioner next considered the other exemption relied upon by the Cabinet Office, the rationale for which is also included within its section 14 arguments, set out above.
30. Section 43(2) of the FOIA provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
31. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her 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."⁶
32. The exemption is subject to the prejudice and public interest tests. With regard to the prejudice test, three conditions must be satisfied in order for the exemption to be engaged.
 - First, the harm that is considered would, or would be likely to, occur should relate to the applicable interest described in the exemption.
 - Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against.
 - Third, there must be a real risk of prejudice arising as a result of the disclosure of the information in question, with the public authority able to demonstrate that disclosure 'would' or 'would be likely' to have the prejudicial effect. Establishing the appropriate level of likelihood is not only important for finding that the exemption is engaged but – if engaged – it will also have an effect on the balance of the public interest test.

⁶ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

33. In essence the Commissioner, for the reasons given below, is only satisfied that a portion of the requested information was properly withheld by relying on section 43.
34. As stated above the Cabinet Office explained, with some detail, why it thought that section 43 applied. Its position is that the information is commercially sensitive and would be prejudicial to the commercial interests of the Cabinet Office and its suppliers if it were released. This is because the data would enable competitors to derive both their rate card and also their commercial strategy on ConsultancyONE bids. This is the case as the data links dates, clients and contract values.
35. Having viewed the withheld information it is not readily apparent to the Commissioner the likelihood of the commercial prejudice actually occurring and, if it did occur, to what extent the "injury" would be so as to justify the Cabinet Office's reliance on section 43.
36. Generally, in essence the withheld information lacks the detail that would appear to be necessary to cause the prejudice that section 43(2) seeks to prevent. As stated above the information primarily informs that a named company provided a service to a government department (or other public body). There is no actual detail as to what that service was or what it involved.
37. Notwithstanding the above the Cabinet Office has supplied the Commissioner with evidence from five suppliers that is much more specific as to why a proportion of the information should be withheld. One such supplier's letter – which is similar in substance to the others - is reproduced below..
38. *"We request that the entire final column of the ... spreadsheet (column M entitled ""Contract Value"") is redacted on the grounds that this is commercially sensitive and disclosure is likely to prejudice our commercial interests.*
39. *As you will be aware, this column sets out our monthly fees which have been invoiced to each client on a per project basis.*
40. *Our reasons for why we consider this data to be commercially sensitive are as follows:*

"(1) Our firm's approach to pricing is to agree a total fixed contract value with our clients for each project.
41. *In line with UK Government transparency rules, our expectation is that the total contract value and contract terms and conditions may be published or publicly disclosed.*

42. *Public sector organisations, however, do not usually release further breakdowns of suppliers' prices (including daily, weekly or monthly rates) due to the recognition that these represent the confidential pricing data of the supplier.*
43. *In the ... spreadsheet, the column entitled ""Contract Value" sets out our monthly invoiced fees on a per project and per client basis - which is a breakdown of total contract values for one contract and so goes further than is required under UK Government transparency rules.*
44. *Our concern is that disclosing our monthly fee rates reveals a level of detail relating to our competitively sensitive pricing structures which is not currently in the public domain (and which would set a new precedent in terms of our fee information which may be publicly disclosed in line with FOIA requirements) and which our competitor organisations may attempt to reverse-engineer in order to gain insights into our firm's internal pricing models and team fee structures.*
45. *(2) Our view is that it would be inappropriate and misleading to disclose this raw data in this format which has been prepared solely with the objective of calculating the monthly management fee due ...(to us)... in line with the ConsultancyONE framework agreement provisions and which has not been prepared for wider or public distribution.*
46. *Publication of this raw data without any supporting information or context does not give the public sector organisation which commissioned and is accountable for the relevant spending the ability to provide an explanation as to what services have been performed, results achieved or how this has met value for money tests.*
47. *We believe that this may lead to inaccurate or false assumptions and criticisms being drawn by third party recipients about the use of management consulting services by public sector organisations and which may be prejudicial to our commercial interests.*
48. *As a final point, our view is that it is in the public interest to withhold this data from further release.*
49. *Suppliers have contracted with the CCS under this framework and agreed to submit monthly management information on the understanding that this will be kept confidential by the CCS, and any relevant public sector bodies, and on the basis that the data is not more widely or publicly disclosed due to its sensitive nature - this is reflected in clause 13.3 of the Framework Agreement.*
50. *If this confidentiality provision is not upheld, and suppliers find that their confidential and commercially sensitive data is being more widely disclosed, it may act as a disincentive to competing for and performing*

services for public sector organisations using the ConsultancyONE and TWO frameworks in the future."

51. Having regard to this (and the other) supplier's submission(s) the Commissioner is minded to accept that the information in column m of the spreadsheet is commercially sensitive and its release would likely prejudice the commercial interest of the suppliers. As stated above this column sets out monthly fees which have been invoiced to each client on a per project basis. The same is not true for the rest of the withheld information, which the Commissioner does not accept engages section 43(2).
52. Given the arguments set out in the submission, the Commissioner accepts that the level detail contained within column m is such that suppliers' competitors would be advantaged by its release. This advantage being a prejudice to the suppliers. However, though the exemption is engaged as regards the information in column m, it has to be determined whether the public interest favours maintain the exemption or releasing the information.

Public interest test

53. The Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information contained in column m.
54. Factors in favour of disclosing the requested information include:
- The public interest in openness and transparency of Government's commercial activities, which can encourage increased trust in the work of the Government, and enables accountability in terms of the use of public funds;
 - The fact that private sector bodies engaging in commercial activities with the public sector must expect some information about those activities to be disclosed;
 - The contention that if competitors undercut current suppliers as a result of the release of this information, the public purse benefits.
55. Factors in favour of withholding the requested information include:
- Preserving relationships of trust and confidence and the free flow of information between the Crown Commercial Service, customers and suppliers. The disclosure of the requested information may jeopardise this relationship, which is fundamentally important in maintaining for the effective delivery of public services;

- The release of information concerning expenditure with suppliers could have a direct impact on the ability of suppliers to compete on a level playing field in current and future commercial activities, both in the private and public sector;
 - Disclosure would be likely to prejudice the commercial interests of public sector organisations engaged in the framework agreement by adversely affecting their purchasing positions during contractual negotiations, resulting in the less effective use of public money should this information be released into the public domain.
56. The Commissioner clearly accepts that there is a broad interest in the public understanding how public money is spent and, in the circumstances of this case, disclosure would provide the public with a clearer insight into the breakdown costs of the contracts.
57. However, the Commissioner believes that there is a public interest in ensuring fairness of competition. In her view it is against the public interest for the commercial interests of a third party to be undermined simply because they have entered into a contract with a government department.
58. The Commissioner, on the facts of this matter, is satisfied that the public interest in releasing this information in column M is outweighed by the public interest in maintaining the exemption. Overall, after weighing up the competing interests, the Commissioner's view is that there is sufficient merit in not damaging the commercial interests (of both the suppliers and the government) to maintain the exemption.
59. In reaching this conclusion the Commissioner noted that there is already a significant amount of information about the ConsultancyONE framework⁷ already in the public domain and that she has also directed that the majority of withheld information in this matter be released. Further, the Commissioner is not persuaded that releasing the information would in future necessarily "drive down" the price paid for the tendered services. The next tendering exercise could well be for a different or refined service. In any event, to release the information would inequitably disadvantage only the current service providers. In these circumstances the call to withhold the most sensitive and detailed financial information (as contained in column M) is justified.

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https://www.gov.uk/search?q=ConsultancyONE+framework+agreement&show_organisations_filter=true

60. Consequently, given the cumulative public interest in protecting the interests of both the suppliers and the Cabinet Office/government, the Commissioner has concluded that the public interest favours maintaining the exemption as regards the information in column m of the withheld information only.
61. The Commissioner stresses, to avoid any doubt, that by agreeing to the withholding of column m, she is not ordering release of any financial information.

Other Matters

62. When a public authority wishes to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. The Commissioner would also remind public authorities that she expects such evidence to be provided to her in a timely manner.

Right of appeal

63. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

64. 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.
65. 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

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