

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2020

Public Authority: HM Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested the names of the suppliers on the Government Hubs Fit-Out Framework linked to their evaluation scores. The public authority withheld this information relying on the exemption at section 43(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 43(2) FOIA.
3. No steps required.

Background

4. The background information provided by the public authority in order to assist the Commissioner with her investigation is set out below.
5. The Crown Commercial Service (CCS) is an executive agency and trading fund of the Cabinet Office. It provides commercial services to the public sector and aims to save money for the taxpayer by awarding and managing commercial agreements for common goods and services. CCS make savings for customers in both central government and the wider public sector. The agency works with over 17,000 customer organisations in the public sector and services are provided by more than 5,000 suppliers.
6. CCS commercial agreements use competition among suppliers to increase quality and value. CCS claims that in 2017/18, £601m of public money was saved using CCS commercial agreements. Everyday purchases, such as office supplies, are available from CCS catalogues and can be bought online for rapid delivery. Catalogues currently include technology products, office supplies and multi-function devices for printing, copying and scanning. CCS publishes commercial agreements for more complex requirements. For example, for buying a fleet of vehicles or for legal advice. These are called frameworks.
7. A framework agreement gives public authorities such as HMRC the flexibility to order services and products from private sector suppliers without going through the full tender application process more than once.
8. A framework agreement is not a commitment to purchase but a legally compliant route to run a competition with qualified providers to enter a contract with one of the suppliers on the framework and commitment to spend for a known requirement. A framework agreement is different from a one-off contract.
9. When setting up a framework, CCS or in this instance HMRC run a procurement exercise compliant with the Public Contract Regulations 2015 (the Regulations) to select suitable suppliers with generic capability and capacity to deliver the scope of the specified goods/service and set terms and prices for a period (usually up to four years).
10. The Regulations are in place to ensure that all contracting authorities act transparently. Regulation 18 Principles of Procurements states, 'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.'

11. According to CCS, invitations to Tender clearly state how all aspects of the tender are evaluated in line with the Regulations. CCS also provides clear, written debrief reports explaining to each unsuccessful bidder the rationale in line with the published criteria for each score awarded and also the relative advantages of the responses from winning bidders, again in line with the Regulations.
12. Before awarding suppliers a place on a framework the Regulations require that the result is issued (this is called an Intention to Award letter) with all of this information and for there then to be a 10 day 'Standstill Period' before the formal Award is made. This is to allow for the authority to answer any queries which may be raised by the bidders, or for bidders to raise a legal challenge to the decision where they believe the Regulations requirements have not been complied with.
13. Once the suppliers are awarded a place on a framework agreement no new suppliers can join the framework.
14. When a public authority is ready to procure the product or service, it will run a further competition with all capable suppliers (ie the framework suppliers) to select one or more suppliers from whom to buy the goods or services. This is a much simplified procurement only open to the framework suppliers. All suppliers should be treated as equal once on the framework.
15. The complainant's request is specific to the Government Hubs Fit-Out Framework. This Framework covers the requirement for contractors to undertake Fit-Out works for the Government Hubs Programme (inclusive of HMRC, Government Property Unit GPU & Other Govt Depts). The Programme of works comprises a range of projects nationally of varying sizes over a four year period. All procurement from this framework is by further competition. Direct award is not permitted.
16. The Government Hubs Programme is overseeing the structural reorganisation and transformation of the current estate. For HMRC, this represents a considerable consolidation programme which will see the current landscape of 170 offices reoriented into 13 modern Regional Centres, equipped with the digital infrastructure and training facilities needed to make HMRC a more highly-skilled organisation, fit for the demands of the 21st century. From a wider Government perspective, the programme will transform central government's office estate by accommodating departmental workforces in shared regional hubs and supporting office estate.

Request and response

17. On 3 July 2018, the complainant submitted a request for information to the public authority in the following terms:

"I would like to submit an FOI request for the following information please, relating to the Government Hubs Fit-Out Framework (2017/S 123-248740) only:

1. Would you be able to provide me with a copy of the assessment scores for Lots 1-3 only within the framework please. I have a copy of a response from another authority but am unable to attach it via your portal, but I am happy to provide a copy. It would be helpful if you could provide information in the same structure please.

2. Could you advise me of the details of each contract awarded via Lots 1-3 please. Could you please detail:

a. The title of the contract.

b. A brief summary of the scope of the contract.

c. Planned and actual value (highlighting any variance between awarded value and final value).

d. Planned and actual dates (highlighting any schedule variance).

e. Who is the client for the work and the FOI email address for any follow up. If you do not hold the information above would you be able to provide advice (FOI Section 16) on who holds the information and for which contracts."

18. The public authority responded on 30 July 2018.

19. In reply to questions 2a-c, the public authority advised that the information requested was published on Contracts Finder¹. It added that part of question 2c could not be quantified and as such is not held as the awarded value is based on the indicative value expected over the life of the framework and until contracts are awarded under the framework, the actual value is not known.

¹ <https://www.contractsfinder.service.gov.uk/Notice/98c61916-01ab-4706-908a-9d6f30880de6?p=@8=UFQxQIR3PT0=NjJNT0>

20. In reply to question 2d, it explained that the information about planned and actual dates will be published by the public authority at the relevant points in the Transformation programme which runs to 2021. As such the information was considered exempt on the basis of section 22(1)(c) FOIA.
21. In reply to question 2e, it explained that any public sector body can call-off from the framework and therefore the responsible person will be named at that point.
22. In reply to question 1, the public authority confirmed it held the information requested which it concluded was a detailed breakdown of the assessment scores. It withheld this information on the basis of section 43(2) FOIA.
23. In order to be helpful it explained that the suppliers' assessment scores were included in the award notification letter but only in relation to how they scored against the highest score achieved. The suppliers did not get to see a detailed breakdown of all the tenderers scores by question or an overall ranking. It explained that in order to ensure a consistency of information disclosed, it was happy to provide the following weighted scores:

Supplier 1 86.35%

Supplier 2 79.11%

Supplier 3 78.12%

Supplier 4 75.99%

Supplier 5 73.30%

Supplier 6 71.81%

Supplier 7 70.59%

Supplier 8 67.43%

Supplier 9 65.22%
24. The complainant requested an internal review on 30 July 2018. He expressed his dissatisfaction with the fact that the public authority had not released supplier names, weightings, questions and scores. He claimed he had received populated spreadsheets from 8 other public authorities, "detailing the company name, weightings, questions and scores."

25. The public authority wrote back to the complainant on 18 September 2018 with details of the outcome of the internal review. It considered that the complainant had only expressed dissatisfaction with its response to question 1 and responded accordingly.
26. It explained that disclosing "the detailed breakdown by supplier" could weaken the relationship between the public authority and the contracted supplier, undermine the tender process and prejudice the authority's commercial interests. It therefore upheld the application of section 43(2) FOIA to this information.
27. It however disclosed "the total weighted scores by question in the structure requested." The information in a table reproduced at Annex A comprises of the weighted scores for each of the 9 suppliers against a criteria or question. The names of the suppliers were not included in the table.

Scope of the case

28. The complainant contacted the Commissioner on 1 October 2018 to complain about the public authority's handling of his request. Further to email exchanges with the complainant, the Commissioner subsequently established on 14 March 2019 that the complainant would like the public authority to also release "the supplier name[s] and the maximum available weighted score for each question [in relation to question 1 of his request]."
29. Further to that clarification, the public authority disclosed another version of the table at Annex A to the complainant on 20 June 2019. This table includes a maximum weighted score for each question. However, as it had done previously, the public authority did not identify the suppliers.
30. Therefore, this decision notice has considered whether the public authority was entitled to withhold the names of the 9 suppliers linked to their individual scores as set out in the table at Annex A and disclosed again by the public authority on 20 June 2019 with the maximum weighted score for each question included. In other words, the correlation between the scores and the 9 suppliers.

Reasons for decision

Section 43(2)

31. Section 43(2) states:

“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).”²

Complainant's submissions

32. The complainant's submissions which are pertinent to her consideration of whether the public authority was entitled to rely on the exemption at section 43(2) to withhold the names of the 9 suppliers on the Government Hubs Fit-Out Framework are summarised below.
33. The Commissioner has previously ruled in his favour further to refusals by public authorities to disclose similar framework related information.
34. A letter the complainant received from the Director of Business Development and Work Winning at Sir Robert McAlpine Ltd does not support the “unevidenced conjecture” by the public authority that “bidders could be damaged as a result of releasing this information.” The complainant provided a copy of that letter which the Commissioner notes is undated.
35. The Commissioner has previously ruled in a similar case that “where commercial entities bid for access to public contracts, they must expect greater openness about their business model and their operations generally. The information is still at a high level rather than especially detailed. The damage to CCS' reputation as a confidential arbiter of commercial information would not be severely prejudiced by disclosure.”³
36. He drew the Commissioner's attention to his submissions to the First-tier Information Rights Tribunal in his appeal (EA/2019/0133) of the Commissioner's decision in case FS50775867 and requested that they
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² <http://www.legislation.gov.uk/ukpga/2000/36/section/43>

³ The Commissioner understands that the complainant is referring to her decision in case FS50771669 which is currently under appeal to the First-tier Tribunal under reference EA/2019/0122.

should also be considered in this case. In the Commissioner's view, the submissions summarised below are directly relevant to this case.

37. Weighted scores are released as a standard part of the process. The name of the winning supplier is released as part of the process. As a bidder, the company the bidder needs to beat is the winning supplier. The bidder has their name and their scores so "I dispute the assertions about 'unfair advantage'."
38. The objective of the request is to understand which companies got which scores for 2nd, 3rd etc. By providing transparency of scores suppliers are able to focus in areas where they have underperformed and drive up the quality of their bids. Public procurements enable bidders to get a better understanding of their comparative strengths and weaknesses which is firmly in the public interest. It closes the gap and helps to drive competition.

Public authority's submissions

39. The public authority's submissions are summarised below.
40. Publicly available information provides that there are three 'lots' covered by this framework and nine named suppliers in total⁴. Lot 1: National UK coverage for work over £25m, Lot 2: Northern UK coverage for work under £25m and Lot 3: Southern UK coverage for work under £25m.
41. The complainant has previously been provided with both the names of framework suppliers and the anonymised evaluation scores of these suppliers⁵. The requested information would however allow the complainant to attribute the evaluation scores to a supplier.
42. It should be emphasised that a framework agreement does not give rise to a commitment to purchase, but rather provides a basis for public authorities wishing to purchase particular works or services to run a simplified (legally compliant) competition with the qualified providers (ie the framework suppliers) to let a contract with one of the suppliers on the framework, and commitment to spend for a known requirement.

⁴ <https://www.crowncommercial.gov.uk/agreements/RM6073>

⁵ The Commissioner notes that the names of the 9 suppliers on the framework and the lots they can cover are published on the following page:
<https://www.crowncommercial.gov.uk/agreements/RM6073/suppliers>

43. The results of a generic framework agreement competition with no committed spend and multiple customers would not necessarily be the same as it would be where committed spend and known requirements are available to bidders tendering for a specific contract. In a procurement exercise for a specific contract, the successful bidder will be the one who is considered the best candidate for that individual contract. In contrast, under a framework agreement, what is being considered is the capability of the bidders to be able to provide a type/range of services across a specific period in the public sector for multiple customers with varying requirements.
44. For suppliers awarded to the framework, disclosure of their names linked to their individual scores would enable an informal 'ranking' of the framework suppliers. This could have implications not only for the award of individual contracts under the framework agreement (with too much work being awarded to too few of the framework suppliers, which can result in those successful suppliers being stretched to or beyond effective capacity) but could result in loss of business elsewhere, reputational damage or impact to share prices.
45. It could also discourage them from bidding for future CCS opportunities if they knew they were going to be made public. This would significantly weaken the breadth of the market that the public sector could choose from, ultimately leading to a loss of choice in the marketplace. It should also be noted that as CCS focuses on framework agreement opportunities, this effect may be multiplied in that multiple contract opportunities could be prejudiced through the release of this information that could run for several years, effectively creating a short-term monopoly for those who rank higher. CCS's role as a central purchasing body places the potential prejudice higher than would be the case for, say, a local council in a similar position. Continued prejudice is likely to occur as new contractual opportunities will continue to present themselves over the lifetime of the framework which is still active, and therefore future prejudice remains possible.
46. CCS seeks to ensure that tender documentation and evaluation criteria are clear and transparent from the outset, and assist bidders in their understanding of the requirement and the process which will be undertaken in order to evaluate their tender. CCS is committed to providing this and also to providing clear feedback to the individual bidders in line with the Regulations.
47. The claimed commercial prejudices would devalue the framework agreement process under which the majority of services are procured by the government. Such disclosure would impact the competitiveness of the bidding process resulting in increased costs and impacting value for money for the taxpayer. It is the view of the public authority that to

undermine this process, and the agreed system of transparency under which it operates would be prejudicial to the department's and in turn the government's commercial interests.

48. Disclosure of the names of the suppliers linked to their individual weighted scores would prejudice their commercial interests and would also prejudice the commercial interests of the public authority.
49. With respect to the balance of the public interest, there is clearly a public interest in providing as much relevant information regarding public sector procurements to those who may potentially be interested in tendering, or who have in fact tendered, for a particular contract or framework arrangement, to ensure procurements are fair, is accessible and attractive to companies that are eligible to tender, and with a view to ensuring that best value is achieved for the public sector. These objectives are met by CCS processes which meet the requirement of the Regulations.
50. There is a public interest in transparency and accountability in relation to the activities of the UK government and public authorities, and also in promoting public understanding of the decision-making undertaken by these bodies. In this respect disclosure of the information requested would allow scrutiny, and in doing so may inform public debate in relation to aspects of the government's system of procurement now and in the future.
51. It is however also important that this can be done without impacting the commercial activity that follows the award of a framework agreement, resulting in negative impact on the suppliers, on the framework and the customers using it to deliver public services with taxpayer's money.
52. There is a more compelling public interest in safeguarding value for money in the purchase of services by the public sector and in maintaining the commercial confidences of potential suppliers so as to maintain an equal, competitive playing field. Additionally, the commercial activities of the government is already significantly open and transparent with a large amount of data already placed in to the public domain by CCS.
53. The public authority is already subject to substantial public scrutiny and considers that the public interest test is met by the numerous channels of information release already in place, examples being but not limited to scrutiny by the National Audit Office and the Public Accounts Committee.
54. Ultimately there is a more compelling public interest in safeguarding the government's ability to complete high quality, cost effective projects

whilst encouraging a competitive market. The requested information is relevant to the UK government's new property strategy that aims to save the government £3.6 billion over 20 years.

The Commissioner's considerations

Is the exemption engaged?

55. The Commissioner first considered whether the names of the 9 suppliers linked to their individual weighted scores (the withheld information) engages the exemption at section 43(2) FOIA.
56. The Commissioner did not find it necessary to inspect the withheld information further to her consideration of the application of the exemption.
57. In order for a prejudice based exemption, such as 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 must relate to the applicable interests within the relevant exemption;
 - 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 which the exemption is designed to protect. The resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
58. The Commissioner is satisfied that the harm the public authority considers would occur relates to the commercial interests of the suppliers and the public authority.
59. With respect to the second criterion of the test, the Commissioner accepts that a causal relationship exists between the disclosure of the names of the suppliers linked to their individual weighted scores and prejudice to the commercial interests of the suppliers and the public

authority. She considers that the alleged prejudice is real and of substance.

60. For the reasons given by the public authority in paragraphs 44 – 47 above, the Commissioner accepts it is more likely than not that disclosing the names of the 9 suppliers linked to their individual weighted scores would prejudice the commercial interests of the suppliers and those of the public authority. The Commissioner shares the view that linking the suppliers to their evaluation scores could result in informal ranking of the suppliers on the framework. The Commissioner accepts that this could have a detrimental impact on the bidding process and likely increase costs to the taxpayer.
61. Whilst the Commissioner discourages public authorities from speculating about the likelihood of prejudice to the commercial interests of third parties, she considers the public authority's submissions on the likelihood of prejudice to the suppliers' commercial interests persuasive. Moreover, she is equally persuaded by the authority's submissions on the likelihood of prejudice to its own commercial interests.
62. The exemption at section 43(2) was therefore correctly engaged.

The Public interest test

63. The exemption at section 43(2) is subject to the public interest test set out in section 2(2)(b) FOIA which is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
64. In assessing the balance of the public interest and indeed whether an exemption is engaged, the Commissioner will consider each case on its own merits. The fact that the Commissioner has ruled one way in a particular case is not a compelling factor in how she will rule in another similar case.
65. Although the public authority has published the individual weighted scores for the 9 suppliers on the Government Hubs Fit-Out framework, the Commissioner accepts that linking the published scores to the suppliers on the framework would enhance the public interest in transparency and accountability in relation to the procurement process for the Government Hubs programme. It may also inform public debate on how the suppliers on the framework were evaluated and give the suppliers a broader comparative understanding of their strengths and weakness.
66. The Commissioner considers that there is a stronger public interest in preventing the informal "ranking" of suppliers on the framework for the reasons explained by the public authority. She also considers that there

is a strong public interest in protecting the suppliers from damage to their commercial interests as a result of informal ranking by customer organisations or wider reputational damage. Given the impact this would also have on the competitiveness of the bidding process, there is a very strong public interest in preventing increased costs to the Government Hubs programme and the ability to obtain value for money for the taxpayer.

67. The suggestion that there would be no unfair advantage because suppliers would only be interested in beating the highest scoring supplier on the framework is not persuasive given the strong possibility that suppliers on the framework could be informally ranked by customer organisations on the basis of their evaluation scores alone. The public authority has explained that all procurement from the framework is by further competition and direct award is not permitted. There is therefore a strong public interest in ensuring that there is a genuinely competitive bidding process on the framework otherwise there would be a detrimental impact on the commercial interests of the government and increased costs to the tax payer.
68. In light of the above, the Commissioner finds that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the names of the suppliers linked to their individual weighted scores.

Right of appeal

69. 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@justice.gov.uk

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

70. 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.
71. 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.....

Terna Waya
Senior Case Officer
Information Commissioner's Office
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Wilmslow
Cheshire
SK9 5AF

Annex A

Number	Name	Supplier 1	Supplier 2	Supplier 3	Supplier 4	Supplier 5	Supplier 6	Supplier 7	Supplier 8	Supplier 9
		Weighted score	Weighted score	Weighted score	Weighted score	Weighted score	Weighted score	Weighted score	Weighted score	Weighted score
a1	Collaborative working arrangements	6.0	6.0	6.0	6.0	6.0	8.0	6.0	6.0	8.0
a2	Continuous improvement and innovation	8.0	6.0	8.0	10.0	10.0	8.0	8.0	4.0	10.0
a3	Design delivery and value for money	15.0	15.0	9.0	12.0	12.0	12.0	9.0	9.0	12.0
a4	Risk management & analysis	8.0	6.0	8.0	8.0	6.0	8.0	6.0	8.0	6.0
a5	Framework management	9.0	9.0	12.0	12.0	12.0	9.0	9.0	9.0	12.0
a6	BIM	15.0	9.0	15.0	15.0	12.0	9.0	15.0	12.0	12.0
a7	Programme & Project Management	12.0	9.0	12.0	9.0	9.0	12.0	15.0	9.0	12.0
a8	Consistency of delivery	10.0	10.0	8.0	10.0	8.0	6.0	6.0	8.0	10.0
b1	Availability of plant, materials, and labour	15.0	9.0	12.0	9.0	12.0	15.0	9.0	12.0	12.0
b2	Supply chain management	12.0	9.0	12.0	12.0	12.0	12.0	6.0	9.0	15.0
b3	Deliver value for money and maximise cost benefits	12.0	6.0	12.0	12.0	15.0	12.0	12.0	12.0	15.0
b4	Exemplar Sub-contractor procurement plan	10.0	20.0	15.0	15.0	25.0	25.0	20.0	15.0	15.0
b5	Estimating process and approach	12.0	12.0	12.0	16.0	16.0	16.0	12.0	16.0	12.0
b6	Approach to Life Cycle Costing	6.0	8.0	6.0	4.0	6.0	4.0	8.0	6.0	8.0
b7	Supply chain partners	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
c1	CDM 2015 (Principal Designer and Contractor)	40.0	30.0	50.0	30.0	40.0	40.0	40.0	40.0	30.0
c2	Safety on site	40.0	50.0	40.0	40.0	30.0	50.0	30.0	50.0	50.0
d1	Environmental	40.0	30.0	40.0	40.0	30.0	40.0	40.0	30.0	40.0
d2	Sustainability	40.0	30.0	40.0	30.0	40.0	50.0	30.0	30.0	30.0
e1	Promotion of SME's and Apprentices	32.0	16.0	40.0	32.0	32.0	24.0	24.0	24.0	40.0
e2	Promotion of local labour and procurement	32.0	24.0	24.0	24.0	24.0	24.0	24.0	24.0	40.0
e3	Community initiatives and development	16.0	16.0	20.0	12.0	16.0	12.0	12.0	12.0	20.0
f1	Fraud and Corruption prevention	Pass	Pass	Pass	Pass	Pass	Pass	Pass	Pass	Pass