

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2020

Public Authority: University of Surrey
Address: Guildford
Surrey
GU2 7XH

Decision (including any steps ordered)

1. The complainant has requested information in relation to a contract for a virtual learning environment. This included the contract, tender responses, evaluation matrices and documents provided as part of the sales process. The University of Surrey refused the request on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that for the majority of the information, including tender documents, the University has correctly refused the request under section 43(2) and the public interest favours withholding the information. For a small number of documents relating to the tendering exercise and the evaluation of the tenders the Commissioner finds the exemption has not been shown to be engaged. A confidential annex lists these documents.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the documents listed in the annex with the tab on price evaluation redacted from the evaluation spreadsheets.
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.

Request and response

5. On 4 March 2019 the complainant made a request to the University in relation to a contract for a virtual learning environment in the following terms:

"I would like to know what information the University holds in relation to the award of the contract and would like copies of the available documents, including:

- The contract itself
- The entirety of the tender response, including appendices
- Any evaluation matrices
- Any documents relating to user testing, verification exercises, or proof of concepts
- Any documentation provided as part of the sales process."

6. The University responded on 2 April 2019 refusing to disclose the requested information on the basis of section 43(2) of the FOIA. The University stated the information would lead to the risk of competitors taking away points about how to write a successful submission.
7. The complainant requested an internal review on 8 April 2019. He argued that the University had only referred to submissions but he had requested much wider information than this. He also argued that competitors will have made successful bids before so would not need to learn from this information and the University is unlikely to be commissioning more virtual learning environments in the next few years so would not be inviting new tenders.
8. The University conducted an internal review and responded on 2 May 2019. It upheld its decision, confirming it considered the commercial interests of both the University and the companies who submitted bids would be at risk if the information was disclosed.

Scope of the case

9. The complainant contacted the Commissioner following the internal review on 10 May 2019 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if the University has correctly withheld information within the scope of the request on the basis of section 43(2) of the FOIA.

Reasons for decision

Section 43 – prejudice to commercial interests

11. Section 43(2) of FOIA states that information is exempt if its disclosure would prejudice the commercial interests of any person, including those of the public authority holding it.
12. The request is in several parts but the University has considered the information as a whole as it all relates to the tendering process. The University found the section 43(2) exemption to be engaged in relation to all of the requested information as to disclose the information would be likely to prejudice the commercial interests of the University and the companies who submitted bids.
13. The exemption can be engaged on the basis that disclosing the withheld information either 'would' or 'would be likely to' prejudice commercial interests. This establishes two thresholds for engaging the exemption. The lower one, 'would be likely to' prejudice has been interpreted by the Tribunal as meaning that the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk. It follows there must be a greater risk of the prejudice occurring for the exemption to be engaged on the basis that the prejudice 'would' occur.
14. The Commissioner notes that the University appears to have applied the higher threshold i.e. that disclosure 'would' prejudice its own interests and that of third parties. The Commissioner has therefore considered the application of the exemption on the basis of the higher threshold initially but may revert to the lower threshold if she considers it more appropriate.
15. The University has had several opportunities to explain its position, when dealing with the request initially and in its engagement with the Commissioner. It has maintained that disclosing the information would lead to the risk of competitors taking away such information about how to write a successful submission and the content that public authorities would want to see in such bids and how to present this.
16. The University expressed concern that disclosing the information would impact on its ability to compete in a competitive market as it may make companies less willing to engage with the University and it would make it harder for the University to achieve value for money from contracts.
17. In terms of third parties; the University is of the view that disclosing the information would reveal bidding methods and withholding the information would preserve the bidders capacity to compete fairly in a commercial market.

18. The University has provided evidence to show it consulted with the bidders to ascertain their views on the disclosure of any documents submitted as part of the tendering exercise.
19. The responses from the various third parties range from strong opposition to disclosure of any kind to concerns about full disclosure and suggested redactions.
20. In one case a bidder considered the entirety of the information in the tender to be a trade secret or other commercially sensitive information and that disclosure would prejudice its commercial interests as the submission was unique, including the way the bid was written and structure and its content. It argued that disclosure would result in it losing its competitive advantage as competitors would understand how it trained its staff and the combination of products and services offered as well as the financial breakdown of the bid. It was argued that it could not be a competitive market if other suppliers could copy this approach and style.
21. Several bidders expressed concerns with full disclosure and preferred the tender documents be withheld in full but accepted that a redacted version of the bid could be appropriate, removing personal data and any information on pricing, values and costings, roadmaps, target response times and failure credits to reduce the competitive advantage this would provide to competitors.
22. Another bidder was firmly in favour of withholding the documents in full as the tender contained trade secrets, applications, developments and partnership agreements that had resulted from investment and intellectual property over many years. It argued that even the structure, scale and quality of the tender would give an insight and knowledge of its business and provide competitors with an advantage.
23. The University also set out that it considered that disclosure of the tender documents would also prejudice the commercial interests of the University itself. The University argued that putting third parties commercial interests at risk could also deter other companies from bidding and entering into future contracts with the University.
24. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority believes would, or would be likely, to occur if the withheld information was disclosed has to be related 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 potential prejudice against which the exemption is designed to protect. Furthermore, 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 upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
25. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather 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.
26. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the University clearly relates to the interests which the exemption contained at section 43(2) is designed to protect. The University has provided arguments relating to prejudice to both its own commercial interests and those of the bidding companies.
27. With regard to the second criterion, the Commissioner must consider the different types of information that are covered by the request. The arguments presented by both the University and the third parties relate to the tender documents. For these documents the Commissioner is satisfied that the disclosure has the potential to harm the third parties interests. This is because, in the Commissioner's view, it is logical to argue that, in a competitive and lucrative market, companies would seek to use the bid documents to gain an advantage over their competitors who have also tendered for the same contracts. She is less minded to accept that disclosure of the tender documents would have the potential to harm the University for the reasons it has suggested as other companies will continue to bid and enter contracts with the University regardless of whether the information is disclosed.
28. The request also asked for evaluation matrices, and documentation provided as part of the sales process. These would not be included in the tender documentation and does not appear to have been considered separately but from the bundle of withheld information provided to the Commissioner there are documents which would fall under these definitions such as guidance on presentations for bidders, finalised agreement documents, a document setting out the timeline for the

tender exercise, evaluation matrices (minus the tab on price evaluations which is specific pricing information from the tender submissions and the Commissioner considers meets the second criterion for the same reasons as the tender documents).

29. For these documents there does not appear to be any clear link between the prejudice described and the disclosure of this information – these documents relate to the pre-tendering period in some cases and set out general points of reference and guidance on how to conduct the tendering exercise. In other cases the documents show information on the scoring used by the University but it is unclear how this would have any prejudicial impact on the University's commercial interests. The exception to this being, as pointed out above, the pricing evaluations which are contained in the scoring spreadsheets. For this reason the Commissioner does not find there is a sufficient causal link between disclosure of these documents and the argued prejudice and therefore the section 43(2) exemption is not engaged. These documents have been listed in a confidential annex which has been provided to the University.
30. The Commissioner has next gone on to consider the third criterion in relation to the tender documents and the pricing evaluation tab from the scoring spreadsheets.
31. The University has referred to relying on the higher level of 'would' cause prejudice to the winning bidders tender document. The Commissioner accepts that disclosure of the successful tender and associate documents (including the pricing evaluation in the scoring spreadsheet) would more likely than not prejudice the successful company's commercial interests. The Commissioner accepts that competitors would seek to use this information to gain an advantage over the successful bidder.
32. With regard to the unsuccessful bidders, the University confirmed that it was relying on the higher level of 'would' prejudice. The Commissioner does not accept that the likelihood of prejudice meets the threshold of 'would' cause prejudice to the unsuccessful companies.
33. The Commissioner considers that as the tenders were unsuccessful, the likelihood of a competitor using the tender as a future template is reduced. The Commissioner does, however, accept that the likelihood of prejudice occurring meets the lower threshold of 'would be likely to' prejudice the unsuccessful companies as there is a more than hypothetical chance that competitors would attempt to use the tender documents to gain a competitive advantage.

34. The Commissioner has accepted that section 43(2) is engaged in respect of certain information as set out above. Since this is a qualified exemption the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

35. The complainant explained that due to the substantial value of the contract in question there is a legitimate and substantial public interest in knowing details of the winning bid as it is not otherwise possible to determine whether the University's choice of bidder represented the best value for money.
36. The complainant had raised concerns that whilst the tender documents may contain some information that may be commercially prejudicial the documents should not be withheld in their entirety.
37. The University acknowledged there is an inherent public interest in transparency and accountability.
38. However, the University is of the view that there is very little public interest in the information. There is no wider interest to society and disclosure would not further the public good. The information was withheld as there was seen to be a real risk of prejudice to the commercial interest of third parties and this would not be in the public interest as it would undermine the competitive environment in which they operate. Less competition will lead to public authorities receiving less bids for contracts and potentially reduce the quality of services offered and this would not be in the public interest.
39. The Commissioner considers firstly that the decision to consider the tender documents as a whole was correct in this case. Whilst it is not always the case that documents and contracts should be considered as a whole as it is often only the financial information, calculations and formula which are truly unique and commercially sensitive; in this case several third parties argued that even the way the bid documents were structured was unique and would give competitors insight. The Commissioner also notes that several of the bids contained detailed technical drawings and product descriptions as well as information about the companies that would not otherwise be known. It would be very difficult to separate this information by means of redaction without rendering the documents of no meaningful use.
40. The Commissioner considers there is always a general public interest in the disclosure of information relating to the spending of money and the

management decisions of public authorities and consideration should be given to whether disclosure of the requested information would increase the public understanding of the management of the University, its decision making and whether it is achieving value for money.

41. The Commissioner, as already mentioned, is not convinced by the University's argument that disclosure of the tender documents would lead to a reduction in the number of companies willing to tender for contracts. The Commissioner considers that contracts, if sufficiently lucrative, will always attract a bid and companies will accept a level of disclosure in order to bid for such contracts.
42. The Commissioner considers that much of the public interest arguments in favour of disclosure relate to accountability and ensuring good decision making has occurred. For this reason she considers that the documents relating to the University's decision making processes be disclosed to show that each third parties submissions received proper consideration and appropriate scoring and that the tender exercise was conducted with thoroughness and fairness.
43. There is no evidence of any wrongdoing or suggestion of this by any party that the Commissioner is aware of which would add weight to the arguments for disclosure. The only public interest arguments for disclosure are therefore seemingly those of accountability and transparency.
44. The Commissioner considers that prejudice to the commercial interests of the winning bidder should be afforded more weight in the balancing exercise. The Commissioner is of the opinion that the public interest in disclosure does not extend to disclosing information that would harm the company's ability to protect its position in a competitive environment. The company was awarded the contract on the basis that it submitted the best tender, and the Commissioner is of the view that it would not be fair to disclose information that would disadvantage the company in future tender processes. The Commissioner considers this to have significant weight in balancing the public interest.
45. The Commissioner has considered whether disclosure of the winning tender document would add significantly to the public debate and understanding of the University's decision. She has also considered the harm that would be likely to occur to the successful company should its tender documents be released into the public domain. The Commissioner concludes that, in the specific circumstances of this case, the public interest in maintaining the exemption narrowly outweighs the public interest in disclosure of the winning tender.

46. Regarding the unsuccessful tenders, the Commissioner considers that the public interest arguments on both sides are limited. The Commissioner has considered what further understanding disclosure of the unsuccessful tenders would provide. She is not persuaded that this information would inform the public of the reasoning behind the University's decision. Consequently, the Commissioner again finds that the public interest in maintaining the exemption outweighs the public interest in disclosing this information.
47. In conclusion the Commissioner accepts that the section 43(2) exemption has been correctly engaged in relation to the tender documents and the public interest favours maintaining the exemption and withholding the information. There are a small number of documents listed in a confidential annex that the Commissioner finds the exemption is not engaged in relation to as they set out the terms of the tendering exercise or show the scoring and evaluation of the bids. The Commissioner requires these documents be disclosed.

Right of appeal

48. 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

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jill Hulley
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