



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2013/0263

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 11 November 2013
FS50493321**

Appellant: Mr Hugh Mills

First Respondent: Information Commissioner

Heard in Belfast on 24 April 2014

Before
John Angel
(Judge)
and
John Randall and Michael Jones

Subject matter: s.43(2) personal information and s.41 (confidential information)

DECISION

The appeal is allowed and a new decision notice is substituted.

Substituted Decision Notice

Public Authority: Western Health & Social Care Trust (the Trust)
Address: Altnagelvin Hospital
Londonderry
Northern Ireland

The Tribunal substitutes a new decision notice to replace of the Decision Notice dated 11 November 2013 providing for the disclosure of the information referred to in the Confidential Annex to this Decision on the grounds set out in the reasons for this Decision.

The Trust to provide this information to Mr Hugh Mills IHCP of 49 Mullaghmeed Road, Drumgay, Enniskillen, Northern Ireland BT74 4GH within 30 days of the date of this notice.

Judge John Angel

2nd May 2014

Reasons for Decision

Background

1. By letter dated 11 July 2012 Mr Mills made a request for information to the Chief Executive of the Western Health and Social Care Trust (“the Trust”) in the following terms:

“In 2011 the Western HSC Trust issued tender documents to domiciliary care providers and published an advertisement in the European Journal.

Within the documentation the Trust declared a maximum price of £10.40 per hour as the rate they would pay for domiciliary care. This was a critical decision in this process and IHCP now wishes to seek under Freedom of Information legislation all documentation including reports, emails, letters, notes etc. on how the decision on this rate was reached. I am unable to specify the time period involved.”

2. The request concerned a procurement exercise run by the Trust in the first half of 2011. As part of that process, the tender specified that the Trust would pay a maximum hourly rate for domiciliary care. Mr Mills sought all the documents held which related to how the Trust decided upon that cap but later clarified that he was not seeking the individual returns as to hours worked and costs of any existing supplier of domiciliary care services to the Trust or any documents dating after December 2010. Also Mr Mills was not seeking the names of any individuals referred to in the documents unless they were the names of any external professional advisors. As a result of this narrowing of the scope of the request we have considered only the information that falls within this narrowed scope.
3. By letter dated 6 August 2012 the Trust informed Mr Mills that it would not disclose the information sought, relying upon section 43(2) of FOIA. Mr Mills sought a review of that decision to which the Trust responded on 6 December 2012. The Trust upheld the refusal to disclose the information, again relying upon section 43(2) of FOIA (as well as section 41). In both its initial and review decisions, the Trust emphasised that it was about to re-run the 2011 tender process, with the result that the information was

commercially sensitive, and that its disclosure could impact upon the fairness of the process, with the possibility of this giving rise to a legal challenge. That was against the backdrop of the 2011 process having already been the subject of a legal challenge.

4. Dissatisfied with the response received from the Trust, Mr Mills complained to the Commissioner on 9 April 2013. The Commissioner thereafter commenced an investigation into the Trust's handling of the request. In the course of his investigation, the Trust provided the Commissioner with a detailed explanation of its reliance on the relevant exemptions by letter dated 19th September 2013 and of the public interest factors pointing for and against disclosure.
5. The Commissioner proceeded to issue his Decision Notice on 11 November 2013 ("the DN") and upheld the Trust's reliance upon section 43(2) of FOIA. He did not go on to consider the application of section 41.

Legal framework

6. Any person who makes a request to a public authority for information is entitled: (i) to be informed in writing by the authority whether or not it holds the information; and (ii) if that is the case, to have the information communicated to him: see FOIA s. 1(1). Under section 1(1), that right is subject to the other provisions of FOIA.
7. Information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it): see FOIA s. 43(2).
8. The Commissioner has brought to the Tribunals attention a number of authorities addressing the application of the prejudice test generally which he says are relevant if not binding upon this Tribunal in order for us to determine whether section 43(2) of FOIA is engaged. - ***BUAV v Information Commissioner; Newcastle University [2012] 1 Info LR 52*** at [15]-[16]; ***Williams v Information Commissioner; Cardiff & Vale NHS***

Trust EA/2008/0042 at [32]; and **University of Central Lancashire v Information Commissioner; Colquhoun [2011] 1 Info LR 1170** (“**Colquhoun**”) at [32].

9. General guidance on the application of the prejudice test was given in **Hogan; Oxford City Council v Information Commissioner [2011] 1 Info LR 588** (“**Hogan**”) at [28]-[36]. The first step is to identify the way in which it is said that a person’s commercial interests would potentially be prejudiced by disclosure. It is then necessary to consider whether that prejudice is real, actual, or of substance. In that regard, the Commissioner argues, the term “*commercial interests*” is to be given a broad interpretation: see **Colquhoun** at [31]. This he says is consistent with the language of section 43(2) itself which makes it clear that the authority can rely upon its own commercial interests.
10. In **John Connor Press Associates Limited v Information Commissioner EA/2005/0005**, the Tribunal considered Munby J’s judgment in **R (Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin)** when interpreting the phrase “*would be likely to*”. The Tribunal held that the risk of prejudice being suffered should be real and significant, rather than a hypothetical or remote possibility, though it need not be more probable than not. This is in contrast to cases where it is said that prejudice “*would*” occur: see [15] and see also **Hogan** at [34].
11. The exemption is qualified. If it is engaged, it is necessary to go on and consider whether the public interest in maintaining the exemption outweighs that in disclosure, what is known as the public interest test.

The evidence

12. Only Mr Mills attended the hearing. The Commissioner did not appear and the Trust was not joined as a party to these proceedings. So most of the evidence is contained in the bundle before us.

13. The Trust undertook a tendering exercise in early July 2011 in order to appoint independent domiciliary care providers for certain homecare services. The Trust issued tender documents and published an advertisement in the European Journal which stated that the Trust would only pay up to a maximum price of £10.40 per hour for domiciliary care.
14. The tendering process took place and the apparent successful bidders became known. However the process became subject to legal challenge and as a result the Trust decided to withdraw the tender and continue with the existing suppliers. It was also decided to start a new tendering process but this had still not taken place by the time of this hearing, although we are informed that the Trust will be retendering for the provision of homecare services.
15. Mr Mills is the Chief Executive of the Independent Health and Care Providers (“IHCP”) who represent many of the care providers in Northern Ireland. Mr Mills explained that the tender withdrawal has caused much uncertainty for existing care providers and their staff which has had a knock on adverse affects on patients.
16. The whole matter has been subject to much public concern and has been featured on BBC television and radio.
17. What Mr Mills seeks to find out is how the Trust established its maximum price of £10.40 per hour for domiciliary care services which he considers has been a major factor in the issues surrounding the tender collapse and current public concern. From his knowledge of the industry he does not consider that this rate will enable care providers to provide an adequate service to patients.

Is s.43(2) engaged?

18. Information relating to how the Trust sets its maximum rate of pay per hour for domiciliary services in our view covers the Trust's commercial interests. Like any health organisation it must balance its budget and the provision of

home care services is an expenditure which will affect whether it can meet its budget.

19. However would the disclosure of information relating to how it set the £10.40 rate prejudice its commercial interest? The Trust is not saying it would prejudice the 2011 tendering process because by the time of the request that process had been abandoned. What the Trust appears to be saying is that it would be likely to prejudice the retendering process which, although it has not yet happened, was announced would be taking place sometime in the future before the request was made.

20. The Commissioner argues that the exemption is engaged. He says that at the time of the request the Trust intended to re-run the tender process pursuant to which the maximum price had been set, the first exercise having been the subject of a legal challenge. The withheld information shows the thinking behind one of the terms of the specification which would have been part of that tender process. It also contains analyses of the current providers' activity and financial payments which had been used to determine that rate. As noted above (§2) Mr Mills is not requesting this latter information. In this context, the Commissioner contends that disclosure of the withheld information could have caused prejudice to the Trust's commercial interests in a number of ways:

20.1 First, disclosure could have put some parties at an advantage and others at a disadvantage. Sight of the information, data and analysis would be an advantage to a company intending to participate and there was a risk that not every bidder would see that information if it was disclosed. We find this argument difficult to understand as disclosure of any of the disputed information would in effect be to the world at large. Equally, the Commissioner says, current providers intending to re-tender could have been disadvantaged by information about their activities being shared with competitors. But Mr Mills is not asking for such information. The Commissioner concludes that

there is a risk that disclosure would impact upon the fairness of the competition to be-run.

In the circumstances of this case we do not necessarily accept this argument. The experience of the first tender process may suggest it would be in the public interest to be more open and transparent in any re-run of the tender.

20.2 Secondly, by potentially impacting upon the fairness of the process, disclosure risked giving rise to a legal challenge, particularly as the first procurement process had already been challenged. The risk of a legal challenge to the tender process, on the basis that it breached principles of transparency, non-discrimination and equal treatment could have arisen either from parties who did not see the disclosed information, or from those who felt disadvantaged by the disclosure of data about them to their competitors.

Again we do not understand this argument in the light of how disclosure is made under FOIA and the fact that competitor information is not being requested. In fact as in the previous paragraph there is an argument that it may be in the public interest to be more open and transparent.

20.3 Thirdly, disclosing data collected from providers risked damaging the Trust's standing amongst providers, which might lead to fewer companies participating in future tender processes, particularly if their information had been shared with their competitors. The Commissioner says this would hinder the effectiveness of the competitive tender process.

In the light of first tender debacle and the public concern that already exists, we are not convinced of the Commissioner's argument that making information available to the public about the rate of pay would have a prejudicial affect, but rather the reverse.

21. The Commissioner argues that any of those scenarios materialising would have caused prejudice to the Trust's commercial interests. They say the

entire purpose of a procurement process is to obtain the best value for the Trust's money in relation to the services it provides (and in turn for the taxpayer's money). This clearly falls within the broad definition of "commercial interests".

22. We can understand that it falls within the Trust's commercial interests. However we cannot see how the procurement exercise would be rendered less competitive, or the competition was less effective if the disputed information was disclosed. There is little actual evidence before us that suggests that the Trust is less likely to obtain the best value provision of services if the disputed information is disclosed. It is likely that any damage to the future process has already been done by the way the 2011 tendering process was carried out. There is no evidence that there is likely to be any future legal challenge, but clearly if one does take place that would be likely to damage the Trust's commercial interests, both in terms of the costs of dealing with said proceedings and the costs arising from further delays in completing the process designed to procure best value services (both of which would be likely to arise simply as a result of a challenge being made, whether meritorious or not). We can only surmise that the delay in retendering is to ensure that there will be a reduced risk of legal challenge.
23. The Commission argues that the Trust's commercial interests might have been prejudiced by disclosure around the time of the request cumulatively, However it seems to us that it's commercial interest had already been damaged by then; being more open and transparent may help to restore confidence.
24. We are not sure whether the Trust or the Commissioner is arguing that disclosure of the disputed information would, or would be likely to, prejudice the Trust's commercial interest of a retendering process. In **Hogan** the Tribunal distinguished the two parts of the test. The Trust and Commissioner seem to apply either one or the other at different times in their correspondence and DN and do not identify clearly which part of the

test they are relying on when finding the exemption is engaged. The reason this is important is that if disclosure “would” prejudice the Trust’s commercial interests this could affect the application of the public interest test as recognised in **Hogan**. On the evidence before us including the confused position of the Trust and Commissioner we cannot see how the disclosure of the disputed information would prejudice the Trust’s retendering process.

25. However we can see the argument that it would be likely to prejudice its commercial interests as there is clearly a causal connection between the two tender processes. There is a real and substantive connection not just a hypothetical one. This is despite the fact that we would expect that 4 years later the basis of the maximum rate of pay will have been reviewed by the time of the retender because for example the Trust’s budget will have changed, as will many other factors which would be used to establish a current rate of pay.

26. Therefore we find that the section 43(1) exemption is engaged.

Public interest test

27. In the Trust’s letter of 19th September 2013 it sets the public interest factors for and against disclosure.

28. The factors for disclosure are:

28.1 It would inform the public of the activities carried out on their behalf, allowing for more user involvement and collaborative decision making.

28.2 It would enable the public to better scrutinise the public monies are spent.

28.3 It would ensure the tender process was open and transparent.

28.4 It would show that the calculation of the ceiling rate followed a transparent and fair process.

28.5 It would help to ensure clarity around fairness, equity, value for money and quality of care in the overall tender process.

28.6 Disclosure of the disputed information to potential bidders would lead to better value for money for the Trust.

29. Mr Mills agrees with these factors particularly where they would highlight whether the maximum hourly rate could provide a sufficient quality of care for patients.

30. We have considered these factors in the circumstances of this case and find that combined together they provide very weighty factors in favour of disclosure.

31. As to the factors against disclosure of the disputed information the Trust provides a much longer list which is as follows:

31.1 The timing of the request in relation to the tendering re-run. In May 2012 the Trust announced the collapse of the tender and plan to retender. The request was made in July 2012.

31.2 The confidential nature of the information provided by existing suppliers and which would give an unfair advantage to other bidders. As such information is no longer part of the request this is no longer a factor which needs to be taken into account.

31.3 Disclosure of commercially sensitive information could seriously jeopardise the integrity of the tendering process.

In our view sensitivity attaches only to the information about individual suppliers and such information is no longer part of the request so this factor is weak.

31.4 The likelihood that the information would only be available to a limited number of potential bidders.

By this we understand that the Trust mean it would only be available to members of IHCP and give them an advantage when tendering. We consider this factor to have little weight as disclosures under FOIA are regarded as disclosures to the world at large and the usual practice of public authorities is to make such information part of its publication scheme once disclosure to a member of the public has been made.

31.5 The timing of the request would harm the retendering process.

We note that this is similar to the first factor at §31.1 and would accept that disclosure at that time would have been a weighty factor against disclosure. However the fact that the re-run has not yet taken place would tend to reduce that weight.

31.6 The initial tender received 4 legal challenges.

No evidence has been provided as to the nature of these challenges or why they would affect a re-run and therefore we are not sure that much weight can be given to this factor.

31.7 The prejudice to the Trust of not getting best value for public monies and best service for patients and clients.

We cannot understand this factor based on the evidence in this case and can equally see the argument that disclosure would be beneficial to achieving these aims.

31.8 The detriment it would cause to the professional relationship between the Trust and current providers.

We consider this detriment is likely to have already been caused by the tender debacle and in any case Mr Mills is not requesting individual supplier information.

31.9 The possibility of suppliers refusing to engage in a future tendering exercise.

Again we find that any such reaction is more likely to be because of what has already happened. In any case no confidential supplier information is required. So again we cannot give much weight to this factor.

31.10 The damage to public confidence in the Trust's procedures and future tendering exercises.

Again we consider that this damage has already been done and disclosure may have the reverse reaction and start to improve confidence in the way the Trust handles the re-run.

31.11 Release of potential bidder information to competitors and failure to follow proper procurement procedures would result in an actionable breach of confidence and leave the Trust open to legal challenge.

Again this should not be an issue because of the narrowed scope of the request. Also there is no evidence as to what procurement procedures the Trust refers and we cannot see from the evidence what failure would be involved.

31.12 The possibility of negative impact on future tendering exercises for other Northern Ireland Trusts for domiciliary care provision.

This appears to be a matter of conjecture. There is no evidence to substantiate this factor.

31.13 The risk to public administration in terms of a transparent and lawful procurement process.

From the evidence before us it is not clear what risk is involved. In fact it could be argued that the risk would be less if fuller disclosure were to be made.

32. We have considered all these factors in favour of non disclosure and find that they should be given less weight than those in favour of disclosure particularly because no individual confidential information of existing suppliers is being requested. Also we find that the public interest in the quality of care that can be provided at the maximum rate per hour is of great weight. We therefore find that public interest balance favours disclosure.

Confidential information

33. The Trust also claimed the section 41 exemption which the Commissioner did not consider as he had found that the section 43 was engaged and the public interest balance favoured maintaining the exemption. As we have found the public interest favours disclosure we need to consider whether section 41 is engaged. As far as we understand from the evidence before us the Trust is claiming this exemption for the parts of the withheld information which are no longer part of the request. Therefore we find the exemption is no longer being applied to any part of the disputed information we need to consider. As a result we find that the exemption is not engaged. Even if we are wrong about this, the first limb in section 41(1)(a) has not been met, because the disputed information which is

within scope would not appear to have been obtained from another person.

Conclusion

34. We find that the appeal succeeds and substitute a new decision notice ordering the disclosure of the information contained in the confidential annex to this decision within 30 days of the date of this decision.

Judge John Angel

2nd May 2014