

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2014

Public Authority: NHS North of England Commissioning Support Unit

Address: John Snow House,
Durham University Science Park,
Durham, DH1 3YG

Decision (including any steps ordered)

1. The complainant has requested information relating to a tendering process for a 'media buying' contract.
2. The Commissioner's decision is that NHS North of England Commissioning Support Unit (NECS) has correctly applied section 43(2) of the FOIA to some of the withheld information. However, the Commissioner also finds that NECS has incorrectly applied section 43(2) to part of the withheld information.
3. The Commissioner requires NECS to disclose pages 6,7,8,16 and 17 in entirety and paragraphs 1-3 of page 18.
4. The Commissioner also requires the public authority to disclose the information it has identified can now be disclosed i.e. pages 1-5 and page 10 of the winning bid.
5. 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

6. On 29 October 2013, the complainant wrote to NECS and requested information in the following terms:

"I'd therefore like to officially request the details of the proposal you have been given through FOI (details of relevant proposal provided by Communications)"
7. NECS responded on 21 November 2013 it provided some information but refused to provide the remainder. It cited section 43 of the FOIA as its basis for doing so.
8. Following an internal review NECS wrote to the complainant on 23 December 2013 and maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 14 January 2014 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to be to determine if NECS has correctly applied section 43(2) to the withheld information.

Reasons for decision

11. Section 43(2) of FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
12. The withheld information relates to the bid proposal of the winning bid. NECS explained that the tendering process involved evaluation against six criteria – three of the criteria involved commercially sensitive information with regards to the organisation which would not otherwise be in the public arena.
13. NECS has argued that the commercial interests of the winning bidder would be likely to be prejudiced if this information was disclosed. However, in its response to the Commissioner, NECS considered that some parts of the withheld information could be disclosed. The Commissioner has reviewed all the withheld information and concurs that those parts identified by NECS should be disclosed. This information

relates to pages 1-5 and page 10 of the tendering document. NECS maintain that section 43(2) applies to pages 6-9 and pages 11-18.

14. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the winning bidder's commercial interests.
15. The term 'commercial interests' is not defined in the FOIA. However Commissioner has considered his awareness guidance on the application of section 43. This states 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."
16. The Commissioner considers that information relating to a tender process and the proposals of the winning bidder does relate to its commercial interests. The Commissioner therefore considers that the withheld information falls within the scope of the exemption. However, for this exemption to be engaged disclosure would have to prejudice or be likely to, prejudice the commercial interests of the winning bidder.
17. In this case NECS has argued that the prejudice caused 'would be likely' to occur. In reaching a decision on the question of the likelihood of prejudice the Commissioner is mindful of the Tribunal's comments in the case of *John Connor Press Associates Limited v ICO*.¹ In this case it interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that, 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.
18. In reaching a decision on the likelihood of prejudice the Commissioner considers that the public authority should be able to show some causal link between the potential disclosure of the withheld information and the prejudice it has argued is likely to occur.
19. NECS has explained that it will be offering contracts of a similar nature to the one in question here. It confirmed one of these is imminent and gave more detail to the Commissioner about the nature of this contract. At least one of these contracts is likely to attract a tender from the complainant as well as similar agencies. NECS went on to state that it had contacted the winning bidder to ask its views on the disclosure of

¹ EA/2005/0005

the tendering information. It confirmed that it considered that disclosure would be likely to jeopardise its relationships with media owners, and consequently affect its tendering bids.

20. It stated that to disclose this commercially sensitive information would mean that the complainant would have an unfair advantage against his competitors in any future tendering exercises.
21. The Commissioner does not consider that this relates to the likely prejudice to the winning bidder. As this information would effectively be in the public domain all competitors would have the same advantage – it would be the winning bidder that would be potentially at a commercial disadvantage. Therefore the Commissioner does not accept this as a valid argument.
22. In addition, NECS stated that the release of the winning bidder's specific tendering information could affect the competitive value of contracts, with competitors being able to 'under-cut' their competitors with this knowledge.
23. Again the Commissioner does not consider this explains how prejudice would be likely to be caused to the winning bidder. However, he has reviewed the withheld information and considers that the disclosure of some parts of the successful bid, could potentially, lead to future bidders replicating it in the hope of finding a 'winning formula'.
24. NECS stated that disclosure of the savings that each company offers will enable the complainant to have competitive advantage in any future tenders of a similar nature. In the current climate of economic recession, it is important to give all organisations a fighting chance to win contracts. If one competitor has 'inside knowledge', this will not be the case and could put organisations at risk of closure.
25. In the Commissioner's view, this is not a particularly strong argument, as again it focusses more on the advantage to be gained by the complainant, rather than the detriment that may occur to the winning bid. However, as a disclosure under the FOIA is a disclosure to the world at large, it is not only the complainant who would have access to the information. Consequently, the Commissioner accepts that it would be likely to prejudice the commercial interests of the winning bidder,
26. The Commissioner has considered all the arguments cited above and has concluded that disclosure of part of the withheld information would be likely to prejudice the commercial interests of the winning bidder. He is satisfied that the financial information and that which relates to its commercial strategy/working practises would be likely to prejudice the its commercial interests.

27. With regard to the information that does not fall into these categories, the Commissioner considers that NECS has not demonstrated that disclosure of this information would be likely to prejudice the winning bidder's commercial interests.
28. Therefore, the Commissioner concludes that the exemption at section 43(2) is not engaged with regard to pages 6,7,8,16 and 17 in their entirety and page 18 (paragraphs 1-3). This information should therefore be disclosed to the complainant.
29. As section 43(2) of the FOIA is a qualified exemption the Commissioner has gone on to consider the public interest in relation to the application of this exemption to the remaining withheld information. Specifically, he has considered whether the public interest in maintaining the exemption outweighs the public information in disclosing the information.

Public interest arguments in favour of disclosing the requested information

30. NECS has explained that it recognises that the following public interest arguments in favour of disclosure of the requested information:
 - Disclosure could help people to understand why the North of England Commissioning Support Unit has taken certain decisions.
 - Disclosure could allow individuals and companies to understand decisions made by the North of England Commissioning Support Unit that have affected their lives.
 - Disclosure could reveal that an appropriate tendering process was followed and that no maladministration has occurred.
 - The Commissioner considers that disclosure of information extracted from successful bids would be likely to drive up the standard of future bids.
 - He also considers that there is a public interest in financial information being made public so that the public can scrutinise whether the services promised by bidding organisations represent value for money.

Public interest arguments in favour of maintaining the exemption

31. NECS stated that it believes that the following public interest arguments favour maintaining the exemption:

- Disclosure could damage the interests of the North of England Commissioning Support Unit without giving the public any useful information.
- Disclosure could damage another organisation or person's interests, without giving the public any useful information.
- Disclosure would give an unfair, prejudicial or inaccurate view of a situation.
- Disclosure would prevent the effective delivery of services without giving the public useful information.
- As a public sector organisation, NECS is required to obtain best value for money and to obtain the best possible services for service users. NECS has stated that it is likely to run very similar tendering processes in the very near future, therefore it considers that, if the withheld information was disclosed it would give an advantage to anyone bidding within the tender process. This would be likely to have a negative impact on its ability to obtain best value for money and the best possible service for users.

Balance of the public interest arguments

32. The Commissioner considers the arguments presented by NECS are poor and vague and not all relevant or inherent to the exemption itself.

33. The Commissioner does however agree with NECS that there is a strong public interest in public authorities being open, transparent and accountable regarding their expenditure of public funds. However, he also accepts that it would not be in the public interest to jeopardise future tendering processes, thereby potentially not achieving best value for those public funds.

34. The Commissioner also agrees that there is a public interest in keeping the public informed of the activities of public authorities, allowing the public to be involved in the decision-making of those authorities. However, he also accepts that NECS needs to maintain professional relationships of trust and integrity with its potential bidders for contracts and to retain quality of service and maintain public confidence.

35. He also considers that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private

companies. Having considered the public interest arguments for and against disclosure in all the circumstances of the case, the Commissioner considers that, on balance, the public interest arguments in favour of maintaining the exemption outweigh those in favour of disclosure of the remaining withheld information in this particular case.

36. For clarity the information to be disclosed is as follows:

- Pages 6,7,8, 16 and 17 in entirety
- Paragraphs 1-3 of page 18.
- Pages 1-5 and page 10 of the winning bid.

Other matters

37. The Commissioner notes that NECS appears to have primarily focussed on the advantage that the complainant would have if the information was disclosed, rather than the prejudice that would be caused to the winning bidder itself.

38. Although the Commissioner accepts NECS's application of section 43(2) to some of the information he recommends that NECS reviews his guidance and previous decision notices with regard to section 43(2). In particular:

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/COMMERCIALDETLEMENTOF3RDPARTIES.ashx

39. Furthermore, the Commissioner notes, that when he began his investigation into this case NECS appeared to have initially focussed on entirely the wrong information requested, i.e. the 'scores' of the bidders taking part, rather than the winning bid. The Commissioner highlighted this to NECS, and further recommends that the public authority ensures it clarifies the information requested if there is any doubt.

Right of appeal

40. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

41. 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.
42. 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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