

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2019

Public Authority: North East Procurement Organisation
Address: Guildhall
Quayside
Newcastle upon Tyne
NE1 3AF

Decision (including any steps ordered)

1. The complainant has asked the North East Procurement Organisation ("NEPO") for recorded information concerning NEPO207 Building Construction Works Framework (2018/S 068-150309). NEPO provided the complainant with some information which is relevant to his request but withheld other information in reliance on section 43(2) of the FOIA on the grounds that would prejudice its and its Member Authorities' commercial interests.
2. The Commissioner's decision is that NEPO is entitled to withhold the information it identified for the Commissioner in its email of 25 January 2019.
3. However, the Commissioner requires the NEPO to disclose to the complainant the spreadsheet it provided to the Commissioner on 25 January 2019 with the exception of the information which it redacted in reliance on section 43(2) of the FOIA.
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 3 July 2018, the complainant wrote to the North East Procurement Organisation ("NEPO") and requested information in the following terms:

"I am conducting some research into contract awards on major construction projects in the public sector and the associated level of transparency. Although the construction frameworks are published on contracts finder, I am struggling to identify which projects were awarded through the framework and who they were awarded to. Crown Commercial Services have advised me that technically any contract should be published on contracts finder.

In view of this, I would like to submit an FOI request for the following information please, relating to the NEPO207 Building Construction Works (2018/S 068-150309) only:

1. Would you be able to provide me with a copy of the assessment scores for Lot 5 within the framework please. I have attached a copy of a response from another authority and 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 Lot 5 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 contract 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."
6. NEPO responded to the complainant's request on 3 August 2018, providing him with documents relating to the NEPO207 Building Construction Works and withholding other elements.
7. The complainant wrote to NEPO on 6 August 2018 to appeal its refusal to disclose the names of the suppliers. The complainant referred NEPO to other authorities which had previously disclosed supplier information to him and he provided NEPO with arguments which he considers support the public interest in the release of that information.
8. On 13 August 2018, NEPO, having conducted an internal review of its handling of this request, wrote to the complainant to advise him that:

"In this instance the internal review endorses the decision to refuse this request based on the Refusal Notice Section 43(2) Freedom of Information Act 2000.

Section 43(2) of the Freedom of Information Act 2000 (the Act) provides that: "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)". In this instance, we believe that disclosure of the information requested would, or would be likely to, prejudice the commercial interests of the North East Procurement Organisation (NEPO) and its members. We also have reason to believe that disclosure of suppliers would prejudice the commercial interests of the other suppliers that tendered for this solution."

9. On 18 September 2018, NEPO provided the complainant with the results of a second internal review. It provided the complainant with the names of the 7 suppliers attached to the lot 5 framework but upheld its decision to withhold their particular scores on the grounds that the information is commercially sensitive.
10. The complainant responded to NEPO's internal review on 19 September 2018, providing NEPO with arguments in rebuttal of its position to refuse disclosure of the withheld scores.

Scope of the case

11. The complainant contacted the Commissioner on 13 August 2018 to complain about the way his request for information had been handled.
12. The Commissioner advised the complainant that her investigation would be focussed on whether NEPO is entitled to withhold information from him in reliance on Section 43 of the FOIA.
13. Following the Commissioner's initial enquiry in this matter, NEPO changed its position in respect of the information which is subject to its application of section 43(2). That information is described in the three bullet points at paragraph 16 below.

Reasons for decision

Section 43 – commercial interests

14. NEPO has confirmed its application of section 43(2) of the FOIA to the information it has withheld from the complainant.
15. On 25 January 2019, NEPO provided the Commissioner with an unredacted and redacted version of an Excel spreadsheet which is the evaluation matrix used by NEPO for scoring and comparing tenders made in respect of Lot 5 of NEPO207 Building Construction Works Framework.

16. The Commissioner examined the information which NEPO supplied to her and subsequently spoke with NEPO to discuss the information it has withheld from complainant. This discussion led to NEPO amending its redacted spreadsheet whereby it now proposed to withhold the following information:

- The contents of cells D2, F2, G2, H2, I2, J2 and K2. The redacted information from these cells is the name of each company which submitted a bid. Redacting this information prevents a company from being associated with the formative and summative scores ascribed by NEPO.
- Cell E2 and the column below that cell is greyed-out. NEPO has explained that 'bidder 2' had passed the first stage of the tender process and was invited to participate within the second stage of the invitation to tender. Bidder 2 chose to opt out of that tender opportunity and did not submit an Invitation to Tender response. The grey-out column is included in the matrix but no scoring was allocated. As such the greyed-out column does not contain information which has been redacted; it is therefore not subject to the Commissioner's consideration of NEPO's application of section 43.
- In cell Q30, a reference has been redacted from the commentary relating to supply chain events. In NEPO's opinion, the redacted reference would identify a particular bidder.

17. The information listed in the bullet points above comprises the information which NEPO is withholding from the complainant in reliance on section 43(2) and which this notice now addresses

18. Section 43(2) states that information is exempt if its disclosure 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.

19. The Commissioner's guidance on section 43¹ states:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."

¹ <https://ico.org.uk/media/1178/commercial-interests-section-43-foia-guidance.pdf>

20. NEPO has identified its own commercial interests and those of its partner Council's which would, or would likely, be prejudiced if the withheld information was to be disclosed. Additionally, NEPO asserts that the commercial interests of those organisations which submitted bids would also be prejudiced. These organisations include its partner authorities and the companies which tendered bids:

Darlington Borough Council
Durham County Council
Gateshead Metropolitan Borough Council
Hartlepool Borough Council
Newcastle City Council
North Tyneside Council
Redcar and Cleveland Borough Council
South Tyneside Borough Council
Stockton on Tees Borough Council
Sunderland City Council
Middlesbrough Borough Council
Kier Construction Ltd
Wilmott Dixon
Esh Construction Ltd
Interserve Construction Ltd
Wates Construction Ltd
Sir Robert McAlpine

21. NEPO has not contacted any third party in relation to the complainant's request. Whilst it continues to hold the view that disclosure of the withheld information would prejudice the commercial interests of those third parties, the Commissioner has restricted her consideration of NEPO's application of section 43 to its own commercial interests.
22. NEPO has advised the Commissioner that tenderers must make a mandatory response on its Invitation to Tender Schedule 6 form. That response confirms the content of the information they submit as part of their tender and declares any aspects which would be classified by the tenderer as confidential/commercially sensitive under the FOIA 2000.
23. With the exception of one supplier, all of the companies which submitted tenders considered aspects of their tender to be confidential and commercially sensitive for timescales ranging between two and twelve years.
24. In the opinion of NEPO and its member authorities, as well as respecting the view of the tenderer's own classification of the information, the information requested by the complainant is commercially sensitive.
25. To support its position, NEPO has drawn the Commissioner's attention to her own guidance, where commercial interests are defined as those that

relate to a person's ability to participate competitively in a commercial activity (i.e. the purchase and sale of goods, and where she notes that information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive.

26. NEPO asserts that the positioning of suppliers within the scoring matrix relates to a tender process which it carried out on behalf of its partner authorities, all of which are public authorities.
27. The withheld scores constitute NEPO's evaluation of each supplier's participation in the tendering process and therefore NEPO argues that the section 43 exemption is engaged.
28. In NEPO's opinion, disclosing the scores of each tenderer would undermine the tenderers' ability to compete successfully for other contracts and would undermine NEPO's ability, and the ability of its partner authorities, to secure quality services in the future or in respect of on-going procurement exercises.
29. To support its position, NEPO again refers the Commissioner to her own guidance on section 43, where it states that a Public Authority may argue that the disclosure of information may prejudice subsequent negotiations with another third party, and that in such circumstances, both the nature of the information and the degree of similarity between the transactions should be taken into account.
30. In this case, NEPO points out that the information the complainant seeks relates to a Framework Agreement which requires mini competitions to be carried out by NEPO Member Authorities. These assess competition over the duration of the agreement and will likely involve the evaluation of the same suppliers identified in scoring matrix. NEPO asserts that releasing this information would be likely to prejudice any future mini competitions between the suppliers under the Framework.
31. Furthermore, NEPO points out that Member Authorities are not mandated to use any NEPO Solutions. Depending on their specific requirements, a member authority may use its discretion to publish opportunities outside of this framework on a case by case basis.
32. NEPO has advised the Commissioner of its intention to re-procure a Solution (i.e. the service) for the provision of civil engineering and infrastructure works, with market engagement anticipated to commence March 2019. In preparation for this, a tendering process is likely to commence in September 2019 and the awarded Solution to be in place by April 2020.
33. In this case, the nature and purpose of the withheld information is to differentiate suppliers based on their tender submissions so that a competitive advantage can be gained.

34. The scores achieved by suppliers is an indication of the economic value of their tender submissions. NEPO argues that disclosing the withheld information would likely prejudice its ability to effectively procure. This is because current and potential future suppliers would be able to gain an unfair advantage by amending or preparing their future bids based on information they would not ordinarily be privy to, i.e., the feedback information provided to other suppliers.
35. Additionally, NEPO argues that, if the withheld information was to be disclosed, its relationships with the suppliers identified in the matrix, and other suppliers who participated in the same process, and who may participate in future tenders with NEPO, would be undermined.
36. NEPO has advised the Commissioner that it has received feedback from its Member Authorities and its tenderers which expresses concern about the possible disclosure of the information requested by the complainant. That feedback includes the possibility that they might be dissuaded from engaging in future procurement exercises
37. The information detailed within the withheld matrix enables NEPO to identify and evidence a high-quality supplier. It says that, "This process would be undermined if third parties were to use the Act to enable it to draw potentially flawed conclusions without fully understanding NEPO's governance procedures". It adds that the withheld data provides a comprehensive breakdown of the tendering evaluation criteria and the individual tenderers scoring against those criteria and says, "If this information was released within the public domain there is a risk that this would identify each supplier, strengths and weaknesses of their submission detailed within their overall tendering position".
38. In NEPO's opinion, the information it is withholding from the complainant would allow competitors to assess their overall positioning and gain a competitive advantage for any future tenders which NEPO might undertake. Whist NEPO is unable to guarantee that this risk would cause prejudice, it asserts, in the light of its Member Authorities' experience, it is likely to do so due to the challenging and highly competitive market conditions.
39. NEPO has advised the Commissioner that the Solution was awarded to suppliers on 29 March 2018 and the operation of the Framework commenced on 1 April 2018. The operation runs unto 30 March 2024.
40. When this request was received, the Framework contracts had been awarded and work was operational. This means that a mini-competition between the suppliers identified in the withheld information could be commenced by NEPO and its Member Authorities at any time.
41. The Commissioner has considered NEPO's representations in respect of its application of section 43(2). Additionally, she has considered the

nature the information that NEPO is withholding from the complainant and she is satisfied that, taken as a whole the withheld information is commercially sensitive and engages the exemption NEPO has applied. The Commissioner must not go on to consider the public interest test.

The public interest

42. The Commissioner will always incline to the disclosure of publicly held information where to do so promotes the accountability of public authorities for the decision and actions they take. This is particularly the case where their decision involves the expenditure of public money.
43. The Commissioner recognises that the disclosure of information promotes transparency and leads to the public being assured that proper and lawful processes have been followed.
44. In this case the public interest in disclosing the contents of the withheld information lies in whether NEPO has fully and fairly evaluated the tenders it has received and that it is managing contacts properly and achieving best value.
45. In addition, there is value in knowing and understanding the factors taken into account by NEPO when it scored the tenders submitted by each contractor.
46. In his email to NEPO of 19 September 2018, the complainant asserted the following points:
 - Disclosure would enable suppliers to understand the variance in how different authorities approach frameworks, which may favour specific suppliers at the expense of SMEs. This is because all frameworks are very different.
 - Disclosure would enable an analysis to be made of the extent to which experience is favoured over technical ability, which the complainant asserts precludes new entrants from joining the framework.
 - Disclosure would enable the public to identify trends across frameworks which may favour specific organisations at the expense of others.
 - Construction companies work on very small margins, and in the current climate some will go to the wall if they bid on wrong contracts. As the cost of bidding is expensive and the probability of a win is very low, the complainant argues that suppliers have a right to have access to NEPO's insights.

- Analysis of the withheld information would enable government to improve consistency across framework contracts and enable the 'playing field' to be levelled for new entrants.
- The complainant asserts that some authorities share all feedback scores with other suppliers, some only share the scores of the winning bidder and some only provide the bidders scores. He argues that this creates a lack of policy which implies there is no policy obstacle to releasing the withheld information.
- The complainant points to 'some data on lessons learned' from a different request for information which he had published. He says that his data received approximately 40,000 views and therefore demonstrates an unequivocal public interest in this sort of information.

47. The Commissioner asked NEPO for its comments about the issues raised by the complainant (above). NEPO's comments are relevant to the Commissioner's consideration of the public interest and therefore she decided to outline them below:

- NEPO considers that the information it has already released allows transparency at a level which meets the public interest by allowing the public to understand the variance in how different authorities approach the framework. It says, "...the positioning of bidders within that matrix would not further this public interest".
- Should it be required to release the withheld information on its own, this would not assist the public to analyse of whether technical ability is favoured over experience or vice versa.
- Releasing the withheld information would not assist in the public to identify trends which show whether NEPO favours one specific organisation or organisations at the expense of others. The withheld information (the positioning of bidders within that matrix) would not further this public interest.
- The released information allows transparency at a level which meets the public interest in confirming that a range of suppliers participated in this tendering process.
- Releasing the withheld information would not offer any information which would provide potential bidders with any particular insight in the process NEPO has carried out. NEPO points out that bidders can readily access information already in the public domain including awarded tenderers by sources including OJEU Contract Award Notifications and Contracts Finders notifications. NEPO has shared information which confirms successful tenderers which are party to lot 5 of the Framework Agreement. Releasing the withheld information

would not further this public interest in the identification of any inconsistencies across framework contracts or enable a levelled playing field for new entries.

- NEPO are active members of National Construction Groups including the National Association of Construction Frameworks and Local Government Association Construction Steering Group which identify any potential barriers and trends. That information is shared with the Local Government Association to help steer Local Authorities and central government policies where there is potential for this.
 - The released information allows transparency at a level which still meets the public interest in understanding the variance in how different authorities approach the framework: It illustrates NEPO's approach to evaluation under the Framework and the positioning of bidders within that matrix would not further this public interest.
 - NEPO has adhered to The Public Contracts Regulation 2015 in a fair and transparent manner confirming the tenderers which are party to this Solution. There is no legal requirement that requires NEPO to share additional information. The withheld information (the positioning of bidders within matrix would not further this public interest.
 - NEPO does not consider the number of views an article receives to be a measure of how relevant it is to the public interest. Indeed, an article which includes false or inflammatory information may be widely viewed, but it would not be considered to be in the public interest based on the reader's appetite.
48. In addition to the above, NEPO has advised the Commissioner that it provides feedback to tenderers by sharing details which confirm all of the suppliers who have been successfully appointed to the Framework, whether the tenderer is successful or not. At the request of a tenderer, NEPO shares additional information regarding any specific queries raised and also the relative advances of the winning tenderer/s. It says, "For auditing purposes, the bidder would be required to request this information via our online tendering portal, we would also issue a response via our tendering portal. To ensure we minimise any risk of legal challenges and follow best practise procurement processes, all requests for additional information are received electronically and responded in the same way. We would not undertake any informal meetings with bidder's to discuss their submission".
49. The Commissioner acknowledges the public interest in maintaining the integrity of procurement exercises. It is fundamental that these exercises are, and are perceived to be fair and equal to all parties and

that prospective bidders are assured that taking part in a procurement exercise, at their considerable expense, their competitive advantage is not lost for a substantial period of time thereafter.

50. Here, the Commissioner has considered the relative weights of the public interest factors outlined above. She agrees with NEPO that the public interest factors favouring disclosure can be met to some extent without the release of the withheld information.
51. She agrees with NEPO that the release of the matrix and the bidder's identities separately allows the public interest to be partially met. In the Commissioner's opinion the disclosure of this information demonstrates accountability and the use of proper, transparent and lawful processes during the procurement exercise. She is satisfied that the information provides sufficient assurance that bids NEPO received have been fully and fairly evaluated allows the public to understand the factors taken into account by NEPO when evaluating the bids.
52. The Commissioner has considered the representations made by the complainant and by NEPO against the nature of the information which NEPO has withheld from the complainant. She is satisfied that the greatest weight should be given to the position advanced by NEPO and she is persuaded that greatest weight must be given to the potential harm that would be done to the commercial interests of NEPO and its Member Authorities should the withheld information be disclosed. The Commissioner accepts that disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises.
53. The Commissioner has decided that NEPO is entitled to rely on the provisions of section 43(2) to withhold the information listed in the bullet points following paragraph 16 above. Therefore, the Commissioner requires NEPO to disclose to the complainant the redacted spreadsheet which sent to her on 1 February 2019.

Right of appeal

54. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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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