

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 September 2021

Public Authority: Black Country and West Birmingham Clinical Commissioning Group

Address: Civic Centre
St Peter's Square
Wolverhampton
WV1 1SH

Decision (including any steps ordered)

1. The complainant has requested the scoring and assessment notes from his company's bid for a tender. Black Country and West Birmingham Clinical Commissioning Group ("the CCG") withheld the requested information and relied on section 43(2) of the FOIA to withhold the requested information.
2. The Commissioner's decision is that the CCG has failed to demonstrate why the exemption is engaged in the circumstances of this case and is therefore not entitled to rely on the exemption.
3. The Commissioner requires the CCG to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, a copy of the withheld information
4. The CCG 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.

Background

5. The original request was made to Sandwell and West Birmingham CCG and that body dealt with both the request and the internal review. However, on 31 March 2021, this body was dissolved, as part of a restructuring of health provision in the area, and its information, functions and obligations were transferred to the CCG which is the subject of this notice. The CCG has accepted responsibility for dealing with this complaint and has adopted the same stance as its predecessor.
6. For consistency, the Commissioner has referred to "the CCG" throughout this notice. However, unless otherwise stated, this should be read as referring to the predecessor body (ie. Sandwell and West Birmingham CCG) when the analysis refers to the public authority at the time of the request.

Request and response

7. On 21 September 2020, the complainant wrote to the CCG and requested information in the following terms:

"We [the complainant's company] were one of the providers who submitted an application, but due to the termination no award was given.

"...I make a formal request via the FOI legislation that we receive our scoring and feedback. For clarity we are only asking for our feedback."
8. The CCG responded on 12 October 2020. It withheld the requested information and relied on section 43(2) of the FOIA to do so.
9. Following an internal review the CCG wrote to the complainant on 28 January 2021. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner 8 December 2020 to complain about the way his request for information had been handled. At that point, the CCG had yet to complete its internal review.
11. Prior to commencing her investigation, the Commissioner wrote to the complainant to explain that, if the CCG were to disclose the requested information under the FOIA, it would be available to the world at large –

including his firm's competitors. She noted that, if he were not happy for the requested information to be made available to his competitors, that would be a tacit admission that the CCG was entitled to rely on the exemption.

12. However, the complainant responded to say that, as a director of the company, he was not concerned about the possible effects of disclosure and wished to have access to the withheld information.
13. On 29 June 2021, the Commissioner wrote to the complainant again in the following terms:

"For the avoidance of doubt, could you confirm that your company's commercial interests would not be significantly affected if the Commissioner were to determine that this information should be made available to anyone who requested it - including your commercial rivals?"

14. The complainant responded the same day and confirmed that this was indeed the case.
15. The Commissioner then wrote to the CCG to set out the scope of the complaint and ask it to provide a submission. She noted the confirmation that the complainant had provided and advised that she would be very unlikely to accept any arguments that the complainant's company's commercial interests would be prejudiced by disclosure – given his unequivocal statement to the contrary. However, she was prepared to entertain arguments about prejudice to the commercial interests of other parties that might result from disclosure. The CCG provided its submission on 25 August 2021.
16. The Commissioner considers that the scope of her investigation is to determine whether the CCG is entitled to rely on section 43 of the FOIA to withhold the requested information.

Reasons for decision

Section 43 – Commercial Interests

17. Section 43(2) of the FOIA states 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)."

18. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
19. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

The CCG's view

20. In demonstrating why the exemption would be engaged the CCG explained to the Commissioner that:

"The CCG believe that the commercial interests of any other potential bidder in a future procurement of this service would be prejudiced if the withheld information was disclosed. The release of the information would give an unfair advantage to the requestor in any future procurement of the service given that they would have the details of the bid and the feedback of such bid."
21. The CCG considered that the higher threshold of "would" prejudice was applicable because:

"The procurement for which the requestor's organisation made a bid, was abandoned. This abandonment was due to a change in demand for delivery of the service as a result of the COVID-19 pandemic. However, this is not to state that a further procurement will not be undertaken at some point in the future, based on historical demand or delivery. Giving feedback to the requestor by releasing the information requested will influence/distort any re-launched procurement on the basis that the requestor would have an unfair advantage over all other bidding organisations. This unfair advantage would come from the fact that details of the bid and the subsequent feedback to that bid would be known by only the requestor. Although the feedback would be accessible by everyone if released under FOI – only the details of the bid made would be held by the requesting organisation."

22. The CCG explained that it was unable to consult these other potential bidders (or even identify them) because their identities would not become apparent until such time as a new procurement process was run.

The Commissioner's position

23. The Commissioner does not consider that the CCG has demonstrated that commercial detriment is likely to result from disclosure – let alone that it is more likely than not to happen.

24. The Commissioner's guidance on this exemption states that

"it is not sufficient for you to simply claim that disclosing details of a contract would, or would be likely to, prejudice someone's commercial position, should that contract come up for retendering. You must be able to demonstrate that you are likely to retender the contract within a reasonable timeframe. If you expect a tendering exercise to take place too far in the future, information relating to the previous contract award may, by that time, no longer be relevant."

25. The guidance further explains that disclosure of information about one transaction or procurement is unlikely to prejudice future transactions or procurements unless there is a sufficient degree of similarity between them.
26. The Commissioner does not consider that the CCG's response demonstrates that this particular contract is likely to be re-tendered in the near future. Whilst she accepts that the CCG has explicitly not ruled this out, it has been vague about when (or even if) a further process would be run.
27. In addition, even if the CCG were to put out a fresh invitation to tender, there is no guarantee that the new tender would be similar to the previous one. Indeed, the Commissioner considers it probable that there would be significant differences. The newly-formed CCG is a much larger organisation and serves a more diverse population than its predecessors. It is therefore logical to suppose that its needs for such services (and therefore the weighting of its assessment of new bids against those needs) would also be different.
28. Furthermore, whilst the Commissioner accepts that, if the CCG were to disclose the withheld information, the complainant's company would be the only company with access to both the bid documents themselves and the scoring of that bid, she does not consider that this would give the company such a large advantage. Having looked at the withheld information, it does provide indications of where the company scored

particularly well and where it did not. Therefore whilst rivals would not have access to all the information the complainant's company has access to, because they would be entitled to ask for (and receive) the scoring information too, the Commissioner does not consider that a substantial disadvantage would result.

29. Finally, the Commissioner notes that in its refusal notice, the CCG explained that it considered that the complainant's company's own commercial interests would be harmed by disclosure. It strikes the Commissioner as odd that the CCG has thus argued that this company would be given an unfair advantage and yet simultaneously *disadvantaged* by disclosure of the same piece of information. She certainly does not consider that this demonstrates that commercial harm is more likely than not to occur.
30. The Commissioner is slightly surprised that the CCG did not put forward any arguments to explain why its own commercial interests might be prejudiced by disclosure – as it would be entitled to do. In its refusal notice and its internal review, the CCG did refer to its own commercial interests. It also referred to protecting its own commercial interests in its submission when explaining to the Commissioner why the balance of the public interest would favour maintaining the exemption. However, despite having been given the opportunity to do so, the CCG did not explain why or how its own commercial interests would be harmed and therefore the Commissioner has not taken such matters into account.
31. The Commissioner therefore considers that section 43 is not engaged in respect of the withheld information and she has thus not gone on to consider the balance of the public interest.

Right of appeal

32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

33. 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.
34. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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