

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2015

Public Authority: Kingston Hospital NHS Foundation Trust

Address: Galsworthy Road
Kingston Upon Thames
Surry
KT2 7QB

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Kingston Hospital NHS foundation Trust for all documents submitted by the winning bidder in a tender for outpatient pharmacy, retail and Homecare services at the Trust. The Trust refused the request under the exemption in section 40(2) (personal information), section 41 (information provided in confidence) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that both the section 41 and section 43(2) exemptions are engaged and in the case of section 43(2), the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 6 August 2014 the complainant made a freedom of information request to the Trust regarding a recent tendering exercise. The request read as follows:

"All documents, including any ancillary, appendix or presentation documents submitted or provided by the winning bidder as part of the process for the Provision of Pharmacy Outpatient Dispensing, Home

Healthcare and Retail Sales, offer reference number KHT/Z/3.14.jg with OJEU reference: 2013/S 174-300673."

4. The Trust responded to the request on 25 September 2014 when it disclosed some of the information it held falling within the scope of the request. However, information was redacted under the exemptions in section 43 (commercial interests) and section 38 (Health and safety) of FOIA.
5. On 23 October 2014 the complainant asked that the Trust carry out an internal review of its handling of the request. It questioned the application of the exemptions relied on by the Trust but also said that it was willing to refine the request to a number of specific sections from the winning bidder's response.
6. The Trust presented the findings of the internal review on 20 November 2014 which upheld the decision to refuse to disclose some of the requested information. The review explained in more detail where the different exemptions had been applied to redact information. It explained that the section 38 exemption was no longer relied upon but that the section 40(2) (personal information) and section 41 (information provided in confidence) exemptions were being applied for the first time.

Scope of the case

7. On 5 January 2015 the complainant contacted the Commissioner to complain about the Trust's decision to refuse to disclose some of the requested information by relying on the exemptions cited above.
8. In making his complaint the complainant said that, to the extent that section 40(2) was being relied upon to withhold names or personal data identifiers, it would have no objection to the use of this exemption. As this was indeed the basis on which section 40(2) was applied, the Commissioner has not considered this exemption as part of this Decision Notice.

Reasons for decision

9. The Trust has applied section 43(2) to most of the withheld information and the Commissioner has considered this exemption first.

10. Section 43(2) provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person including the public authority holding it. In this case the Trust has said that disclosure would prejudice its own commercial interests, the commercial interest of the successful bidder Boots UK Ltd as well as several other NHS trusts which contributed information to Boots for the purposes of the tender.
11. Section 43(2) is a prejudice based exemption which means that in order for the information to be withheld the Trust must be able to identify and explain the nature of the prejudice it envisages would be caused by disclosure. Following the test adopted by the Information Tribunal in *Hogan and Oxford City Council v the Information Commissioner*, this means that the public authority must be able to show that the prejudice claimed is "real, actual or of substance" and that there is some "causal link" between disclosure of the information and the prejudice claimed.
12. In addition, when a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
13. The withheld information in this case has been redacted from Boots' response to the invitation to tender for Pharmacy services at the Trust. In other words, it is their winning bid and the information that has been redacted comprises financial data (including pricing and contract values), information on contracts with other services of Boots and details of the business approach of Boots, including its strategy and technical details.
14. The Trust has argued that disclosure of this information would significantly undermine the ability of Boots to bid successfully for future contracts using the "winning formula" that was successful in this tender. It explained that the withheld information "constitutes a well thought out piece of intellectual property; many of its parts dependent on others, creating a cohesive whole". It said that Boots' competitors would be able to use Boots' intellectual property and confidential information in their own tenders.
15. The Trust went on to say that "The concepts and algorithms developed by Boots, if disclosed in their entirety, would be seized upon by

competitors, with loss of competitiveness to Boots. What they have developed is original, highly valuable and much sought after”.

16. The Commissioner has reviewed the withheld information and he is satisfied that it has commercial value and that disclosure would be useful to a competitor. The Commissioner would agree that the withheld information amounts to an important part of Boots’ business model and disclosure would reduce their competitive advantage. The Commissioner is satisfied that the information provides an insight into how Boots operates this part of its business and why it was successful in this tender. In the case of the financial information, a competitor would also be able to use this information to alter their own bids to undercut Boots in future negotiations.
17. The Commissioner understands that many other NHS Trusts are conducting similar tendering exercises for pharmacy services and Boots is bidding for these contracts. Therefore, there is a very real possibility that disclosure would provide Boots’ competitors with a commercial advantage in future negotiations in what is clearly a competitive market. A causal link between disclosure of the information and the prejudice can clearly be drawn. Any loss of competitiveness leading to Boots losing future contracts would be significantly damaging to its commercial interests and can certainly be described as “real, actual or of substance”. In reaching this view, the Commissioner has established that the Trust’s reasons for engaging the exemption are indeed based upon and reflect the concerns of Boots. The Commissioner has been passed copies of correspondence between Boots and the Trust on this matter. For these reasons the Commissioner has decided that disclosure would prejudice the commercial interests of Boots and that section 43(2) is engaged.
18. The Trust also argued that disclosure would prejudice its own commercial interests because it would deter bidders from making bids in the future for fear that their commercially sensitive information would be made public and would also damage relations between the Trust and Boots. The Commissioner has considered this point and is satisfied that disclosure would have this effect. In reaching this view the Commissioner is mindful that at the time of the request the Trust had informed bidders of its intention to award the contract to Boots but the contract had not yet been signed and was not finalised. Therefore, the information was very recent and disclosure at this stage is likely to have been more sensitive. Given the significant prejudice that would be suffered by Boots if the information was disclosed the Commissioner also accepts that this would lead to it being discouraged when bidding for contracts in the future or else it would be more reluctant to provide

information as part of its bid. This would hamper its ability to achieve the best deal when carrying out future tendering exercises of this kind.

Public interest test

19. Section 43(2) is a qualified exemption and so the Commissioner has now undertaken a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of disclosure

20. The complainant argued that there was a public interest in demonstrating transparency, accountability and value for money where a company is gaining access to public money. It also suggested that companies seeking public sector work are expected to accept an increased level of public scrutiny as a result of gaining access to publicly funded opportunities and this weighed in favour of disclosure.
21. For its part, the Trust acknowledged that the factors favouring disclosure included "the inherent requirement for openness and transparency, informing the public of how their taxes are spent, and how the decision was made in relation to the successful tenderer".

Public interest arguments for maintaining the exemption

22. In favour of maintaining the exemption the Trust's arguments were limited to saying that it was not in the public interest to cause the prejudice described in the section above.

Balance of the public interest arguments

23. In balancing the public interest the Commissioner has first considered the arguments for disclosure. He accepts that disclosure of the information would shed light on the reasons why the successful bidder was awarded the contract and this would serve the public interest in transparency and accountability in the spending of public money.
24. However, the Commissioner would also take their view that the public interest has to some extent already been satisfied by the information already disclosed by the Trust. In particular, the Trust has disclosed the overall price of the contract and the decision making process into how the winning bidder was selected. Whilst disclosure of the remaining withheld information may help Boots' competitors to adapt their own bids in order to be better able to win future contracts at other trusts, this would do very little to serve the wider public interest in disclosure.

25. Indeed, the Commissioner is aware that the complainant favours disclosure in this case because he feels that the company he represents has been unfairly disadvantaged in competing for contracts with Boots. This is because, he argues, his company has disclosed a wider range of information on its bids compared to Boots. Therefore, Boots should be required to disclose further information on its bid so that it is forced to operate on what he sees as a more level playing field.
26. The Commissioner has considered this point and accepts that there is a public interest in markets operating fairly. If the market was distorted in this case then this would be a factor in favour of disclosure. However, the Commissioner is not in a position to say to what extent this has occurred and can only make a judgment on the information in question in this case. Indeed, on the basis of what he has seen the Commissioner cannot say that Boots has an unfair position in the market or that other companies are being denied access to contracts. Therefore the Commissioner can only give these argument very limited weight.
27. In any event, there must be a very strong public interest in ensuring competitiveness. If the consequences of securing a successful bid was that detailed information as to why that bid was successful had to be provided to competitors then this would act as a disincentive to innovation or a company seeking to improve the service it offers. This would not be in the public interest.
28. Furthermore, the Commissioner takes the view that there is a strong public interest in protecting the commercial interests of companies and that they should not be disadvantaged as a result of doing business with the public sector. In particular, the public interest in protecting the commercial interests of Boots is especially strong given the timing of the request. As explained above, the Trust and other NHS Trusts, are in the process, and were at the time of the request, of negotiating new contracts for pharmacy services. Therefore the commercial prejudice that would be suffered by Boots is likely to be significant and this is a strong factor in favour of withholding the information.
29. Given the timing of the request and the prejudice that would be caused to Boots' commercial interests, the Commissioner has found that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 41 – Information provided in confidence

30. For some of the requested information the Trust has applied the section 41 exemption. Section 41 provides that information is exempt if it was obtained from another person and disclosure would give rise to an actionable breach of confidence.

31. First of all the Commissioner is satisfied that the information was obtained by the Trust from Boots and therefore this first test for engaging the exemption is met. The information was clearly compiled by Boots for the purposes of its bid and passed to the Trust to allow it to make a decision on awarding the contract.
32. For section 41(1)(b) to be met disclosure of the withheld information must also constitute an actionable breach of confidence. In the ICO's view a breach will be actionable if:
 - The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
 - The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
 - Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.
33. The Trust explained that the information withheld under this exemption included detailed financial information and internal standard operating procedures of Boots such as business continuity aspects and emergency plans. The Commissioner has reviewed this information and is satisfied that it has the necessary quality of confidence. The information is important to the way in which Boots operates its business and it cannot be said that it is trivial. The information would appear to have been kept confidential and the Commissioner has not seen anything to suggest that the information has at any time been made publicly available.
34. As to whether there was an obligation of confidence surrounding the information, the Trust said that in its view it was clearly given to it by Boots in the expectation it would not be disclosed and the tender document submitted by Boots clearly stated that the information was confidential. Boots' response to the tender does indeed say that the information is provided in "strict confidence" and that it should not be "copied or disclosed wholly or in part to any other party without prior written approval by an authorised representative of Boots". This part of Boots response then goes on to identify categories of information which it said it would regard as commercially sensitive for the purposes of the Freedom of Information Act.

35. The complainant has queried the Trust's position on this point and had suggested that Boots could have no expectation of confidence because the Pre-Qualification Questionnaire (PQQ), which was sent to potential providers before the formal tender stage, made it clear that all information submitted to the Trust was subject to FOIA and could be disclosed. The complainant argued that rather than giving an expectation that information would be held confidentially, the Trust was only inviting potential providers to outline what information they considered to be commercially sensitive.
36. However, the Commissioner is also aware that this position appears to have changed slightly by the time the formal Invitation to Tender (ITT) stage of the process. The ITT document includes the following statement:

If offerors provide any information to Kingston Hospital NHS Trust in connection with this procurement exercise, or with any Contract that may be awarded as a result of this exercise, which is confidential in nature and which an offeror wishes to be held in confidence, then offerors must clearly identify in their offer documentation the information to which offerors consider a duty of confidentiality applies. Offerors must give a clear indication which material is to be considered confidential and why you consider it to be so, along with the time period for which it will remain confidential in nature. The use of blanket protective markings such as "commercial in confidence" will no longer be appropriate. In addition, marking any material as "confidential" or equivalent should not be taken to mean that Kingston Hospital NHS Trust accepts any duty of confidentiality by virtue of such marking. Please note that even where an offeror has indicated that information is confidential, Kingston Hospital NHS Trust may be required to disclose it under the FOIA if a request is received.

37. In light of this, the Commissioner is satisfied that the information withheld under this exemption was given in the expectation that it would not be disclosed. In reaching this view the Commissioner is mindful that Boots had not sought to claim that all of its response to the ITT was confidential but rather had sought to identify those aspects of its response that would cause the most prejudice if disclosed. It was invited to do this by the Trust who indicated that such information would remain confidential.
38. As regards any detriment that would be caused to Boots, the Trust explained that because Boots was still in competition in several tenders at other trusts, disclosure would give their competitors an advantage. The Commissioner is satisfied that this is the case and would refer to the

comments made in relation to section 43. In addition where the information contains details of Boots' other contractors then the Commissioner would also accept that disclosure could damage relationships with those third parties and therefore this element of the test is met.

39. Whilst the Commissioner is satisfied that the information is subject to a duty of confidence, in deciding whether the exemption is engaged it is necessary to consider whether an actionable breach of confidence would occur. Case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The public interest test in deciding if a duty of confidence is actionable is the reverse of that normally applied under the FOIA, i.e. the test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
41. The Trust had said that since this was the only request it had received for the information, this was evidence of a lack of public interest in disclosure. In the Commissioner's view this is clearly not the correct approach to take because there will always be a point when a person is the first to request any particular information and it would be unreasonable to withhold the information simply on the basis that no one else had requested it previously. That said, the Commissioner would agree that there is a lack of a compelling public interest in disclosure. As noted in relation to section 43, disclosure would serve the public interest in terms of transparency and accountability, but that this is not sufficient to outweigh the wider public interest in protecting the principle of confidentiality and the public interest in protecting the interests of the confider of the information, Boots.
42. The Commissioner has decided that section 41 is engaged.

Right of appeal

43. 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

44. 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.
45. 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

Pamela Clements

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