



Appeal number: EA/2018/0247

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

DR. ANDREW GOULD (on behalf of THE DENTAL CHANNEL LTD)
(Appellant)

- and -

THE INFORMATION COMMISSIONER
(Respondent)

**TRIBUNAL: JUDGE ALEXANDRA MARKS CBE
ROGER CREEDON
PAUL TAYLOR**

The Tribunal sat in public at Fleetbank House, London EC4 on 4 April 2019

**Dr Andrew Gould appeared in person for the Appellant
The Information Commissioner did not appear**

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made two requests to the Ministry of Defence (“MOD”) seeking information about a particular procurement process (for the provision of online training material for MOD personnel carrying out dental services).
3. The outcome of the procurement process was announced in October 2017.
4. The Appellant made his First Request for information from the MOD on 6 December 2017, and his Second Request on 1 February 2018.
5. The Appellant sought the information in order to help him determine whether the procurement process had been conducted correctly. He had concerns (a) that the winning bid was non-compliant; and (b) an erroneous announcement had been made at an MOD Study Day that his organisation had been successful.
6. The Appellant was an unsuccessful bidder.
7. In response to the First Request, on 23 January 2018, the MOD provided some information, confirmed that some other information was not held, and sought to withhold further information on the basis of sections 40(2) and 43(2) of the Freedom of Information Act 2000 (“FOIA”).
8. In relation to one part of the First Request, the MOD refused to confirm or deny whether it held any information, relying on s. 40(5) FOIA.
9. On 9 February 2018, the Appellant sought an internal review of the MOD’s decision in relation to the First Request. As a result of such internal review, the MOD accepted that the evaluation spreadsheet and file minute requested by the Appellant were within the scope of such request and disclosed a redacted version of the file minute. However, it concluded that the remainder of the file minute, and the whole of the spreadsheet, were exempt under s.43(2) FOIA. The MOD maintained its position on the information about composition of the evaluation panel, and disclosure of parts of the winning bid. The Appellant was notified of the outcome of the internal review on 25 May 2018.
10. The Appellant complained to the Information Commissioner (“the Commissioner”) on 9 April 2018, asking her to consider:
 - (1) whether the MOD was entitled to rely on s.40(2) FOIA to withhold the names of members of the evaluation panel;

- (2) whether the MOD was entitled under s.40(5) FOIA to refuse to confirm or deny whether a specific individual identified by the Appellant was a member of the evaluation panel;
- (3) whether the MOD was entitled to rely on s.43(2) FOIA to withhold (i) parts of the file minute; (ii) the evaluation spreadsheet; and (iii) parts of the winning bid; and
- (4) the MOD's failure to respond to his Requests within 20 working days, and to complete the internal review in relation to the First Request within 40 working days.

11. The Commissioner issued Decision Notice FS50737523 on 6 November 2018, upholding the MOD's reliance upon sections 40(2), 40(5) and 43(2) FOIA.

12. However, the Commissioner also concluded that in handling the First Request, the MOD had breached s.10(1) and s.17(1) FOIA, and with the regard to the Second Request, had breached s.10(1) FOIA by failing to respond to it within 20 working days.

Appeal to the Tribunal

13. The Appellant's Notice of Appeal dated 6 November 2018 referred in particular to three elements of his First Request:

- (1) Question 2: Was [name redacted] a member of the evaluation panel?
- (2) Question 6b: Please provide copies of the following parts from the successful tenderer's tender...[i.e.] the section which sets out the specific learning aims, objectives and outcomes for each course and the documentary evidence in the tender to show that the successful tenderer has submitted the required information.
- (3) Question 7: A copy of the transcript of the Regional Study Day at DMS Whittington held on 5 October 2017. Were participants at this event informed that The Dental Channel had been awarded a contract to supply the MOD with free CPD?

14. The subject of the Second Request (to which the MOD responded in July 2018) is not relevant to this appeal.

15. The Appellant submitted that the evidence shows that the tender was not open, fair or transparent and thus breached the requirements of the Public Contracts Regulations 2015. He argued that the information he sought was not commercially sensitive and that, in the circumstances, releasing the names of the individuals on the evaluation panel would, contrary to the Commissioner's reasoning, bring further clarity and thus support his complaint about the tender process and its outcome.

16. The Commissioner's Response dated 11 December 2018 maintained the analysis set out in the Decision Notice.

17. The Tribunal convened an oral hearing at which the Appellant appeared in person on behalf of The Dental Channel Limited. The Commissioner informed the Tribunal she would not be attending and that no discourtesy was intended. The Tribunal was content to proceed in her absence.

18. The Tribunal considered an agreed open bundle of evidence comprising some 140 pages, including submissions made by both parties, and an additional open bundle comprising another seven documents totalling 22 pages (including further Case Management Directions dated 25 January, 12 March and 3 April 2019). Together these comprised the Open Bundle.

19. The Tribunal pre-read the withheld material which had been provided in two closed bundles and was available at the hearing. The first bundle was not disclosed to the Appellant, and the second bundle was not disclosed to the MOD. It was not necessary to hear any evidence or submissions in closed session.

The Law

Section 1(1) FOIA: duty to disclose

20. The duty of a public authority to disclose requested information is set out in s.1(1) FOIA. The exemptions to this duty are referred to in s.2(2) FOIA as follows:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 40 FOIA: personal information

21. Section 40(2) FOIA - at the time of the Appellant’s First Request - rendered information exempt from disclosure if it constituted personal data of which the applicant was not the data subject, and its disclosure would contravene any of the data protection principles under the Data Protection Act 1998 (“DPA”) (being the law applicable at the date of the First Request).

22. DPA defines “personal data” in s.1(1) as:

“...data which relate to a living individual who can be identified –

(a) from those data; or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...

23. The first data protection principle under DPA provides that personal data shall be processed fairly and lawfully and, in particular, shall *not* be processed unless at least one of the conditions in Schedule 2 DPA is met.

24. Paragraph 6(1) of Schedule 2 DPA permits the processing, including disclosure, of data if it is:

“...necessary for the purposes of legitimate interests pursued by...the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

25. Section 40(5) FOIA provides that the duty to confirm or deny whether the information is held by a public authority does not arise where to do so would contravene any of the data protection principles.

Section 43(2) FOIA: commercial interests

26. Section 43(2) FOIA provides that information is exempt from disclosure where this *“...would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”*

27. According to *Hogan v Information Commissioner [2011] 1 Infor LR 588* at paragraph 34, *“would be likely to”* means that the chance of prejudice being suffered should be *“more than a hypothetical or remote possibility: there must have been a real and significant risk.”* This approach was approved by the Court of Appeal in *DWP v Information Commissioner [2016] EWCA Civ 785*.

28. The exemption in s.43(2) FOIA is a qualified exemption which means that a public authority may only withhold the information if the public interest balancing exercise required by s.2(2)(b) of FOIA (set out in paragraph 20 above) favours maintaining the exemption rather than disclosure.

The powers of the Tribunal

29. The powers of the Tribunal in determining this appeal are set out in s.58 FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

The burden of proof

30. The burden of proof rests with the Appellant in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

31. Before the hearing, both parties had submitted written evidence which was contained in the Open Bundle.

32. At the hearing, the Appellant produced:

- (1) further screenshots from the winning bidder's website;
- (2) definitions – from the websites of Imperial College, London and the International Council on Archives – of the meaning of learning “aims, objectives and outcomes”;
- (3) an uncompleted Part 1 from the MOD's tender, namely the “Provision of online dental training portal”; and
- (4) a booklet published by the General Dental Council on 30 September 2013 entitled “Continuing Professional Development for dental professionals”.

33. It appeared that these materials had not been supplied to the Commissioner but -with the exception of item (3) which the Commissioner has already seen - they are all publicly available on the internet. For this reason, the Tribunal did not object to their production at the hearing.

Submissions

34. The Commissioner submits that:

Commercial interests

(1) Having carefully considered arguments put forward by the Appellant, the MOD and the winning bidder in respect of s.43(5), it was correct to conclude:

- (a) that there was more than a hypothetical risk that the commercial interests of the winning bidder and the MOD could be harmed by disclosure of the information sought by the Appellant (despite the fact that some, but not all, of the withheld information was set out on the winning bidder's website); and
- (b) that the public interest balance favoured maintaining the exemption from disclosure because of the strong public interests in: (i) maintaining competition between competing suppliers; (ii) protecting the commercial interests of those who submit bids for public contracts; and (iii) protecting the government's own commercial interests.

Personal data

(2) Since the disclosure of the names of the evaluation panel members (and confirming or denying whether a specific individual was such a member) constitutes personal data, it was correct to consider whether such disclosure was necessary for the

purposes of legitimate interests pursued by the third party (in this case the Appellant) and concluded that it was not.

35. The Appellant submits that:

Commercial interests

(1) The Commissioner, in relying on s.43(2) FOIA:

(a) was wrong to conclude that the Appellant's request for parts of the winning bid would be likely to prejudice anyone's commercial interests (because the information sought is publicly available, and was not about the way the successful bidder structured its tender proposal). The Commissioner has not explained how such disclosure would harm the MOD's interests; and

(b) was wrong to conclude that the public interest is best served by protecting the commercial interests of the winning bidder, other bidders and the MOD, and has provided no evidence to support this proposition.

Personal data

(2) The Commissioner was wrong to apply s.40(2) FOIA to the Appellant's request for names of members of the evaluation panel, and s. 40(5) FOIA to refuse to confirm or deny that a specifically identified individual was a member of that panel. The Appellant argues that there would be a public benefit in releasing the panel members' names because that would support his complaint about the process and outcome of the procurement exercise. Neither the MOD nor the Commissioner have provided any reason why disclosure would harm the specific individual identified, and the Commissioner's Decision says that it would not lead to a "serious infringement of privacy".

(3) The Commissioner was incorrect to state that disclosing the names of the evaluation panel members would not bring any further clarity to the issue about the name of the 'winning' bidder being announced at the Regional Study Day at DMS Whittington held on 5 October 2017.

Submissions at the hearing

36. At the hearing, the Appellant confirmed that he was not pursuing his appeal in respect of Questions 1 and 2 of the First Request (respectively seeking the names of members of the evaluation panel, and specifically whether an identified individual was a member of that panel).

37. The Tribunal did not need to consider the Commissioner's Decision to the extent it relates to personal data, nor did it do so.

38. At the hearing, the Appellant also confirmed that he was no longer pursuing Questions 5 and 7 of the First Request (respectively seeking minutes of any meeting about the

procurement process, and a copy of the transcript of the Study Day on 5 October 2017). The Appellant accepted that no such minutes or transcript exist.

39. Thus, during the hearing, the Appellant and Tribunal focussed on Question 6(b) – the Appellant’s request for those parts of the successful tender which set out the specific learning aims, objectives and outcome for each course, and the documentary evidence in that tender to show that the successful tenderer had submitted the required information.

40. The Appellant put his case in the following way:

(1) Part 1 of the MOD’s Invitation to Tender (“ITT”) required bidders to answer Yes or No to the question whether they had the required dental training in place for continuing professional development (“CPD”) **and** had supplied relevant documents detailing how they meet General Dental Council (“GDC”) Standards.

(2) For CPD to be “verifiable” in accordance with the GDC (CPD) (Dentists) Rules 2008 (“the Rules”), documentary evidence is required that the CPD has:

- (a) concise educational aims and objectives;
- (b) clear anticipated outcomes; and
- (c) quality controls.

(3) The Appellant argued it was evident from the winning bidder’s website, that their online dental training courses in place at the time of the ITT did NOT set out any learning outcomes, nor adequately specify those courses’ learning aims and objectives. Consequently, those courses did not satisfy the Rules and hence failed to meet GDC Standards.

(4) Thus, the Appellant argues, the winning bidder should have answered “No” to Part 1 of the ITT, and should have been eliminated from the procurement process at the outset. Alternatively, the MOD should have recognised during its quality assurance process that the winning bidder’s answer “Yes” was incorrect and therefore eliminated the winning bidder at that stage.

(5) The information the Appellant sought in response to his request 6b was, he argued, publicly available on the winning bidder’s website and therefore not “commercially sensitive” as regards either the MOD or the winning bidder.

(6) The Appellant sought the information in order to challenge the *outcome* of the procurement exercise (because, he argues, the winning bidder’s documentary material could not have met GDC Standards) and to challenge the *conduct* of the procurement process (because, he argues, the MOD failed to take account of the winning bidder’s sub-standard material).

(7) The Appellant claimed that disclosure at the MOD’s training day of information about the tendering exercise (which had prompted an attendee to contact him two weeks before formal announcement of the winning bidder) should never have happened, and was further evidence that the procurement process was flawed.

(8) The training day incident also supported the Appellant’s suspicion that “something had happened” after the evaluation panel had met which had prevented the MOD from awarding his organisation the contract even though it had scored highest in

the technical evaluation. A full and proper response to his FOIA request, he argued, would shed light on what this “something” was.

(9) Moreover, he argued, the MOD had “delayed and delayed” responding to his requests for information in the hope that he would “go away”. In the event, the Appellant said, he had lost the opportunity formally to challenge the outcome of the tender under the Public Contracts Regulations 2015 because the MOD’s failure to respond promptly and fully meant he had not obtained the necessary evidence in time.

Discussion and reasons

41. It is worth noting from the outset that materials in the Open Bundle made clear – and that Appellant accepted – that his organisation lost the bid on price alone. The winning bidder achieved the highest combined technical and commercial score from the evaluation process.

42. However, the Appellant argues that the MOD’s technical evaluation was flawed – for the reasons set out in paragraph 40(3) and (4) above. He says that as the winning bid was non-compliant, it should have been eliminated.

43. For the reasons below, we are not persuaded by the Appellant’s argument.

44. We do not accept the Appellant’s premise that the information he sought in response to his request 6b was publicly available. Our reasons are:

(1) as the Appellant himself pointed out, the Rules’ requirement for “verifiable” CPD applies to dental practitioners themselves, not the providers of dental CPD training. Thus, there is no *legal* requirement for providers (and thus the bidders in this case) to state the aims, objectives and outcomes of the training they offer, nor is there any specific legal requirement as regards the public part of providers’ websites.

(2) again, as the Appellant himself pointed out, it is the responsibility of dental practitioners *themselves* to check that the CPD they undertake meets the requirements of the Rules, and thus GDC Standards.

(3) to assist dental practitioners, CPD providers such as the Appellant’s organisation, clearly articulate – for example on their website, and hence publicly – their training courses’ aims, objectives and outcomes. Other CPD providers do not necessarily do so but, in our view, that does not mean that their courses fail to meet GDC Standards.

(4) For example, it was clear from the screenshots provided as evidence by the Appellant, that the winning bidder describes its courses on its website as providing “verifiable CPD.” In our view, it would be entirely rational for a dental practitioner to buy a course described as “verifiable CPD”, and only once granted access to a login/licence-protected part of the provider’s website to see not just the course’s content, but also its precise aims, objectives and learning outcomes. From the CPD provider’s perspective, there may well be good commercial reasons for it to ensure that all these matters are accessible on its online platform only to those who have paid for the course.

(5) In this case, the Open Bundle contained evidence from the winning bidder both of its current dispute with another provider about plagiarism, and its concerns about compromise of its intellectual property. Aside from confirming that the Appellant’s

organisation was not the “vexatious” competitor with whom the winning bidder was in dispute about plagiarism, the Appellant did not rebut this evidence. We therefore conclude that, on the basis of the evidence before us, the winning bidder’s concerns about disclosure compromising its commercial interests amount to “*more than a hypothetical or remote possibility. [but] a real and significant risk.*”

45. In responding to Part 1 of the MOD’s ITT – which we note did not require bidders to set out the specific learning aims, objectives and outcomes for each course - it was legitimate, in our view, for bidders to submit documentary material which went *beyond* the publicly available material on their website in order to demonstrate to the MOD how their dental training courses meet GDC Standards.

46. We saw evidence indicating this was indeed what the winning bidder had done. Included in the Open Bundle was a redacted version of the winning bidder’s response to the freedom of information request, which said:

“This information is not in the public domain and any competitor could approach these organisations.”

“...have been developed specifically by us and are not available publicly, it would be a significant disadvantage to us if a competitor were to see this, and our intellectual (sic) property would be compromised.”

47. Further, we do not accept the Appellant’s argument that bidders *must* have set out in their tenders their courses’ specific learning aims, objectives and outcomes (with documentary evidence to support this). First, as we have already mentioned, it was not an explicit requirement of the ITT that bidders set out the specific learning aims, objectives and outcomes of their courses. In Part 1 (Provision on online dental training portal), bidders were required to answer Yes or No whether they could demonstrate their ability to provide online dental training in various areas of dental CPD in accordance with GDC Standards. In Part 5 (Quality Assurance), bidders were asked to provide a detailed narrative of how they intend to meet the required dental training as set by the GDC Standards.

48. We also reject the Appellant’s argument that “*the information requested is not commercially sensitive by definition.*”

49. On the contrary, on the evidence before us - and for the reasons set out in paragraph 45 above - we are satisfied that providing extracts of the winning bidder’s tender in response to the Appellant’s request 6b would disclose not only material already in the public domain (which some of it was) but also other material. We conclude that, on the basis of the evidence, this would create a real and significant risk of prejudice to the commercial interests of that bidder.

50. Consequently, we are satisfied that the Information Commissioner was not wrong in law, but correct to conclude that, in the circumstances of this case, the information sought by the Appellant’s request 6b engaged the exemption in s.43(2) FOIA.

51. We went on to consider the manner in which the Commissioner weighed up - in accordance with s.2(2) FOIA - the competing public interests in favour of maintaining the exemption from disclosure on the one hand, and of disclosing the information on the other.

52. We accept the Appellant's argument that there is a public interest in disclosing whether the MOD followed correct procedures in conducting its procurement exercise. We also accept his point that disclosure would also be in the interests of companies submitting tenders in the future because they need to know that the process is open, fair and transparent.

53. However, we also note the MOD's arguments in the Open Bundle which included:

“Disclosing (sic) the successful tenderer's intellectual property could afford competitors an unfair advantage in bidding for similar future contracts with the MOD. Potentially, this could limit competition and the best price that could be achieved for the tax-payer. This would not be in the public interest.

Further, should it be known that the MOD puts such commercially sensitive information into the public domain, it could deter companies generally from bidding for contracts with the MOD. This could limit future competition, and the best price that could be achieved for the tax-payer. Again, this would not be in the public interest.”

54. We are not persuaded by the Appellant's arguments that even if the information he seeks is commercially sensitive (contrary to his position that it is not), the public interest lies in its disclosure. Overall, while he had concerns about the conduct of the procurement process, the evidence we have seen does not support the Appellant's contention that the outcome, or the MOD's evaluation of bids, was unfair or lacking in transparency or that “something had happened” to prevent his bid succeeding (other than weighted evaluation of the price) – and that disclosure of the information he requests would expose this.

55. In conclusion, the Appellant has not satisfied us that the Commissioner should have exercised her discretion differently when balancing the competing public interests. We agree with the Commissioner that in all the circumstances of the case, on balance the public interest favours the cumulative weight which should be attributed to protecting the commercial interests of the MOD, the winning tender and the other tenderers who submitted bids.

56. Accordingly, we find that the Commissioner correctly decided that the public interest favours withholding the information sought by the Appellant, and maintaining the exemption from disclosure in s.43(2) FOIA.

Conclusion

57. For the above reasons, we uphold the Commissioner's Decision Notice and dismiss the appeal.

ALEXANDRA MARKS CBE
(First Tier Tribunal Judge)

DATE: 10 April 2019