

Freedom of Information Act 2000 (FOIA)

Decision notice

Date 26 October 2011

Public Authority: NHS North of Tyne
Address: Bevan House
1 Esh Plaza
Sir Bobby Robson Way
Great Park
Newcastle Upon Tyne
NE13 9BA

Decision (including any steps ordered)

1. The complainant made a request to NHS North of Tyne (NHS NoT) under the Freedom of Information Act 2000 (FOIA) for information surrounding an orthodontic procurement process which took place in 2009. NHS NoT provided the complainant with some of the requested information, however it withheld some information under section 43(2), section 41 and section 40(2) of FOIA.
2. The Commissioner considers that in relation to the information requested at point 2 of the request, NHS NoT incorrectly applied section 41 and section 43(2) to withhold this information. However where the names and business addresses of the unsuccessful bidders appear within the information this should be redacted under section 40(2) of FOIA. In relation to points 3, 4 and 6 of the request, NHS NoT correctly applied section 43(2) to withhold this information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information requested at point 2 of the request with redactions made to the names and business addresses of the unsuccessful bidders.
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

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 November 2010 the complainant made a request to NHS NoT for the following information:

"... can you please provide me with the following information relating to the procurement and award of the contract for the provision of NHS Primary Care Specialist Orthodontic Services in the North Tyneside, Newcastle and Northumberland PCTs (NHS Supply2Health website, reference number 5D8/09/002):

- 1. The names and addresses of the winning bidder – I have been previously informed that the winning bidder is Neo Orthodontics which appears to be a trading name, however please confirm whether this is a trading name for a sole trader, a general partnership. In either case please specify the name(s) of the individual(s) trading as a sole trader or a general partnership.*
 - 2. The minutes of all meetings with any bidders, including those meetings with the winning bidder after the contract was awarded, any reports made and all correspondence entered into throughout the procurement exercise.*
 - 3. The agreed Unit of Orthodontic Activity (UOA) value.*
 - 4. The number of Units of Orthodontic Activity (UOA) that are to be provided annually.*
 - 5. The duration of the contract that was awarded.*
 - 6. The completed Tender Submission documents submitted by all bidders as part of the Invitation to Tender process. The scores for each bidder's document as set out in the Appendix 4 form which had been provided and comments for each bidder following the bidder's presentation. The scores requested are to include those scores awarded by individual panel members, any reports or correspondence concerning the scoring of tenders.*
 - 7. All documents, report or correspondence (including emails and electronic documents) between the PCT and PRO-NE (the North East Commercial Support Unit) which refer to the North of Tyne Procurement and Dr Ross Hobson during the period 1 June 2009 to the present."*
6. NHS NoT provided a response to the complainant on 29 November 2010 in which it disclosed the information requested at points 1 and 5 and some of the information requested at point 2 of the request. It withheld the rest of the information relevant to point 2 of the request

under section 43(2)(commercial interests) and section 41(information provided in confidence) of FOIA. In relation to points 3 and 4 of the request it withheld this information under section 43(2) of FOIA. In relation to point 6 of the request NHS NoT provided the complainant with some information, however it withheld some information under section 43(2), section 41 and section 40(2) (personal data). In relation to point 7 of the request NHS NoT explained that this information amounted to the complainant's own personal data and was dealt with as a subject access request (SAR) under the Data Protection Act 1998 (DPA). On 14 December 2010 NHS NoT wrote to the complainant with the public interest arguments it had considered in relation to the application of the exemptions.

7. The complainant requested an internal review of the public authority's decision on 5 January 2011. On 28 January 2011 the public authority wrote to the complainant with the details of the result of the internal review it had carried out. It upheld its original decision.

Scope of the case

8. On 20 April 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner will consider whether NHS NoT was correct to withhold information relevant to points 2, 3, 4 and 6 of the request. As the information requested at point 7 of the request was dealt with under the Data Protection Act 1998 this will not be considered as part of this Notice.

Reasons for decision

Point 2 of the Request

9. The information withheld in relation to point 2 of the request is three meeting notes. Two of the meeting notes relate to a record of the debriefing between NHS NoT and two of the unsuccessful bidders. The third meeting note relates to a meeting between NHS NoT and the successful bidder discussing the delay in finalising the contract. This was because one of the unsuccessful bidders had appealed through the Dispute Resolution process as it had been claimed that the Principles and rules for Cooperation and Competition had not been complied with.

Section 43(2)

10. Section 43(2) 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.
11. In this case NHS NoT has stated that disclosure of the requested information would be likely to prejudice the commercial interests of NHS South of Tyne and Wear and the bidders in the NHS North Tyne and Wear procurement.
12. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to commercial interests of NHS South of Tyne and Wear and the bidders in the NHS North Tyne and Wear procurement.
13. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. This comments 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."
14. NHS NoT has explained that NHS South of Tyne and Wyre (NHS SoT) has a forthcoming procurement for orthodontic services. The Commissioner considers that putting services out to tender by NHS SoT is a commercial activity as NHS SoT is aiming to procure a particular service for the best possible price and quality. The Commissioner also considers that tendering for a contract to provide services to NHS NoT is a commercial activity.
15. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
16. The Commissioner has next considered the nature of the prejudice claimed and the likelihood of the claimed prejudice occurring.
17. NHS NoT explained that the sharing of information relating to tender submissions for the NHS NoT contract with competitors would render a fair process in the NHS SoT procurement impossible. NHS NoT contacted NHS SoT to ask for its perspective on disclosure. NHS SoT identified its plans for a procurement of similar orthodontic services and expressed concerns about the effect disclosure could have on this forthcoming exercise.

18. Finally NHS NoT has argued in this case that the prejudice would be likely to occur. Therefore the threshold to prove would be likely to prejudice is lower than if it had claimed that the commercial interests would be prejudiced. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk” (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
19. Upon considering the withheld information in this case the Commissioner does not consider that disclosure of the notes about the debrief with two of the unsuccessful bidders would be likely to cause the prejudice claimed. This is because the notes contain issues raised by the unsuccessful bidders with the procurement process but it does not provide any detail about the bidder’s business plans. In relation to the notes of the meeting between the successful bidder and NHS NoT again it does not contain detail of the bidder’s business plan, it contains information about why finalising the contract had been delayed and issues raised by the successful bidder in relation to this. The Commissioner therefore does not consider that disclosure of this information would be likely to cause the prejudice claimed. He does not consider that disclosure of this information would be likely to obscure the fairness of the upcoming procurement process for NHS SoT.
20. As the Commissioner does not consider that the prejudice claimed would be likely to occur he considers that section 43(2) was incorrectly engaged in relation to the information withheld relevant to point 2 of the request.

Section 41

21. Information is exempt under section 41(1) if it was obtained by a public authority from another person and the disclosure of the information outside of the Act would constitute an actionable breach of confidence.
22. In this case the Commissioner considers that the information was provided to NHS NoT by NHS Procurement North East.
23. The Commissioner notes that NHS NoT has not provided any arguments as to whether the information was imparted in circumstances importing an obligation of confidence. Despite the lack of arguments in this regard, the Commissioner also notes that where

commercial information is purported to have been imparted in confidence he considers that there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged. The Commissioner would refer to the arguments set out in relation to section 43(2) above and would reiterate as disclosure would not cause a detriment to the commercial interests of the parties involved in the procurement process or the planned future procurement process this would not cause a detriment to the commercial interests of NHS Procurement North East. NHS NoT has not provided any submissions to demonstrate that disclosure would cause a commercial detriment to NHS Procurement North East.

24. The Commissioner therefore considers that section 41 was incorrectly applied to withhold this information.

Section 40(2)

25. As the Commissioner does not consider that section 43(2) and section 41 were correctly applied to this information, as it does contain some personal data he has gone on to consider whether section 40(2) should have been applied in this case.

26. Section 40(2) of FOIA provides an exemption for information that constitutes the personal data of third parties:

"Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

27. Section 40(3)(a)(i) of FOIA states that:

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),”

28. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - a. from that data, or
 - b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
29. The Commissioner considers that the names and business addresses of the unsuccessful bidders would be classed as the personal data of those individuals.
30. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. The council has argued that disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met.
31. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

Damage and Distress to the Data Subject

32. The Commissioner considers that disclosure of the names and business addresses of the unsuccessful bidders may cause damage and distress to the data subjects due to the fear of the company being portrayed in a negative light.

Legitimate Interests

33. The Commissioner does not consider that there is a legitimate public interest in disclosing the names of unsuccessful bidders. As contracts were not awarded to the unsuccessful bidders there is no legitimate interest in understanding how public money is being spent.
34. The Commissioner therefore considers that section 40(2) should have been applied to redact the names and business addresses of the unsuccessful bidders from the withheld documents.
35. In this case NHS NoT has explained that whilst the procurement for orthodontic services has now completed, NHS SoT is going to begin a

similar procurement exercise for orthodontic services and given that these organisations are geographically close, it is highly likely the same individuals or organisations will submit bids through this tendering process. Furthermore it is likely that any information disclosed relating to the bids for the NHS NoT contract could be used by competitors who wish to bid for the NHS SoT contract.

Point 3 and 4 of the Request

Section 43(2)

36. For the same reasons as set out at paragraphs 10 to 16 above, the Commissioner considers that the information requested at points 3 and 4 of the request would fall within the scope of the exemption. He has therefore gone straight on to consider the nature of the prejudice claimed and the likelihood of the claimed prejudice occurring.
37. NHS NoT has argued that disclosure would be likely to prejudice NHS SoT's commercial interests. It has argued that "in light of the forthcoming procurement in NHS South of Tyne and Wear we considered, and still consider, that disclosure of this financial information was likely to prejudice NHS South of Tyne and Wear's ability to secure best value for money in its procurement." In relation to point 3 of the request it explained that "disclosure of the values agreed in the NHS North of Tyne procurement would be likely to restrict the ability of NHS South of Tyne and Wear to negotiate improved rates." In relation to point 4 of the request, it explained that, "disclosure of this information is likely to lead to the Unit of Orthodontic Activity Unit (UOA) values being identified". It explained that it has considered whether what is already known about the range of UOA values within the region is likely to diminish the sensitivity of the requested information. However it concluded that due to the similarity between the services commissioned in the two procurements, it would be likely that NHS SoT's ability to secure best value for money would be likely to be prejudiced.
38. In relation to point 3 of the request, the Commissioner considers that disclosure of the values agreed in the NHS NoT procurement would be likely to prejudice the commercial interests of NHS SoT. This is because NHS SoT is going to be putting the same or very similar services out to tender in the near future. Due to geographical closeness, the NHS SoT tendering process is very likely to attract many of the same bidders as the NHS NoT procurement and the values are likely to be relevant to the NHS SoT procurement. Furthermore if the information were disclosed bidders in the NHS SoT procurement would be likely to use this information when putting together their tender submissions. This would impede NHS SoT's ability to secure the best possible terms

which would be likely to result in prejudice to their commercial interests. NHS NoT has argued that the prejudice would be likely to occur rather than would occur. The Commissioner considers that the timing of the request increases the likelihood of the prejudice occurring, that is the imminent NHS SoT tendering process for the same or very similar services.

39. In relation to point 4 of the request, the Commissioner does not consider that disclosure of the number of UOA units that are to be provided annually under the NHS NoT contract would be likely to prejudice the commercial interests of NHS SoT. This is because NHS NoT has argued that by disclosing this information this would lead to the UOA values being identified (the values were requested at point 3 of the request) and would therefore be likely to have the same effect as described at paragraph 21 above. NHS NoT has not however explained how disclosure of the number of units to be provided annually would expose the UOA value. The Commissioner is not therefore satisfied that the number of units to be provided annually would be likely to expose the unit value and therefore does not consider that the prejudice would be likely to occur.
40. In relation to point 4 of the request the Commissioner does not consider that the prejudice would be likely to occur and therefore the section 43(2) exemption was incorrectly applied. In relation to point 3 of the request the Commissioner will now consider the public interest arguments.

Public interest arguments in favour of disclosing the requested information

41. NHS NoT recognises that there is a strong public interest in demonstrating how public funds are spent, in understanding how the decision to select a successful bidder is taken and in demonstrating that value for money will be achieved as a result of procurement.

Public interest arguments in favour of maintaining the exemption

42. NHS NoT has argued that it is not in the public interest to disclose information which would be likely to inhibit NHS SoT's position in obtaining value for money in the forthcoming orthodontic procurement process. This is because NHS SoT is a publicly funded body endeavouring to obtain the best and most cost effective services for the population it serves.

Balance of the public interest arguments

43. The Commissioner considers that there is a public interest in providing the public with information to enable better understanding of how

decisions have been taken. He also considers that there is a public interest in showing that value for money is being achieved through the procurement process.

44. The Commissioner does however consider that there is a very strong public interest in NHS SoT being able to secure the best and most cost effective services through the forthcoming orthodontic procurement process. Disclosure of information which may impede NHS SoT's position in this regard is not in the public interest.
45. The Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Point 6 of the Request

Section 43(2)

46. Again for the same reasons as set out at paragraphs 10 to 16 above, the Commissioner considers that the information requested at point 6 of the request would fall within the scope of the exemption. He has therefore gone straight on to consider the nature of the prejudice claimed and the likelihood of the claimed prejudice occurring.
47. NHS NoT confirmed that it has provided the complainant with a redacted copy of the tender evaluation report. It withheld Appendix 4 and copies of the full tender documents in their entirety.
48. NHS NoT has argued that it would be NHS SoT, as well as competitors of the NHS NoT procurement process, whose commercial interests would be likely to be prejudiced.
49. It explained that disclosure of the withheld information would be likely to allow the strengths and weaknesses of individual bids to be identified by commercial competitors of those who submitted tender submissions to the detriment of the forthcoming procurement of orthodontic services in NHS SoT. It went on to say that disclosure of the tender submissions or information which discloses strengths and weaknesses of the submissions to rival bidders during the currency of a procurement would be likely to result in damage to free and fair competition in that procurement. It explained that this would be likely to damage the commercial interests of NHS SoT as it would hinder the fairness of the process and therefore distort the outcome. This would be likely to inhibit NHS SoT's ability to procure the best and most value for money orthodontic service. It also explained that it would damage the commercial interests of the bidders as it would disclose valuable information about their business plans and objectives. It highlighted that some bidders had not objected to disclosure but that disclosure

would still be likely to prejudice the commercial interests of NHS SoT as set out above.

50. In this case NHS SoT has argued that the prejudice would be likely to occur. It has explained that in this case due to the level of similarity between the services up for tender in the completed NHS NoT procurement and those services up for tender in the forthcoming NHS SoT procurement and the fact that the pool of likely bidders will be substantially the same, this increases the likelihood of the prejudice occurring.
51. The Commissioner considers that in this case disclosure of the withheld information would be likely to prejudice the commercial interests of NHS SoT as it would be likely to distort the procurement process and hinder its abilities to obtain the best service provider for the most value for money. The Commissioner also considers that it would be likely to prejudice the bidders commercial interests, as whilst he is aware that some of the bidders did consent to such disclosure, some of the bids may have been strong contenders and may disclose information which could be of significant use to a rival bidder when developing their own tender submission in the NHS SoT competition. Given the geographical proximity of NHS NoT and NHS SoT the Commissioner accepts that both processes would attract a very similar pool of competitors. The Commissioner considers that section 43(2) was therefore correctly engaged in this case and has gone on to consider the public interest arguments.

Public interest arguments in favour of disclosing the requested information

52. NHS NoT recognises that there is a strong public interest in demonstrating how public funds are spent, in understanding how the decision to select a successful bidder is taken and in demonstrating that value for money will be achieved as a result of procurement.

Public interest arguments in favour of maintaining the exemption

53. NHS NoT has argued that it is not in the public interest to disclose information which would be likely to inhibit NHS SoT's position in obtaining value for money in the forthcoming orthodontic procurement process. This is because NHS SoT is a publicly funded body endeavouring to obtain the best and most cost effective services for the population it serves.
54. The Commissioner does not consider that it is in the public interest to hinder the commercial interests of the bidders of the NHS NoT procurement, given the proximity of the forthcoming NHS SoT

procurement, competitors may gain valuable information which may put them at an unfair advantage. It is not in the public interest to distort the fairness of a procurement process of public services.

Balance of the public interest arguments

55. The Commissioner considers that there is a public interest in providing the public with information to enable better understanding of how decisions have been taken. He also considers that there is a public interest in showing that value for money is being achieved through the procurement process.
56. The Commissioner does however consider that there is a very strong public interest in NHS SoT being able to secure the best and most cost effective services through the forthcoming orthodontic procurement process. Disclosure of information which may impede NHS SoT's position in this regard or render the process unfair is not in the public interest.
57. The Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

58. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

59. 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.
60. 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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