

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 November 2013

**Public Authority:** Western Health & Social Care Trust  
**Address:** Altnagelvin Hospital  
Londonderry, Northern Ireland  
BT47 6SB

#### **Decision (including any steps ordered)**

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The complainant has requested documentation from the Trust regarding a tender process between the Trust and domiciliary care providers and the maximum named hourly price reached by the Trust. The Trust refused to disclose the information, relying on the exemptions within sections 41 (breach of confidence) and 43(2) (commercial interests) of FOIA. The Commissioner's decision is that the Trust has correctly applied section 43(2), which applies to the entirety of the withheld information. The Commissioner therefore orders no steps to be taken.

#### **Request and response**

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1. On 11 July 2012, the complainant wrote to the Trust and requested information in the following terms:

In 2011 the Western HSC Trust issued tender documents to domiciliary care providers and published an advertisement in the European Journal. Within the documentation the Trust declared a maximum price of [named price] per hour as the rate they would pay for domiciliary care. This was a critical decision in this process and IHCP now wishes to seek under Freedom of Information legislation all documentation including reports, emails, letters, notes etc. on how the decision on this rate was reached. I am unable to specify the time period involved as I don't have the information as to when the Trust began research on the matter.

The Trust responded on 6 August 2012. It stated that it was refusing to disclose the requested information and cited section 43(2) of FOIA (commercial interests) as a basis for non-disclosure.

2. Following an internal review the Trust wrote to the complainant on 6 December 2012. The reviewer upheld the original decision not to disclose the requested information, agreeing with the use of section 43(2) of FOIA and stating that section 41 (information provided in confidence) was also applicable to the requested information.
3. The complainant sought a further internal review on 4 February 2013. The Trust responded on 19 March 2013, re-iterating its original position and advising the complainant of his right to complain to the Commissioner.

### **Scope of the case**

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4. The complainant contacted the Commissioner on 9 April 2013 to complain about the way his request for information had been handled.
5. The Commissioner has considered the Trust's handling of the complainant's request.

### **Reasons for decision**

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6. Section 43(2) of FOIA 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.
7. The withheld information relates to tender documents issued by the Trust to domiciliary and how the maximum domiciliary tariff that the Trust would pay was reached. The Trust has argued that its commercial interests would be prejudiced if this information were disclosed.
8. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the Trust's commercial interests.
9. The term 'commercial interests' is not defined in the FOIA. 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.

10. The Commissioner considers that information relating to a tender process and the maximum hourly rate for a service provided does relate to the Trust's commercial interests.
11. The Commissioner therefore considers that the withheld information falls within the scope of the exemption. However, for this exemption to be engaged disclosure would have to prejudice or be likely to prejudice the commercial interests of the Trust.
12. In this case the Trust has argued that the prejudice caused by disclosure would be likely to occur. In reaching a decision on the question of the likelihood of prejudice the Commissioner is mindful of the Tribunal's comments in the case of *John Connor Press Associates Limited v ICO*<sup>1</sup> where it interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that, 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.
13. In reaching a decision on the likelihood of prejudice the Commissioner also believes that the public authority should be able to show some causal link between the potential disclosure of the withheld information and the prejudice it has argued is likely to occur.
14. The Trust has explained that, as a public sector organisation, it is required to obtain best value for money and to obtain the best possible service for domiciliary care service users. At the time of the request, the Trust was about to embark on a tender re-run. It informed the Commissioner that it considers that, if the withheld information was disclosed it would give an absolute advantage to anyone bidding within the tender process. This would be likely to have a negative impact on the Trust's ability to obtain best value for money and the best possible service for users.
15. The Trust explained to the Commissioner that it needs to ensure that the tender re-run is robust and must avoid any action which would jeopardise the process. It is concerned that, if the Trust disclosed information into the public domain which is integral to a procurement process, this would obviously be public knowledge and would damage public confidence in the Trust's processes. This would include the confidence of other service providers and impact on future tendering of services and getting best value. The Trust is also concerned that suppliers may refuse to engage in future tendering exercises with the Trust, which would weaken the

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<sup>1</sup> EA/2005/0005

competitive nature of the process and would be likely to result in an ultimate reduction in quality of service provided.

16. The Trust considers that disclosure of the withheld information would harm the tender process and leave the Trust open to future legal challenge with regard to not having properly followed the strict procurement rules and processes. Disclosure of the information would be likely to further prove detrimental to the tender process and prejudice the Trust by negatively impacting upon the quality of its service provision and damaging public confidence in its processes. The Trust is of the view that there is a clear causal link between the disclosure of the withheld information and future likely prejudice to the commercial interests of the Trust.
17. The Commissioner having considered all the arguments cited above has concluded that disclosure of the withheld information would be likely to prejudice the commercial interests of the Trust by potentially severely compromising the tender process, undermining its reputation and damaging public confidence in its processes and its ability to provide quality of service for best value for public money.
18. As section 43(2) of the FOIA is a qualified exemption the Commissioner has gone on to consider the public interest in relation to the application of this exemption. Specifically, he has considered whether the public interest in maintaining the exemption outweighs the public information in disclosing the information.

### **Public interest arguments in favour of disclosing the requested information**

19. The Trust has explained that it recognises that the following public interest arguments favour disclosure of the requested information:
  - It recognised that there is a strong public interest in openness, transparency and accountability with regard to expenditure of public money. This provides the public with the means to scrutinise the use to which these funds are put.
  - The Trust also recognised that there is a public interest in release of information which informs the public of activities carried out by public authorities on their behalf, allowing for more user involvement and collaborative decision making. It also accepted that release of information on the calculation of the ceiling rate would show that a transparent and fair process was followed.

### **Public interest arguments in favour of maintaining the exemption**

20. The Trust has explained that it believes the following public interest arguments favour maintaining the exemption:

- Disclosure of the withheld information could jeopardise the integrity of the tendering process. By not adhering to standard procurement guidelines and procedures, there is a real risk of harming the tender rerun. The resulting delays within the process would lead to delays in bringing the best service to the patient and best value for public money, which would obviously not be in the public interest.
- Disclosure of the withheld information could cause detriment to the professional relationship between the Trust and the current domiciliary care providers, in the supply of current and future services for patients and clients. If the professional business relationship between the Trust and its current providers was to be weakened, this could lead to suppliers refusing to engage in future tendering exercises with the Trust, which would weaken the competitive nature of the process and could lead to a reduction in the quality and standard of care provided. This could damage public confidence in the Trust and its services and procurement procedures, which would obviously not be in the public interest.

### **Balance of public interest arguments**

21. The Commissioner agrees with the Trust that there is a strong public interest in public authorities being open, transparent and accountable regarding their expenditure of public funds. However, he also accepts that it would not be in the public interest to jeopardise an ongoing tendering process, thereby causing delays to the process and potentially not achieving best value for those public funds.
22. The Commissioner also agrees that there is a public interest in keeping the public informed of the activities of public authorities, allowing the public to be involved in the decision-making of those authorities. However, he also accepts that the Trust needs to maintain professional relationships of trust and integrity with its current domiciliary care providers in order to retain quality of service and maintain public confidence.
23. Having considered the public interest arguments for and against disclosure in all the circumstances of the case, the Commissioner considers that, on balance, the public interest arguments in favour of maintaining the exemption outweigh those in favour of disclosure in this particular case.
24. As the Commissioner considers that the exemption in section 43(2) of FOIA is engaged in relation to the entirety of the withheld information, he has not gone on to consider whether section 41 of FOIA also applies.

## **Right of appeal**

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25. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

26. 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.
27. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**SK9 5AF**

