

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2015

Public Authority: NHS Commissioning Board (NHS England)
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested full details of the Lead Provider Framework submission from Yorkshire & Humber Commissioning Support. The complainant said that this should include a copy of the submission and the documents relating to the appraisal of the bid including the scoring sheets that were completed. NHS England refused to provide the requested information under section 43(2) FOIA.
2. The Commissioner's decision is that NHS England incorrectly applied section 43(2) FOIA to the contents of the withheld submission but correctly applied section 43(2) FOIA to the scoring document.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld submission.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 February 2015 the complainant requested information of the following description:

"Can I please request full details of the Lead Provider Framework submission from Yorkshire & Humber Commissioning Support? I'd like to be provided with a copy of the submission and the documents relating to the appraisal of the bid including the scoring sheets that were completed."

6. On 4 March 2015 NHS England responded. It refused to provide the complainant with the information he requested under section 43(2) FOIA.
7. The complainant requested an internal review on 6 March 2015. NHS England sent the outcome of its internal review on 4 June 2015. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 June 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether NHS England was correct to apply section 43(2) FOIA to the withheld information.

Background

10. The withheld information is the Lead Provider Framework submission of Yorkshire and Humber Commissioning Support and the scoring of this submission. The submission was unsuccessful and it is likely that this body will be disbanded.
11. The Legal Provider Framework is a procurement framework agreement which has been developed in response to clinical commissioners calling for a simple and cost effective process to buying excellent and affordable support services that enables them to secure better value for money and better quality and outcomes for patients. In addition, it is open to other customers, both within and outside the NHS, who may wish to procure some or all of their health and social care support services from a variety of accredited providers.

Reasons for decision

Section 43 – commercial interests

12. Section 43(2) of the 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.
13. 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."*¹
14. Upon viewing the withheld information the Commissioner considers that it relates to an accrediting process to enable private and public bodies to be able to procure their services both within and outside the NHS. This does therefore fall within the scope of the exemption.
15. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice that disclosure would cause and the relevant party or parties that would be affected.

Whose commercial interests and the likelihood of prejudice

16. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
17. NHS England has stated that disclosure of the information would be likely to prejudice its own commercial interests and the commercial

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

interests of all clinical support units (CSUs), all clinical commissioning groups (CCGs) and particularly Yorkshire and Humber Commissioning Support.

The nature of the prejudice

Prejudice to Yorkshire and Humber Commissioning Support's commercial interests

18. NHS England has explained that both public and private bodies were able to present submissions to the Lead Provider Framework up until 26 October 2015. The current provider (Yorkshire and Humber Commissioning Support) was unsuccessful in its bid in securing a place on the Lead Provider Framework. The Yorkshire and Humber Commissioning Support will cease its contractual obligations to its current customers (20+ CCGs and over 50 other customers, including Foundation Trusts and other clinical providers) by March 2016. The 20+ CCGs are estimated to award a contract for their services by early December 2015.
19. Whilst a contract is estimated to be awarded by early December 2015, should a provider not be awarded; the support a CCG requires to function would fall to NHS England to provide, as per its obligations under the NHS Act 2006. It is likely that NHS England would then need to sustain/resurrect the failed Yorkshire and Humber Commissioning Support in some form to continue to provide strategically important and patient focusing services for CCGs to ensure service continuity. If this is the case, then this entity may then need to compete for contracts from other organisations and its commercial interests would have been jeopardised if its previous bid for the Legal Provider Framework was released.
20. The Commissioner does not consider that the Trust has provided sufficient evidence to demonstrate that disclosure would be likely to lead to the claimed prejudice occurring. Whilst the Commissioner accepts that there is a small chance that alternative contracts may not be awarded in December 2015 and the responsibility would fall back to NHS England to resurrect the current arrangements, as Yorkshire and Humber Commissioning Support's submission was unsuccessful and this entity did not receive accreditation, it is highly unlikely that an alternative contract will not be awarded.
21. The burden upon NHS England is to demonstrate that the prejudice claimed is 'real and significant'. In this case NHS England has not argued that the prejudice claimed is real and significant, they have only suggested that it would be likely to occur if the planned process to award contracts from the Lead Provider Framework fails. They have not

argued that there is any strong likelihood of this occurring, but have just explained the consequences in the unlikely event that the planned process fails.

22. NHS England also argued that the unsuccessful bid put forward by Yorkshire and Humber Commissioning Support remains the information of this body (and NHS England by default as the hosting authority). It said that they may have been unsuccessful in the process for the Lead Provider Framework; however, they still have the option in the short term to put forward their bid to other customers (CCGs and other providers) for assessment to award a contract until they are formally closed down in April 2016. It said to disclose the withheld information at this stage would be detrimental to Yorkshire and Humber Commissioning Support. It said that it is only at the point of knowing that there is a successful outcome of the CCG re-procurement by early December 2015 that the information becomes less sensitive and applicable for release.
23. The Commissioner does not consider that he is able to speculate as to whether or not Yorkshire and Humber Commissioning Support would be likely to submit bids to provide services independent of the Lead Provider Framework up until the process is complete and contracts are awarded in December 2015. He does therefore accept that this is a possibility and if Yorkshire and Humber Commissioning Support did choose to submit bids to CCGs or other providers, independent of the Lead Provider Framework, he has to consider whether disclosure of the withheld information would be likely to prejudice their commercial interests. Upon viewing the withheld information, the Commissioner considers it is an unsuccessful bid and is therefore unlikely to be followed by any competitors unless they were able to identify the strengths and weaknesses of the submission. Therefore whilst the Commissioner does not consider that NHS England has sufficiently demonstrated that disclosure of the substance of the bid would be likely to prejudice the commercial interests of Yorkshire and Humber Commissioning Support, disclosure of the scoring, showing the strengths and weaknesses of the bid, would be likely to prejudice the commercial interests of Yorkshire and Humber Commissioning Support by putting its competitors at a commercial advantage.
24. The Commissioner does not therefore consider that section 43(2) FOIA was correctly engaged in relation to the substance of the bid. However he does consider that it was correctly engaged in relation to the scoring of the bid as this would demonstrate its strengths and weaknesses and is likely to be of use to competitors. Until the awarding of contracts is complete in December 2015 and Yorkshire and Humber Commissioning Support begin the process of closing down for April 2016, there is a causal link between disclosure of the scoring and the prejudice claimed.

Prejudice to the commercial interests of CSU's and CCGs generally

25. NHS England has argued that disclosure of the withheld information would be likely to prejudice the commercial interests of CSU's and CCG's generally. In the case of CSU's, it has argued that disclosing the unsuccessful bid still provides an idea of how CSU's are set up and operate and would provide a commercial advantage to private companies who may wish to compete to gain accreditation on the Lead Provider Framework.
26. The withheld information is an unsuccessful bid (without the scoring information) from Yorkshire and Humber Commissioning Support. It is unsuccessful and therefore would not enable another body to use it to gain accreditation, without scoring information identifying the parts which were stronger/weaker.
27. NHS England considers that as private sector bodies may not operate in the same way as public bodies it may provide private sector bodies an advantage over their public sector counterparts. The Commissioner considers that any perceived advantage is minimal as public sector bodies are already operating in this way and are potentially already in a stronger position to potential private sector competitors. Disclosure may put the process on more of a level footing but is unlikely to extend the commercial position of private sector bodies beyond that of the CSUs and therefore is unlikely to cause these bodies commercial prejudice.
28. In relation to the CCG's, NHS England considers that disclosure of the withheld unsuccessful submission would distort the accreditation process and therefore the quality of contracts for services ultimately entered into by the CCGs when procuring services from the Lead Provider Framework. As explained above, the Commissioner considers that disclosure is more likely have the effect of creating a more level playing field between public and private providers and may actually increase the number and quality of accredited bodies and therefore the choice and efficiency of contracts for services. Nevertheless the Commissioner does not accept that NHS England has provided a sufficient causal link between disclosure of the withheld information and the prejudice claimed to CCGs in general.
29. The Commissioner does not consider that section 43(2) FOIA was correctly engaged in relation to the commercial interests of the CSUs and CCGs generally.

Prejudice to NHS England's commercial interests

30. NHS England has argued that if there is no successful outcome to the re-procurement (i.e. no alternative provider to take over services), then

NHS England may need to resurrect the Yorkshire and Humber Commissioning Support in some shape or form to ensure service continuity for CCGs and important patient facing services. If this happens then the new entity that NHS England creates is likely to remain operationally similar to the previous and will be actively competing alongside other organisations in the market (albeit outside of the Lead Provider Framework) to win contracts from customer (CCGs, other clinical providers and non NHS organisations). Releasing details about Yorkshire and Humber Commissioning Support may jeopardise the commercial interests of this new entity (and hence NHS England as host) borne from the previous CSU.

31. As stated above, the Commissioner does not consider that the prejudice claimed is 'real or significant' as whilst there is potential for the re-procurement to fail following the Lead Provider Framework accreditation, this scenario is unlikely to occur. It is more the consequences of a remote possibility rather than something that is likely to occur.
32. However as the Commissioner does consider that section 43(2) FOIA was correctly engaged in relation to the withheld scoring (as disclosure would be likely to prejudice the commercial interests of Yorkshire and Humber Commissioning Support), he has gone on to consider the public interest test.

Public interest test

Public interest arguments in favour of disclosure

- the general public interest in transparency in matters relating to public spending and the decisions taken by public bodies;
- promoting accountability and transparency;
- sharing information which gives a greater level of understanding regarding the position of authorities within the public eye;
- promoting accountability and transparency in the spending of public money within healthcare settings. The public interest is likely to be served if the disclosure of information ensures greater competition and better value for public money.

Public interest arguments in favour of maintaining the exemption

- The information relates to an open and on-going process. There is a strong public interest in allowing for its unfettered and

proper conclusion, which would be compromised if this information was released;

- Releasing this information would be likely to damage relationships between NHS England, CSUs and CCGs. This in turn would negatively impact CSUs in their ability to secure themselves as a viable organisation in the current procurement process. NHS England consider disclosure could allow CSUs to be undercut by other organisations viewing the information. Such information which would not normally be in the public domain especially within a live process.
- NHS England also considered the importance of preserving a situation in which contractors such as CSUs can contract with public authorities (i.e. CCGs) without prejudice to their commercial interests.
- It was also its opinion that there is a public interest in ensuring that the commercial interests of CSUs are not damaged or undermined by disclosure of information which is not common knowledge and which could adversely impact on future business as demonstrated in this reply.
- It is essential to maintain thorough and effective processes to allow full assurance of the validity in the future of these organisations. In turn doing so this also ensures full consideration of all options and the best quality for the public purse and NHS services provided by CCGs.
- There is a strong public interest in ensuring procurement processes are followed fairly and for which services are commissioned that are ultimately for better care for patients and to ensure that funding is adequately proportioned in line with business requirements at a time of extreme pressure on NHS budgets overall.
- Although it is important that the public are informed about the outcome of the tenders (unsuccessful and successful) this must happen in a co-ordinated manner, and whilst ensuring the tendering processes themselves have the time and protection to achieve compliance in practice. There is a strong public interest in ensuring this protection is maintained.

Balance of the public interest arguments

33. The Commissioner considers that there is a very strong public interest in disclosure of information relating to the Lead Provider Framework to demonstrate that the accreditation process is fair and going to achieve value for money and efficient provision of services within the NHS.
34. The Commissioner is mindful that the public interest arguments in favour of maintaining the exemption, presented by NHS England, relate more to the impact upon CSUs and CCGs generally and the overall impact on the process. Not all arguments are directly relevant to the exemption claimed. The Commissioner has therefore considered the arguments presented in the context of Yorkshire and Humber Commissioning Support and the fact that whilst they were unsuccessful in receiving accreditation onto the Lead Provider Framework, it is still a viable business until contracts are awarded in December 2015 and the process commences to close this entity down by April 2016. Disclosure of the scoring of an unsuccessful bid would provide the strengths and weaknesses of Yorkshire and Humber Commissioning Support's operations and could therefore be used to gain a commercial advantage by its competitors, potentially by using the stronger elements of the bid. There is a strong public interest in not distorting commercial competition whilst the body concerned is an ongoing concern with potential to tender for services.
35. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case. Section 43(2) FOIA was therefore correctly engaged in relation to the scoring information.

Right of appeal

36. 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

37. 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.
38. 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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