

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2018

Public Authority: Central London Community Healthcare
NHS Trust

Address: 15 Marylebone Street
London NW1 5JD

Decision (including any steps ordered)

1. The complainant has requested information about a tender process associated with creating a dementia awareness video. Central London Community Healthcare NHS Trust ('the Trust') released some information having redacted some under section 40(2)(third person personal data).
2. The Commissioner's decision is as follows:
 - The Trust has communicated to the complainant the majority of the information it holds that falls within the scope of five of his requests that is not exempt information, and has complied with section 1 of the FOIA with regard to this information.
 - The Trust breached section 10(1) as it did not communicate all the relevant information it holds within the required timescale of 20 working days.
 - The Trust can rely on section 40(2) to withhold the majority of the information to which it has applied this exemption as it is the personal data of third persons. It incorrectly applied section 40(2) to some of the withheld information; namely cost figures in the 'Document 2' email exchange.

3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Release the cost figures withheld from the 'Document 2' email exchange in the emails dated 13 March 2017 19:10 and 14 March 2017 10:03:10.
4. The public authority must take this step 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 15 June 2017 the complainant wrote to the Trust and requested information in the following terms:

"Please may I have sight of all the information the Trust holds in relation to:

- [1] it's decision to tender this video project;*
- [2] how and why it approached certain companies to tender;*
- [3] how it assessed each tender;*
- [4] It's evaluation criteria of the tenders;*
- [5] how the decision was communicated;*
- [6] post-decision correspondence relating to my request for feedback.*

For sake of clarity, information may include internal and external emails, and any written notes, including text messages on work phones.

In this documentation, we would be expecting to see

- *A written set of criteria against which your Trust was marking the companies inviting to tender;*
 - *A written set of marks against those criteria;*
 - *Reference to our 'quote' that the Trust was assessing us against;*
 - *Any concluding remarks on where the three companies did well or could do better"*
6. The Trust responded on 23 June 2017. With respect to requests 1, 2 and 3 the Trust did not confirm whether or not it held relevant information but provided narrative answers to these requests. It indicated that it did not hold the information requested at request 4 and offered an apology regarding its communications with the complainant about the tender process in question with regards to requests 5 and 6.

7. On 25 August 2017 the Trust appeared to provide an internal review. It released some information (the two tender quotes it had received from the complainant). The Trust said other relevant information it holds (other tender quotes it had received) was exempt from release as it was commercially sensitive although it released the figure quoted by the company it had finally used. Finally the Trust said that four quotes had been received and corrected some financial information it had provided in its initial response to request 3. In its submission to the Commissioner, the Trust has confirmed that, in fact, it received three quotes: two from the complainant's company and one from the preferred company.
8. On 1 May 2018, during the Commissioner's investigation, the Trust released some information to the complainant: email exchanges with some information redacted under section 40(2) and the preferred bidder's tender quotation with some information redacted under section 43(2).

Scope of the case

9. The complainant contacted the Commissioner on 9 November 2017 to complain about the way his requests for information had been handled. He considers that the Trust holds more related information than it has released and that it cannot rely on the exemptions it has applied to information it has withheld.
10. As noted above, during her investigation - as a further response to request 4 - the Trust released to the complainant a redacted version of the preferred bidder's quotation, with some information redacted under section 43(2). In the Commissioner's view, the preferred bidder's quotation is not relevant to request 4 (for evaluation criteria) or, indeed, to any of the other five requests. Since this is not information that the complainant has requested she has removed this particular document and the Trust's application of section 43(2) to it from the scope of her investigation.
11. The Commissioner's investigation has focussed on whether, on the balance of probabilities, the Trust has released all information it holds that is relevant to the complainant's requests. She has also considered whether the Trust complied with its obligation under section 40(1) and is entitled to rely on section 40(2) with regard to information relevant to the requests that it has redacted. Finally, she has considered whether the Trust complied with its obligation under section 10(1).

Reasons for decision

Section 1 – general right of access to recorded information

12. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held (and is not subject to an exemption in Part II of the Act).
13. It is important to note that the FOIA concerns only relevant information that a public authority holds in recorded form at the time the authority receives a request for it. In this case, the Commissioner is not concerned whether the Trust *should* hold particular information; only on whether, on the balance of probabilities, it did or did not hold it.
14. With regards to the request 1 – for information on the Trust’s decision to tender for this particular video project – the Trust has now released an email dated 3 March 2017 between a member of its communications team and its dementia team and a further email exchange dated from 13 to 14 March 2017 in which the company that was finally the preferred company was included. Through these communications the decision to make a video and the criteria to be used is broadly discussed.
15. In both communications there is reference to the dementia project having been previously “discussed” and “discussed on the phone”. It therefore seems likely that the decision-making process was at least partially a verbal process, with no records of these verbal exchanges being held. The Commissioner is prepared to accept that the Trust has now released all the relevant information it holds that falls broadly within the scope of request 1.
16. Request 2 is for information on how and why the Trust approached certain companies to tender. The FOIA is concerned with any recorded information the Trust may hold that addresses this request. The Trust has told the Commissioner that a member of its communications team approached the complainant’s company. That staff member is currently not available and the Trust says it therefore cannot say with certainty why that company was approached. The Trust has confirmed that it had a pre-existing relationship with the preferred bidder and this was why it had approached that company.
17. The Trust has confirmed that it has searched email inboxes of current members of staff who had been part of the procurement process, those who had been party to potential feedback and those who had been involved in the complainant’s FOI request. It used the words ‘dementia video’, the complainant’s name and the name of this company as search

terms. The Trust has also confirmed that any relevant, held information would be held electronically and that, to its knowledge, no relevant information has been destroyed or deleted.

18. Having considered the request, the circumstances and the Trust's submissions, the Commissioner is prepared to accept, on the balance of probabilities, that the Trust does not hold information falling within the scope of request 2.
19. Request 3 is for any information the Trust holds on how it assessed each tender. In its submission to the Commissioner, the Trust has explained how it assessed the tenders on this occasion and indicated that it does not hold any recorded information that addresses the request. The Trust has explained that this procurement exercise had a value of above £1,000 but under £50,000. As such, under public authority procurement rules the only requirement was for the Trust to seek multiple quotations; it was not necessary for it to undertake a full tendering process. There was no formal evaluation methodology other than a consideration of the price and the ability to deliver a product of the required quality, in the required time. The Trust has confirmed that it was necessary for its Communications and Dementia teams to make a swift decision on the preferred bidder and that it did not use specific, formal, criteria or a marking scheme. Having considered the Trust's submission and the circumstances of this procurement exercise, the Commissioner is prepared to accept that the Trust does not hold information that would fall within the scope of this request, such as specific assessment criteria or a marking scheme.
20. Request 4 is for information on the Trust's tender evaluation criteria. The complainant considers that the Trust should hold recorded information on such criteria because otherwise it would look like the Trust made its decision on an entirely arbitrary basis.
21. How the Trust assessed the three bids it received is described above. The Trust has explained to the Commissioner that the two companies considered during the tender process were professional film companies. It says that the evaluation, such as it was, focussed on the need to have a finished video in a short timescale. The Trust had had previous experience with the preferred bidder which gave it added confidence that this company would be able to deliver the video within the necessary short timescale. The Trust has confirmed that there was no written process associated with this procurement and that no written feedback, marks or evaluations exist. The Commissioner is prepared to accept that this is the case and that the Trust holds no recorded information falling within the scope of request 4.

22. The Commissioner notes that request 5 is for information on *how the decision was communicated*. In submission the Trust explains how it communicated its decision to the complainant – by email – but does not refer to how it communicated its decision to the preferred bidder. In response to questioning by the Commissioner, the Trust confirmed that it does not hold information that addresses the specific request as it has been framed – which the Commissioner accepts. The Trust says that the individual who was leading on the tender project has left the Trust and that it is unable to confirm with that person how she communicated the decision to the preferred bidder, or to access her email account. The Trust has indicated that the preferred bidder was working on another project at that time and that a member of staff did have a meeting with that company to discuss that project. A view on the dementia film may have been communicated at that time.
23. Request 6 has been discussed below, under 'Other Matters'.
24. To summarise, the Commissioner is prepared to accept that the Trust has released the majority of the information it holds that is relevant to requests 1 to 5 – the two email exchanges. It has voluntarily released other information – the preferred bidder's quotation – which is not relevant to the requests that have been submitted. The Commissioner therefore finds that the Trust has complied section 1(1) with regards to these five requests.

Section 40(2) – third personal data

25. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and the conditions under either section 40(3) or 40(4) are also satisfied.
26. The Trust appears to have redacted from the email exchanges discussed in paragraphs 14 to 22: email addresses, telephone numbers and job titles of Trust staff (who do not appear to be senior members of staff) and at least one individual from the preferred company. It has also redacted cost figures under this exemption.
27. The Trust has not confirmed that this particular information has been redacted under section 40(2) and has not discussed this exemption in its submission. Because her role is to uphold people's information rights, it has been necessary for the Commissioner to proactively consider whether this information can be withheld under section 40(2). She has therefore considered whether the redacted information is the personal data of third persons.

Is the information the personal data of a third party/third parties?

28. The Data Protection Act (DPA), which was still in force when the Trust provided its response to the request, says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable. The Commissioner is satisfied that the majority of the information relates to those individuals and that they can be identified from it. This withheld information can therefore be categorised as personal data. She does not consider the cost figures to be personal data, however.

Is a condition under section 40(3) or 40(4) satisfied?

29. Under section 40(3)(a) disclosing the personal data would contravene (i) any of the data protection principles or (ii) section 10 of the DPA (right to prevent processing likely to cause damage or distress).
30. In assessing whether disclosure would be unfair and thus constitute a breach of the first data protection principle the Commissioner takes into account whether the information relates to an individual's public or private life, whether they have been asked if they are willing to consent to their personal data being released and what their reasonable expectations might be as to what will happen to their personal data.
31. Assessing fairness however, also involves balancing the individual's rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so. The Commissioner has therefore finally considered these interests.
32. The information in question relates to the public, or professional, life of the individuals concerned. The Commissioner assumes they have not been asked if they consent to their personal data being released. Release under the FOIA is effectively release to the wider world. The Commissioner's view is that the individuals concerned would have the reasonable expectation that their personal data – generated in the course of their day to day professional duties and roles – would not be put into the public domain.
33. From a discussion with the complainant, the Commissioner is aware that he is dissatisfied with how it appears tendering processes are sometimes run in the public sector. On 10 May 2018 she invited him to provide arguments to support his position that the individuals in this case should be identified; he did not do so. The withheld information may be of interest to the complainant but the Commissioner is not aware of any wider concerns about how the Trust's staff run its tendering processes which might strengthen any arguments in favour of releasing the names

of particular people. In the absence of these, the Commissioner is satisfied that the information does not have any wider public interest such that it outweighs legitimate interests of the data subjects; that is the Trust staff and individual(s) from the preferred company.

34. The Commissioner is therefore satisfied that the Trust is correct to withhold the information in question (apart from the cost figures) under section 40(2). It is the personal data of third persons and a condition under section 40(3) is satisfied because releasing it would breach the first data protection principle. Since a condition under section 40(3) has been met, it has not been necessary to consider the condition under section 40(4).

Section 10 – time for compliance

35. Section 10(1) says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
36. The complainant submitted his request on 15 June 2017 but the Trust did not communicate to him all the relevant information that it holds until 1 May 2018. This is a severe delay and the Commissioner reminds the Trust that, at the time it receives a request, it must consider more carefully the request it has received and whether it holds relevant information in recorded form that it can release.

Other matters

37. Section 40(1) of the FOIA says that information is exempt information if it is the personal data of the applicant. This is because release under the FOIA is effectively release to the wider world and it is unlikely that an applicant wants his or her personal data disclosed to the public. When a public authority receives a request for information under the FOIA that is the applicant's own personal data it should advise the applicant that it is refusing the request under section 40(1) of the FOIA and that it will go on to handle the request as a subject access request under the appropriate Data Protection legislation.
38. At internal review, the Trust released to the complainant copies of his own tenders under the FOIA (despite the fact that he had not requested these). The Trust appears, in effect, to have released his own personal data to him under the Act. Similarly, request 6 is a request for information on decisions the Trust made when it received the complainant's request for feedback on his tender bid. As such, it is a request for the complainant's own personal data.
39. With regard to request 6, the complainant is not satisfied with the Trust's redaction of third party personal data from this information. However, because this is a data protection matter the Commissioner cannot consider this request as part of her FOIA investigation and has advised the complainant accordingly.
40. On 1 May 2018 the Trust released to the complainant other relevant information it holds, namely email correspondence from June 2017. This correspondence concerns the complainant and is again his own personal data to which the Trust should have applied section 40(1) before going on to handle this material under the appropriate data protection legislation.
41. The Commissioner advises the Trust to use this experience to ensure it is familiar with the appropriate access regimes so that it deals with future requests accordingly.

Right of appeal

42. 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

43. 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.
44. 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

Andrew White
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