

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

### **Decision notice**

**Date:** 23 January 2018

**Public Authority:** University of Bedfordshire  
**Address:** University Square  
Luton  
Bedfordshire  
LU1 3JU

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

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1. The complainant has requested to know if the University of Bedfordshire ("the university") uses a private company to take photographs at graduation ceremonies. If it does, the complainant has asked the university to disclose when the current contract is due to expire and when the university is likely to re-tender. The university confirmed that it does use a private company for these services but refused to confirm when the current contract is due to expire and when the university is likely to re-tender, citing section 43 and 22 of the FOIA.
2. The Commissioner's decision is that sections 43 and 22 of the FOIA do not apply in this case.
3. The Commissioner requires the university to take the following steps to ensure compliance with the legislation.
  - The university should disclose the information requested in questions two and three of the complainant's request.
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**

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5. On 20 October 2017, the complainant wrote to the university and requested information in the following terms:  
  
"1. Does your university use a private company to take photographs at Graduation Ceremonies and or university events? We only require a yes or no response. We are not looking for the name of the company or any commercially sensitive information.  
  
2. If so, can you please advise when the current contract will expire?  
  
3. Can you please advise then you expect to re-tender the contract?"
6. The university responded on 24 October 2017. In response to question one, the university confirmed that it does use a private company to take photographs at graduation events. However, the university refused to provide the requested information for questions two and three, stating that it is exempt from disclosure under section 43 of the FOIA.
7. The complainant requested an internal review on 26 October 2017.
8. The university carried out an internal review and notified the complainant of its findings on 30 October 2017. It stated that it remains of the opinion that section 43 of the FOIA applies to questions two and three of the request.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 31 October 2017 to complain about the way his request for information had been handled. Specifically, the complainant disagrees with the application of section 43 of the FOIA, as he does not agree the requested information is commercially sensitive. He stated that he has made the same request to a number of other public authorities and a large number have responded providing all the requested information. He also provided evidence from the NHS London Procurement Partnership's website where the requested information for other contracts is routinely disclosed to the public.

## Reasons for decision

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10. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the university or a third party.
11. Section 43 of the FOIA is also subject to the public interest test. Therefore, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the university or a third party, the university must also consider the public interest arguments for and against disclosure and demonstrate that the public interest rests in favour of maintaining the exemption.
12. The university stated that it is a public institution required to comply with the Public Contracts Regulations 2015 and other legislation implementing the Government's Public Procurement Policy. It must ensure that its procurement process supports the general principles of procurement law which are equality in the treatment of the bidders, transparency, mutual recognition and proportionality. It considers disclosing the date as to when it is likely to re-tender the contract of its graduation photography is contrary to the principles of treating all parties equally. Providing the complainant with the withheld information provides him with an unfair disadvantage which amounts to unequal treatment of the other parties eager to bid for the contract. It therefore considers disclosure would be likely to prejudice its own commercial interests and those of other parties/potential bidders.
13. The university explained further that, in accordance with procurement legislation, tenders must be notified via a Prior Information Notice, thereby giving all parties equal chance of preparing a bid. Early notification of a potential tender will give the complainant an unfair advantage, prejudicing the university and other bidding parties. It could allow the complainant additional time to prepare in advance; time which other contractors would not have. It stated that the tendering process allows more than enough time for contractors to formulate and submit competitive tenders on which to be judged and that is the purpose of tendering within an agreed process.
14. The university advised that it considers disclosing the requested information to the world at large would be "outwith the Regulations" and would render the requisite procurement process redundant.
15. It stated that it understood the complainant is a firm of professional bid consultants and tender writers. It argued that it is well within its rights to engage section 43 of the FOIA and informed the Commissioner that it has considered the complainant's identity and reasons for requiring the

withheld information as material to the fact that he seeks to gain competitive advantage in the outsourcing of bids and tenders and is not a "purveyor of the goods or services of that contract with a genuine interest in their supply".

16. Firstly, the Commissioner wishes to point out that an information request should be considered as applicant blind. The relevant consideration when deciding whether information can be disclosed is whether it can be disclosed to the world at large, or in other words released into the public domain. The complainant's identity and reasons for requiring the information are not relevant factors.
17. In this case, as section 43 of the FOIA has been applied, the relevant consideration is whether the withheld information is commercially sensitive.
18. The Commissioner does not agree that disclosure would be likely to prejudice the commercial interests of the university or other contractors that may wish to bid for this work should it come up for re-tender. The date the current contract expires and when the university is likely to re-tender does not place one contractor at an advantage over another. As the complainant has pointed out, all it enables one to do is to schedule in to their work diary the likely time the contract will come up for re-tender. It will put them on notice to look out for the Prior Information Notice but nothing more. The individual would have no prior knowledge of what the tender will be or what it is likely to contain and so they cannot prepare their bid in advance of others. If the university was to disclose details of the likely tender in advance, this would be likely to place those in receipt of the information at an advantageous position but that is not the information under consideration here.
19. The Commissioner does not agree that disclosure would be likely to prejudice any up and coming tender process or prevent the university from carrying this exercise out in accordance with the relevant regulations it makes reference to and she does not agree that disclosure would result in any inequality in the treatment of likely bidders.
20. Disclosure of the requested information would not render the requisite procurement process redundant for any up and coming tender. Prior knowledge of what the tender is likely to be and what the university is willing to accept would render a future tender renewal for this work redundant. It would provide an unfair advantage to those in receipt of such information, a disadvantage to others, stifle true competition and potentially lead to a poorer deal for the university and in turn the public. But again, this is not the information being considered here. The requested information cannot place any one contractor at an advantage and simply informs at what time in the future this contract may come up

for renewal and open to all bidders. From this information a contractor cannot work out and write its response because it does not know what any future tender will be. It is only when the tender is announced and bids invited that a contractor can write and present its business case and this will be at the same time for all contractors.

21. It is worthy to note that the complainant has made a number of requests to other public authorities for this type of information and it has been provided. The NHS London Procurement Partnership actively publishes this type of information and it is the type of information the Commissioner would expect to be disclosed at the very least for public sector contracts.
22. For the above reasons, the Commissioner has decided that section 43 of the FOIA does not apply in this case.
23. The university has also made reference to section 22 of the FOIA. Although no detailed submissions have been made by the university, it is clear to the Commissioner that this exemption cannot apply.
24. Section 22 states that information is exempt from disclosure if –
  - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
  - (b) the information was already held with a view to such publication at the time when the request for information was made, and
  - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
25. For this exemption to apply the university must, at the time of the request, intended to publish the requested information. It must have had a settled expectation that the information will be published at some future date.
26. The Commissioner considers the university had no intention or settled expectation to publish this information at a future date at the time of the request. The university considered the requested information was exempt from disclosure at the time of the request and remains of that opinion now because it believes it is commercially sensitive and so had no intention or settled intention to publish the information at a date sometime in the future at the time of the request.
27. The brief submissions made about the application of section 22 of the FOIA also refer to "...if the university intends to re-tender the contract..."

The university's use of the word "if" also demonstrates that there was not a definite intention at the time of the request to publish the requested information. There appears to be no definite intention to even re-tender and it is a possibility that this may not happen.

28. Additionally, in order for this exemption to apply, the information intended for future publication must be the *specific* information the applicant has requested. What will be published in this case is the new tender process should this indeed take place, not, at the time of the request, *when* the university expected the current contract to expire and *when* any re-tender may take place. If a Prior Information Notice is ultimately presented by the university and the details of the new contract going forward on which tenders are invited, this will not equate to the disclosure of the *specific* information the complainant has requested here.

## Right of appeal

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29. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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** .....

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**