

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2020

Public Authority: NHS Supply Chain Coordination Limited
Address: Skipton House
80 London Road
London
SE1 6LH

Decision (including any steps ordered)

1. The complainant has requested information from NHS Supply Chain Coordination Ltd ("SCCL") about the volume, units, quantity and revenue of certain product lines it sold in 2017 and 2018. SCCL initially withheld all the information under section 43(2) but subsequently disclosed information regarding the first three items. It continued to cite section 43(2) for the revenue information.
2. The Commissioner's decision is that SCCL has correctly withheld the requested information under section 43(2) but that in providing information late, SCCL breached section 10(1) of the FOIA.
3. The Commissioner does not require the public authority to take any further steps.

Background

4. SCCL has provided a summary of its role to the Commissioner. Established on 1 April 2018, SCCL is a limited company wholly owned

by the Secretary of State for Health and Social Care to operate as the management function of the new NHS Supply Chain.

5. SCCL manages the sourcing, delivery and supply of healthcare products, services and food for its "customers" - NHS Trusts and healthcare organisations across England and Wales. It is responsible for driving commercial objectives and managing the 11 specialist buying functions (known as "Category Towers").

Request and response

6. On 12 April 2019 the complainant made the following request for information under the FOIA:

"Can I please request some information on current product lines sold by NHS Supply Chain under the freedom of information act I would like to know the below information of the products in the attached excel sold by NHS Supply Chain in the years 2017-2018.

- *Volume by each*
- *Units*
- *Quantity*
- *Revenue"*

7. On 18 April 2019 the complainant wrote again with an attached spreadsheet asking SCCL to populate the spreadsheet for its response.
8. SCCL responded on 13 May 2019 and refused to provide the requested information, citing the following – section 43(2).
9. The complainant requested an internal review on 10 June 2019 and SCCL provided a preliminary review response on 5 July 2019 in which it revised its position, stating that section 43(2) did not apply to the first three parts of the request – volume by each, units and quantity. That information was then disclosed to the complainant. However, SCCL maintained its position regarding "revenue" but explained that it was writing to all its suppliers to ascertain their opinion on whether they considered that disclosing this information was commercially prejudicial.
10. SCCL wrote to its suppliers on 11 July 2020 seeking their opinion and responded further to the complainant on 22 July 2019.
11. On 6 September 2019, SCCL confirmed that it had decided to refuse to disclose the revenue information, based on its own view and the views

of the majority of the suppliers who responded.

Scope of the case

12. The complainant contacted the Commissioner on 30 October 2019 to complain about the way his request for information had been handled. He argued that SCCL had not provided explanation or analysis as to why the release of this information would be commercially prejudicial or provided public interest reasons for withholding it.
13. The Commissioner considers that the scope of this case is whether SCCL was entitled to withhold this information as commercially prejudicial under section 43(2). She will also consider any procedural breaches that may have occurred.

Reasons for decision

Section 43(2) – commercial interests

14. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
15. The Commissioner has defined the meaning of the term “commercial interests” in her guidance on the application of section 43 as follows:

“...a commercial interest relates to a person’s ability to participate competitively in a commercial activity”¹

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

16. This exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, she then needs to assess whether it is in the public interest to release the information.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

17. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.
 - Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice.
18. SCCL has provided the Commissioner with the withheld information which, following the internal review, consists of the figures for the fourth part of the request - revenue.
19. The public authority explains that prior to April 2019, the supply chain arrangements were funded by a margin being applied to the price paid to suppliers for products. That percentage margin varied across products but was consistent for similar products. From 1 April 2019, SCCL launched a new pricing policy, 'buy price = sell price'. This means that SCCL offers prices for certain aspects of its offering with no margin on the part of SCCL included.
20. SCCL stresses that access to the prices charged to its customers (called the "Price File") is restricted only to its customers and SCCL itself. It further explains that suppliers will be aware of the pricing of their own products but they do not have access to the Price File and are not informed of other suppliers' pricing under the same category of product.
21. SCCL states that information confirming both total products sold and revenue from those sales would allow supplier tendered pricing to be derived on a very simple mathematical calculation to reveal the pricing agreed between SCCL and identifiable individual suppliers. The Commissioner agrees that the withheld information clearly relates to a commercial activity.
22. The public authority next needs to make the case for a causal relationship or a clear link between the disclosure of this information and a prejudice to its commercial interests.

23. Apart from the commercial prejudice to SCCL, there would also be commercial prejudice to its suppliers. Their responses were provided to the Commissioner. When consulted for their views about the information request, 86% of its suppliers responded by saying that they did not wish the revenue information to be disclosed with the majority saying that they considered it to be commercially sensitive information. 14% of the suppliers responded by saying that they did not object to disclosing the information.
24. Based on these responses, SCCL confirmed that releasing revenue information relating to the suppliers' pricing of their types of continence care products would be commercially prejudicial and compromise both the relevant company and SCCL's commercial and bargaining position with any actual or prospective contracting parties in any forthcoming procurement exercise. It would also adversely impact on SCCL's ability to manage its relationship with external suppliers and its ability to achieve best value solutions with its suppliers who may be constrained in offering solutions if they were at risk from disclosure. This would result in real and significant prejudice to SCCL and its suppliers.
25. SCCL argue that disclosure of the volume of sales together with the total revenue from those sales provides the information needed for a simple calculation to reveal the price charged for those goods. A supplier who knows what price they supply their product to SCCL would also be able to calculate the margin SCCL applied and, by applying that to similar products, will be able to deduce with some certainty the price at which other suppliers had sold their product to SCCL.
26. SCCL further explained that because it provided a single point of supply it was able to establish economies of scale for its customers and provide suppliers with ease of access to a significant proportion of NHS and other healthcare customers. SCCL contends that this leads suppliers to significantly discount their list prices in order to secure a place on what it describes as an SCCL Category Tower.
27. Many of the products on the list and particularly those that are the subject of the request are in competitive markets including products where differences in quality may be less important to customers than price. Suppliers compete on price and pricing strategies within SCCL and, given the volume of sales they can expect, they may not wish potential customers outside SCCL to know the prices enjoyed by SCCL customers.
28. If the pricing information is shared with a wider audience beyond its customers it would be likely to harm the suppliers' commercial interests. It would impede their position in any future tendering or offerings to any other party they may wish to contract with in that the

price agreed with SCCL is based on economies of scale and other advantages to suppliers that would be likely to be considered as the starting point for negotiations. Suppliers would consequently be placed at a commercial disadvantage. SCCL would also be at a commercial disadvantage in future tendering exercises in that any innovative pricing structure would be revealed to competitors, eroding the individual supplier's commercial advantage.

29. SCCL further argues that if the pricing information is shared with a wider audience beyond its customers, it would be likely to result in non-SCCL customers of existing suppliers placing considerable price pressure on SCCL's suppliers. This would be likely to lead to significant and unwelcome commercial and legal consequences that are financially damaging across supplier relationships.
30. SCCL believes that disclosing the withheld information would be likely to undermine its ability to secure best value for money through future, or ongoing procurement exercises. The framework agreement for the products named in the request ends in July 2021 and work is already underway to develop the procurement process that will lead to the framework that will operate from August 2021. SCCL does not disclose pricing agreed through tenders to other suppliers (or third parties) to ensure that tenders are competitive and to assure best value for its customers and consequently the public purse. Competition exists principally on price for many of the tendered products. If bidders' pricing and pricing strategies were disclosed it would be likely to lead to what SCCL describes as a coalescing or price around a single point that would erode pricing competition which would be likely to harm SCCL and its customers as it would remove the savings made from the suppliers' list price.
31. SCCL argues that disclosure would be likely to act as a disincentive for suppliers to continue to innovate by developing pricing models specifically for SCCL to the benefit of its customers with a view to economies of scale that offers (compared to sales outside) a longer term procurement framework.
32. Finally, SCCL's customers would also be likely to be prejudiced commercially in that the price savings which SCCL is able to offer would be unlikely to be available as there is what it describes as a real risk that suppliers will choose not to participate in the framework.
33. The complainant's arguments were formed as a result of SCCL's response and review to his request. The Commissioner has subsequently been provided with more detailed arguments. The complainant questions SCCL's contention that disclosure would adversely impact on its ability to manage its relationship with external

suppliers. He believes that SCCL has failed to explain how such an adverse impact would occur, nor what such adverse impact would mean in practical terms for SCCL's ability to *"manage its relationship with external suppliers"*. The complainant states that their explanation is entirely unsupported by evidence and coherent statements.

34. He suggests that the statement that disclosure would adversely impact on SCCL's ability to achieve best value solutions with its suppliers who may be constrained in offering those solutions should they be at risk of disclosure under the FOIA, does not make sense and is also entirely unsupported by evidence and coherent explanation.
35. The complainant's view is that it is already possible to derive product price information from the disclosure of both the total products sold by SCCL and the revenue from those sales. The price at which SCCL sells individual products to its registered users is already available to those users through its online catalogue. The complainant argues that SCCL has operated a "buy price = sell price" model since April 2019. Meaning that the price at which SCCL sells products is, or should be, the price that it paid for these products.
36. His view is that there is no prejudice to suppliers by virtue of the fact that the pricing information of products is available within the community of SCCL users. The complainant suggests that these are the only parties who could feasibly use the pricing information to the detriment of other persons. If such prejudice does not arise when it is already available to commercial competitors, he cannot see how prejudice would arise by disclosing it to the public.
37. Although the Commissioner remains unconvinced by SCCL's argument that suppliers might not take part in such a major market as a result of disclosure, the Commissioner agrees that the actual harm relates to SCCL and the third party suppliers' commercial interests. She accepts that the prejudice is real and of substance to both SCCL, its suppliers and, ultimately, its customers.
38. Finally, the Commissioner needs to establish whether the level of likelihood of prejudice that is being relied on by the SCCL is met.
39. The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than a 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
40. To meet the threshold of "would be likely to prejudice" is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and

significant risk of prejudice, even though the probability of prejudice occurring is less than 50 per cent.

41. SCCL has not clearly stated what threshold of prejudice it is relying on. There are times when it uses "would" but these are exceeded by its use of "would be likely to". The Commissioner assumes therefore that SCCL is claiming the lower threshold in terms of the prejudice to its commercial interests. She agrees that disclosing this information would be likely to result in commercial prejudice to itself and its suppliers and that there is a real and significant risk. The Commissioner therefore finds that the exemption at section 43(2) is engaged.

Public interest test

42. The Commissioner accepts that the exemption is engaged but section 43(2) is a qualified exemption. She also needs to consider whether it is in the public interest to withhold the requested information. It may be in the public interest to disclose the requested information, even if it does prejudice SCCL and its suppliers' commercial interests.

Public interest arguments in favour of disclosure

43. SCCL acknowledges that there is a general public interest in openness and transparency in both SCCL's operations and indirectly, the workings of its customers in the public sector. SCCL also recognises that there is a general public interest in the prices paid for goods being known as that can support competition.
44. The complainant has concluded that the public interest in disclosing the information outweighs the public interest in maintaining the exemption. He states that the price at which SCCL sells products is, or should be, the price that it paid for those products as it operates a buy price = sell price. If this is not the case, then SCCL has not implemented or is not operating the policy that it reportedly implemented in April 2019. It would clearly be in the public interest for that fact to become publicly known so that the reasons can be understood as to why it is not following this course. The complainant contends that it is in the public interest to have accountability and transparency and disclose the revenue information as it relates directly to the spending of public money. If this information gives rise to legitimate challenge, this is also in the public interest.

Public interest arguments in favour of maintaining the exemption

45. SCCL's view is that there are strong public interest factors which support the exemption it has cited. Disclosing the requested information would reduce its ability to negotiate or compete in a

commercial environment. Healthcare providers are not subject to the FOIA. A one-sided disclosure of prices would be likely to harm SCCL's ability to maintain an effective procurement framework for the benefit of its customers who serve the general public. As NHS services are free at the point of delivery and generally funded by the taxpayer there is a significant public interest in maintaining the exemption.

46. Additionally, there is a public interest in protecting the commercial interests of individual companies and ensuring they are able to compete fairly and supply public authorities without being commercially disadvantaged as a consequence.
47. SCCL argues that, in a competitive market where price is a significant factor, it is not in the public interest to lessen a competitive advantage held by the public authority or its suppliers.
48. In the circumstances, SCCL concluded that the public interest was not in favour of the disclosure of the withheld information at the time of the request and is not now.

Balance of the public interest arguments

49. The Commissioner does not consider the argument that suppliers will be deterred from engaging with SCCL as persuasive because of the huge customer base that would then be unavailable to them. However, in the absence of any compelling public interest arguments for disclosure being put forward, the Commissioner's view is that it is in the public interest for SCCL to be able to negotiate effectively with its suppliers and consequently save money for its customers and, by extension, the public purse.
50. The Commissioner finds that the disclosure of the requested information would be commercially prejudicial to SCCL and its suppliers and that it was correct to withhold the information by virtue of section 43(2).

Section 10 – time for compliance

51. Section 1(1) states that any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request; and
 - (b) if that is the case, to have that information communicated to him.

52. Section 10 of the FOIA states that a public authority must comply with its obligations under section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
53. SCCL withheld information that it later disclosed at review, having decided that the exemption it had previously cited did not apply. Therefore some of the information was not, in fact, subject to the exemption and was disclosed beyond the statutory timeframe.

Right of appeal

54. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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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