

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 5 August 2022

Public Authority: General Dental Council
Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant has requested information on a tendering exercise conducted by the General Dental Council in 2014 for in-guise investigations. The GDC provided some information, stated some information was not held, cited section 12 in relation to parts of the request that would require further examination to determine if information was held, and withheld the names of bidders under section 43(2) of the FOIA.
2. The Commissioner's decision is that the GDC has correctly cited section 12(1) of the FOIA in relation to parts 3, 4 and 5 of the request. In relation to section 43(2) of the FOIA the Commissioner finds the exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in the weighting model that has been withheld under section 43(2) i.e. the names of the bidders.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 29 June 2021 the complainant wrote to the General Dental Council ("GDC") and requested information in the following terms:

"Please supply the following information pertaining to your tendering process for investigation services that you published with a closing date for tender submissions of 29th August 2014.

1 – who within GDC procurement was responsible for this tendering process?

2- a list of all investigation companies/service providers/individuals, who submitted tenders. (An electronic submission was a part of the specified process).

3 – all written details of the shortlisting of these tenders, specifically, who shortlisted and who signed off the short list?

4 – all written details of the final decision to award the contract, specifically, to who? By who? What were the reasons for the decision?

5 – all written details of any GDC senior team/Chair involvement in any aspect of this tendering process, including but not limited to, directing the process to start, prior instructions/advice regarding the work up to committing formally to tendering for external investigation services.

6 – whether the aforementioned tendering documentation (found simply on-line), was looked at as part of my other FOIs to the GDC regarding under-guise investigations/operations. If it wasn't why? If it was, why was it not mentioned?"

6. The GDC responded on 27 July 2021 stating as the tendering exercise was in 2014 some information was no longer held due to the GDCs retention schedules. The GDC responded to each part as follows:

- For part 1 of the request the GDC withheld the name of the individual under section 40(2) of the FOIA;
- For part 2 the GDC provided the list of companies;
- For part 3 the GDC stated information on how tenders were shortlisted was not held and the overall weighting model was withheld under section 43(2);
- For parts 4 and 5 the GDC stated the information was not held; and

- For part 6 the GDC provided explanations.
7. Following an internal review the GDC wrote to the complainant on 7 September 2021. It provided additional details of searches carried out for information but did acknowledge there were some archived files in boxes that might contain information but it would exceed the cost limit under section 12 of the FOIA to search these. The GDC also concluded that a redacted version of the weighting model could be provided but with some information still redacted under section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 7 September 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine whether the GDC has correctly withheld information from the weighting model under section 43(2) of the FOIA and whether it would exceed the cost limit under section 12 to identify if any further information is held.

Reasons for decision

Section 12 – cost of compliance

10. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
11. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
12. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the GDC is £450.

13. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the GDC.
14. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
15. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
16. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
17. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

18. As is the practice in a case in which the public authority has informed the complainant that it may hold information, the Commissioner asked the GDC to provide a detailed estimate of the time/cost taken to determine if information falling within the scope of this request was held.

19. By way of background the request relates to under-guise investigators and followed the publication of articles¹ relating to the outcome of an under-guise investigation in 2016 which was determined by a practice committee to not be proportionate or justified in the circumstances. This request relates to the GDCs tendering process for investigation services.
20. The outstanding parts of the request where the GDC has stated that no information was held are parts 3, 4 and 5. These requests asked for written details of the shortlisting of tenders (including details of who shortlisted, written details of the final decision to award the contract and written details of any GDC senior team involvement in any aspect of the tendering process.
21. The GDC has explained that its use of under-guise investigation services accounted for 0.2% of cases on average each year. The GDC has stated that the use of these services was an operational decision so it would not have been considered by the Executive Team or Council and it was therefore highly unlikely much information within the scope of the request would be held.
22. The GDC has explained that its retention schedule² only requires it to keep unsuccessful application information for two years and other tendering documents would have been likely deleted at the same time. However, before searching electronic systems the GDC contacted its Fitness to Practise Executive Directors to ask whether they held any information relevant to the request. They advised none of the senior members of staff who may have been involved in the exercise were still at the GDC.
23. Following this the GDC next searched Council records for any information relating to the tender. The Head of Governance advises that tendering exercises do not fall within the Council's remit so no information was returned. A further system search of senior management team meetings with keywords 'investigation services', 'investigation services tender', 'in guise', 'procurement' and 'illegal' returned no information within the scope of the request. Procurement records were also searched with no relevant information located.
24. Turning next to paper records; the GDC considers it unlikely it would have printed and stored the documents not least due to the cost but also as there was no necessity to keep information relating to the tender and what would have been kept would have been held electronically.
25. The GDC consulted with its Records Manager about the likelihood of there being any boxes in paper storage assigned to tender documents –

¹ [Undercover investigation and fitness to practise \(gdc-uk.org\)](http://gdc-uk.org)

² [AG GDC Retention Schedules for Website CL.xlsx \(gdc-uk.org\)](http://gdc-uk.org)

blanket searches of 'tender(s), private, investigator(s)' returned no further information.

26. In the Commissioner's view these searches were thorough and proportionate and would have located any relevant information if it were held. However, the GDC on receipt of the internal review request considered if there were any further steps it could take to determine if information might be held, resulting in its assertion that section 12 would be engaged by any further searches.
27. The GDC asked Finance and Government teams to look for any paper boxes that might contain relevant information. This returned 116 undated boxes and searching them would have, as the GDC describes it, required a 'lift the lid' exercise. Essentially, a manual search of the documents contained within to determine if relevant information was held.
28. The GDC estimated this would take 20 minutes per box based on previous searches it had conducted. These previous searches had been on boxes that were labelled and included relevant information. 116 boxes requiring 20 minutes per box searched would amount to approximately 38 hours, above the cost estimate.
29. The GDC further explained the boxes stored by its Governance team can include up to a thousand documents. The GDC accepts some documents could be quickly scanned over however the request asked for 'all written details' necessitating a more detailed review of some of the documents, for example minutes of meetings if found. At an estimate of 10 seconds per document and an average of a thousand documents per box (116 boxes x 1000 documents = 116000 documents) could take 322 hours to search to determine if relevant information is held.
30. The Commissioner would consider this to be a somewhat inflated estimate, a fact which the GDC itself has also acknowledged. The GDC is aware some of the boxes will contain less documents, some will include folders which can be discounted more quickly if they are labelled. Some folders, such as those including minutes of meetings would need to be reviewed more thoroughly. Even if the GDC considered it could review all of the information in a box in 30 minutes to determine if relevant information is held, this would still take over 58 hours of staff time, far exceeding the cost limit.
31. The Commissioner considers that the GDCs estimate that it would take more than 18 hours to conduct further searches for relevant information was reasonable. 116 boxes is quite significant and as they are undated and contain some unlabelled folders there does not seem to be a simple means of reducing the search time by only looking at a few boxes. The

Commissioner considers an estimate of 30 minutes per box to be entirely reasonable given the vast differences in the amount of information in each box.

32. The Commissioner therefore considers the GDC was correct to apply section 12(1) of the FOIA to parts 3, 4 and 5 of the complainant's request.

Section 16(1) – The duty to provide advice and assistance

33. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request if it is reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice³ in providing advice and assistance, it will have complied with section 16(1).
34. The Commissioner notes that the GDC has addressed section 16 in its submissions to him. The GDC is aware of its obligation to provide meaningful advice and assistance where it can and did consider this. However the request was for 'all written details' so was deliberately broad and a time period was already specified and could not realistically be refined. The GDC therefore considered that any refinement of the request would still require it search the manual paper files and there was no obvious way of avoiding this by the complainant submitting a refined request as electronic searches had been exhausted and only paper records still remained unsearched.
35. The Commissioner is satisfied that there was no meaningful advice or assistance that could be provided to the complainant and has met its obligations under section 16 of the FOIA.

Section 43 – commercial interests

36. Section 43(2) of the FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it.)"

37. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was

³ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

disclosed has to relate to the applicable interests within the relevant exemption;

- 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. Furthermore, the resultant prejudice which is alleged should be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, ie disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
38. The GDC disclosed the tendering model but applied section 43(2) for the unsuccessful bidders names on the tendering assessment. The GDC has explained this was to protect the GDCs commercial interests, not those of the bidders.
39. The GDC acknowledges the procurement was completed in 2014 but still argues that companies would be reluctant to engage with the GDC in the tendering process if they did not believe the GDC could protect commercially sensitive information. The GDC is of the view that regardless of the passage of time, releasing this information would bring reputational damage and pose the risk of fewer companies submitting tenders and the GDC having fewer options to receive value for money in its procurement process.
40. The Commissioner has considered the argument presented by the GDC. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the GDC does relate to commercial interest which section 43(2) is designed to protect, that is the procurement of goods or services.
41. With regard to the second criterion, the Commissioner is wary of accepting arguments such as the ones presented by the GDC. The information already disclosed does provide details of the categories that were scored and the scoring given to each bidder for each category. Putting names on the scoring model is not likely to be well received by the bidders. However the Commissioner does not consider that

businesses would be dissuaded from bidding for contracts in the future where there is a commercial value.

42. Furthermore the passage of time is a relevant factor in this case that cannot be discounted. Even the lowest scoring bidder may have gained invaluable experience and been awarded contracts since 2014 that would change their position in the event of another tendering opportunity arising at the GDC. The Commissioner is not convinced that disclosing the names of the unsuccessful bidders from seven years ago would lead to such a decline in numbers and quality of bidders in future tendering exercises that the GDC would not be able to obtain good value and high quality services.
43. The Commissioner does not consider the GDC has demonstrated the second criterion has been met and that there is a causal link between the potential prejudice and the information in question. As such the Commissioner finds that the prejudice test has not been met and the section 43(2) exemption is not engaged in relation to the names of the bidders.

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. 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

Jill Hulley
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