Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2015

Public Authority: South Western Ambulance Service NHS Foundation Trust

Address: Abbey Court
Eagle Way
Exeter
EX2 7HY

Decision (including any steps ordered)

1. The complainant has requested aggregate pricing information relating to South Western Ambulance Service NHS Foundation Trust's (the Trust) procurement of vehicle spare parts to support its Mercedes ambulances. The Trust refused to disclose the requested information under section 43(2) FOIA.

2. The Commissioner's decision is that the Trust has incorrectly applied section 43(2) FOIA to the withheld information in this case.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Disclose each bidders total for the parts listed, not the individual item pricing.

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. In January 2015 the complainant requested information of the following description:

1. Who does SWAST intend to award the contract to?

2. What was the winning bids price as a percentage of our bid?

6. On 6 February 2015 the Trust responded. It provided the information requested at part 1 of the request, it said the information requested at part 2 of the request was exempt under section 43 FOIA.

7. On 6 February 2015 the complainant clarified that he required aggregate scores and not individual prices.

8. On 11 February 2015 the Trust wrote to the complainant to explain that [named company] were not scored so it was unable to provide an aggregate score as they were disqualified on the pass/fail criteria as they could not adhere to the specification of the requirement.

9. On 11 February 2015 the complainant again wrote to the Trust to clarify that all that was required was each bidders total for the parts list requested. The complainant explained that "We are aware of our own pricing of course. We do NOT require, nor are we asking for bidders' individual line pricing provided SWAST can confirm the sheet total and that each bidder priced ALL lines as per the ITT instructions."

10. On 17 February 2015 the Trust responded. It said that other bidders pricing and aggregated scoring including the sheet total was considered to be 'Commercial in Confidence' and was therefore being withheld under section 43 FOIA.

11. The complainant requested an internal review. The Trust sent the outcome of its internal review on 26 March 2015. It upheld its original position.

Scope of the case

12. The complainant contacted the Commissioner on 15 April 2015 to complain about the way his request for information had been handled.

13. The Commissioner has considered whether the Trust correctly applied section 43 FOIA to the withheld information.

Reasons for decision

14. 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.

15. 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]

16. Upon viewing the withheld information the Commissioner considers that it is information submitted in a bid to win a contract to provide services and does therefore fall within the scope of the exemption.

17. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.

Whose commercial interests and the likelihood of prejudice

18. 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.

19. The Trust has stated that disclosure of the information would be likely to prejudice the commercial interests of the applicants who submitted the bids.

The nature of the prejudice

20. The Trust explained that disclosure of the withheld information would allow the complainant to calculate the pricing strategy of the successful contractors giving the complainant an unfair advantage in any future contracts tendered for by both parties.

21. The Trust provided arguments as to why disclosure of the price of specific items would be likely to cause the prejudice claimed. In addition due to the nature of the business it is highly likely that the contractors involved in this bid would be competing for the same contracts in the future.

22. The Trust said that its Procurement Team did approach the successful bidders to ask them if it could release their pricing strategy to the complainant and they requested that the information was withheld as commercial in confidence.

23. After considering the arguments presented by the Trust, the Commissioner does not consider that it has demonstrated that disclosure of the total price for all parts listed for all bidders (including the successful bidder) would be likely to enable the complainant to calculate the pricing strategy. It has not provided any causal link between disclosure of the overall price and the prejudice claimed.

24. The Commissioner noted that the Trust provided some further arguments as to why disclosure of the price of specific items would be likely to cause the prejudice claimed, however as the complainant only requires the overall total, and not specific item prices, these arguments are not relevant.

25. Finally the Commissioner acknowledges the Trust's argument that the contractors involved in this bid would be competing for the same contracts in the future. However it has not provided any further explanation of any other ongoing or upcoming similar bids. Furthermore even if there was evidence of such similar bids, the Commissioner has not been provided with evidence of how disclosure of the overall total pricing would enable a competitor to work out any detailed pricing strategy.

26. As explained at paragraph 18 above, the Trust was required to demonstrate that the prejudice claimed is real and significant. For the reasons set out at paragraphs 23-25 above the Commissioner does not consider that the Trust has explained how disclosure of the overall price of the other bidders could be used by competitors to work out detailed pricing strategy. It has not therefore met the requirement to establish that the prejudice claimed is real and significant. Section 43 FOIA was not therefore correctly engaged in this case.

Right of appeal

27. 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

28. 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.

29. 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 .....

Pamela Clements
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