

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2016

Public Authority: Cambridge University Hospitals NHS Foundation Trust

Address: Hills Road
Cambridge
CB2 0QQ

Decision (including any steps ordered)

1. The complainant has requested the contract for the appointment of a strategic business partner for pathology services, together with information on the selection process and any revisions made to the contract. The Cambridge University Hospitals NHS Foundation Trust (the Trust) provided information regarding the selection process but withheld the contract and any revisions to it, under the exemptions provided by section 43(1) – trade secrets, and 43(2) – prejudice to commercial interests.
2. The Commissioner's decision is that the Trust has failed to demonstrate that any of the withheld information constitutes a trade secret and therefore the Commissioner finds section 43(1) does not apply. Although some of the withheld information attracts the exemption provided by section 43(2), a very significant proportion of it does not.
3. However, a limited amount of the remaining information is third party personal data which can be withheld under section 40(2).
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in the confidential annex.
5. 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

6. On 2 June 2015 the complainant wrote to the Trust and requested information in the following terms:

“Request for disclosure of information under Freedom of Information Act 2000 – contract for the appointment of a strategic business partner for the provision and development of pathology services”

We write in connection the letting of the above contract, advertised in Contract Notice ref 2008/S 134-180167.

We should be grateful if you would please supply:

- i. the documentation for the selection phase of the procurement (ITT or equivalent document(s));
 - ii. the contract awarded as a result of the procurement process; and
 - iii. any variations to the contract made since contract award.”
7. The Trust responded on 23 June 2015. It provided the information sought in the first part of the request. Although its covering letter indicated the Trust’s willingness to provide a copy of the contract itself, this was not actually provided. The Trust stated that it was withholding the variations to the contract under section 43.
8. Following an internal review the Trust wrote to the complainant on 8 December 2015. It now stated that it was withholding both the contract and any variations to it under section 43. The Trust had arrived at this decision after consulting with the contractor in question who was of the opinion that the information constituted a trade secret and that its disclosure would be likely to prejudice its commercial and technical interests. The Commissioner understands this to mean that the Trust is applying both section 43(1) – trade secrets, and section 43(2) – prejudice to commercial interests to the information.

Scope of the case

9. The complainant contacted the Commissioner on 7 December 2015 to complain about the way his request for information had been handled.
10. The Commissioner considers the matter to be determined is whether the Trust is entitled to withhold the contents of the contract and the

variation to that contract under section 43(1) trade secrets or section 43(2) prejudice to commercial interests.

11. When viewing the information it became apparent to the Commissioner that some of the information constitutes the personal data of either the Trust's or contractor's staff. The Commissioner has therefore also considered whether any of this information is exempt under section 40(2) – third part personal data.
12. The Commissioner will start by looking at the Trust's application of section 43(2).

Reasons for decision

Section 43(2) - prejudice to commercial interests.

13. Section 43(2) of 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).
14. In its original refusal notice dated 23 June 2015, the Trust stated that disclosing the information would affect its ability to take part in commercial activity. At the internal review stage the Trust focussed more on the commercial harm that would be caused to the contractor's commercial interests. Therefore the Commissioner considers that the Trust has applied the exemptions on the basis of the impact on both its own commercial interests and those of the contractor.
15. In order for section 43(2) to be engaged the Commissioner considers 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 disclosed has to relate to the 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 to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met.
16. In relation to the first point the Commissioner is satisfied that as the requested information comprises of a contract and any variations to it,

the information describes the commercial relationship between the Trust and the contractor. In essence, the Trust argues that its disclosure would compromise the ability of the Trust and the contractor to maximise the commercial benefits of that contract and, in the case of the contractor, its disclosure would be of value to its competitors. Clearly these are consequences that the exemption is designed to protect against.

17. It is now necessary to consider whether the Trust has demonstrated that disclosing the requested information could cause the prejudice claimed. As mentioned above, the Trust has applied the exemption, at least in part, on the basis that disclosing the information would be likely to prejudice the contractor's commercial interests. In relation to the commercial interests of such third parties it is not appropriate to take account of speculative arguments which are advanced by public authorities about how any prejudice may occur. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects the arguments advanced by the public authority to be based on its prior knowledge of the third party's concerns. In this case the Commissioner is satisfied that the Trust has consulted with the contractor over this matter.
18. The onus is on the public authority to justify any exemption it has applied. In this case the public authority has only provided the Commissioner with limited arguments. Its original refusal notice simply stated that, "This exemption applies because the prejudicial effect of disclosure would be real as it would affect the Trust's ability to take part in commercial activity". At the internal review stage it advised the complainant that it had consulted with the contractor who was of the view that the withheld information was deemed commercially sensitive, that it was a trade secret which if disclosed to a competitor would cause real (or significant) harm to its business interests and is likely to be prejudicial to the commercial and technical interests of the contractor.
19. At the outset of his investigation the Commissioner wrote to the Trust and asked it to explain its grounds for relying on section 43 in detail. The Commissioner's letter made it clear that the Trust needed to provide a detailed response and provide evidence of a clear link between the disclosure of the information and the prejudice to commercial interests which the Trust is claiming would, or would be likely to occur. In response the Trust simply referred the Commissioner to a copy of the letter it had received from the contractor at the internal review stage (see paragraph 18). As well as stating its opinion that the withheld information was a trade secret and that disclosure would prejudice its commercial interests, the contractor said that it had concerns over the potential disclosure of information relating to:

- price;
 - service methodology;
 - its risk profile, including limits of liability; and
 - equipment sourced under the contract including the location of the equipment.
20. However the Commissioner has not been provided with any more detailed explanation of how either the contractor's or the Trust's own commercial interests could be prejudiced by the disclosure of the requested information. Nevertheless the Commissioner would not wish to order the disclosure of information if it was clear to him that the information was commercially sensitive. He has therefore gone through the contract to identify any information which is obviously sensitive. In doing so he has had regard for the information identified above as being of particular concern to the contractor in its letter to the Trust.
21. The Commissioner recognises that one of the points on which the contractor would compete for business is price. Similarly the Commissioner can see how it is in the contractor's interests to reduce any commercial risks involved to the lowest levels possible and so he accepts that information on the contractor's risk profile may be commercially sensitive. However it is not clear from the Trust's submission how information on service methodology and the equipment used in performing the contract would be commercially damaging if released.
22. In addition to the pricing and risk profile information the Commissioner discovered that Schedule 6 of the contract itself listed the types of information that the contractor had identified as being commercially sensitive. While some of the information is only described in general terms, other information is identified by reference to specific parts of the contract and documents. This schedule has been of assistance to the Commissioner when trying to identify any information which is clearly commercially sensitive. Unfortunately as this schedule is itself part of the withheld information the Commissioner is unable to detail its contents in the main notice.
23. The Commissioner will now discuss the types of information which he considers to be commercially sensitive together with his reasoning. There is a confidential annexe to this notice, which will be provided exclusively to the Trust, identifying the specific elements of the contract which are commercially sensitive.
24. The first part of the contract which the Commissioner finds to be commercially sensitive is information relating to limitations on liability.

In broad terms this sets out the maximum amount each party would be penalised for failing to perform particular elements of the contract. These amounts are expressed as a percentage of the annual charge payable by the Trust. The Commissioner considers that these would have been the subject of negotiation between the two parties and set out the level of liability, and so risk, which each party was prepared to accept. If it this information was released it could undermine the Trust's and the contractor's negotiations in any future procurement exercises and provide the contractor's business rivals with intelligence that they could use when competing against it in future procurement exercises. The Commissioner therefore finds this information, as detailed in the confidential annexe, is commercially sensitive.

25. Schedule 3 of the contract contains an appendix which includes information of the contractor's insurance policies. The information details the names of the insurers together with the relevant policy numbers. The Commissioner is satisfied that such information relates to the contractor's private commercial relationship with its insurers. If the information was disclosed there is some limited potential for it to be misused. As such the Commissioner accepts that there could be a prejudicial impact on the commercial interests of the contractor.
26. One small part of Schedule 11 sets out the circumstances in which the Trust could terminate the contract on the basis of the contractor's underperformance. The Commissioner finds that disclosing this information would be of value to those competing either against the contractor in future contracts, or those competing for contracts with the Trust in the future. As such the information is commercially sensitive.
27. The withheld information includes what is referred to as the contractor's 'basecase financial model'. The model details all the costs incurred by the contractor, for example equipment costs, depreciation costs, staff costs. The Commissioner is satisfied that the disclosure of such detailed information would allow the contractor's business rivals to understand how it is able to compete on price when bidding for contracts.
28. The Trust has not specified whether the contractor is currently involved in bidding for similar contracts but the Commissioner recognises that one of the contractor's nine major business areas is healthcare including the delivery of services such as those provided under this contract. It describes itself as one of the world's largest suppliers of medical infrastructure and is a leader in medical imaging and laboratory diagnostics. The Commissioner is therefore prepared to accept that the contractor would be involved in tendering exercises for the provision of similar services on a regular basis.

29. The withheld information relates to a contract that was signed in 2013, nearly two years before the request was received. The sensitivity of the costing could have waned over that time. However, the financial model includes forecasts of future costs and depreciation and therefore still appears to relate to the contractor's current commercial and financial position. Its disclosure would also reveal the contractor's rationale when calculating the prices it could afford to offer services at under such a contract.
30. In light of the above the Commissioner is satisfied that the financial model in its entirety is commercially sensitive and that its disclosure would significantly undermine the contractor's ability to bid for similar contracts in the future. The information is commercially sensitive.
31. Another element of the withheld information consists of a list of the charges for the different tests which the contractor carries out under the contract. The same list forms the appendix to two separate schedules. The charge per test is a fundamental component of the contract, it represents the contractor's income and, when combined with information on the contractor's costs, would reveal its profit margins. So long as this information is current it would clearly be commercially sensitive.
32. The contractor is entitled to submit proposals to increase the charge for the tests which, if agreed, take the form of 'Change Authorisation Notices' (CANs). There have been a number of CANs agreed, but the Commissioner is satisfied that the vast majority of the pricing information in the list still represent the prices charged at the time of the request. The Commissioner finds that this information engages the exemption. The exception to this is the name of the test and the product name. Collectively this information simply reveals the number of different types of tests performed under the contract and what is actually being tested for. The Commissioner finds this information is not commercially sensitive.
33. In respect of the CANs, these are caught by the third element of the request, "any variations to the contract made since the contract award". For the same reasons as explained above, the actual pricing information contained in those CANs is also commercially sensitive.
34. The Commissioner has considered the information contained in Schedule 22 of the contract together with a number of attachments and appendices. The first attachment is a table listing at least some of the contractor's equipment and what appears to be described as the environmental impact of such equipment. The Commissioner notes that in its letter to the Trust, the contractor refers specifically to information on the description and location of equipment sourced under the contract

as being commercially sensitive. However without any explanation as to why, the Commissioner is not prepared to speculate how any commercial interests could be prejudiced by the disclosure of such information.

35. An appendix to one of the schedules includes the amount subcontractors would charge for training staff on the equipment they provide. No specific arguments have been presented in respect of any prejudice to the commercial interests of these parties. In light of this the Commissioner is not satisfied that any of this information is commercially sensitive.
36. Before concluding that the information identified above as being commercially sensitive engages the exemption the Commissioner is required to consider the third criterion set out in paragraph 15. That is, whether the level of likelihood of prejudice being relied upon by the Trust is met.
37. Section 43(2) can be engaged on the basis that the alleged harm to commercial interests either 'would' occur or 'would be likely' to occur. In its refusal notice the Trust stated that disclosing the information 'would' affect its own ability to participate in commercial activity. At the internal review stage it stated that disclosure would be 'likely' to prejudice the contractor's interests. The Trust failed to clarify its position when responding to the Commissioner's enquiries. Therefore the Commissioner's position is that the Trust is seeking to apply the exemption on the basis of the lower test, ie that the prejudice would only be likely to occur. This is taken to mean that there must be a more than hypothetical possibility of the prejudice occurring. There must be a real and significant risk, even if that risk falls short of being more probable than not. Although relying on the lower threshold makes it easier to engage the exemption, the lower level of certainty means there is less weight given to the factors for maintaining the exemption when considering the public interest test.
38. The Commissioner has found that the information on the contractor's costs contained in its financial model, together with the pricing information, ie the charge per reported test, is commercially sensitive. The Commissioner has also found that information on the limits to both the contractor's and the Trust's liabilities is commercially sensitive, as is the detailed information on the contractor's insurance policies. In respect of all this sensitive information the Commissioner is satisfied its disclosure would present a real and significant risk of prejudice to the parties' commercial interests. The Commissioner finds that the information engages the exemption.

Public interest test

39. Section 43(2) is subject to the public interest test as set out in section 2 of FOIA. This means that although the Commissioner has found that certain elements of the contract engage the exemption the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in its disclosure.
40. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority such as the Trust is carrying out its functions. This public interest is heightened where the information relates to the spending of large amounts of public money as is the case here. In line with this the Trust accepts there is a public interest in providing information which would allow people to have confidence that the Trust's commercial activities are conducted in an open and honest way.
41. There are also generic public interest arguments in favour of maintaining the exemption. Clearly disclosing information that would prejudice a public authority's commercial interests would have some impact on the public purse. Similarly there is a public interest in providing a level playing field between those commercial organisations bidding for public sector contracts in order to ensure the process is truly competitive .
42. The Trust has provided the following public interest arguments in favour of maintaining section 43(2). Firstly it believes that releasing the information could damage commercial relations with private health care providers. Secondly, that releasing the information could damage the commercial interests of the private contractor.
43. In addition to these generic public interest arguments the Commissioner has set out more specific arguments relating to the information which engages the exemption.
44. The information on the limitations of liability as discussed at para 24 set out the maximum financial penalties that can be imposed on either party for poor performance under the contract. Such terms are important as they establish one means of enforcing the contract and in the case of the Trust reveal what power it has to ensure it obtains value for money and meet its objectives. Although disclosing such information is likely to have some impact on each parties' negotiating position in any future procurement exercises, the Commissioner finds that there is a very strong interest in reassuring the public that the Trust has negotiated terms which give it the power to manage the contract effectively and hold the contractor to account for any underperformance. The Commissioner therefore finds that the public interest favours disclosure. In reaching this conclusion the Commissioner has taken account of the

importance of the contract both in terms of its value and the services provided under it. He has also had regard to the duration of the contract and the possibility that the contract could be extended. The Trust is required to disclose this information.

45. In respect of the insurance details contained in the appendix to Schedule 3, as discussed at paragraph 25, the Commissioner finds that there is little value in disclosing the information as it would simply provide details of the insurance cover which the contractor is obliged to hold under the contract. As such it adds very little to public's understanding of how the contract operates or whether the Trust is obtaining value for money under that contract. In light of this the Commissioner is satisfied that the public interest in preventing any detrimental impact on the contractor outweighs the public interest in disclosure. The public interest favours maintaining the exemption and therefore the public authority is entitled to withhold this information.
46. The Commissioner has found that certain information contained in Schedule 11 also engages the exemption, see paragraph 26. This information relates the standard of performance below which the Trust is entitled to terminate the contract. As with the information on the limitations to the contractor's liabilities, it reveals the power the Trust has to manage the contract and to ensure its objectives are being met and that it is obtaining value for money from the commercial relationship. The Commissioner finds the public interest in disclosing this information outweighs the public interest in maintaining the exemption. The Trust is required to disclose this information.
47. The basecase financial model engages the exemption. The Commissioner has found that its disclosure would cause a significant prejudice to the contractor's competitive position. It could be argued that there is a public interest in disclosing such information as it would allow other contractors to understand the contractor's successful business model and so submit more competitive bids themselves in the future. Such an outcome would be in the public interest. There is however a counter argument that if competitors believed they knew the price they had to beat they would have less incentive to submit tenders that significantly undercut that price. Consideration also has to be given to impact on the current contractor. The Commissioner has concluded that the public interest favours maintaining the exemption. The Trust is therefore entitled to withhold the financial model under section 43(2).
48. The Commissioner has also found that pricing information from the list of charges for the different tests provided under the contract engages the exemption, together with the pricing information contained in the CANs that amend that list. As with the financial model discussed above, the disclosure of such information would cause a significant prejudice to

the contractor's competitive position and for similar reasons the Commissioner has concluded that the public interest favours maintaining the exemption. The Trust is therefore entitled to withhold the financial model under section 43(2).

Section 43(1) - Trade secret

49. Section 43(1) states that information is exempt if it constitutes a trade secret. The Commissioner has considered whether any of the information not protected by section 43(2) could be withheld on the basis that it is trade secret.
50. The FOIA does not define a trade secret, but the Commissioner considers that one determining factor is whether its release would cause the holder of the trade secret commercial harm, or be advantageous to their rivals. It follows that having already concluded this information is not commercially sensitive; its disclosure would have neither of these effects. The Commissioner is satisfied the remaining information is not a trade secret.

Section 40(2) - Third party personal data

51. A very limited amount of the information contained in the contract and change control notices constitutes the personal data of either the Trust's or the contractor's staff. Under section 40(2) of FOIA personal data of individuals other than the applicant can be withheld if its disclosure to the public would be unfair and so breach the first data protection principle of the Data Protection Act 1998 (DPA).
52. For completeness the first data protection principle states that personal data shall be processed fairly and lawfully and, in particular shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
53. The personal data in question consists primarily of names of staff of both Trust and contractor. In respect of those who signed the contract itself, it includes their signatures. As this information both identifies and relates to living individuals, the Commissioner is satisfied that it is their personal data.
54. Although the Trust has not relied on section 40(2) to withhold the personal data contained in the contract the Commissioner, as a responsible regulator of both FOIA and the DPA has considered whether disclosing any of this personal data would breach the first principle. The Commissioner has not found it necessary to undertake a detailed analysis of whether disclosing the personal data would be unfair. He has adopted a pragmatic approach as the information is peripheral to main content of the contract.

55. As previously mentioned, some of the personal data consists of the names and signatures of those who signed the contract. Given that these individuals would hold senior positions within their respective organisations the Commissioner finds that it would be fair to disclose the names of the signatories and their job roles. However the actual signatures may be withheld because of the potential for such information to be misused if it was disclosed to the public.
56. The other personal data is found in various places within the contract. For example in one schedule entitled Governance, key personnel are identified together with the composition of different joint groups and committees established to manage the contract. Although the Commissioner considers it likely that these individuals will also hold relatively senior positions, in this context it is of more biographical significance and he does not anticipate that they would have had any expectation that this information would be released. Therefore the Commissioner finds that it would be unfair to disclose this information and that the exemption provided by section 40(2) is engaged.
57. There is also personal data contained in the Change Authorisation Notices, for example the name of the member of staff requesting the change in question. Again the Commissioner does not consider that these individuals would have had any expectation of their names be disclosed. He concludes that disclosure would be unfair and so section 40(2) is engaged.
58. In summary, the only personal data that the Commissioner finds should be disclosed is the name and job role of those individuals who signed the contract. All other personal data may be withheld.

Other matters

59. The Commissioner is concerned that, in this case, the Trust has demonstrated a lack of engagement with both the request handling process in general and the Commissioner's investigation. In the Trust's responses to both the complainant and the Commissioner it has simply asserted that disclosure of the requested information would prejudice commercial interests without any explanation of how such a prejudice would occur. This suggests that it has made no serious attempt to understand the actual information in question.
60. Furthermore, during the course of the investigation the Commissioner had to go back to the Trust on a number of occasions because it had failed to provide all the information captured by the request. This was because the contractor itself had retained the only copies of the documents in question. This has highlighted the Trust's apparent

misunderstanding of section 3(2) of the FOIA which provides that a public authority will be deemed to hold information if it is held by another person on behalf of the public authority.

61. It also suggests very strongly that the Trust did not actually review all the withheld information either when initially responding to the request or responding to the Commissioner's enquiries.
62. Finally, on a separate matter, the third element of the request captures a number of 'Change Authorisation Notices'. These are numbered 001 to 023. The Trust has not been able supply copies of three of these notices; 002, 017 and 018. In discussions with the Commissioner, the complainant has indicated that in order to avoid further delays in concluding this case he does not currently wish to pursue this matter.

Right of appeal

63. 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

64. 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.
65. 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

Rob Mehan
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