

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2017

Public Authority: Wirral University Teaching Hospital NHS
Foundation Trust

Address: Arrowe Park Hospital
Arrowe Park Road
Upton
Wirral
CH49 5PE

Decision (including any steps ordered)

1. The complainant has requested information in relation to its removal from a contract to remove waste from two hospital sites, the appointment of an interim contractor and the appointment of that same contractor to a longer term contract following a formal procurement exercise. The Trust disclosed some information but withheld a limited amount under the exemption provided by section 43(2) – commercial prejudice. The complainant has not challenged the application of section 43 but did argue that additional information was held. Failure to identify all the information captured by a request would constitute a breach of section 1. Following further searches some additional information was located, some of which was released.
2. The Commissioner's decision is that, on the balance of probabilities, the Trust's searches have now identified all the information falling within the scope of the request.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 4 August 2015 the complainant requested information of the following description:

"Please will Wirral supply:

 1. all information held by Wirral in relation to the removal of [the complainant's company] from the waste contracts at Arrowe Park and Clatterbridge Hospitals in 2013;
 2. All information held by Wirral in relation to the procurement of [Company A] to replace [the complainant's company] in 2013 and beyond; and
 3. in so far as the information is not available from 2 above, all information relating to the tendering exercise for the waste removal contracts from 2013."
5. On 21 January 2016 the Trust responded. It confirmed that it held information of the description specified in the request. It went on to provide the complainant with some of that information, but withheld other information under section 43 on the basis that its disclosure would prejudice commercial interests.
6. On the 9 March 2016 the complainant requested an internal review. When doing so the complainant raised the following concerns:
 - In response to part 1 of the request the Trust did not produce any information (internal or external) documenting the decision making process to remove the complainant's company from the contract or the consequences of that decision. The complainant did not accept such information did not exist.
 - The information provided in response to part 2 of the request was dated from 29 August 2013. The information which the Trust had provided to the complainant indicated that some arrangements had been made for Company A to take over the contract before then. The complainant therefore suspected that there would be records of those arrangements.
 - The complainant questioned the limited amount of information that had been provided in response to part 3 of the request. The complainant also suggested that the procurement exercise would have been the subject of an internal investigation and questioned why there was no information relating to such an investigation or documenting why no such investigation took place.
7. The Trust provided the outcome of its internal review on 23 May 2016. It informed the complainant that it was satisfied it had carried out

thorough searches for the requested information. It continued to withhold some information under section 43(2), but it did release some additional information from a cost analysis spreadsheet.

Scope of the case

8. The complainant contacted the Commissioner on 14 July 2016 to complain about the way the request had been handled. The complainant believed that the Trust held more information than it had already located. In particular the complainant was concerned that the Trust had not provided any information from communications prior to 29 August 2013. Based, in part, on the information already disclosed the complainant believed that such information existed and that it would be relevant to the request.
9. During the course of her investigation the Commissioner confirmed with the complainant that it was not interested in challenging the Trust's application of section 43(2) to the information it had already found. The issue the complainant wanted adjudicating was whether the Trust held any information in addition to that which it had already located.

Reasons for decision

10. Section 1 of FOIA states that any person making a request for information to a public authority is entitled to be informed whether the public authority holds the information and, if the information is held, to have that information communicated to them, subject to the application of any exemptions.
11. In this case there is a dispute as to the amount of information which the Trust holds. Where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
12. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any additional information which falls within the scope of the request (or was held at the time of the request).
13. The Commissioner will consider the thoroughness of the searches for information carried out by the Trust, the grounds presented by the complainant as to why it is reasonable to expect further information would be held and the interpretation of the request itself.

14. In order to understand the range of information that the Trust might hold and therefore the arguments presented by the complainant the Commissioner asked both the Trust and the complainant to explain the background to the request. She understands that the complainant's company held a contract for the collection and removal of waste at the two hospitals referred to in the request. The contract was originally due to run up to 31 March 2014. The complainant's company held the contract by virtue of an agreed extension to a previous contract. During the summer of 2013 problems arose which led to the Trust terminating the contract midterm with effect from 12 September 2013. As a consequence it became necessary to appoint an interim contractor to provide the waste collection services as a matter of urgency. Company A was appointed as interim contractor. In 2014 a fresh procurement exercise was conducted to select a longer term waste contractor. This resulted in Company A being re-appointed in October 2014.
15. Therefore, between them, the second and third parts of the request capture any information held by the Trust in relation to both 2013 procurement exercises ie the one for an interim contractor, and the more formal procurement exercise in 2014. Both of these were won by Company A.
16. The complainant believes the procurement exercise for the interim contract was flawed and expects that following complaints and unplanned expenditure surrounding a procurement exercise for the interim contract and subsequent litigation, there would have been an internal investigation. It is important to note that the second part of the request asks for all information in 'relation' to the procurement of the interim contractor. The term 'relating to' is given a wide interpretation by both the Commissioner and the Tribunal and would certainly capture records of any investigation, if such information existed. However the Trust has stated categorically that it did not carry out any investigation. In the absence of evidence to the contrary and in light of the searches conducted by the Trust, which will be explained later, the Commissioner is satisfied that no recorded information about an investigation exists.
17. At the start of the Commissioner's investigation the Trust undertook to carry out further searches. Furthermore throughout the course of the investigation the complainant has suggested additional search terms and date ranges which the complainant considered would ensure all the relevant information was found. The Trust agreed to conduct additional searches using those terms.
18. The information located as a result of the searches conducted by the Trust when originally responding to the request, together with those conducted during the investigation, includes email exchanges between the Trust and the complainant's company discussing the problems which arose with its performance, internal emails between the Trust's staff

discussing these issues and the procurement of an interim contractor to resolve the problem, and email exchanges between the Trust and Company A at the time it was appointed as interim contractor. The attachments to the emails were also located. These were disclosed to the complainant. The disclosed information also includes that relating to the more formal procurement exercise carried out in 2014 including the Invitation to Tender, tender scores for the four companies who bid and the Contract Award Notice. Some of this information had been redacted to remove information which the Trust considered to be commercially sensitive.

19. The complainant has argued that the contents of the information already disclosed suggest that still further information is held in relation to the decision to remove the complainant's company from the contract and appoint an interim contractor. In support of this argument the complainant has directed the Commissioner to particular emails from the internal exchanges between the Trust's staff, including those between the business area responsible for managing the waste removal contract, Hotel Services, and that with responsibilities for procurement, Procurement and Supply Chain, as well as those exchanged between the Company A and the Trust at the time Company A was preparing to replace the complainant's company in the summer of 2013.
20. The information disclosed to the complainant in the Trust's original response only went as far back as 29 August 2013, apart that is from correspondence between itself and the Trust. Following the additional searches carried out by the Trust some additional information was located which predates this period. Some of the additional documents are from July and early August 2013. They relate to the termination of the contract with the complainant's company, arrangements to meet with representatives from the companies which bid for the interim contract and preparations for Company A to commence the interim contract. There is some even older material going back to April and March 2012. These documents appear to relate to previous procurement decisions of the Trust which the Commissioner understands led to the complainant's company having the contract it held at that time extended.
21. The complainant argues that the information disclosed as a result of all the additional searches still fails to tell the whole story. The Commissioner has viewed the information provided to her as part of this investigation. It is apparent from the contents of the email correspondence that there had been consideration of whether to terminate the contract with the complainant's company prior to the period covered by the emails. It is also clear that steps had been taken to procure an interim contractor and that ultimately the decision was taken to appoint Company A. The Commissioner has therefore considered the thoroughness of the searches conducted by the Trust and

its explanations of why information which one would expect to be held, is not held.

22. Looking at the searches first, the Trust initially asked relevant staff from its Hotel Services department and from its Procurement and Supply Chain department to identify the information caught by the request. The Trust has explained that both these departments work predominantly with electronic data and do not keep manual files wherever possible. Therefore the staff who were involved with the decision to terminate the contract with the complainant's company's and the two procurement exercises that followed, searched the electronic data held on their personal computer/drives, networked drives and their email accounts.
23. However it was only at the start of the Commissioner's investigation that centralised, automated searches were conducted. Electronic searches of the email accounts of eight members of staff involved in the procurement exercises were carried out. This included staff who had since left the Trust. The network drives of these individuals were also searched. These searches extended back to 1 January 2013 and went up to 31 March 2016. The Commissioner understands that the Trust felt it was only necessary to go as far back as the start of 2013 as it was only during the summer of that year that the problems arose which led to the contract with the complainant's company being terminated.
24. Various key words were used, the full name of the complainant's company, its name abbreviated to initials, the name of its solicitors, different descriptions of the contract, for example 'Waste Removal', the formal title of the contract, the Trust's tender reference and the reference from the Official Journal of European Union where the formal procurement exercise was advertised. The information retrieved by these searches was reviewed and some of it was found to be out of the scope of the request. It is understood that this was because some search terms used such as 'Waste Removal' captured information on this general topic but which had no association with the contracts in question, whilst search terms based on the name of the complainant's company returned information which related to normal activities associated with the management of such a contract rather than the decision to terminate the contract or the subsequent procurement exercises.
25. Nevertheless some additional information relevant to the request was located and this was provided to the complainant subject to redactions under section 43(2) for commercially sensitive information.
26. Having reviewed the freshly disclosed information the complainant raised a query regarding a particular email, one dated 26 March 2012 which referred to an attachment containing reasons to change from the complainant's company to Company A. The complainant suggested

further searches it believed the Trust should carry out to ensure it had retrieved all the relevant information. These included searches going back as far as June 2011, the inclusion of an additional, named, member of the Trust's staff, three variations of Company A's name, including a misspelling that appeared in one email, and all drives where an attachment to the email of 26 March 2012 might be held.

27. The Trust was able to direct the Commissioner to the attachment referred to in the 26 March 2012 email in the information which had already been disclosed and the Commissioner updated the complainant. The Trust also advised the Commissioner that the email and attachment in question related to decisions that were being taken in March/ April of 2012 and concerned whether to run a formal procurement at that time for waste removal. Ultimately the decision was taken to extend the contract with the complainant's company instead. The Trust said that as such the information did not fall within the scope of the request and had only been provided to the complainant on the basis that as it had been located by the searches and, as the Trust could see no reason for withholding it, the Trust chose to volunteer the information. For avoidance of doubt the Trust has confirmed to the Commissioner that the costings in the attachment were not used in either the procurement for the interim contract or for the longer term, 2014, contract. Nevertheless the Trust agreed to conduct the additional searches requested by the complainant.
28. A couple of days later the complainant suggested further search terms which it hoped would yield the information it believed to be missing. These were the names of two of the directors of Company A. The Trust again agreed to carry out these searches. Some additional information was identified and this was disclosed subject to limited redactions for commercially sensitive information under section 43.
29. The Trust also confirmed to the Commissioner that it had conducted searches of the shared drive used by the Procurement and Supply Chain department. Hotel Services did not use a shared drive so there was none to search.
30. The Commissioner is satisfied that by the conclusion of these additional searches the Trust had conducted a thorough search for the information. One would normally expect such a search to return all the relevant information. However in this case there were still obvious gaps in the story of the procurement process. Therefore the Commissioner sought explanations of why information that one would normally expect to exist, relating to the decision to remove the complainant's company midterm and appoint Company A as interim contractor, was in fact not held.

31. The Trust provided the Commissioner, and later the complainant, with a statement which set out the process followed. It is understood that during the summer of 2013 serious concerns arose with the collection of waste and the ability of the complainant's company to meet its obligations under its contract. The problem needed to be addressed as soon as possible. Two companies were identified as being able to take over the removal of the Trust's waste with as little disruption as possible. These two companies were contacted by phone and briefed on the Trust's requirements. Individual site meetings followed and Company A was then awarded a fixed term interim contract for three months from 1 September 2013. The unsuccessful company was advised that its bid had failed over the phone. The Trust has emphasised that the urgent need to address the waste collection problem meant that much of the business was conducted over the phone or at face to face meetings and that a letter from the Trust to Company A served in place of a more formal contract.
32. The Commissioner accepts that in the circumstances described by the Trust its explanation is a plausible one.
33. It is clear that the Trust had been aware of other waste removal contractors, including Company A, prior to the informal procurement exercise for the interim contract. However when asked directly whether any pre-existing information about waste management companies was used in either of the procurement exercises, the Trust stated that it had not. By 'pre-existing information' the Commissioner was referring to information which had been submitted prior to the procurement exercises taking place and that was not submitted as part of the actual procurement exercise in question. Furthermore the Trust provided the Commissioner with the only other piece of information relating to Company A which had been discovered by the searches. Having viewed that information the Commissioner is satisfied that it has no bearing on either procurement process.
34. The Trust has also explained something of the procurement process followed for the formal 2014 procurement exercise. The relevant rules at the time were set out under the Public Contracts Regulations 2006. These do not explicitly prohibit taking into account pre-existing information in the evaluation of bids. However, as the rules require that all bidders are treated equally and without discrimination this effectively rules out the use of pre-existing information. Certainly as far as the formal, 2014, procurement exercise was concerned the Trust has said that there is nothing in the procurement documentation that suggests pre-existing information was used.
35. In light of these assurances the Commissioner is satisfied that the earlier searches conducted by the Trust going back as far as January 2013 would have captured all the information relevant to the request,

and that certainly the searches going back to June 2011 would have unearthed any information that was held.

36. Despite the gaps in the narrative of the process followed during the removal of the complainant's company and the award of the interim contract to Company A, the Commissioner is satisfied that, on the balance of probabilities, the Trust has located all the information captured by the request. The Trust has complied with its obligations under section 1. The Commissioner does not require the Trust to take any further action.

Right of appeal

37. 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

38. 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.
39. 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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