

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

Date: 12 March 2019

Public Authority: Cabinet Office
Address: 70 Whitehall
London SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information regarding Estates Professional Service Framework RM3816. The Cabinet Office disclosed some information and provided a weblink. The complainant submitted an internal review. The Cabinet Office refused to provide other information within the scope of the request citing section 43 (prejudice to commercial interests) as its basis for doing so.
2. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 43 as its basis for withholding the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information it holds within the scope of the request in full
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. On 11 April 2018 the complainant requested information of the following description:

"1. The feedback scores that were published to the framework providers when they were awarded a place on the framework. I understand that this feedback is typically along the following lines, but you may use something slightly different:

[He provided a table with evaluation criteria against which companies can be measured]

2. Information on the contract title, description, start, end, contract value and supplier for contracts that have been awarded via the framework."

6. From the correspondence, it can be deduced that the complainant was referring to Estates Professional Service Framework RM3816.
7. On 10 May 2018, the Cabinet Office responded and provided some information about successful bidders (minus company names) as well as a link to other information it considered relevant.
8. The complainant requested an internal review on 14 May 2018 explaining that he wanted to see all company information. He explained that this information is routinely made available to other bidders after the tender is awarded (he cited personal experience) and therefore could not see any commercial confidentiality issues. Specifically, he sought access to the named supplier scores.
9. The Cabinet Office sent him the outcome of its internal review on 19 June 2018. It explained that the information was exempt under section 43(2) of the FOIA (prejudice to commercial interests).

Scope of the case

10. The complainant contacted the Commissioner on 15 August 2018 to complain about the way his request for information had been handled.
11. At this point, the Commissioner would note that the Cabinet Office provided to her the scores given to companies that were unsuccessful and the names of those companies. The Cabinet Office argued that these were outside the scope of the request but were provided to the Commissioner for completeness. The Commissioner agrees that this information is outside the scope of the request because it does not comprise companies that were (to quote the request) "framework providers when they were awarded a place on the framework".

Background

12. Crown Commercial Services ("CCS") has organised a series of frameworks through which government, public and third sector organisations can buy common goods and services. The Cabinet Office explained that "the framework agreement does not guarantee work for successful bidders who are awarded a place on the framework, but only successful bidders on the framework agreement can be awarded commercial contracts and become suppliers going forward."
13. A list of available frameworks can be accessed online.¹ Further information about the operation of such frameworks is also available online.²

Reasons for decision

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"³
16. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
17. The exemption is subject to the public interest test which means that even if the exemption is engaged the Commissioner needs to assess whether it is in the public interest to release the information.
18. The Cabinet Office applied this exemption for several reasons. It argued that its unique position would be undermined by, in effect, allowing the creation of unofficial ranking of contractors where business names were linked to scores. Insufficiently evidenced inferences could be drawn

¹ <https://www.gov.uk/government/publications/crown-commercial-service-agreements>

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560268/Guidance_on_Frameworks_-_Oct_16.pdf

³ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

about each contractor. It explained that companies awarded a place on the framework were deemed equally capable of providing the service in question to the required standards. Disclosure, that is, matching a score to a company would, in effect, create an artificial distortion in the framework. It also explained that the CCS is tasked with monitoring and maintaining capacity across the framework and, implicitly, such distortion would make it more difficult where one or two companies were sought disproportionately based on their "ranking".

19. It also stressed that this information was not supplied to suppliers or customers, contrary to a point raised by the complainant which will be addressed later in this decision notice.
20. It also argued that disclosing the identity of failed bidders could discourage them from bidding again (as a consequence of reputational damage) which could create a weakness in the breadth of the market.
21. In addition, it said "Crown Commercial Service's role as a central purchasing body places the potential prejudice higher than would be the case for, say, a local council in a similar position."
22. It also argued that even if the framework has been established, there could be continued prejudice as new contractual opportunities arise over the life of the framework and the effect of the aforementioned likely distortion could still be felt.
23. In its final point, it said that CCS was obliged under the Public Contracts Regulations 2015 to encourage competition and that it had a responsibility to achieve best value from public funds on behalf of government and the wider public sector.
24. The complainant provided copies of information of a similar nature that he had received from other public authorities. He argued that such disclosures had not given rise to prejudicial outcomes alleged. He also cited the Commissioner's decision in FS50662919.⁴
25. Of particular significance is the evidence he provided from one major national construction company who supported his position. It emphasised that the sensitive information was not the scoring but the information submitted by the companies that lead to the score attributed to them.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014315/fs50662919.pdf>

26. 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 occurring.

27. Regarding the first criterion, the Commissioner is satisfied that the harm envisaged is harm to the commercial interests of both CCS and the named companies. She is therefore satisfied that the first criterion is met. This is not to say she agrees it will happen; simply that she agrees the criterion is met.
28. The Commissioner also accepts that there is a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect against. Disclosure would reveal how each company scored in comparison to each other when they applied to become part of the framework. This is commercial information not previously made public by CCS. The Commissioner therefore accepts a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect against. The second criterion is therefore met.
29. Finally, the Commissioner needs to establish whether the level of likelihood of prejudice that is being relied upon by the Cabinet Office is met. To meet the lower threshold of "would be likely to" result in prejudice, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. Regarding the higher threshold, there must be a stronger evidential burden on the public authority and prejudice must be more likely than not.
30. The Cabinet Office sought to rely on the lower threshold of "would be likely to prejudice".
31. The Commissioner has noted that in FS50662919, the public authority in question was not a central government department. The Commissioner

is not bound by previous decisions she has made and considers each case on its merits. The difference between that case and this is the difference between the two public authorities. The CCS covers national matters. It has clearly asserted that it does not disclose this information as a matter of course. It notes that other public authorities have chosen to do so (it acknowledged this) but they are not specifically obliged to do so and the impact of their doing so is not as far reaching as it would be in this case.

32. That said, while it did assert prejudice to its own commercial interests, it did not provide any supporting evidence other than its own assertions of prejudice to third parties. It appeared to be relying on what it asserts are the reasonable expectations of those third parties. It did not provide any evidence to support this such as, eg, extracts of contractual information. The Commissioner specifically asked the Cabinet Office to provide evidence in support of any assertion of prejudice to third parties. In doing so, the Commissioner referred to the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014).⁵ The Commissioner explained to the Cabinet Office that, following this decision, she does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
33. The third party evidence supplied by the complainant while not particularly broad in scope (it only relates to one company) nor required by the Commissioner, is useful in that it indicates the views of a national company. This is in contrast to the lack of third party evidence from the Cabinet Office despite a specific request for such evidence from the Commissioner.
34. The Commissioner is therefore not satisfied that disclosure would be likely to give rise to prejudice to the commercial interests of third party companies. The evidence provided by the Cabinet Office on this point is speculative and, while the complainant's evidence is not conclusive on the point of likely prejudice to third parties, it casts further doubt upon the Cabinet Office's clear but unsupported assertions. The lack of negative impact for third parties arising from disclosure in the case referred to by the complainant also undermines the Cabinet Office's unsupported assertions on this point.

⁵ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

35. That said, the Commissioner is satisfied that there is a real and significant risk of likely prejudice to the commercial interests of Cabinet Office. The Commissioner has reached this view noting not only the Cabinet Office's assertions as to likely prejudice but also the national scope of its work which is wider than that of the public authority in the case referred to by the complainant. Any likely prejudice could have a more wide-ranging effect on the market – the provision of goods and services in the public sector - and the work of the CCS to manage that market in order to obtain best value for the public purse. The third criterion has therefore been met.
36. The Commissioner does not agree with the Cabinet Office's arguments as to likely prejudice to the commercial interests of third parties. However, the consequence of agreeing that disclosure would be likely to prejudice to the Cabinet Office's commercial interests is that she is satisfied that the requested information engages the exemption at section 43(2).
37. Although the Commissioner accepts that the exemption is engaged, it is necessary for her to go on to consider whether the public interest favours maintaining the exemption or disclosing the requested information.

Public interest arguments in favour of disclosure

38. While the complainant focussed his arguments on the likelihood of prejudice, the Commissioner notes from his submissions a clear position as to the balance of public interest even if the exemption is engaged. He was unconvinced as to the weight that could be attached to any likely prejudice.
39. He expressed clear support of the arguments put forward by the third party on whose opinion he sought to rely, namely
 - A degradation in public trust in procurement, particularly following the events surrounding Carillion contracts
 - It would actually help bidders understand more about what is required to participate in public sector frameworks
 - There is a strong public interest in ensuring consistency across geographic regions which would be shown more clearly by disclosure of the withheld information
 - Disclosure would inform the creation of new and innovative approaches to the benefit of the market and, consequently, the public purse.

- The inconsistency on disclosure of this information is contrary to the public interest and the economy, in particular the construction sector. There is a compelling public interest in ensuring a consistent and transparent picture.
40. He also explained that "our analysis to date indicates that the approach to these frameworks differs significantly and a client could be successful in one area and unsuccessful in another, although the work is very similar."
41. He added that this was important information for construction companies who operated on very narrow margins and committed considerable resources to bidding for work. "[Disclosure] allows us to assess the potential for bias and understand how marking regimes may favour certain sorts of suppliers, incumbents or actively discourage new entrants." Referring to the collapse of the contractor, Carillion, he said:
- "The demise of Carillion has [shaken] public confidence and the lack of transparency creates mistrust. This is an opportunity to provide full transparency."
42. Regarding the extent of interest in this subject, he referred to analysis of information obtained under FOIA that he had published online in a professional context. He said that the analysis had received 47,000 views indicating considerable appetite for more information. He said: "The vast majority of these views were from practitioners who have a thirst for knowledge, including government officials".
43. The Cabinet Office acknowledged that there was a public interest in openness in government which may "increase public trust in and engagement with the government".

Public interest arguments in favour of maintaining the exemption

44. The complainant did not put any arguments forward on this point nor did the Commissioner require him to.
45. The Cabinet Office commented that there was a more compelling public interest in "safeguarding value for money in the purchase of services by the public sector and in maintaining the commercial confidences of potential suppliers so as to maintain an equal, competitive playing field. Additionally, the commercial activities of the CCS is already significantly open and transparent with a large amount of data already in the public domain."

Balance of the public interest arguments

46. The Commissioner has carefully considered the benefits of transparency in this instance due to the importance of CCS work at the heart of public

procurement. There is a clear public interest in obtaining best value for public money. The Commissioner also accepts that the clear and transparent operation of the work of CCS is clearly in the public interest for its own sake and for the benefit to the public purse.

47. She is particularly persuaded by the complainant's argument that greater transparency would make clearer if there are any regional inconsistencies. While the Cabinet Office has disclosed figures, it has not disclosed information which would allow the public to match the supplier to the figure.
48. The Commissioner recognises, however, that CCS, must carry out a delicate balancing act on transparency in order to serve the public interest on obtaining best value for money. The Commissioner recognises that direct dialogue with suppliers addresses any strengths or weaknesses they have demonstrated as part of their bid to join the framework. Disclosure may, to an extent, undermine its effectiveness in this regard.
49. That said, the Commissioner notes that where commercial entities bid for access to public contracts, they must expect greater openness about their business model and their operations generally. The information is still at a high level rather than especially detailed. The damage to CCS' reputation as a confidential arbiter of commercial information would not be severely prejudiced by disclosure.

Section 43 - Conclusion

50. In light of the above and by a narrow margin, the Commissioner has concluded that the public interest favours disclosing the information. As set out earlier in this notice, the Commissioner has not been persuaded by the arguments as to likely prejudice to third party commercial enterprises – the Cabinet Office's submissions on this point were speculative. The Commissioner is not persuaded that the likely prejudice to CCS is particularly severe. The requested information is relatively high level and does not disclose operational or commercial detail. While the actions of other authorities in disclosing similar information are not conclusive, they are pertinent insofar as they do not appear to have given rise to reported negative consequences that the Cabinet Office could submit to the Commissioner in evidence. The Commissioner recognises that CCS has a role at a national level which differs from those public authorities which made disclosures of similar information. However, the Cabinet Office did not provide any evidence to substantiate its assertion which, in the Commissioner's view, was more necessary in the light of these other disclosures.

51. The public interest arguments in disclosure are compelling in this case. The events surrounding the demise of Carillion do not mean that all information about businesses who have commercial contracts with the government should be disclosed.⁶ However, those events add weight to the argument in favour of greater transparency to improve public trust, particularly where the weight of any prejudice to commercial interests arising from disclosure is not supported by further evidence.

⁶ <https://www.ft.com/content/6e7d9a62-68bf-11e8-b6eb-4acfcfb08c11>

Right of appeal

52. 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

53. 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.

54. 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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