

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 July 2019

**Public Authority:** Highways England Company Ltd

**Address:** Bridge House  
1 Walnut Tree Close  
Guildford  
GU1 4LZ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Highways England Company Ltd ("Highways England") relating to the assessment scores of all bidders for Lots 1-11 of the Area 13 and 14 Construction Works Framework. Highways England refused to disclose part of this information citing section 43(2) (prejudice to commercial interests) as its reason for doing so.
  2. The Commissioner does not find that section 43(2) is engaged in relation to the withheld information.
  3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
    - Disclose the information regarding part one of the request that was withheld under section 43(2) and provided to the Commissioner on a spreadsheet.
  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.
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## Request and response

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5. On 3 July 2018 the complainant made the following request for information under the FOIA:

*"I am conducting some research into contract awards on major construction projects in the public sector and the associated level of transparency.*

*Although the construction frameworks are published on contracts finder, I am struggling to identify which projects were awarded through the framework and who they were awarded to. Crown Commercial Services have advised me that technically any contract should be published on contracts finder.*

*In view of this, I would like to submit an FOI request for the following information please, relating to the Area 13 and 14 Construction Works Framework — UK North East and North West (2017/S 037-066459):*

- 1. Would you be able to provide me with a copy of the assessment scores for Lots 1-11 within the framework please. I have attached a copy of a response from another authority and it would be helpful if you could provide information in the same structure please.*
- 2. Could you advise me of the details of each contract awarded via Lots 1-11 please. Could you please detail:*
  - a. The title of the contract.*
  - b. A brief summary of the scope of the contract.*
  - c. Planned and actual contract value (highlighting any variance between awarded value and final value).*
  - d. Planned and actual dates (highlighting any schedule variance).*
  - e. Who is the client for the work and the FOI email address for any follow up.*

*If you do not hold the information above would you be able to provide advice (FOI Section 16) on who holds the information and for which contracts."*

6. On 12 July 2018 Highways England responded and provided a partial response regarding part two of the request in an Annex but refused the quality score information (part one) under section 43(2) unless it could be provided in an anonymised form. If not, the information could not be disclosed without written confirmation from all suppliers that they were happy for their individual information to be released and that this would take time. The Commissioner has not had sight of the complainant's response to the suggestion of anonymisation but it is clear in his later correspondence when requesting a review that it was not acceptable.

7. Highways England has explained to the Commissioner that "*requests were sent to all suppliers awarded on the framework on 25 July 2018*" asking for their views on disclosure.
8. Highways England responded to the complainant on 2 August 2018 and again refused to provide the remaining requested information under section 43(2). This refusal notice also stated that Highways England required an extension to consider the public interest test. This was provided on 30 August 2018.
9. The complainant asked for a review on 30 October 2019. An internal review was subsequently provided on 11 December 2018 in which Highways England maintained its original position.

## **Background**

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10. The information in this paragraph and paragraph 11 was provided by Highways England:

*"CWF is a Highways England term service contract framework which is used to deliver constructions works to maintain, repair and renew the Strategic Road Network in Operational Areas. This framework is not used for major construction projects which Highways England has separate arrangements in place for these procurements. The CWF is a four year framework with a value of circa £414m across all Lots and is primarily used for the maintenance programme with works issued via package/task orders."*

11. Feedback on the quality scores of the bids regarding the requested information was anonymously provided to other tenderers as part of the feedback process.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 4 January 2019 to complain about the way his request for information had been handled. He explained that Highways England had refused to provide supplier names or the maximum weighted score for each question and that he sought to gain access to that information. He provided to the Commissioner the same disclosure he had provided to Highways England from another public authority that contained a breakdown of quality evaluation criteria scoring against the names of the organisations that had been scored.

13. The Commissioner therefore considers the scope of this case to be the applicability of Highways England's citing of section 43(2) to the information requested at part one of the request, namely the assessment scores for Lots 1-11 for Areas 13 and 14.

## **Reasons for decision**

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### **Section 43(2) – prejudice to commercial interests**

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"<sup>1</sup>*

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

16. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. It provides the example of procurement where public authorities will be involved in the purchase of goods and services and will hold a wide range of information relating to it.
17. The exemption is subject to the public interest test which means that, even if it is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
18. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of the party. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real actual or of substance for it to be successfully engaged.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

19. The Commissioner has been provided by Highways England with the withheld information which consists of a spreadsheet that contains the broad criteria upon which each potential supplier was qualitatively evaluated numerically by Lot.
20. 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. Information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive. The Commissioner agrees that the actual harm relates to the public authority's commercial interests.
21. Highways England provided some individual examples of suppliers who had been asked for their views on the possible release of this information and had responded by arguing that its release would result in detriment to their commercial interests. Highways England also provided the Commissioner with a spreadsheet containing all the suppliers' names and all the responses that had been made both for and against disclosure.
22. The Commissioner has gone on to consider the prejudice which disclosure would or would be likely to cause to Highways England and the potential suppliers. Highways England stated that the release of this information "would or would be likely" to be commercially prejudicial to both itself and its suppliers, from this the Commissioner will assume the lower evidential bar. However, even where the lower threshold for engaging the exemption is being relied upon (that disclosure would be likely to result in prejudice) public authorities need to identify specific harm, link it to specific information and explain how disclosure would cause the ascribed harm.
23. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
24. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that '*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*' (Tribunal at paragraph 15).
25. The complainant's view is that the Commissioner's decision notice FS50662919 makes clear that the public authority must disclose the questions, the scores and the weightings. The Commissioner notes however that the requested information in that instance did not include names.

26. The complainant also provided a supporting document which was in the form of a letter from a major construction company that expressed the view that the release of the evaluation scores was not prejudicial and that the winning supplier's scores from a set of anonymised figures could clearly be correlated from publicly available information. It was pointed out that some public authorities release all the scores and that the approach across the public sector is inconsistent. The information that is sensitive is how the suppliers secured the winning scores. The evaluation scores do not involve intellectual property or what was offered by the suppliers in their submissions.
27. Highways England's reasons why it believed that the release of this information would be commercially prejudicial were provided via its public interest arguments for non-disclosure which incorporated its thinking in this regard. Highways England stated that providing quality scores which are linked to the supplier names for the construction works framework for Areas 13 and 14 is commercially sensitive. As Highways England will be tendering in the future for similar works in other regions over the following 12 months, releasing the quality scores which are directly linked to a supplier increase the sensitivity. It is not clear from this whether the sensitivity is to Highways England, the supplier or both.
28. Highways England argued that the release of quality scores directly linked to the tenderer could not be done without causing harm to them and undermining their commercial interests. Highways England argued that the scores do not relate to performance and that this could lead to misunderstanding and reputational impact.
29. However, the only commercial prejudice it identified to itself if the information was to be released would be reputational. Highways England stated that disclosure would lead to a lack of trust which could impact on supply chain interest in future tendering opportunities. It did not go further than this or consider the level of prejudice to the tenderer if they did not engage with a major client like Highways England.
30. Highways England did provide the Commissioner with the feedback it had obtained from its potential suppliers regarding any disclosure. From the Commissioner's reading of the spreadsheet supplied, of the 38 companies asked, there were 11 suppliers content to release the information, though one appears to have thought it would be released in an anonymised form. There was one blank where the supplier wanted more information. There were nine responses that argued for non-disclosure, though some of the views suggested that the supplier concerned believed the information under consideration included their own submission. Seventeen of the potential suppliers did not respond at all.

31. The views of the tenderers who objected have been summarised by the Commissioner in the bullet points below:

- that the FOI request was intended to provide another tenderer with information that may be of advantage to its own bid;
- that the detailed scoring breakdown could highlight weaknesses and strengths and provide a commercial advantage to another party and damage future procurement;
- that the information would provide a benchmark to others competing for Highways England tenders;
- that it might be possible for someone with knowledge of the Highways England bid scoring system to gain some view on pricing strategy in relation to the quality score;
- that it could potentially provide a competitor with an unfair advantage in any future procurement exercise as a high quality submission score may influence competitors to lower their price.
- that it might compromise current and future bidding for similar work.

32. However, it is unclear how these outcomes could result from the requested information. Highways England did not provide comment itself on the likely effects, other than the generic comment that release would or would be likely to be commercially prejudicial. Highways England's view, as expressed to the complainant on 12 July 2018, is that it would require written confirmation from all the suppliers that they would be happy for their information to be released. The Commissioner does not consider that this should be the bar to meet before information can be disclosed.

33. On the basis of the above responses from the potential suppliers a higher percentage were either unconcerned, had not expressed any view or were content to disclose. The Commissioner does not accept that Highways England has therefore shown that a causal relationship has been established.

34. Highways England's argument regarding reputational damage to itself is not compelling. The Commissioner does not agree that its supply chain is likely to dwindle due to the release of this information. She also considers that the tenderers know that they are bidding for contracts involving public money and that any information has the potential to be

disclosed, other than their own submissions and pricing which would be commercially prejudicial.

35. The Commissioner does not accept therefore that the criteria have been met and that the level of prejudice is real, actual or of substance, either in relation to the bidders or to Highways England. Consequently, as the exemption is not engaged it is not necessary to consider the public interest.



## **Right of appeal**

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36. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.

38. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**