

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2019

Public Authority: Welsh Government

Address: freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant has requested copies of tenders and contracts in respect of the provision of fresh and frozen meat to Wales NHS. The Welsh Government provided some information in respect of tenders but informed the complainant that it did not hold information relating to the contracts. The Commissioner's decision is that the Welsh Government has complied with its obligations under section 1(1) of the FOIA. However, its failure to provide appropriate advice and assistance means that it has breached section 16. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 27 November 2018, the complainant wrote to the Welsh Government and requested the following information:

"I would like to read all tenders and contracts on the provision of fresh and frozen meat to Wales NHS in 2016/07/08.

Including the data of the tender and subsequently awarded contract/s on this contract:

Provision of fresh and frozen meat (including pork and poultry), and chilled ready to eat foods

Framework

29/08/17 – 28/08/2019

2 years

NPS-Food-0068-1"

3. The Welsh Government responded on 17 December 2018. It stated that
"A copy of the information I have decided to release is enclosed."
4. It further informed the complainant that:
"Contracts between the NHS and the supplier are decided by, and held by the NHS not the NPS. The NPS also doesn't hold data on the specific products purchased by Customers using the Framework."
5. The complainant was not satisfied with the response and stated that the signed and awarded contract was missing.
6. The Welsh Government wrote to the complainant on 2 January 2019. It stated that:
"Tender responses from suppliers for the NPS frameworks are received by the NPS. A panel of individuals which may include the NPS, evaluate the tender responses and then come to a collective decision as to whether or not a supplier has met the required criteria to be awarded a place on the framework.
Subsequent framework call-off contracts between customers and suppliers e.g. the NHS and their suppliers, as previously stated, are decided by, and held by, the customer not the NPS."
7. On 10 January 2019, the Welsh Government further informed the complainant that:
"In terms of NHS mini-competitions all tenders submitted were sent to NHS Wales...NPS were not provided with copies of these bids/tenders."
8. The Commissioner notes that further correspondence between both parties continued with the complainant apparently unaware of the two distinct exercises undertaken by two separate organisations outlined in paragraphs 16 to 23 of this notice.

Scope of the case

9. The complainant contacted the Commissioner on 10 January 2019 to complain about the way her request for information had been handled. The complainant specified the following concerns:
 - No FOIA section analysis of why there is apparently no record of who these tenders were sent to.

- Recorded data appears to be missing from the response.
 - The Welsh Government seems to be stating that there is no correspondence data on the contracts between any other organisations.
 - There seems to be no evaluation of a public interest determination in the response.
 - Very little Section 16 assistance.
10. The Commissioner considers that the scope of her investigation is to determine whether the Welsh Government has complied with its obligations under section 1(1) and section 16 of the FOIA. She would also point that a public authority is not required to undertake a public interest test where it is relying on an absolute exemption, or (as in this case), where it is not relying on exemption.

Reasons for decision

Section 1 – General right of access to information held

11. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
12. In scenarios where there is some dispute between whether a public authority holds relevant information, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
14. In this particular case, the complainant considers that the Welsh Government is likely to hold information in respect of the tenders and contracts it has carried out on behalf of NHS Wales as it would not undertake this work without retaining some records.
15. The Commissioner asked the Welsh Government to confirm it had disclosed all information it holds relevant to the request and to clarify its involvement in the procurement process from start to finish.

16. The Commissioner notes that the National Procurement Service (NPS) promotes Welsh public sector procurement collaboration to deliver goods and services to the public sector in Wales. The Welsh Government explained that the NPS tender process is distinct from the provision of fresh and frozen meat to NHS Wales, which is called a call-off contract, and which NPS has no involvement in.
17. The Welsh Government explained that the NPS Framework provides an overarching agreement which sets out the general terms and conditions of any contracts awarded under the Framework and exists in numerous different goods and services, including supplying stationery.
18. It further informed the Commissioner that suppliers enter framework agreements not for a specific contract but to enable them to be in a position to be selected by customers to meet their specific supply requirements. Once a framework is set up, individual organisations such as the NHS are able to select suppliers from the framework without undertaking a full procurement exercise. When individual organisations select suppliers from the framework, this is known as a 'call-off contract'.
19. The Commissioner was further informed that organisations can choose to either award a call-off contract directly to a particular framework supplier or to undertake a mini-competition between the suppliers on the framework, as in the case of the NHS Wales meat supply contract.
20. Organisations may opt for the mini-competition to allow it to fully specify its particular requirements such as quantity and delivery location which would be impossible at an all Wales framework level.
21. Whether using a full procurement or mini-competition method, the organisation will draft tender documentation and advertise the tender opportunity. Companies looking to win that contract submit bids direct to that organisation, who then evaluate those bids and award the contract.
22. The Welsh Government added that organisations can ask the NPS to assist them in a procurement exercise, but most organisations undertake that exercise without the assistance or input from the NPS, and it is normal practice for the NHS Wales to undertake its own procurement exercise without the involvement of the NPS.
23. It further stated that in sending the NPS tender responses with its original response, it has served to confuse the complainant.
24. In terms of the searches for relevant information, the Welsh Government informed the Commissioner that knowledge of personnel within the team highlighted that the NPS did not assist the NHS with the

mini-competition in relation to meat supply. Nevertheless, searches were undertaken of its internal electronic filing system and staff email accounts using the key terms '*meat*' '*NHS*', '*mini-competition*' on the basis that if it held any relevant information it would be held electronically.

25. The Commissioner has considered the complainant's arguments and the Welsh Government's explanation of the process, along with details of its search, and has accepted that as there are two distinct exercises undertaken by separate organisations. As such, the Welsh Government could not reasonably be expected to hold information falling within the scope of the request. Consequently, the Commissioner considers that the Welsh Government has complied with its obligations under section 1(1) of the FOIA.

Section 16 – duty to provide advice and assistance (comp upheld)

26. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request, so far as it would be reasonable to do so.
27. The complainant has specifically raised concerns that the Welsh Government did not provide adequate advice and assistance with either its original response or its subsequent correspondence regarding her request.
28. The Commissioner would point out that she was unable to complete her investigation of this complaint based on the Welsh Government's responses to the complainant. It was therefore necessary to ask the Welsh Government to clarify its involvement in the process from start to finish. Following the very helpful clarification of the two separate exercises outlined in paragraphs 16 to 23 of this notice, the Commissioner was able to conclude that the Welsh Government could not reasonably be expected to hold relevant information.
29. However, it appears from the complainant's correspondence to the Welsh Government that she was unaware that there are two distinct exercises. Consequently, in failing to provide such an explanation to the complainant, the Welsh Government breached section 16 of the FOIA.

Right of appeal

30. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

**Catherine Dickenson
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