



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2013/0129

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50473543
Dated: 5 JUNE 2013**

Appellant: MR CLIVE PALMER

1st Respondent: INFORMATION COMMISSIONER

2ND Respondent: THE ROYAL MARSDEN FOUNDATION TRUST

Heard at: FIELD HOUSE, LONDON

Date of hearing: 23 JANUARY 2014

Date of decision: 6 FEBRUARY 2014

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and SUZANNE COSGRAVE
Tribunal Members

Attendances:

For the Appellant: Mr Palmer attended in person
For the 1st Respondent: Written representations from Richard Bailey, Solicitor for the Information Commissioner, also relied on by the 2nd Respondent.

Subject matter:

Freedom of Information Act 2000

Qualified Exemptions

- Commercial interests/trade secrets

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 5 June 2013 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Royal Marsden Foundation Trust sought tenders for hospital taxi and hospital courier contracts.
2. The Appellant tendered unsuccessfully and wanted to know further details about the process and how the successful companies were selected.

The request for information

3. On 13 September 2012 the Appellant requested the following information in relation to the tender process for a hospital taxi contract and a hospital courier contract :
 - (i) Who were the 6 companies to make it through to the IIT stage?
 - (ii) What was their mark on the award grid that was sent with the contract award notice?
 - (iii) Of the 6 companies did some only bid for Lot 1 the taxi contract and did some only bid for Lot 2 the courier contract?

- (iv) Regardless of whether the 6 companies bid for just Lot 1 or Lot 2 or both Lots, did any of the companies just bid for the work from either of the Chelsea or Sutton Hospitals?
 - (v) As per page 5 of 5 of the PQQ section 1.10 please forward a copy of the whole of the GT Cars and City Sprint bids?
4. The duration of each contract was three years with provision to extend it for a further two years.
 5. The Royal Marsden Hospital responded on 1 October 2012. It refused disclosure of items (i), (ii) and (v) under s.44 (1) (b) FOIA on the grounds that the Public Contract Regulations 2006 prohibited release. It answered the queries in items (iii) and (iv). On 2 November 2012 the hospital's internal review upheld its decision to withhold the information under s. 44 (1) (b) FOIA, suggesting that s 41 and s.43 FOIA exemptions might also apply.

The complaint to the Information Commissioner

6. The Appellant complained to the Commissioner on 15 November 2012 about the way his request for information had been handled. On 25 January 2013 the Commissioner asked the Royal Marsden Hospital for a copy of the award grid, copies of the tenders requested by the Appellant and copies of the PQQ (Pre-Qualification Questionnaire) at (v) of his request.
7. The Royal Marsden Hospital supplied copies of the award grid and the following documentation:
 - (a) GT Car's completed PQQ and tender for the hospital's Lot 1 taxi service
 - (b) City Sprint's completed PQQ and tender for the hospital's Lot 2 courier service.

Both companies were successful in their tenders and were awarded the contract for which they applied.
8. The Royal Marsden Hospital had required the PQQ to be completed by each company tendering for the contracts. The responses to the PQQ were used by

the Royal Marsden Hospital to assess the tenderers' suitability in terms of technical knowledge and experience, capability/capacity and their organisational and financial standing. The intention of the PQQ was to enable the Royal Marsden Hospital to determine a shortlist of companies that would proceed to the final stage of the procurement.

9. The Commissioner considered the completed PQQ to be an integral part of each company's application. He advised the Royal Marsden Hospital that the Public Contract Regulations did not in this instance bar the information from disclosure and asked the Royal Marsden Hospital to clarify whether it was relying, instead, on the exemptions at s.41 or s.43 FOIA. The Royal Marsden Hospital relied on s.43 (2).

10. The Commissioner concluded that the information contained within the award grid itself was not exempt under s.43 (2).

11. However he concluded that s.43 (2) applied to City Sprint's pricing information set out in pages 57 to 67 of its tender response. Disclosure of that information would reveal that company's pricing strategy and enable competitors to undercut it when bidding for contracts of a similar nature elsewhere. In relation to the public interest test, while disclosure would assist the promotion of openness and transparency in the public procurement process the Commissioner did not consider it to be in the public interest that companies entering into contracts with public authorities should be commercially prejudiced as a result. The public interest in maintaining the exemption in relation to the company's pricing information outweighed the public interest in disclosure.

12. In relation to GT Cars costings on pages 21 and 22 of its tender the Commissioner considered that s.43 (2) was engaged in relation to its application, its sample extract on page 35 and the related Excel spread sheet that the company supplied in the tender. Disclosure of that information would reveal GT Cars' pricing strategy and enable competitors to undercut the company when bidding for similar contracts elsewhere and the public interest in maintaining the exemption in relation to GT Cars' pricing information outweighed the public interest in disclosure.

The appeal to the Tribunal

13. The Appellant's position – in his Grounds of Appeal and in the arguments he presented to the Tribunal at the appeal hearing - can be summarised as follows:

(1) He believed that there was a “plausible suspicion” of wrongdoing by the Royal Marsden Trust and that the Commissioner had not considered this sufficiently fully when he looked at the tendering process for the awarding of the Courier and Taxi services.

(2) That “plausible suspicion” stemmed from his belief that the Trust had a pre-existing intention to hand back the relevant contracts to the existing suppliers without any real consideration of other companies.

(3) The award grid used to evaluate the tenders was constructed to favour that eventual conclusion. That was because:

- The contract was divided into 2 lots - for Courier and Taxi Services, yet, the Trust only had one award grid. His Company had bid for both lots yet only received one mark.
- The weighting for **cost** was 60%. Four companies received that mark which he believed was statistically impossible and reflected the Royal Marsden Hospital Trust's intention to hand back the contract to its existing suppliers.
- The Tender clearly stated that the Trust required one company for courier work and one company for taxi services to service the needs of both the Sutton & Chelsea sites. Yet the taxi contract had been split into two and re-awarded to the original two suppliers, neither of whom could provide the required service for both sites. He questioned how Olympic Cars could have been awarded anything in the tendering process when its mark was so low.

14. At the appeal hearing he stated that both Olympic Cars and GT Cars had the contract with the Royal Marsden Hospital Trust for over 25 years without interruption. It had taken repeated phone calls over a period of time from him –

after the European Procurement Rules came into force – to make the Trust put the work out to tender.

15. He believed there was a strong public interest in demonstrating the criteria used in selecting the winning suppliers were fair. There was a strong public interest in good decision making by public authorities and in promoting transparency and accountability in public authorities.
16. He believed there was strong local feeling in respect of the Royal Marsden Hospital's obligation to make the best use of its financial resources in the light of the many and various fund raising activities that occurred for it.
17. He added that, at no stage of the tendering process, had his company premises been visited by anyone in respect of the tenders he had submitted. That, in itself, he found both unusual and surprising.

Conclusion and remedy

18. The Tribunal has seen, as closed and confidential material, the information requested by the Appellant. The Tribunal, as always, has taken a robust approach to information received which cannot initially be revealed to the Appellant and has carefully considered the public interest arguments presented to it by the Appellant in terms of further disclosure.
19. Looking at p.66 of the Open Bundle – which deals with Part 9 of the Royal Marsden NHS Foundation Trust's Taxi and Courier Services Tender - there is the general heading *Acceptance And Contract Award Criteria*. Paragraph 9.1 states: "The Trust is not bound to accept the lowest or any Tender." Paragraph 9.2 states: "The Trust may, unless the Tender expressly stipulates to the contrary, accept any part of any Tender i.e. for the different service elements defined in Schedules 2 and 3. Paragraph 9.3 states: "The Contract will be awarded on the basis of an assessment of tenders against criteria to determine the most economically advantageous offer." Paragraph 9.4 states: "The overall tender evaluation scores will be split with 40% of the overall total score awarded to the service delivery element and 60% of the overall split awarded based on the cost analysis."

20. No information had been made available to the Appellant at the time of the Tender, or subsequently in the feedback, nor to the Tribunal, on the analysis the Trust applied to the pricing to determine what portion of the 60% was awarded to any Tender and it was not therefore possible to draw any conclusions about how any part of the available 60% was awarded.
21. The effect of Paragraph 9.2, in contractual terms, allows a firm tendering expressly to stipulate what it does and does not want to be considered for within the bidding process.
22. It is clear that the Appellant felt the wording in this paragraph gave him an expectation of a degree of parity (and clarity) among those tendering for the Courier and Taxi elements when in fact it allows those tendering to limit the areas of work for which they wish to be considered and allows the Royal Marsden Hospital to pick and choose to whom they wish to apply the grid criteria in the light of any limitations expressed by those tendering.
23. The Appellant argues that that prices have changed dramatically during the 18 months since the prices were given (in the tender documents in October | November 2011).
24. However the question for the Tribunal is whether the public interest in disclosure of the withheld information *at the time of the request* (in September 2012) outweighs the public interest in maintaining the exemption under section 43(2).
25. The Tribunal has no hesitation in affirming in this appeal that at the operative time of the request the public interest in maintaining the exemption was the correct conclusion by the Commissioner.
26. That is not to say that a new information request for similar information made now would, with the passage of time, produce the same conclusion. This Tribunal is only concerned with the time of the request for the information in this particular appeal.

27. The Trust confirmed in earlier correspondence that the release of information would be more appropriate after a greater passage of time [Bundle page 51] although [page 52 para 10] it did subsequently state that City Sprint had asked for their pricing to be kept confidential as it is commercially sensitive and GT Cars had said they considered the entire document to be commercially sensitive at the time the Royal Marsden Hospital was then considering the matter.
28. While the prices might have altered in the ten or eleven months between the date of the tender and the Appellant's information request, disclosure of the withheld information *at that stage* would still have revealed the companies' pricing strategy enabling competitors to undercut it when bidding for contracts of a similar nature elsewhere.
29. The Appellant accepts the general proposition that disclosure of this kind of information would be likely to prejudice the commercial interests of the companies involved.
30. The Tribunal – having had access to all the information and documentation - does not accept the Appellant's argument of "plausible suspicion" about the outcome of the tendering process having been predetermined, nor that was the award of 60% to more than one tender as a result of a flawed analysis. So the Tribunal does not agree with the Appellant that this adds weight to the public interest assessment towards disclosure of the information rather than its retention on s.43 (2) FOIA grounds
31. It follows, therefore, that his appeal fails.
32. Our decision is unanimous.
33. There is no order as to costs.

Robin Callender Smith

Judge

7 February 2014