



Information Tribunal Appeal Number: EA/2012/0253
Information Commissioners Ref: 50456178

Freedom of Information Act 2000 (FOIA)

Magistrates Court, Northampton
8th. April, 2015

Decision Promulgated
28th April 2015

BEFORE

INFORMATION TRIBUNAL JUDGE

DAVID FARRER Q.C

And

LAY MEMBERS

SUZANNE COSGRAVE AND

ANNE CHAFER

Between

ROGER IAN TOPP

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

MILLBROOK HEALTHCARE

Second Respondent

Representation:

The Appellant appeared in person:

Mr. Philip Campling, Managing Director, appeared for the Second Respondent.

The First Respondent did not appear but made written submissions

Abbreviations :

RT	The Appellant
The ICO	The Information Commissioner
Millbrook	Millbrook Healthcare
NCC	Northamptonshire County Council
The DN	The ICO's Decision Notice dated 28th. November, 2012.
ICES	Integrated Community Equipment Services
PCT	Primary Health Care Trust
PQQ	Preliminary qualification for an invitation to tender.
The LGA	The Local Government Association
FOIA	The Freedom of Information Act, 2000
The UT	The Upper Tribunal
The FTT	The First - Tier Tribunal

Decision

The Tribunal finds that FOIA s.43(2) is engaged and that the public interest favours the maintenance of the exemption from the duty to provide the requested information.

Accordingly, it dismisses this appeal.

Reasons for Decision

The Background

1. NCC was the lead commissioning partner with its Health and Adult Social Services and NHS Northamptonshire in inviting tenders for the provision of goods and services in accordance with an ICES model specification. At the same time it sought tenders for the provision of wheelchairs and specialist seating. Both contracts were to run from 1st. April, 2011. Both services had previously been provided through the local PCT.
2. The model involves a combination of capital and activity costs, whereby NCC would be charged for each item of equipment when supplied and would receive a full ("100%") credit for the current value when that item was "recycled", that is returned to the provider. Delivery and collection charges, maintenance charges and charges for use of the provider's IT system to reorder were important elements in the scheme.
3. Tenders are assessed against publicised criteria, which embrace price and quality of service. Unsuccessful tenderers are generally provided by the commissioning authority with a response showing how their tenders were marked by comparison with the successful tenderer.
4. Millbrook successfully tendered for both contracts. Three other companies also tendered. At the material time - and indeed at the date of the hearing - only three or four companies generally reached the tendering stage for such ICES contracts, which demanded substantial specialist expertise and capital resources. Other potential competitors failed to pass the PQQ (pre - qualification) stage, often on financial grounds.
5. Invoices submitted under the contract between NCC and Millbrook dated 17th. June, 2011 were payable monthly. Clause E3.1 required each party to treat as confidential all confidential information belonging to the other, subject to specified exceptions.
6. RT lives in Northamptonshire and takes an active and well - informed role on behalf of the local community in monitoring NHS contracts and performance. He is a representative of LINK, a consumer watchdog on local health care and, as such, is a member of the ICES operational board.

The Request

- 7 On 26th. February, 2012 RT requested the following information from NCC -
- “1 A signed copy of the contract, containing all completed appendices, awarded to Millbrook Healthcare lot number 1.*
 - 2 Total monthly amounts invoiced by Millbrook Healthcare for LOT1, the ICES contract by NCC the lead agency since the contract was awarded.*
 - 3 Total monthly amounts credited by Millbrook Healthcare to NCC for equipment recycled back into Millbrook store since the contract was awarded.”*
8. NCC responded on 22nd. March, 2012. It disclosed all the requested information save the lists of service charges and stock prices contained in a schedule to the contract. As to that information, it impliedly relied on the exemption contained in FOIA s.43(2), namely that its disclosure would prejudice Millbrook’s commercial interests.
9. NCC maintained that position explicitly following an internal review, in which it stated that the public interest favoured maintaining the exemption.
10. RT complained to the ICO on 3rd. April, 2012 and again, following the internal review, on 28th. June, 2012. The ICO consulted both NCC and Millbrook in the course of his investigation. The DN upheld NCC’s reliance on s.43(2).
11. RT appealed to the Tribunal. Millbrook was not joined as a party. Following a determination on written submissions the Tribunal upheld the decision of the DN and dismissed the appeal.
12. RT appealed successfully to the UT against that decision. The UT ruled that an oral hearing should have been ordered, given the state of the evidence. It offered further guidance to the FTT and remitted the appeal for rehearing - hence this decision.
13. Millbrook was joined on its own application on 19th. February, 2015. It submitted an undated written response to the appeal, which was amplified by Mr. Camping, when he gave evidence and made oral submissions.

The law

14. Millbrook relied on the exemption provided by s.43(2) of FOIA, which, so far as material, provides -

“Information is exempt information if its disclosure under this Act would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

For the purposes of this appeal the relevant commercial interests were those of Millbrook. NCC did not apply to be joined as a party nor attempt to demonstrate that it would suffer commercial prejudice by disclosure of the Millbrook pricing structure. There is nothing inconsistent, therefore, in finding that disclosure would prejudice Millbrook’s commercial interests but making no finding as to prejudice to the interests of NCC. It is simply a matter of evidence.

Millbrook argued, as had NCC and the ICO, that disclosure would prejudice its commercial interests and the Tribunal approached its decisions on engagement of the exemption and the balance of the public interests solely on that basis.

RT’s case

15. RT made full and very clear written submissions, which he developed and emphasised at the oral hearing. Essentially, his case was this -

The engagement of s.43(2)

- (i) At the date of his request, Millbrook’s pricing of stock and services in its tender for the NCC contracts was not commercially sensitive and its disclosure could not prejudice Millbrook’s interests. Its contracts with NCC had been signed eight months earlier and its competitors could gain no unfair commercial advantage by a unilateral disclosure of tender prices.
- (ii) Future tenders for similar contracts would be unaffected.
- (iii) Any prejudice to Millbrook’s commercial interests was speculative rather than substantial; the evidence did not justify the “would be likely to prejudice” test, let alone its more rigorous alternative.
- (iv) The contract did not designate the withheld or any other information as confidential.

At a later stage in oral argument RT appeared to concede that Millbrook would or would be likely to suffer prejudice from disclosure but the Tribunal is not persuaded that this was an intentional concession and has treated the engagement of s.43(2) as a live issue

The public interest

- (v) Knowledge of unit pricing is critical to a sensible public appraisal of value for money. The public cannot rely on service providers to give value for money. Early discharge from hospital requires punctual provision of equipment
- (vi) The Department of Health and Monitor (an NHS regulator) demand transparency in procurement. The LGA local transparency guidance and the Local Government Transparency Code 2014 require publication of spending and procurement information.
- (vii) Lack of pricing information tends to exclude smaller competitors from this market and thus reduces competitiveness.
- (viii) Suppression of such information “violates” one of the three requirements of an effective market, namely common access to information.
- (ix) There should be a general principle that, just as the Department of Health is required to share information with the Benchmarking Service, local authorities should be obliged to provide this information to the public.
- (x) The public interest would be served simply by the disclosure of the pricing by a single bidder, here Millbrook.
- (xi) NCC and other local authorities are incompetent and possibly unfair in their commissioning of such goods and services. Disclosure would help to some degree to identify their failings.
- (xii) NCC impose unduly onerous conditions on tendering companies at the PQQ stage and thus unnecessarily eliminate smaller potential competitors.

The case for the ICO and Millbrook

16. Summarily stated it was that -

The engagement of s.43(2)

- (i) Price is a critical issue in procurement contracts of the type involved here and pricing structures are therefore highly sensitive information. The disclosure of

Millbrook's pricing to the small group of its regular competitors or indeed to a wider commercial audience, would seriously prejudice its commercial interests by alerting them to the possible deals that it had achieved with suppliers and where and at what level it made its profit.

- (ii) At the date of the request Millbrook was tendering for three ICES contracts, one for Bedfordshire, in which it was successful and two others, where it was not. It would be placed at a significant competitive disadvantage in future tenders as compared with other contractors, whose pricing remained confidential since pricing in an era of historically low inflation does not alter substantially over a period of a few years.
- (iii) That disadvantage would be particularly acute when re - tendering for the NCC ICES contract when the present agreement expired.

The public interest

- (iv) The information supplied by NCC pursuant to RT's request provided a fair picture of the costs incurred by NCC, month by month, under its contract with Millbrook. It enabled the public to compare such costs with those paid by other comparable authorities under similar ICES contracts.
- (v) Disclosure limited to the pricing structure of just one of the competitive tenders for one particular contract would be of little, if any value to the public.
- (vi) Likewise, it would do little to promote competition by facilitating entry into the market by new contractors.
- (vii) Disclosure only of Millbrook's pricing structure would be plainly unfair to Millbrook and would be a major handicap in similar competitive tenders in the near future. Such unfairness is against the public interest, the more so where its effect would be to reduce competition in such tenders by disabling one of the main competitors

The evidence

17. The Tribunal received a wealth of documentary evidence, including a spreadsheet "Value for Money" comparison for the ICES contracts in the Trent Region, tender documents, the NCC/ Millbrook contract, from which the pricing schedule was redacted and provided in the closed bundle. RT was well aware of the nature of the schedule and suffered no disadvantage since the only information withheld from him was the actual figures, which were of themselves irrelevant to the Tribunal's decision.

18. There was no closed material session during the hearing.
19. Mr. Campling gave evidence for Millbrook. He referred to a series of letters from commissioning authorities to Millbrook where it had failed to secure ICES contracts, largely on price issues. The letters demonstrated that unsuccessful tendering companies are given extensive feedback as to their ratings for price, quality and presentation matched with those of the successful tenderer. He also presented a spreadsheet showing which providers currently held ICES contracts and when those contracts expired and tender processes began. It showed clearly that the great majority of such contracts in the South of England and the Midlands were held by one of three providers and a fourth operated largely in the North - West.
20. In 2012, the year of the request, three ICES contracts for which Millbrook was tendering were awarded. Millbrook was successful in Bedfordshire but not in the others. He submitted that its pricing structure for the NCC contract was therefore highly sensitive in February, 2012 and for a considerable time thereafter because Millbrook continued to tender for such contracts and prices remained quite stable in an era of low inflation. One invitation to , making details of unit prices all the more sensitive. tender was generally very similar to another
21. He explained the basic structure of the ICES contract and the basic requirements of governance and financial substance which the PQQ process was designed to identify, so that the closed bids procedure was usually limited to three or four tenderers. He stated that the biggest barrier to entry into this market is financial; set - up costs for producing a tender amount to around £7 - 800,000, £500,000 for storage facilities and the balance for the purchase of initial stock. As to information regarding pricing by an established competitor, that was available in outline through the feedback letters to unsuccessful bidders. Commissioners provided all tendering companies with identical information including the weighting given for each factor - price, quality, service reliability etc. - in the evaluation of bids. Those bids were made on a confidential basis.
22. This is, we were told, a market with a small number of providers which deal with a limited number of core suppliers of equipment. Disclosure of one provider's pricing structure would tell its competitors where it had secured a better deal with an identifiable supplier and where a worse bargain than that competitor. It would provide an insight into collection, delivery and refurbishment costs and profit margins. It would damage supplier relationships in addition to weakening the position of the company whose prices were revealed. Such disclosure would be especially unfair where such information was made available to large companies (of which examples were given) with no track record in respect of ICES contracts which contemplated diversifying into this market. The exposure of all pricing structures would cause even greater disruption of

supplier relationships. It would make competitive negotiating impossible and result in a significant loss of trust where one provider discovered that its rival, contrary to what it supposed, had struck a better deal. Such transparency would do nothing to drive prices down, probably the reverse.

The Tribunal's findings

The engagement of s.43(2)

23. A fundamental problem for RT's case, as regards both the engagement of the exemption and the public interest in disclosure, if the exemption was engaged, was that his request was restricted to information provided to NCC by only one of the parties tendering for the ICES contract. Unless such information was of no or no significant value to Millbrook, it followed inevitably that disclosure would harm or be likely to harm its commercial interests and would be unfair. Unfairness is plainly a relevant factor when weighing public interests in a civilised society.

24. On the evidence before us, we have no doubt that such selective disclosure would have significantly prejudiced Millbrook's commercial interests at the date of the request and would do so now.

25. We do not consider that such a finding depends on the number of competitors in the field. Price is a critical issue in any large public procurement contract, more than ever at a time of great financial stringency in the public sector, as the tender document stressed. Whatever uncertainties may exist when assessing other features of a tender, price is a matter of objective comparison. Detailed knowledge of the breakdown of a rival's bid is a major advantage, when deciding what deal to agree with a supplier or what overall price will undercut that rival's tender. That advantage would be enjoyed both by existing and potential competitors, great and small.

26. We are satisfied that the figures in Millbrook's NCC tender remained significant both as regards current undecided tenders in 2012 and numerous subsequent tendering processes to commence in the following two or three years, as evidenced by the spreadsheet submitted by Millbrook. It seems that such processes generally begin about nine months before the expiry of the current contract.

27. For these reasons we find that s.43(2) is engaged and that disclosure would prejudice Millbrook's commercial interests.

The public interest

28. Beyond arguing the general desirability of transparency in public affairs, RT's case is essentially that publication of all tender information, including unit pricing, would be in the public interest as leading to
- (i) a substantial improvement in procurement skills within commissioning authorities, and
 - (ii) a widening of the range of providers competing in this market ,
- both leading to better value for money for the public.
29. As regards general considerations of transparency, the LGA's guidance quoted by RT specifically excepts from the demands of transparency commercially sensitive information and refers to the need to observe the provisions of FOIA, including relevant exemptions. That is plainly not a prohibition on publication of such material but reinforces the need to look very carefully at requests for its disclosure.
30. As noted already, this request does not extend to all pricing information in the various tenders for the NCC contract. The value to the public of Millbrook's figures alone, even though it was the successful bidder, is very limited. It would be impossible to judge whether a particular unit price quoted in the tender was lower than the corresponding figures from other competitors or, if lower (or higher), by how much. It would provide no sound basis for assessing the fairness or competence of the commissioning exercise.
31. The Tribunal sees no connection between publication of these figures and criticisms, justified or not, of NCC's management of the procurement process. NCC's PQQ standards would be entirely unaffected by the disclosure of the requested information.
32. The submission that disclosure of these prices would promote competition by assisting new entrants into the market demands careful scrutiny because its implications are far - reaching. It is not obvious why, if valid, such an argument should apply to procurement contracts of the kind involved here but not to other contracts put out to tender, whether in the private or public sector. If it applies generally, it is an argument for the general removal of confidentiality from hitherto sensitive price information and probably other protected commercial information. Of course, FOIA is concerned only with information held by specified public authorities but the advantages to the public of disclosure would extend to private sector contracts in a more general economic sense, going beyond FOIA, because there is a widely - acknowledged public interest in increased competition which transcends the distinction between public and private commercial activity.

33. Disclosure to aspirant competitors of the pricing structure of just one of the established players would provide them with a limited benefit, whilst putting Millbrook at a serious disadvantage as against them and its habitual competitors. Requiring a general release of sensitive pricing information by all tendering parties (which is not, of course, under consideration in this appeal but which RT wants to see introduced), would cause chaos within the market, we do not doubt, rupturing supplier relationships and destroying the basis of competitive tendering. We accept the evidence of Mr. Campling, summarised at paragraph 22. Fair competition, which is central to the public interest in value for money requires the provision of identical information, publicly available, to all tendering parties. Equally, it demands confidentiality for important elements in the responsive tenders, if one bidder is to retain a legitimate competitive advantage over another, resulting in a lower bid price or a better all round bargain than others can offer.
34. The Tribunal rejects the submission that such disclosure, partial or universal, would broaden the range of tenders by admitting new smaller competitors. It accepts the evidence that the requirement for financial substance is a major obstacle to participation in the tendering process. It would be difficult, moreover, to conceive of a more anti-competitive measure than mandatory provision of the pricing structures of companies operating in a market to would-be entrants which have no such structures and of whom no such demand can be made. As regards the public interest, that is a decisive argument against disclosure for the benefit of large well-financed newcomers gaining entry to the market through unilateral provision of a competitor's sensitive commercial information.
35. The legitimate source of price information is the letter to the unsuccessful tendering party.
36. As mentioned above, the fact of unfair and discriminatory treatment of Millbrook by contrast with its competitors is a factor of some importance when weighing the public interest.
37. In an email dated 26th. August, 2014, RT developed, to some extent, his criticisms of commissioners generally and NCC in particular. As already indicated, the Tribunal does not consider that disclosure of the requested information would serve the objective of improving commissioning standards, even if RT's criticisms were well founded. However, the evidence before the Tribunal did not support the arguments advanced in that email anyway. There was no evidence of the renewal of contracts despite inadequate delivery. There was, on the other hand, evidence of benchmarking consultation among commissioners and of data as to comparative value for money in ICES contracts being available, as exemplified by the Trent region spreadsheet. The claim that commissioners hid behind a lack of transparency was not made out.

38. Disclosure of the Millbrook pricing information would not, in the Tribunal's opinion, for the reasons given above, achieve the worthy purpose of enabling the public to ensure that it was getting best value from these ICES contracts or that the "NHS constitution" was being upheld.

39. Having well in mind that disclosure is required if the public interests for and against are of equal weight, the Tribunal has no doubt that the case for withholding this information is clearly made out.

40. For these reasons we dismiss this appeal.

41. We wish to add, however, that we were greatly assisted by the fair and measured manner in which RT presented his carefully researched and forcefully argued case.

42. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

24th. April, 2015

Signed

Chairman

24th April 2015