

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2019

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested to know the number of bids the Home Office received when tendering for service providers to conduct Secure English Language Testing. The Home Office refused the request, on the grounds that the requested information was exempt from disclosure under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 43(2) to withhold the requested information.

Background

3. The Home Office has recently run a procurement exercise to recruit service providers to conduct Secure English Language Testing ('SELT'). The tests are taken by visa applicants to demonstrate proficiency in English.
4. The tender invited bids from service providers in respect of three parts, or "Lots":
 - Lot 1 – SELT UK
 - Lot 2 – SELT Rest of the World ("ROW")
 - Lot 3 - Life in the UK ("LITUK").

Request and response

5. On 24 January 2019, the complainant wrote to the Home Office and requested information in the following terms:

"I will appreciate if you could provide below information under FOI request.

On 23/01/2019, how many bidders RFP¹ received by the UKVI²/Home Office, please provide number of RFP received for each lot I.e. Lot 1 SELT UK, Lot 2 SELT ROW and Lot 3 Life in the UK."

6. The Home Office responded on 7 February 2019. It stated that the requested information was exempt from disclosure under section 43(2) (commercial interests) of the FOIA.
7. Following an internal review, the Home Office wrote to the complainant on 7 May 2019. It upheld its application of section 43(2) of the FOIA to withhold the information.

Scope of the case

8. The complainant contacted the Commissioner on 7 May 2019 to complain about the way his request for information had been handled. He disputed the Home Office's decision to apply section 43(2) of the FOIA to refuse the request.
9. During the Commissioner's investigation, the Home Office advised her that it was withdrawing its application of section 43(2) of the FOIA in respect of Lot 3. It confirmed that the number of bids received for Lot 3 was four, and that it had recently published this information in a contract award notice³, on the Tenders Electronic Daily ("TED") website, the procurement process for Lot 3 having been completed. Having satisfied herself that this was the case, the Commissioner has

¹ Request for Proposal – process by which an organisation invites formal bids from potential service providers

² UK Visas and Immigration - a division of the Home Office, responsible for the UK's visa system

³ <https://ted.europa.eu/udl?uri=TED:NOTICE:342912-2019:TEXT:EN:HTML>

excluded the Home Office's response to the request for information about Lot 3 from the scope of this decision notice.

10. The Home Office commented to the Commissioner that, in addition to section 43(2), it believed that the exemption at section 22 (information intended for future publication) of the FOIA could be applied in respect of the requested information, although it did not provide the Commissioner with substantive arguments in support of this position.
11. The analysis below considers the Home Office's decision to apply section 43(2) of the FOIA to refuse the information requested in respect of Lot 1 and Lot 2. In view of her decision that the Home Office was entitled to apply section 43(2), it has not been necessary to also consider its application of section 22 of the FOIA.
12. The Commissioner has commented on the time the Home Office took to conduct the internal review, in the "Other matters" section at the end of this decision notice.

Reasons for decision

Section 43 – Commercial interests

13. Section 43(2) of the FOIA states:

"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)."

14. The Home Office applied section 43(2) to withhold information as to the number of bids received for Lot 1 and for Lot 2. It explained to the Commissioner that it did so because, at the time the request was received, the procurement exercise was still underway. Although the request only asked for the number of bidders for each Lot, disclosure of this information would enable competitors to build a picture of the extent to which they faced rival bids to deliver the service, and who the other bidders might be. It said this would be likely to compromise the procurement process.

Is section 43(2) engaged?

15. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, 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 the applicable interests within the relevant exemption.

16. Second, 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. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
17. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
18. In relation to the lower threshold of 'would be likely', the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold of 'would', in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Applicable interests

19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43⁴ of the FOIA explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity, such as the purchase and sale of goods or services.
20. It is the Home Office's contention that disclosure of the requested information in respect of Lot 1 and Lot 2 would be likely to prejudice its own commercial interests and those of the third parties who were bidding for the contracts in question. It believes that disclosure of the information would be likely to undermine the procurement process, which was still underway at the time the request was submitted.

Does the requested information relate to the applicable interest?

21. Having regard to the definition in paragraph 19, above, the Commissioner considers that information about bidders for a particular contract is information which relates to a commercial activity.

⁴ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

Is there a causal relationship between disclosure and the prejudice envisaged?

22. In order for the exemption at section 43(2) of the FOIA to be engaged, it is necessary to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and the specific prejudice which disclosure of these elements would cause.

23. The Home Office provided the following explanation on this point:

"Providing the information prior to the completion of the procurement process would prejudice a party's commercial interests as the information requested allows bidders to understand the scale of their current competitors in the bid cycle. Revealing the requested information prior to completion of the procurement process could increase the likelihood in the marketplace of other parties knowing which organisations have bid. These organisations could therefore be subsequently approached by for example media outlets or the public about confidential bids they are involved in. Equally, we would not release the number of bids (other than LitUK which is now public knowledge) until the procurement is completed in case there is a challenge that requires us to re-run the procurement.

We are careful not to disclose this type of information ... as it could, if made known to a potential Bidder, allow that Bidder to adjust their approach to bidding e.g. if a Bidder found out that they were the only Bidder in a procurement they could put in a lower quality and/or higher cost bid knowing it would be accepted. On the other hand, if a Bidder found out there were many Bidders it could influence whether they bid at all (saving bid costs). Clearly in either scenario that Bidder would have a material advantage over others. It could also disadvantage the value that the Home Office is able to achieve from a procurement (lower quality/higher cost services) and have a reputational impact – Bidders having lower confidence in our ability to run a fair and transparent procurement reducing the market from which services might be sourced leading to poorer value."

24. The Commissioner does not consider that the Home Office has persuasively shown how the disclosure of bid numbers would be likely to prejudice the commercial interests of the bidders. However, she does accept that the Home Office has demonstrated a causal relationship between disclosure of the number of bids and prejudice to its own ability to obtain best value for money, in that knowledge of the number of other bids that they were competing against could lead

bidders to adjust their bids, or not to bid at all. Either of these outcomes would be likely to be disadvantageous to the Home Office in terms of it being able to obtain best value for money. Furthermore, the Commissioner is satisfied that the prejudice envisaged is real, actual and of substance.

Is the level of likelihood of prejudice being relied upon met?

25. The Home Office specified that the prejudice it envisaged, "would be likely to" occur.

"This is in line with the approach taken by the Information Tribunal in the case of John Connor Press Associates Limited v the Information Commissioner (EA/2002/0005). The Tribunal stated:

'Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not" (paragraph 15).'"

26. The Commissioner is satisfied that the arguments supplied by the Home Office demonstrate that the chance of prejudice occurring to the Home Office's commercial interests is more than a hypothetical possibility. She is satisfied that they demonstrate that there is a real and significant risk of prejudice occurring and therefore she finds that the exemption is engaged.

Public interest test

27. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosure

28. The Home Office explained that it took the following arguments into account:

"It was recognised that there will be a public interest in immediate disclosure to ensure that there is full transparency in the Home Office's commercial interests and in particular to maintain the Home Office's accountability to tax payers. Disclosure of this information would also enable the public to assess whether or not the Home Office is getting best value for money in terms of its contracts."

Arguments in favour of maintaining the exemption

29. The Home Office argued that there is a substantial public interest in government departments being able to secure contracts that represent value for money. Value for money can be best obtained where there is a healthy competitive environment, coupled with protection of the Government's commercial relationships with industry. The Home Office argued that, were this is not the case, there would be a risk that:
- Companies would be discouraged from dealing with the public sector, fearing that disclosure of information might damage them commercially, or
 - Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.
30. It argued that the disclosure would be likely to damage the relationship between the Home Office and its service providers and put the Home Office at a competitive disadvantage.
31. The Home Office also said that it did not expect to maintain its reliance on section 43(2) indefinitely. It is its usual practice that information about bids for contracts (including the number received) is published on the TED website⁵ after procurements have completed, as had recently been done with the information about Lot 3. It said that once the procurement process for Lot 1 and Lot 2 had been completed, it intended that the requested information would be published on the TED website.

Balance of the public interest arguments

32. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there will be a public interest in knowing more about commercial contracts and projects, including the appetite among private sector organisations for bidding for public sector contracts. It follows that knowing the number of bids there was for each Lot would satisfy this interest.

⁵ <https://ted.europa.eu/TED/browse/browseByMap.do>

33. However, the Commissioner notes that the Home Office is already committed to publishing this information, once the procurement has completed, and so this interest will, in time, be addressed.
34. The Commissioner is aware that it is necessary for public authorities like the Home Office, which negotiate with third parties on a regular basis, to be able to keep certain information about its negotiations confidential, so as not to prejudice its ability to achieve the best value possible when spending public money on public services and projects. There is a real possibility that the Home Office could be commercially disadvantaged by the disclosure of bid numbers because of the way this information could be used by bidders while the procurement process is still live.
35. On balance, whilst the Commissioner accepts that disclosure of the withheld information could promote transparency, she considers that the public interest in disclosure is outweighed by the public interest in ensuring that the Home Office's ability to obtain best value for money is not undermined. She is therefore satisfied that the Home Office was entitled to rely on section 43(2) of the FOIA to withhold the information requested in respect of Lot 1 and Lot 2.

Other matters

36. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

37. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
38. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40

working days; it is expected that this will only be required in complex and voluminous cases.

39. In this case, the Home Office took 58 working days to notify the complainant of the internal review. The Commissioner asked the Home Office to explain why it exceeded the time limits set out in the section 45 Code of Practice, however, the Home Office failed to provide a response on that point.
40. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"⁶ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁷.

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

41. 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

42. 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.
43. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF