

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2020

Public Authority: Her Majesty's Chief Inspector for Education and Training in Wales (Estyn)

Address: enquiries@estyn.gov.wales

Decision (including any steps ordered)

1. The complainant requested information about joint inspection work in respect of non-maintained settings. Estyn provided some of the information requested and withheld other information under section 43(2) of the FOIA. During the course of the Commissioner's investigation Estyn disclosed some of the information it originally withheld. The Commissioner's decision that Estyn has correctly applied section 43 to the remaining withheld information. However, the Commissioner finds that Estyn breached section 10(1) in failing to disclose some of the information requested within the statutory time for compliance. The Commissioner does not require any steps to be taken.

Request and response

2. On 22 October 2019, the complainant wrote to Estyn and requested information in the following terms:

"I would like the following information relating to the joint inspection work Estyn undertake with Care Inspectorate Wales for inspecting non-maintained settings (non-school providers of care and education) for 3 to 4 year olds:

- *How many inspections have taken place from January 2019 to 31 October 2019*
- *How many of these inspections have been undertaken by a fee paid/contracted inspector?*

- *How much in total, will Estyn have paid to these contracted/fee paid inspectors for this work?*
 - *Given your transparency with regard salary information you publish in respect of your employed staff. What is the average amount paid to contracted staff per joint inspection?*
 - *How many of these inspectors are on your approved list?*
 - *What is the annual budget for this piece of work?"*
3. Estyn responded on 15 November 2019 and provided some information but withheld information relating to parts 3, 4 and 6 under section 43 of the FOIA.
 4. On 19 November 2019 the complainant requested an internal review of the handling of the request.
 5. Estyn provided the outcome of its internal review on 24 December 2019 and upheld its decision that the remaining information was exempt under section 43 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 10 February 2019 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation Estyn disclosed the budget figures (part 6 of the request).
8. The scope of the Commissioner's investigation is to consider whether Estyn should disclose the remaining information held relevant to parts 3 and 4 of the request or whether it correctly withheld the information under section 43(2) of the FOIA.

Reasons for decision

Background

9. The request in this case relate to joint inspections which Estyn undertake in conjunction with Care Inspectorate Wales, of childcare providers who provide funded education for 3 and 4-year-olds (in non-maintained settings). Both Estyn and Care Inspectorate Wales either employ their own staff, or contract with their own, separate pool of additional inspectors to undertake the inspections. The withheld information relates to the costs for engaging contracted inspectors.

Section 43 – prejudice to commercial interests

10. 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).
11. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
 - Secondly, 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 to those commercial interests; and
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
12. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case, the withheld information relates to the fees paid to contracted inspectors. The Commissioner is satisfied that the information relates to the purchase and sale of services and is therefore commercial.
13. Estyn considers that disclosure of the withheld information would be likely to prejudice both its own commercial interests and those of the contracted inspectors.
14. The remaining withheld information comprises the total amount paid to contracted inspectors and the average amount paid to contracted inspectors per joint inspection (which includes both lead and team roles). Estyn's arguments in support of its application of section 43 relate primarily to disclosure of the average amount paid to contracted staff per inspection. However, as Estyn has already disclosed the number of inspections undertaken by contracted staff, disclosure of the total amount paid would allow calculation of the average amount paid.
15. Estyn is of the view that disclosure of the average amount paid to contracted staff per inspection would provide a benchmark for future inspections, and give an indication of the amount it is willing to pay individuals to conduct such inspections. Estyn advised that contracts are awarded on the basis of price as well as quality assessment. In terms of contracted inspectors, Estyn advised that there is a considerable

variation in the contract rates submitted and approved and this is based on a number of factors such as:

- The geographical location of the facility being inspected;
 - The language of the setting ie English only or bilingual (Welsh/English); and
 - Whether the individual has a lead or support role on an inspection.
16. Estyn considers that disclosure of the average amount paid is likely to be misleading and could lead to confusion amongst inspectors as it fails to take into account the varying factors referred to above. Estyn argues that disclosure of the withheld information would be likely to prejudice its ability to achieve value for money in future negotiations. This is because disclosure of the average fee would be likely to result in inspectors who previously charged at the lower end of the scale increasing their charges to be more within the region of the average fee, even in cases where there are no special circumstances such as bilingual requirements involved. This would in turn adversely affect the competitive tendering process and prejudice Estyn's ability to achieve value for money, and thus it would suffer a commercial disadvantage. Estyn confirmed that it has a regular, frequent need to engage inspectors to carry out these inspections.
17. Estyn advised that it takes steps to ensure there is no collusion or price fixing between inspectors on fees, and inspectors are required to sign a Certificate of Non-Collusion ('the Certificate') to this effect. A copy of the Certificate was provided to the Commissioner and includes various provisions for inspectors to attest to, such as confirming they have not communicated the amount or approximate amount to any other persons other than Estyn or any necessary person such as in order to obtain an insurance premium. Estyn is concerned that disclosure of the withheld information will undermine what the Certificate is designed to achieve, which is ensuring that inspectors provide bids based on the specific circumstances of the inspection, rather than attempting to undercut or bid based on a form of 'benchmark'.
18. Estyn advised that bids in excess of the average fee regularly provide value for money, particularly in cases where there are complicating factors such as remote location. It considers that disclosure of the withheld information could lead to 'a bidding war' with inspectors feeling compelled to submit lower bids than they might normally, in line with the average fee, in order to remain competitive, even when there are factors which would normally result in an increased bid/fee. This is likely to discourage some inspectors from submitting bids and lead to a reduction in the number of inspectors that Estyn will be able to call on in the future. There is a relatively small pool of Registered Nursery

Inspectors that are available as a result of the rigorous training and evaluation that they have to undergo. Estyn considers disclosure is likely to prejudice its commercial interests by adversely affecting its ability to attract inspectors to tender in the future.

19. Estyn also argues that disclosure is likely to prejudice the commercial interests of some of the Registered Nursery Inspectors as they *"could find themselves priced out of the market as a result of other inspectors undercutting them in line with the average fee"*. Estyn advised that it has reached this view based on the likely effect that disclosure will have on the contract bidding process in terms of driving down prices below which some inspectors will not be able to compete. Estyn confirmed that it has not consulted with any of the third party inspectors concerning this matter.
20. In relation to the commercial interests of third parties the Commissioner does not consider it is appropriate to take account of speculative arguments which are advanced by public authorities about how any prejudice may occur. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects arguments advanced by the public authority to be based on its prior knowledge of the third party's concerns. Whilst the Commissioner accepts that disclosure could result in fees being driven down she notes that Estyn has not consulted with any third parties regarding this request and she has seen no evidence to suggest that Estyn's view is based on any prior knowledge of concerns from inspectors. In light of this the Commissioner is unable to conclude that disclosure of the withheld information would be likely to prejudice any third party interests.
21. The Commissioner has considered the arguments put forward by Estyn and considers that it is reasonable to accept that disclosing the withheld information is likely to create a benchmark for the inspection fees and it would therefore be likely to prejudice Estyn's own commercial interests, and its ability to achieve value for money in future negotiations. In reaching this view the Commissioner has taken into account the fact that there is a small pool of inspectors that are qualified to carry out the role in question, and the fact that Estyn has taken steps to ensure that there is no price fixing or collusion between inspectors on fees via the Certificate that inspectors have to complete when bidding.
22. In order to accept the exemption is engaged the Commissioner usually requires evidence of a causal link between the information in question and the alleged prejudice argued. This is usually easier to argue where an issue is ongoing, such as retendering or negotiating a new commercial contract or deal. The Commissioner notes that given the nature of its work, Estyn has a frequent need to carry out inspections of this nature. It conducted 53 inspections involving fee paid/contracted

inspectors in the period from January to October 2019. In light of this the Commissioner accepts that disclosing the average fees will have a likely impact on future negotiations as it may make inspectors more reluctant to offer favourable rates in the future. The Commissioner is therefore satisfied that section 43(2) is engaged in relation to the remaining withheld information and she has gone on to consider the public interest test in this case.

Public interest test

23. The exemption under section 43(2) of the FOIA is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

24. Estyn acknowledges the public interest in increasing transparency and accountability in relation to the spending of public money. If the public has a better understanding of how public money is spent it could increase confidence in the integrity of the authority and its ability to effectively allocate and manage public funds. However, it considers there is limited public interest in disclosure of the average fee paid to inspectors as *"the figures do not provide an accurate picture and in the absence of any other information would be inaccurate and of little use, thereby reducing the public interest in favour of disclosing the information"*. Estyn referred again to the variance in rates due to special circumstances such as language and location. It also pointed out that contract prices are not a reflection of the contracted inspector's take home earnings as they are not paid travel or subsistence in the same way as inspectors employed by Estyn. As such, it would not be possible to use contract prices as a comparison with the earnings of those with employed status.
25. Estyn also recognise that a further argument in favour of disclosure relates to promoting competition in procurement through transparency. Greater transparency about the tendering process and negotiation of contracts may encourage increased competition and may reduce costs. However, Estyn pointed out that this public interest is significantly reduced in this particular case due to the small pool of individuals who are qualified and eligible to conduct the work in question. As such, disclosure is unlikely to increase competition in future tenders. In addition, for the reasons set out in paragraph 18 above, Estyn considers that disclosure may have the reverse effect and actually discourage inspectors from tendering in the future as they may feel compelled to submit bids at the average fee.

26. The complainant works for an organisation that represents individuals who undertake joint inspections in conjunction with inspectors appointed by Estyn. He has indicated that he requires the information to ensure that there is equal and fair pay for the inspectors conducting the work on behalf of the two organisations. He also advised that he would be happy to examine any confidentiality agreement in respect of the information as he does not want to cause any harm to any party.

Public interest arguments in favour of maintaining the exemption

27. Estyn argues there is a public interest in withholding information which, if disclosed, would reduce its ability to negotiate future contracts and/or competition in the future. It considers that the public interest in promoting economy and value for money in future spending would be undermined through disclosure of the withheld information.
28. Estyn explained that, because of the rigorous training and evaluation that inspectors undergo in order to be qualified to carry out the role, there is a small pool of inspectors that are able to bid for such work. Estyn needs to be assured that inspectors are delivering a quality service and regular update training is also provided which inspectors are required to attend. Estyn considers that disclosure would be likely to lead to some inspectors feeling compelled to reduce their fees in future tender exercises, in line with the average fee, in order to remain competitive. Estyn also considers that this will also dissuade some inspectors from continuing to work with Estyn in the future. This would reduce an already limited pool of inspectors to carry out this type of inspection work in the future.
29. Estyn pointed out there is a public interest in it being able to carry out its statutory duties to inspect non-maintained nursery providers. It is concerned that disclosure will prejudice its ability to carry out such inspections effectively in the future as it would be likely to reduce the number of bids/available inspectors for these inspections, particularly in Welsh speaking or remote locations.
30. Estyn also considers that disclosure would be likely to have an adverse effect on its ability to achieve value for money in the future, as inspectors who previously may have submitted bids at the lower end of the charging scale will increase future bids to be more in line with the average figure. This would not be in the public interest.

Balance of the public interest

31. The Commissioner considers that there is a public interest in openness and transparency, and in accountability for the efficient use of public funds.
32. Disclosure of the information requested in this case would provide members of the public with information about the average paid to contracted inspectors carrying out inspections within non maintained nursery settings. However, the Commissioner also notes Estyn's comments about the wide variance between fees paid to inspectors for this type of work, based on factors such as location, and whether the inspection is conducted bilingually.
33. Beyond increasing transparency generally, the Commissioner does not consider there to be any other compelling public interest arguments in favour of disclosing the information.
34. Balanced against this, the Commissioner accepts that disclosure of the requested information would be likely to prejudice Estyn's commercial interests and she must therefore accept that there is weight to the argument that disclosure would not be in the public interest. Disclosing information which would put Estyn at a disadvantage when negotiating rates for inspectors in the future would not be in the public interest.
35. Based on the evidence provided, the Commissioner accepts that it is likely that disclosure of the information may result in inspectors being less likely to bid for the work in the future. This in turn could reduce the already limited pool of inspectors available to Estyn in the future.
36. The Commissioner considers that any arguments in favour of disclosure are somewhat diminished by the fact that the request is for the average fees paid to inspectors. Disclosure of the average fees paid would not give members of the public an insight into to the scale of fees paid to inspectors. Whilst the Commissioner accepts that the complainant and the members he represents have an interest in disclosure of the withheld information she does not consider that this is sufficient to outweigh the public interest in maintaining the exemption in this particular case.
37. Having taken into account all of the public interest arguments for and against disclosure of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

Section 10 – time for compliance

38. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and in any event not later than 20 working days following the date that a request was received. Section 1(1) states that a public authority should confirm whether it holds relevant recorded information and, if so, to communicate that information to the applicant.
39. In this case the request for information was submitted on 22 October 2019. Estyn responded on 15 November 2019 and disclosed some information. During the Commissioner's investigation Estyn withdrew reliance on section 43 in relation to one part of the request and disclosed the total budget amount. As this information was not disclosed within the statutory time for compliance the Commissioner finds that the Estyn breached section 10(1).

Right of appeal

40. 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

41. 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.
42. 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

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