

Decision Notice

Decision 048/2017: Citizens Advice Scotland and NHS Greater Glasgow and Clyde Health Board

Contract with CP Plus Ltd.

Reference No: 201602273

Decision Date: 31 March 2017



Scottish Information
Commissioner

Summary

NHS Greater Glasgow and Clyde was asked for information about its contract with CP Plus for parking services. NHS Greater Glasgow and Clyde disclosed most of the information, but withheld some financial information, arguing that it was commercially sensitive. The Commissioner found that while NHS Greater Glasgow and Clyde had correctly withheld some information, other information had been wrongly withheld. She required NHS Greater Glasgow and Clyde to disclose this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 16 August 2016, Citizens Advice Scotland (CAS) made a request for information to NHS Greater Glasgow and Clyde Health Board (NHS Greater Glasgow and Clyde) about parking arrangements. This decision considers only part (ii) of the request, which related to parking services contracted to a third party. CAS asked for “a copy of any such contract(s) that is in place between the health board and the parking management company(ies)”.
2. NHS Greater Glasgow and Clyde responded on 13 September 2016. In relation to part (ii) of the request, it advised CAS that it was withholding some financial information under section 33 of FOISA.
3. On 28 October 2016, CAS wrote to NHS Greater Glasgow and Clyde requesting a review of its response. In particular, CAS disagreed with the decision to withhold information covered by part (ii) of the request under section 33 of FOISA.
4. NHS Greater Glasgow and Clyde notified CAS of the outcome of its review on 9 December 2016. It continued to withhold information falling under part (ii) of the request under section 33 of FOISA.
5. On 13 December 2016, CAS applied to the Commissioner for a decision in terms of section 47(1) of FOISA. CAS was dissatisfied with the outcome of NHS Greater Glasgow and Clyde’s review because (in its view) the authority had not demonstrated a genuine link between disclosure of the information and harm. It also argued that the public interest favoured disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that CAS made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 13 January 2017, NHS Greater Glasgow and Clyde was notified in writing that CAS had made a valid application. NHS Greater Glasgow and Clyde was asked to send the Commissioner the information withheld from CAS. NHS Greater Glasgow and Clyde provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Greater Glasgow and Clyde was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both CAS and NHS Greater Glasgow and Clyde. She is satisfied that no matter of relevance has been overlooked.

Withheld information

10. Most of the contract with CP Plus was provided to CAS. The information which has been withheld falls into three main categories:
 - (i) Names of other NHS bodies that have also held contracts with CP Plus.
 - (ii) Weekly and annual cost totals, including details of recurrent costs and VAT charges.
 - (iii) Hourly rates for staff, annual salaries, number of staff, and number of hours staff work at each site per week/year.
11. All of this information falls under part (ii) of CAS's information request. NHS Greater Glasgow and Clyde is withholding all of this information under section 33(1)(b) of FOISA.

Section 33(1)(b) of FOISA: substantial prejudice to commercial interests

12. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is subject to the public interest test in section 2(1)(b).
13. There are a number of elements an authority must demonstrate are present when relying on this exemption. In particular, it must show:
 - (i) Whose commercial interests would, or would be likely to, be harmed by disclosure;
 - (ii) The nature of those commercial interests; and
 - (iii) How disclosure would, or would be likely to, prejudice substantially those interests.
14. Where the authority considers that the commercial interests of a third party would, or would likely be harmed by disclosure, it must make this clear: in such cases, consulting the third party is generally advisable.

15. "Commercial interests" are not defined in FOISA, but the Commissioner's guidance¹ on this exemption states that an organisation's commercial interests will usually relate to the commercial trading activity they undertake, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.
16. NHS Greater Glasgow and Clyde argued that disclosure of the withheld information would, or would be likely to cause harm to the commercial interests of CP Plus. They submitted that CP Plus provide car park management services across the UK to a diverse range of clients, both public and private sector, including a large number of NHS organisations. NHS Greater Glasgow and Clyde argued that it was very likely that CP Plus charges different prices to different clients and disclosing the rates would put them at a commercial disadvantage.
17. NHS Greater Glasgow and Clyde explained that it had asked CP Plus for comments (on the effects of disclosure on its commercial interests), but CP Plus had declined to make any representations. NHS Greater Glasgow and Clyde had no further submissions or arguments to make regarding the commercial interests of CP Plus.
18. In light of the arguments put forward by NHS Greater Glasgow and Clyde, the Commissioner is satisfied that the commercial interests that would be affected by disclosure of the information are those of CP Plus. The Commissioner accepts that CP Plus operates in a commercial environment, as demonstrated by its actions in bidding competitively for contracts to provide parking management solutions.
19. The Commissioner will now consider whether the level of prejudice to those commercial interests that would, or would be likely to, follow disclosure is sufficient to engage the exemption. The prejudice must be substantial: in other words, of real and demonstrable significance.

Names of NHS bodies that have also held contracts with CP Plus

20. NHS Greater Glasgow and Clyde withheld the names of some NHS bodies which have also held contracts with CP Plus (while some have been disclosed). NHS Greater Glasgow and Clyde has made no submissions on these redactions and it is not clear why these names are being withheld.
21. The Commissioner has found information online that indicates that each of the NHS bodies whose names were redacted are, or have been, clients of CP Plus. Given that this information is in the public domain, and in the absence of any compelling arguments from NHS Greater Glasgow and Clyde, the Commissioner can see no reason why disclosure of this information would, or would be likely to, prejudice substantially the commercial interests of CP Plus. Accordingly, the Commissioner finds that the names of current and former clients of CP Plus (which are publicly known) is not information which engages the exemption in section 33(1)(b) of FOISA. She concludes that the information was wrongly withheld under this exemption and should be disclosed to CAS.

Totals of weekly and annual costs, including recurrent costs and VAT charges

22. As indicated above, some of the withheld information relates to the weekly costs or annual recurrent costs of operating the contract on specific sites, and includes VAT costs. Disclosure of these weekly or annual cost totals would not reveal the hourly rates paid to staff or the number of staff at each location. NHS Greater Glasgow and Clyde has not

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

explained to the Commissioner's satisfaction how disclosure of these totals could cause the harm cited by NHS Greater Glasgow and Clyde. NHS Greater Glasgow and Clyde have made no specific arguments on why disclosure of this particular information would cause harm, and CP Plus itself has not put forward any arguments.

23. In the circumstances, the Commissioner finds that this information does not fall under the exemption contained in section 33(1)(b) of FOISA and she requires NHS Greater Glasgow and Clyde to disclose this information to CAS.

Hourly rates, staff salaries, number of staff and number of hours at each site per week/year

24. The remaining information that is being withheld relates to the hourly rates and annual salaries paid to staff, the numbers of hours per week worked by staff on each site, and the number of staff employed on specific sites. The Commissioner considers that this information is central to the tender bid from CP Plus, and that it provides a detailed insight into how CP Plus calculated its total costs when bidding for the contract. The Commissioner acknowledges that CP Plus may use different calculations when tendering for different contracts, depending on the specific requirements of each tender, but she considers that information relating to hourly rates, staff salaries and staff numbers is commercially sensitive.
25. It is the Commissioner's view that disclosure of such information could enable competing companies to out-bid CP Plus in future tenders, and to put CP Plus at a commercial disadvantage. The Commissioner concludes that disclosing information revealing the hourly rates, staff salaries, and numbers of staff hours would, or would be likely to, prejudice substantially the commercial interests of CP Plus. The information is therefore exempt from disclosure under section 33(1)(b) of FOISA.

Public interest test

26. As the Commissioner has found that the exemption in section 33(1)(b) of FOISA was correctly applied to the hourly rates, staff salaries, numbers of staff and numbers of hours staff work at each site per week/year, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

CAS submissions on the public interest

27. CAS submitted that NHS Greater Glasgow and Clyde had failed to conduct a proper balancing exercise and had not fully considered why disclosure could be in the public interest, or demonstrated why the public interest in withholding the information outweighs the public benefit in disclosure. In addition, CAS submitted that NHS Greater Glasgow and Clyde had not made any reference to "the significant impact this information could have on regulating or otherwise controlling a sector that has significantly caused consumer detriment and even breached consumer protection law".
28. CAS referred to research it has conducted on the charges levied on private land by parking operators such as CP Plus, and a legal opinion it has obtained which supports its view that many of these parking contracts may not be valid based on poor signage leading to an unfair contract being entered into.
29. CAS argued that the contractual information being withheld by NHS Greater Glasgow and Clyde would allow a fair assessment of whether firms operating sites owned by the public sector were being managed within existing consumer protection law.

30. CAS also argued that CP Plus has not handed over any of the parking charges to NHS Greater Glasgow and Clyde, despite the contract requiring it to do so. CAS argued that it is not in the public interest (or in the interests of NHS Greater Glasgow and Clyde) for CP Plus to be the sole beneficiary of any income generated from Unauthorised Parking Notice's (UPN's) as it allows for charges to be levied purely on a revenue producing basis.
31. CAS argued that there is substantial public interest in disclosure of the information withheld by NHS Greater Glasgow and Clyde, as public finances are used to fund the contract and the activities of CP Plus. CAS noted that while the contract states that all charges collected would be passed to the health board, NHS Greater Glasgow and Clyde has stated that it has received no income from the parking scheme. CAS understood this to mean that CP Plus are the sole beneficiaries from any charges paid. CAS argued that this does not serve the interests of NHS Greater Glasgow and Clyde or the public, and it allows for charges to be levied purely on a revenue producing basis for CP Plus rather than for the means of allowing adequate parking as the health board would wish.

NHS Greater Glasgow and Clyde's submissions on the public interest

32. NHS Greater Glasgow and Clyde acknowledged that there was a public interest in openness and transparency around any expenditure of public funds. However, it argued that there was a strong public interest in it being able to obtain best value for money. It submitted that CP Plus provide car parking management services for a number of public-facing organisations and there is a substantial public interest in avoiding significant harm to CP Plus' ability to compete in future procurement exercises. It argued that it was in the public interest that companies which tender for public work are able to compete on an equal footing with their competitors.
33. NHS Greater Glasgow and Clyde referred to the arguments made by CAS. It noted that CAS had stated that the activities of some parking operators were not in keeping with the level of service expected of the industry or public authorities on whose land they may be enforcing parking management. CAS appeared to be suggesting that this was the case with CP Plus. NHS Greater Glasgow and Clyde disputed this.
34. NHS Greater Glasgow and Clyde explained that the way in which CP Plus operated their services (under contract to NHS Greater Glasgow and Clyde and in support of its policies) is clearly set out in the tender submissions which were provided to CAS with only minimal redactions. It argued that disclosure of the withheld information would not inform CAS further in respect of the activities of CP Plus in providing car parking management services on behalf of NHS Greater Glasgow and Clyde.
35. NHS Greater Glasgow and Clyde argued that the parking management services provided by CP Plus support the Health Board's own parking management policies. It stated that these policies exist to ensure that optimum use is made of the limited parking facilities available on its hospital sites; and that these facilities are used by patients, visitors and staff in a responsible and appropriate manner.

Commissioner's consideration of the public interest test

36. In considering the public interest in favour of disclosure, the Commissioner recognises the general public interest in disclosing information held by Scottish public authorities, for reasons of openness and transparency. She accepts that disclosure in this case would contribute to the public's understanding of the parking management services provided by CP Plus, especially its hourly costs and staffing levels. It is in the public interest to ensure

effective oversight of public funds, and disclosure of the withheld information could enable or assist such oversight.

37. The Commissioner has considered the public interest arguments put forward by CAS. While she accepts that CAS has uncovered recurring problems with the regulation of parking on private land, she is not satisfied that disclosure of the withheld information would be directly relevant in relation to this issue, or go any way towards meeting the associated public interest specified by CAS.
38. CAS has argued that disclosure would allow a fair assessment of whether firms operating sites owned by the public sector were being managed within existing consumer protection law. However, CAS has not provided the Commissioner with any evidence to suggest that CP Plus is breaching existing consumer protection law in relation to its contract with NHS Greater Glasgow and Clyde. It has not provided any compelling reasons why disclosure of the withheld information would meet the specific public interest arguments it put forward.
39. On the basis of the submissions made to her, the Commissioner does not accept that disclosure of the staffing numbers, staff salaries and hourly costs in this particular contract would be in the public interest, by allowing the public to assess whether firms contracted to provide parking solutions in the public sector were being managed within existing consumer protection law.
40. In relation to the point made by CAS on the revenue generated by UPNs, the Commissioner does not accept that this is relevant, when considering the balance of public interest in this case. In any event, she notes that the contract states that CP Plus will give 100% of all UPN income received to NHS Greater Glasgow and Clyde after its own administration costs have been deducted. This gives less weight to the public interest argument put forward by CAS.
41. Against the arguments in favour of disclosure, the Commissioner has balanced arguments for withholding the information in the public interest. She has accepted that disclosure of the information in this case would, or would be likely to, prejudice substantially the commercial interests of CP Plus. She accepts that there is a public interest in avoiding such prejudice.
42. The Commissioner has considered all the factors set out above. She is aware that NHS Greater Glasgow and Clyde has disclosed much of its contract with CP Plus and is only withholding limited information, mainly about its financial outlays and operating costs. The Commissioner considers that disclosure of the remainder of the contract has satisfied many of the public interest arguments in favour of disclosing information.
43. The Commissioner also accepts that there is a strong public interest in ensuring that organisations that tender for public work are able to compete on an equal footing with their competitors. She accepts that it would not be in the public interest to compromise this process.
44. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice to commercial interests may result, the Commissioner does not believe that it would be justified on public interest grounds in this case. On balance, the public interest in this case favours maintaining the exemption (and withholding the information).

Decision

The Commissioner finds that NHS Greater Glasgow and Clyde Health Board (NHS Greater Glasgow and Clyde) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Citizens Advice Scotland (CAS).

The Commissioner accepts that NHS Greater Glasgow and Clyde correctly withheld information under section 33(1)(b) of FOISA. However, some information was wrongly withheld under this exemption, and in this respect, NHS Greater Glasgow and Clyde failed to comply with Part 1 of FOISA.

The Commissioner therefore requires NHS Greater Glasgow and Clyde to provide CAS with the information it wrongly withheld (described in paragraphs 21 and 22) by 15 May 2017.

Appeal

Should either CAS or NHS Greater Glasgow and Clyde wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If NHS Greater Glasgow and Clyde fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that NHS Greater Glasgow and Clyde has failed to comply. The Court has the right to inquire into the matter and may deal with NHS Greater Glasgow and Clyde as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

31 March 2017

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

33 Commercial interests and the economy

(1) Information is exempt information if-

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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