

Our Ref: 67038

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NHS South Sefton CCG

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Re: Freedom of Information Request

Please find below the response to your recent Freedom of Information request regarding contracting of Care Homes within NHS South Sefton CCG.

Request/[Response](#):

1. Please can you provide the details of the contract with Athena under the freedom of information act –

- a. Category of client

Clients who have been medically optimised for discharge with either having a non-COVID related disease on admission to hospital and having tested negative by swab on discharge OR having had a COVID-19 related illness on admission to hospital with a positive swab and having tested negative by swab on discharge.

Clients occupying these beds will require short term placement for nursing care and/or a period of intermediate care as part of a discharge to assess arrangement.

- b. Confirmation of contract term

This is for a period of 12th May to 16th November 2020

- c. Weekly rate

I can confirm that NHS South Sefton CCG holds information relevant to your request.

Unfortunately we are unable to provide you with this information. This is because it is covered by exemption section 43(2) of the FOI Act. This exempts 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). Information relating to the weekly rates of NHS South Sefton CCG care home contracts are considered exempt under section 43(2) of the Act.

Section 43(2) is a qualified exemption and as such the CCG is required to conduct a public interest test. For further information about why these exemptions have been applied and the outcome of the public interest test, please see the refusal notice at the end of this letter.

Refusal Notice – Section 43(2)

The CCG has declined to provide you with the information requested under exemption 43, section (2) of the Freedom of Information Act, which states that: 2) 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)

Under Section 2, information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person; in this instance the CCG considers that it would compromise the company concerned, and in turn the CCG itself. The CCG will outline below the factors which have led the CCG to this conclusion.

The Information Commissioner's guidance explains that organisations compete by offering something different to their rivals; this difference can include the information being sought in this request (ie pricing details). The company has used their experience and knowledge to develop their business model (including pricing structure) - the information that has been requested details this and would be described as business intelligence. The CCG considers that the information requested is intrinsically sensitive to the business of the company concerned: it is unique and is not in the public domain, and would be beneficial to competitors in the commercial market place; and therefore carries significant commercial value. Placing the requested information into the public domain would reveal these potential trading advantages (especially if combined with other information available, such as annual usage) and would provide a rival with an understanding which would afford them a distinct advantage with regards to any similar future business they look to win; as it would provide details that would inform and influence them. This would have the ability to undermine any future business opportunities the company concerned attempts to participate in; their future competitive edge would be jeopardised. As such the CCG considers that the release of the information would have a real and significant potential to detrimentally affect the company's ability to participate competitively in future commercial activity, and could consequently cause irreparable damage to its commercial interests in relation to future business. By providing the requested details to a potential rival, a competitor would have information that could influence their business plans and ultimately the offers available to the CCG. This would have a negative knock on effect on the CCG in a number of ways; these have been outlined below.

Firstly, the release of such sensitive information would limit the CCG's future purchasing position. Any companies in possession of competitors pricing/costing details would be able to submit an informed bid and this would have the effect of limiting the CCG's bargaining power. As such the CCG's choice of more favourable tender submissions/offers in the future may be limited, which would mean that the CCG is not able to achieve best value for public money.

Secondly, potential rivals furnished with this commercially sensitive information, may submit artificially formulated proposals/offers solely designed to outperform their rivals, that may not be sustainable in practice. The organisations/rivals then potentially awarded activity may not provide the most efficient and effective service in practice and may not provide the best value for money.

Thirdly, the unfair advantage held by a competitor would have the real potential to jeopardise the company's future business opportunities and their ability to compete in the commercial market place would be damaged. This would be likely to have a negative knock on effect on the quality and choice available to public authorities (including the CCG) when attempting to procure the most efficient and effective products/services in the future. In the longer term if companies fail, this may reduce the competition in the market generally, and therefore the choice available to the CCG would be further reduced, and again this will hamper the CCG's ability to achieve value for public money, quality and efficiency. Competition is required to ensure that efficiency and quality is maintained.

Fourthly, the CCG is of the opinion that to release the information would jeopardise the CCG's future relationship with the provider, and this in turn would be likely to negatively affect any future negotiations the CCG participates in with that company and any offers ultimately available.

The Information Commissioner's guidance explains that very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made, and circumstances (for example market conditions) will change over time, and through this passage of time information generally becomes less commercially sensitive. The CCG recognises the justification for this argument, however in this instance it is considered that a potential rival could use the information to their advantage, as they could benchmark the information against themselves. Therefore the CCG believes that the information would be valuable commercially as it would give a rival an insight which would assist with informing and formulating their own business plans.

The CCG is satisfied that the information requested would be likely to prejudice the commercial interests of the company concerned, and in turn the CCG, however the exemption can only be maintained if the CCG believes the public interest in withholding the information outweighs the public interest in disclosing it. Please see details of the public interest test below.

The CCG recognises that the release of such information would facilitate CCG transparency and demonstrates the use of, and accountability of resources; therefore enabling the public to have an increased understanding of the CCG (and is therefore of benefit to the community), which in turn would generate confidence in the integrity of the procedures involved in decision making. Instances that strengthen the argument for release are situations where there is evidence or suspicion of wrongdoing (must be more than mere allegation – ie there must be a plausible basis for suspicion), however in this instance there is no wrongdoing (or suspicion). The release of raw information can also provide the public with details which would allow for scrutiny and removes the potential for spin and manipulation of facts.

The CCG however believes that there is also a strong public interest in ensuring the CCG is able to operate effectively and in a fair environment, and that there is a level playing field for all parties and that there is fair competition for public sector purchases and contracts; as this in turn has an effect on the products/services available and ultimately patient care. The CCG has detailed in the paragraphs above how it considers that the release of the information requested would undermine this ability, and how it would detrimentally affect the CCG, briefly:

- Restricted purchasing position and bargaining power
- Artificially formulated offers may be submitted that are not sustainable or effective in practice
- Damage to the wider market place, therefore limiting choice

The above factors would lead to difficulties obtaining quality, efficiency and value for public money, which would have a direct knock on effect on the products/services available and ultimately patient care. To summarise the public interest test: The CCG has considered all the relevant factors in the public interest test and has reached the conclusion that the benefit to the public in applying the exemption outweighs the public interest in releasing the information requested, as a result of the prejudices and losses that would potentially affect the CCG and patients. The release could jeopardise the company's future position, which would cause a detrimental knock on effect on the market place, and would potentially limit the choices available to public authorities, including the CCG. This would potentially threaten the quality of products and services available to the CCG. The CCG considers that it is not in the public interest to do anything to undermine the competitive nature of the procurement process, and the disclosure of key information, as has been requested, could have that affect. The CCG believes that the consequences of releasing the information are serious and the likelihood of this occurring is high.

Therefore in conclusion, the CCG has reached the decision that the release of the information requested would be likely to be prejudicial to the commercial interests of the company concerned and the CCG, and that the public interest in withholding the information is greater than the public interest in releasing the information, and as such the information is being withheld under section 43 of the Freedom of Information Act.