

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2023

Public Authority: UK Health Security Agency (Executive Agency of the Department of Health and Social Care)

Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information from the UK Health Security Agency ("UKHSA") in relation to overseas territories being included in the vaccine damage act and vaccine damage compensation scheme, specifically for the arrangements coordinated with Gibraltar. The UKHSA withheld the information, citing section 43(2) of FOIA – commercial interests.
2. The Commissioner's decision is that the withheld information engages section 43(2) and that the public interest lies in maintaining the exemption.
3. The Commissioner does not require any steps as a result of this decision notice.

Background of complaint

4. The complainant made the original request to the Department for Business, Energy and Industrial Strategy (BEIS), as this was the relevant body to make the request to.
5. Following the responses being issued, the department relevant to the request transferred to the UKHSA. As UKHSA now holds the information

relevant to this request, the public authority for this complaint is the UKHSA.

Request and response

6. On 8 May 2022, the complainant requested information in the following terms:

“Could you please provide information into the liability for residents of the overseas territory of Gibraltar who May have resulted in an injury, disability or had died as a result of administration of the covid vaccines and medication that have been supplied from the UK GOV. Could you please provide information as to how the overseas territories have been included in the vaccine damage act and vaccine damage compensation scheme , if such injuries or fatalities were to occur here in Gibraltar as a result of products supplied from UK. I would be grateful if you could provide me with all of the arrangements that have been coordinated for Gibraltar.”

7. BEIS responded on 19 May 2022. It stated that some information was held, however, it refused to provide the requested information citing section 43(2) of FOIA. BEIS did, however, provide links to some information already available online, which relates to the complainant’s request.
8. Following an internal review BEIS wrote to the complainant on 31 May 2022. It stated that it upheld its original position: that some information was held, but it is being withheld under section 43(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 21 August 2022 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of this complaint is to determine if section 43(2) is engaged for the UKHSA to withhold the requested information.

Reasons for decision

Section 43(2)– commercial interests

11. Section 43(2) of FOIA states

“Information s 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.”

12. It is a qualified exemption. So in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority and/or a third party, the public authority must consider the public interest test. It must weigh up the public interest arguments in favour of disclosure against the public interest arguments in favour of maintaining the exemption. It then needs to demonstrate that the balance of the public interest test rests in maintaining the exemption.
13. UKHSA has explained that it considers that disclosure of the information it holds would prejudice the commercial interests of the involved parties.
14. UKHSA has explained that information relating to the liability and indemnity arrangements that fall within the scope of the request have been redacted from the published contracts, as they fall under section 43(2) of FOIA.
15. UKHSA has explained that the indemnity and liability clauses are commercially sensitive information and that they were formed through negotiation between the parties.
16. UKHSA has explained that to release such commercially sensitive information within the supply agreements would lessen any competitive advantage of the parties, as it would prejudice their ability to negotiate or compete in the commercial environment. It would therefore impede the parties' potential for reducing or distributing risks and costs, or providing value for money. UKHSA went on to explain that it considers that disclosure of the current terms would prejudice the parties' negotiations.
17. UKHSA has also explained that it is in the process of negotiating with COVID-19 vaccine suppliers for future supplies and, therefore, the disclosure of indemnity and liability terms could cause severe prejudice to its ability to negotiate with suppliers and would prejudice suppliers' likely negotiations with other nations, and potentially the private market, causing them to be competitively disadvantaged.
18. UKHSA has also explained that the release of information agreed between the parties as confidential would cause unwarranted reputational damage to it, as future suppliers cannot be confident that their commercially sensitive information will be kept confidential. It went

to explain that the loss of reputation may in turn damage its commercial interests through loss of trade and, in turn, prejudice its function to provide COVID-19 vaccines, or other products and services.

19. Having considered the arguments provided by UKHSA, the Commissioner is satisfied that there is a causal link that exists between disclosure and commercial prejudice towards both the UKHSA and the other companies involved. As such, the Commissioner's decision is that the UKHSA was entitled to apply section 43(2) to the withheld information, and he will go on to consider the associated public interest test.

Public interest test

Arguments for disclosure

20. The complainant has argued that if a product has been instructed to be supplied under the UK Government command for the supply of vaccines for the pandemic to the overseas territory of Gibraltar, as a matter of principles and good governance, the health of the public is taken into consideration, rather than the commercial interests.
21. The complainant has also explained that they believe the information should be readily available as part of the informed consent and education process.
22. The complainant advised that this should be a standard practice and that there should be sufficient information supplied by the UK government to inform anyone of the overseas territory, how the UK will apply liability to the Vaccine Damage Act legislation, to cover those in overseas territories who have not had their vaccines administered as per the requirements of the Vaccine Damage protocol.
23. UKHSA has explained that it is recognised that there is a public interest in the disclosure of the cost of COVID-19 vaccines, as greater transparency makes government and decision-making in this policy area more open and accountable.

Arguments for maintaining the exemption

24. UKHSA has explained that there is a public interest in ensuring that the commercial interests of vaccine suppliers are not damaged or undermined by disclosure of information which is not common knowledge, and which could adversely impact on future business.
25. UKHSA went on to advise that it is important that vaccine suppliers are able to share commercially sensitive information with government in the

confidence that the information will not go out into the public domain and damage their wider commercial interests and opportunities. It went on to explain that disclosure of the requested information in this case, would be contrary to the legitimate expectations of confidentiality provided for under FOIA and would be likely to damage the commercial interests of the companies.

26. UKHSA has argued that should this information be released, it would not only prejudice the commercial interests of the suppliers, which continue to negotiate vaccine deals with other countries, and potentially with the UK in the future, but it would also significantly damage the ability of the government to secure further deals in the future. It explained that disclosure of this information would be contrary to the company's legitimate expectation of confidentiality, casting doubt on the government as a trustworthy partner in maintaining such confidentiality in the future.
27. UKHSA explained that it is in the public interest that it, along with any other government bodies are able to procure necessary products and services efficiently and effectively. To undermine this ability would be detrimental to both the UKHSA's duty and aim to protect the public's health and the ability to ensure value for money.

Commissioner's Decision

28. In considering where the balance of the public interest lies, the Commissioner recognises the complainant's concerns regarding the health of the public and what information they have access to, especially when considering vaccinations.
29. However, the Commissioner is also mindful that government bodies should be able to procure necessary products and services efficiently and effectively.
30. The Commissioner has considered the public interest arguments accepts that disclosure would help to increase openness and transparency. However, given the level of likelihood on commercial harm that would occur should the information be disclosed, the Commissioner finds that the balance of the public interest favours maintaining section 43(2) of FOIA.
31. Having considered the relevant facts, the Commissioner has concluded that, in this case, the public interest favours maintaining the application of section 43(2).

Right of appeal

32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Michael Lea
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