

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2024

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London SW1H 0EU

Decision (including any steps ordered)

1. The complainant requested information about personal protective equipment categorised as not fit for use. The Department of Health and Social Care (DHSC) disclosed some relevant information, advised that it doesn't hold other information, and relied on sections 21, 23, 31, 41 and 43 of FOIA to withhold the remaining information in scope of the request. These exemptions concern information already accessible to the applicant, information supplied by, or relating to, bodies dealing with security matters, law enforcement, information provided in confidence and commercial interests, respectively.
2. The Commissioner's decision is that DHSC doesn't hold the updated table of information that the complainant is seeking and its response to that part of the request complied with section 1(1)(a) of FOIA. The information DHSC is withholding is exempt from disclosure under section 23(1) of FOIA.
3. It's not necessary for DHSC to take any steps.

Background

4. In its submission to the Commissioner, DHSC has provided the following background information on how it has created and stored records about procuring, using and storing Personal Protective Equipment (PPE) since the beginning of the Covid pandemic:

"During the pandemic DHSC set up a new parallel supply chain to procure, manage and distribute life-saving PPE. This was an enormous

cross-government effort, drawing upon expertise from a number of Departments and in addition to DHSC, records of that activity are contained within several departments and agencies, including Government departments such as Cabinet Office, the Foreign, Commonwealth & Development Office (FCDO), The Ministry of Defence (MOD), and other agencies such as Supply Chain Co-ordination Ltd (SCCL), and contracted specialists such as Clipper logistics.

DHSC does hold the contractual records from the PPE purchased, however from April 2022 it has not held some of the supporting documents pertaining to the PPE product (ie technical testing certificates and proof of validity), data on stock levels and detailed information on items (specifications and similar detail given by manufacturer) and history of supply.

The responsibility for operational supply management of the covid PPE stock transferred along with the supporting data to Supply Chain Coordination Ltd (www.sccl.nhs.uk).

SCCL is the legal entity through which NHS Supply Chain undertakes its procurement services and transacts with customers and suppliers. Whilst its shares are owned by NHS England, SCCL is a separate organisation and has its own FOI facility www.sccl.nhs.uk/contact-us/freedom-of-information"

Request and response

5. The complainant made the following information request to DHSC on 8 January 2024:

"[1] How many items bought during the pandemic (in total) have been deemed "not fit for use"/"do not supply" – I'm aware that previously, in an answer dated 15 September 2021 to a written question (UIN HL2327) Lord Bethell said that, as of 10 June, 1.9 billion items of personal protective equipment stock were in the 'do not supply' category, with an estimated value of £2.8 billion.

[2] Following on from that, there have been reports of an increase in this future, to £4 billion of PPE bought during the first year of the pandemic listed as unusable:...

... So could the department tell me how much PPE in total could not be used in an NHS setting that was bought during 2020 and 2021 (or whenever the department records pandemic-era PPE supply as having tapered off, this could be in 2022, happy to take advisement here if the June 2022 update is no longer the most up-to-date).

[3] Once the figure of waste is established from a total list of items awarded by the department, I'd like a list of those contracts in respect of those £4 billion worth of items. If this cannot be provided within the cost threshold, please explain why not and provide the report, dataset or other information that was used to inform Lord Bethell's answer, and then the departments updated information about the number of items unusable /cost

I'm aware that previously, a spreadsheet has been provided for a similar response to this request, which the department can use to advise this information please, as I'm looking for a list of the companies, cost, and wasted amount of PPE as outlined in the prior request response, which I believe sets precedent here. entitled - HAVENDHAND IR-1369447, and which I believe relates to the FOI request number IR-1369447."

6. DHSC relied on section 21 to withhold information within scope of parts 1 and 2 of the request because relevant information is already in the public domain and so was reasonably accessible to the complainant. It directed the complainant to where that information is published.
7. Regarding part 3 of the request, DHSC confirmed it holds some relevant information but noted that the complainant had said that they already had this. DHSC advised that it didn't hold an updated version of the list in question as it hadn't needed to connect the data sets again or to maintain a list of PPE items in the 'Do not supply' category.
8. At internal review DHSC confirmed that it doesn't hold most of the information the complainant has requested. It suggested to the complainant that they could submit a request to NHS Supply Chain, which it said might hold relevant information. DHSC advised that FOIA didn't oblige it to create new information to respond to a request, but it disclosed some information that it had used in its 'Havenhand' internal review, and some further information that was created for its annual accounts.
9. DHSC advised that it was relying on sections 23, 31, 41 and 43 to withhold the remaining information it holds that's within scope of the request.

Reasons for decision

10. This reasoning first covers whether DHSC holds information within scope of part 3 of the complainant's request, namely an updated version of a spreadsheet that DHSC had disclosed previously.

11. The reasoning then focuses on DHSC's application of section 23 to the relevant information that it's withholding. If necessary, it will consider the remaining exemptions on which DHSC is relying.

Section 1 – general right of access to information held by public authorities

12. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information an applicant has requested and (b) communicate the information if it's held and isn't exempt information.
13. In the third part of their request the complainant has requested an updated version of a spreadsheet that had been disclosed in response to an earlier request submitted by another person. DHSC has advised it doesn't hold this information.
14. In their complaint to the Commissioner, the complainant listed reasons why they considered that DHSC did hold the information; these are listed in the appendix to this notice. The Commissioner put the complainant's arguments to DHSC.
15. In its submission, DHSC addressed the complainant's points. It says that, as it has explained in the background it has provided, SCCL is the legal entity through which NHS Supply Chain undertakes its procurement services and transacts with customers and suppliers. Whilst its shares are owned by NHS England, SCCL is a separate organisation. NHS England is an arm's length body (ALB) of DHSC and shares responsibility for accounting to the public and to Parliament for policies, decisions and activities across the health and care sector.
16. Accountability to Parliament will often be demonstrated through appearances before parliamentary committees and responses to parliamentary questions (PQs).
17. Accountability to the public may be through publishing information on the agency's website, as well as through responses to letters from the public and responses to requests under FOIA.
18. NHS England has its own responsibilities in accounting to the public and to Parliament and its way of handling these responsibilities is agreed with DHSC. In all matters of public and parliamentary accountability DHSC and its ALBs and executive agencies will work together considerately, co-operatively and collaboratively. Any information the agency provides will be timely, accurate and, where appropriate, consistent with information provided by DHSC.
19. DHSC has gone on to explain that as NHS England is Executive non-departmental public body, there's an arrangement in place for DHSC

ministers to answer PQs relating to NHS England. In order to answer these questions DHSC officials will liaise with officials at NHS England, and, in a fundamental difference to the way that FOIA requests are handled, occasionally needs to create new information to answer a question.

20. The table in question in the Havenhand response was created only once in response to a PQ using data from NHS SCCL and DHSC and there has been no requirement to update the table since that PQ was asked. Any update to the table would require DHSC to commission another body outside of DHSC, NHS SCCL, to provide the data. This would create a new record in DHSC, with the information having been sought from another organisation in order to reply to a FOIA request.
21. DHSC has confirmed that it can't update an old record as it doesn't hold the source data to enable this. Moreover, DHSC doesn't consider that answering this PQ set a precedent.
22. DHSC noted that it has indicated to the complainant which other agency may hold the information they're seeking, and it provided signposting to that agency's FOI service so that the complainant can make a request to the correct organisation who may hold the record they're seeking.
23. For the reasons DHSC has explained, the Commissioner is satisfied that, on the balance of probabilities, DHSC doesn't hold the "updated" information the complainant has requested in part 3 of their request. In order to answer a 'one off' parliamentary question, DHSC and SCCL produced a table of information about PPE items in the 'Do not supply' category. However, DHSC had no business need to then maintain that table and doesn't hold the source datasets that were used to produce the original table.
24. The Commissioner's decision is that DHSC's response to this part of the request complied with section 1(1)(a) of FOIA. It has directed the complainant to the organisation that might hold relevant information.

Section 23 – information supplied by, or relating to, bodies dealing with security matters

25. Under section 23(1) of FOIA, information is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).
26. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3). This means that if the requested information falls within this class, it's absolutely exempt from disclosure under FOIA.

There's no requirement on the public authority to demonstrate that disclosing the requested information would result in some sort of harm. This exemption isn't subject to the public interest test.

27. One of the agencies listed under section 23(3) is the National Crime Agency.
28. DHSC has explained that because investigations/proceedings relating to PPE contracts are ongoing, the information it's withholding is being held particularly securely and only a very limited number of people have access to it. DHSC has described the information as being information held in PPE contracts that are in dispute and held in recorded negotiations around those disputed contracts and other PPE contracts that aren't in dispute.
29. In its submission to the Commissioner, DHSC has explained that the awarding of PPE contracts during the Covid pandemic and the ongoing disputes and attempts to recover some of the money paid has received widespread media attention. The National Crime Agency (NCA) and DHSC both have legal investigations/proceedings in train against PPE Medpro. DHSC says it's public knowledge that PPE Medpro, a company linked to Baroness Mone, is the subject of an ongoing potential fraud investigation and on 12 June 2024 it was announced that a person linked to PPE Medpro had been arrested.
30. DHSC has also advised that it and other public bodies, including Cabinet Office, Public Sector Fraud Authority and the NCA, backed by legal advice, have agreed that section 23 (and section 31) are to be applied to all cases involving PPE Medpro, Baroness Mone, Doug Barrowman, or any other individuals connected to the company/contracts.
31. In addition to PPE Medpro there are, DHSC says, several other parties that would be affected if the requested information were to be disclosed. These are:
 - DHSC
 - The National Crime Agency
 - PPE suppliers – especially PPE Medpro.
 - Other companies (including Visage) affected by the Contract Dissolution Team (CDT) process.
 - The taxpayer
32. DHSC has noted that some companies that have been party to the CDT process have mutually binding confidentiality clauses contained in the recent agreements signed by DHSC and these companies.
33. It's DHSC's view that to release previously undisclosed information mid-litigation is irresponsible and possibly in contempt of court.

34. Based on the submission DHSC provided to him, the Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of section 23(1) of FOIA. He has reached this conclusion because he accepts that there's a sufficiently close connection between the information DHSC's holds which falls within the scope of this request, and the NCA's investigation into PPE Medpro, such that the information can be said to relate to a section 23(3) body.
35. The Commissioner is aware of the complainant's public interest arguments for the information's disclosure. However, as above, section 23(1) is an absolute exemption and in most cases, including this one, it isn't subject to the public interest test.
36. The Commissioner's decision is in line with his decision in IC-149867-D8B9¹ which involved a request to the Cabinet Office for similar information.
37. Because the information being withheld in the current case engages section 23(1) of FOIA, it's not necessary to consider the remaining exemptions that DHSC has applied to it.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025408/ic-149867-d8b9.pdf>

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF

Appendix

"1) in the original response which produced the Havenhand FOI table (itself an updated document - for the purposes of responding to that FOI, as stated within the document itself) the full and updated information was provided to the requester.

I'll draw your attention to Internal Review case reference IR-1369447, in which the department lays out the following:

"The department stated that we were able to provide a table showing the relevant information we held..."

...To produce this information relevant to your request, we linked together information from a range of datasets to attempt to identify the suppliers for items in the 'do not supply' category" - so in the first instance it appears that they did create or compile this dataset for the person requesting the information.

If the department "had cause", as it stated in response to me, to link this information to supply a response to a previous requester, there can be no reasonable basis for not providing an updated version of this information when it is requested, as the number has drastically changed, 2 years on, as a precedent has already been set through the previous response in this instance.

It, therefore, falls to the department to provide the information requested. No "other reasons" (as stated in the response to me) were specified in the Havenhand response, in fact it was intimated that the datasets were pulled together for the purposes of being able to respond to that request. Additionally, nor have any "other reasons" been identified or explained now, and nonspecified reasons do not constitute a proper response.

2) This is not "creating new information", as the department states, but is simply updating a spreadsheet that already existed, was pulled together for the purposes of answering a previous FOI, and for which public interest, as reflected in the reporting that came directly out of it (below), exists:

<https://www.spotlightcorruption.org/half-of-vip-lane-companies-supplied-ppe-worth-1-billion-that-was-not-fit-for-purpose/>

Therefore I am not asking that the department "create new information", I'm asking that it pulls together information it already has, and logically it must have this information to arrive at the figure of £4

billion in wasted PPE, up from a figure of £2.8 billion previously. The publicly available link does not come close to providing the information, split by company, that I am requesting from the department....

...4) A precedent has been set in the original Havenhand response for which no material difference in the information I am requesting exists.

5) I'd also question the department in its assertion that it hasn't needed to maintain an updated list of the companies marked "do not supply". If it hasn't done this, how has it arrived at the figure it has done? The information must be recorded somewhere, and it isn't exempt under the act, so the department has a duty to disclose.

6) For some reason the department has not followed its own previous method of disclosure for this request. You'll note the figure on the heavily redacted table in the second document provided to me. It is exactly the same as the Havenhand response spreadsheet in both total amounts of money and PPE waste, but with the names of the companies that were already disclosed redacted, there is no reason for this, as that information has already been given under the act, which I believe to be further evidence that the department is falling short of its obligations by way of transparency under the act in this instance."