

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2024

Public Authority: Supply Chain Coordination Ltd
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information about a Personal Protective Equipment contract. The above public authority ("the public authority") relied on section 43(2) of FOIA (commercial interests) to withhold the requested information.
2. The Commissioner's decision is that the public authority has not demonstrated that section 43(2) of FOIA is engaged. The public authority also breached section 10 of FOIA in its handling of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - provide the number of items, purchased via the contract in question, placed into the Do Not Supply category; and
 - provide (where known) the location of these items.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 January 2024, referring to a contract for Personal Protective Equipment (PPE) that had been awarded to a specific company during the Covid-19 pandemic, the complainant requested information of the following description:

 "[1] can you outline how many items were wasted and/or rejected in the following PPE contract

 "[2] I also require the present whereabouts of the PPE ordered."
6. On 25 April 2024, the public authority responded. It refused to provide the requested information and relied on section 43 of FOIA as its basis for doing so. It upheld this position following an internal review.

Reasons for decision

Scope of the request

7. The public authority explained to the Commissioner that the word "wasted" was not one that it used to categorise items and that this word required a subjective judgement. It argued that it held no information within the scope of this part of the request.
8. It also explained that it did hold information about how many items had been categorised as "Do Not Supply." Though it argued that this category was not limited to items found to be faulty or inferior.
9. In the circumstances, the Commissioner considers it reasonable for the public authority to interpret "rejected" items as being those in the Do Not Supply category - as these would have been items provided under the terms of the contract but, for what ever reason, not supplied to staff. The complainant did not specify that items had to have been rejected for any specific reason to be within the scope of his request.
10. The Commissioner has therefore proceeded on the basis that the information the public authority holds within the scope of part one of the request is the number of items in the Do Not Supply category.

Section 43 – commercial interests

11. Section 43 of FOIA allows a public authority to withhold information whose disclosure would prejudice any party's commercial interests.
12. The public authority explained to the Commissioner that the Department of Health and Social Care (DHSC) had set up a team dedicated to recovering money from PPE contracts that had failed to perform to satisfactory standards.
13. The team was and is, investigating a number of contracts and it is possible that some of these investigations may result in a financial settlement or in legal action. As a result, information about the performance of the contracts was highly sensitive as it may form the basis for the negotiation of a settlement.
14. As such, the public authority stated that it wished to withhold all such information until all such work is completed. If it were to disclose some information prior to completion, it argued, it would give other suppliers an indication of the DHSC's negotiation tolerances which would, in turn, hamper DHSC's ability secure the best possible settlement for taxpayers. The public authority was keen to stress the size of the sums involved.
15. In respect of the second part of the request, the public authority informed the Commissioner that:

"We do not typically name the sites PPE is stored at because they can be places of private business where [we] are one of many clients and these businesses do not need additional security risks from unannounced visits."
16. The public authority also noted that the locations themselves could be used to infer the answer to part one of the request.

The Commissioner's view

17. The Commissioner considers that the public authority has not demonstrated why this exemption is engaged as it has failed to draw a causal link between disclosure and harm.
18. The public authority did not disclose whether any investigation was ongoing into the particular contract named in the request, but the Commissioner accepts that this does not disturb the logic of the arguments.

19. However, the Commissioner is not persuaded that simply knowing how many items from a particular supplier went into the Do Not Supply category gives other suppliers an advantage in negotiations.
20. In order to exploit the information, a supplier would not only need to know the number of items ending up in this category, they would also need to know the value of the settlement offers that had been made. Without that information, they are unable to calibrate their own negotiating position.
21. For example, if supplier A knows that 60% of supplier B's items went into Do Not Supply and that supplier B has reached a financial settlement for 50% of the original value of the contract, it will know that the DHSC will accept a settlement that is lower than the value of the unusable items.
22. However, if supplier A knows the percentage of Supplier B's items in the Do Not Supply category, but not the final settlement figure, it has no benchmark on which to calibrate its offer – even if it knows its own percentage of unusable items is also 60%.
23. Secondly, as the public authority was keen to stress, not all items in the Do Not Supply category were necessarily faulty or inferior. It would seem logical that a settlement figure is likely to be more closely tied to the amount of faulty or inferior items delivered – rather than the total items which could not be used. Therefore, other suppliers will have, at best, incomplete information on which to calibrate their negotiating positions.
24. Turning next to the second part of the request, the public authority has not put forward any evidence to support its assertion that disclosing the withheld information would increase unannounced visits or would otherwise increase security risks. It is not clear to the Commissioner why unusable PPE would create a security risk.
25. The Commissioner is also sceptical that the locations can be used to infer anything of significance about the information within the scope of part 1. As the public authority has pointed out, each location may be used by many clients besides itself – making it difficult to work out the proportion of capacity at any location allocated to the public authority.
26. In any case, even if the information could be deduced via this route, for the reasons already given, the Commissioner is not satisfied that there is a realistic prospect of the DHSC's commercial interests being harmed.
27. The Commissioner is not satisfied that the public authority has demonstrated a causal link between disclosure of this information and

any harm to the DHSC's commercial interests. Therefore, the exemption is not engaged and the information must be disclosed.

Procedural matters

28. The public authority breached section 10 of FOIA in its handling of the request because it failed to provide non-exempt information within 20 working days.

Right of appeal

29. 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

30. 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.
31. 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

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