

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 December 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the Department of Health and Social Care (DHSC) information relating to companies that were given access to the high priority lane to provide PPE during the Covid pandemic. The DHSC refused to provide the requested information, citing section 43(2) of FOIA (commercial interests) to all parts of the request. Later, the DHSC additionally cited sections 31 (law enforcement) and 41 of FOIA (information provided in confidence) to parts one, two and four of the request.
2. The Commissioner's decision is that sections 43(2), 31 and 41 of FOIA are not engaged. The DHSC breached section 17(1)(b) of FOIA by relying at investigation stage on exemptions it had not cited within the time for compliance with section 1(1) of FOIA.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation.
  - Disclose the information requested in all four parts of the request.
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

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5. On 1 May 2024, the complainant wrote to the DHSC and requested information in the following terms:

"On the spend records for your department it states, in relation to companies during covid that were given access to the high priority lane, that the following "refunds" or returns to the department have been issued, with the following reasons given.

Pestfix (Crisp Websites) - 15/02/2023 - £25,915,370 for a "deposit overpayment".

Medicom Healthcare - 30/01/2023 - £1,490,000 - "faulty goods, dissolution team".

Visage Limited - 14/07/2022 - £891,951 - "refund for Visage"

Ideal Medical Solutions - 29/01/2024 - £2,991,000 - "vat repayment"

1. Are all of these repayments down to the dissolution team's efforts to recoup money lost during the pandemic? I know they don't all say that, but I note the high value for Pestfix, who were ordered to repay £70,000,000 to the department.
  2. If this is the case, does this represent all of the money recouped from VIP lane companies by the dissolution team to-date?
  3. Will all of the moneys recovered by the dissolution team be reflected in the published spend records? (if they are over £25,000) or is there another place they will be reflected. If so, where?
  4. How much money has the dissolution team been able to recoup so far?"
6. The DHSC responded on 31 May 2024 and refused to provide the requested information, citing section 43(2) of FOIA – commercial interests.
7. The complainant requested an internal review on 4 June 2024.
8. On 20 June 2024 the DHSC provided its internal review and maintained its position.

## Background

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9. The DHSC explained how records “about the procurement, use and storage of Personal Protective Equipment (PPE) were created and stored since the beginning of the Covid Pandemic”. A “new parallel supply chain” was set up “to procure, manage and distribute life-saving PPE”. Expertise was drawn on from “several departments and agencies” including contracted specialists.
10. The DHSC holds the contractual records from the PPE that was purchased but -  

“from April 2022 it has not held some of the supporting documents pertaining to the PPE product (i.e. 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.”
11. The operational supply management of the covid PPE stock was transferred to Supply Chain Coordination Ltd (SCCL) “along with the supporting data”. “SCCL is the legal entity through which NHS Supply Chain undertakes its procurement services and transacts with customers and suppliers.”
12. In April 2022 the DHSC “established a Contract Dissolution Team” with the task of recovering “the value for the taxpayer from PPE contracts that have not performed to the Government’s satisfaction”. These contract investigations are considered confidential by the DHSC “as the review of those records and related discussions may result in a financial settlement or be escalated to legal action”. This dispute process can take months or years due to the willingness or otherwise for companies to engage and the complexity of the case. Access to information connected to these communications are limited to “a handful of SCS staff in DHSC and the Government Legal Department”.
13. The DHSC explains that it has “committed as much information as we are able but without some of the confidential detail as in the monthly spend reports and also to providing (sic) a final report on activities once the work is complete”.

## Scope of the case

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14. The complainant contacted the Commissioner on 6 July 2024 to complain about the way their request for information had been handled.

15. During the Commissioner's investigation the DHSC confirmed that it was maintaining its citing of section 43(2) but that other exemptions applied. Additionally, it cited sections 31 (Law enforcement) and 41 (information provided in confidence) of FOIA to parts one, two and four of the request. The DHSC also considers that if the same request were to be made today, it would cite section 36(2)(c) as it would be likely to prejudice the effective conduct of public affairs.
16. The DHSC has explained to the Commissioner that it had chosen not to cite section 22 of FOIA – future publication. It had not cited it “because we are not yet able to give further detail on timings and specific content following the change of Government and the recent appointment of the Covid Fraud Commissioner”. The DHSC expects that the “Covid Fraud Commissioner will be examining all PPE dissolution cases upon appointment”. It considers that updates will be made public in due course which it hopes will answer the complainant's third question.
17. The Commissioner made further queries and a Teams meeting was held on 6 December 2024 with the DHSC. During this meeting the DHSC raised some doubt over whether it held the information to respond to parts one and two of the request. From the DHSC's responses in this meeting, the Commissioner concluded that it did hold it and had already cited exemptions in order to withhold it. Issues were raised by the DHSC over the accuracy of the company related information that had been quoted by the complainant.
18. The DHSC provided some further argument on 16 December 2024 relating to sections 31 and 41 of FOIA as its first submission had been brief and generic when referring to these exemptions.
19. The Commissioner considers that the scope of his investigation is to decide whether the DHSC has appropriately cited sections 43(2) to parts one, two, three and four of the request. If it has been inappropriately cited he will move on to consider sections 31 and 41 in relation to parts one, two and four of the request. He will also look at any procedural matters that may have arisen.

## **Reasons for decision**

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### **Section 43(2) – commercial interests**

20. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
21. The Commissioner has defined the meaning of the term “commercial interests” in his guidance on the application of section 43 as follows:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."<sup>1</sup>

22. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
23. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
24. The public authority must demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a real and significant risk of the prejudice to commercial interests occurring for it to be successfully engaged.
25. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
26. Due to the nature of this information and the fact that access to it is confined to a very limited amount of individuals, the Commissioner has made his decision without viewing it. However, he has had a meeting with the DHSC to discuss what information is held.

### **The DHSC's view**

27. See paragraph 12 for the background to the setting up of the Contract Dissolution Team (CDT).
28. In its refusal notice the DHSC stated that the disclosure of the requested information "may cause third-party providers financial and reputational damage". It highlighted the commercial interests of its suppliers. In its submission to the Commissioner, the DHSC confirmed that the parties that would be affected by the disclosure of the requested information are -

"The taxpayer  
DHSC  
HM Treasury  
Covid Fraud Commissioner

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<sup>1</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

The National Crime Agency (NCA), and other law enforcement bodies.

All PPE suppliers, especially:

- 1) all companies linked to the dissolution process, and
- 2) PPE suppliers in litigation [example redacted]."

29. The work of the CDT is expected to continue until 2025. It explained that "Not all PPE companies involved in the dissolution process are at the same stage..." some have completed the process whilst others have not been finalised. The DHSC provided a further example of why the requested information was confidential that cannot be outlined here.
30. If the DHSC was to release its "negotiation tolerances" it would mean that it "would not get optimal offers made to them and would lose the ability to negotiate fully". The DHSC explained to the Commissioner that if official records showed that the government had accepted x amount from a company, a party to negotiations might say that that is all it will offer. This could give suppliers "an unfair advantage over DHSC" and would "ultimately disadvantage the public purse".
31. The DHSC explained to the Commissioner that it "takes the view that Section 43(2) applies to all cases that are going through, or have been a part of, the CDT process for as long as this is current". It argues that,  
  
"There is a clear risk that releasing information before the process is complete would compromise the ability of the Government to carry out the process in a fair and equally applied way and to recover the optimum amount of money for the public purse."

The DHSC underpins its view by quoting an extract from its response to the Public Accounts Committee regarding the DHSC's annual accounts for 2020-21. It includes this quote to demonstrate that the issue of releasing confidential information had already been considered: "There will be some instances where the information is commercially sensitive and could impact the department's ability to successfully pursue cases to completion."

32. The DHSC contends that there has been widespread media attention regarding the awarding of PPE contracts during the pandemic and attempts to recover money. This is unlikely to "fade in the short to medium term". If the information about the process and terms of settlement were released it "would put a spotlight on any PPE firms that were included in that partial release, regardless of the outcome".
33. It explains that it -  
  
has changed its approach to handling these cases based on the

behaviour of other suppliers when entering discussions. It quickly became apparent historic settlements would be used as a bargaining tool and to protect the public purse DHSC moved to stop that happening”.

The DHSC argues that publishing incomplete figures as each settlement is reached “would prejudice other negotiations including ongoing legal activity”.

34. The DHSC “is withholding identifiable reporting on CDT cases under section 43(2) until the work is complete because information shared on settlements reached would give another supplier an indication of what figure they would need to give in their negotiations”. It suggests that this would be “especially concerning for those discussions that progress to legal cases where details of previous settlements may be used as a precedent for a (sic) proposing a less favourable offer”.
35. The DHSC concluded that sharing the requested information “might prejudice the commercial interests of our suppliers and could impact on DHSC’s current and future relationships”.
36. The complainant queries how the exemption applies as “Some of the questions in the FOI request do not speak to specific companies, for example questions 3 and 4 would not require the department to actually name any companies, so it is unclear in this instance how the exemption would even apply.”

### **The Commissioner’s view**

37. The Commissioner agrees with the complainant that the actual harm to any third party has not been established by the DHSC regarding this particular information. Parts one and two of the request simply require a “yes” or “no” response. The DHSC can provide explanation should there be any inaccuracy or contextual comment it considers necessary. In these two questions the complainant specifically asks about information that had already been placed in the public domain. The Commissioner does not accept that answering either of these questions would cause further commercial prejudice to any that may have been already caused. Neither does he accept that it would cause commercial prejudice to the commercial interests of the DHSC because, whatever the response, he does not consider that it will cause the DHSC difficulty in recouping money from VIP companies. The DHSC provided an instance of where it believed this had occurred as a result of the previously published figures but the Commissioner does not accept that this is an ongoing factor in view of the limited information currently available in the public domain.
38. It is the Commissioner’s understanding that further information of the type quoted in the request relating to specific companies is no longer published and that there are many companies being pursued by the

CDT. Parts three and four of the request do not relate to any specific companies and he is not persuaded that release of this information would affect their commercial interests or cause detriment to ongoing relationships between the suppliers and the DHSC. The information requested relates only to the DHSC's moneys recovered or how much it has recouped. The Commissioner does not accept that the release of this information would give a supplier "an indication of what figure they would need to give in their negotiations". Although the DHSC provided an example of how this could occur during a Teams meeting, he remains unpersuaded that the very limited nature of what is in the public domain and is being requested here would enable a company to negotiate from any position of knowledge.

39. The Commissioner has not looked at any of the other bodies listed in paragraph 28 as no argument has been provided as to how the withheld information could affect their commercial interests. The commercial interests of the taxpayer can only really be considered in terms of the public interest should the DHSC's own commercial interests be affected which he doesn't accept is the case here.
40. Therefore the Commissioner has found that section 43(2) is not engaged. If there was granular information available on individual settlements reached that could be compared with contractual information and lists of companies in the fast track lane, then he could accept that commercial prejudice to the companies and the DHSC would or would be likely to occur. The DHSC argued that providing the information could set a precedent but the Commissioner considers each case individually and any conclusions reached here would not set a precedent for further complaints to the Commissioner around this subject. Whilst understanding the DHSC's desire to only publish at the conclusion of negotiations or litigation, the Commissioner has found that section 43(2) is not engaged for this particular request.
41. As the Commissioner has found this exemption not to be engaged, the information requested at part three of the request must be disclosed.
42. The DHSC also cited sections 31 and 41 of FOIA to parts one, two and four of the request therefore he has gone on to consider whether these exemptions have been correctly cited and whether the information requested should remain withheld.

### **Section 31 – Law enforcement**

43. Section 31 of FOIA allows a public authority to withhold information which, if disclosed, could harm its own, or another public authority's ability to enforce the law.
44. The DHSC argues that the withheld information falls under the following sub-sections of section 31:



31(1)(a) the prevention or detection of crime,

31(1)(b) the apprehension or prosecution of offenders,

31(1)(c) the administration of justice

31(1)(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

31(1)(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment...

45. It specifies the purposes as -

- 31(2)(a) the purpose of ascertaining whether any person has failed to comply with the law,
- 31(2)(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- 31(2)(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

46. The DHSC argued that releasing the "previously undisclosed information mid-litigation is irresponsible and possibly in contempt of court...as it could unfairly influence a possible court case for both sides. It may affect a trial's outcome and stop someone from getting a fair trial..." Until the CDT process has been completed, disclosure would cause detriment to the companies which have been through proceedings as opposed to those that are yet to do so and additionally affect the DHSC's ability to negotiate.

47. The DHSC has quoted the Commissioner's guidance on the 'mosaic effect' to underpin its citing of section 31 and the prejudice test:

"The prejudice test is not limited to the harm that the requested information could cause on its own. You can take account of any harm likely to arise if someone pieced together the requested information with other information to form a broader picture. This is commonly known as the 'mosaic effect' and is explained in more detail in our guidance on information in the public domain.

Complying with one request can make it more difficult to refuse requests for similar information in the future. You are therefore entitled to consider any harm that could be caused by combining the requested information with the information you could

subsequently be required to provide, if the current request was complied with.”<sup>2</sup>

48. The DHSC’s view is that “the very high levels of media (both conventional and campaign groups etc) coverage of PPE contracts” providing an example “and the very high level of FOI requests made about PPE supply to DHSC as well as Supply Chain Coordination Ltd (SCCL) mean that there are already a considerable number of ‘mosaic pieces’ in the public domain”. It then refers to related information requests sent in the “past three years, with the majority being in the past 12 months”.

49. Its argument also rests on the Commissioner having found that the DHSC had withheld the information correctly in some previous cases<sup>3</sup>.

50. The DHSC refers to the Commissioner’s guidance as stating that the term “law enforcement” should be interpreted broadly. It quotes the Commissioner’s reference to the Upper Tribunal decision in *William Thomas Stevenson v the Information Commissioner and North Lancashire Teaching Primary Care Trust* [2013] UKUT 0181 (AAC)<sup>4</sup>:

“it is plain from reading the activities listed in s.31(1) and the purposes specified in s.31(2), that they include activities and purposes which go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings. They include a wide variety of activities which can be regarded as in aid of or related to the enforcement of (i) the criminal law, (ii) any regulatory regime established by statute, (iii) professional and other disciplinary codes, (iv) standards of fitness and competence for acting as a company director or other manager of a corporate body (v) aspects of law relating to charities and their property and (vi) standards of health and safety at work” (paragraph 75).”

51. The CDT has -

“176 active cases on its books, and it is simply not feasible for the Department’s FOI team to examine each of these cases to consider which ones of them may be affected by the release of the data in the scope of this request”.

It has therefore argued that a “broad interpretation, as applied, would

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<sup>2</sup> [How should we apply the prejudice test? | ICO](#)

<sup>3</sup> [ic-292871-q2s3.pdf](#) and [ic-300019-s2r6.pdf](#)

<sup>4</sup> [Sections 31\(1\)\(a\) – \(f\): criminal and civil law | ICO](#)

cover most cases". The DHSC contends that there is potential harm in "unintentionally releasing a piece of sensitive information into the public domain and allowing a mosaic to be completed is very high".

### **The Commissioner's view**

52. The Commissioner does not accept that the DHSC has provided sufficient detailed arguments or compelling evidence in support of any sub-section of section 31 being engaged. Though the DHSC refers to the mosaic effect that can take account of information being pieced together with information it could subsequently be required to provide, its arguments are generic and have not been applied closely enough to the particular information being requested here.
53. As the Commissioner has found that section 31 is not engaged, he has not gone on to consider the public interest. The information requested at parts one, two and four of the request must now be released unless section 41 is engaged which he will consider next.

### **Section 41- information provided in confidence**

54. Section 41(1) of FOIA states that:

"(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

55. For this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.
56. The DHSC provided the Commissioner with some further information about the level of confidentiality expected (details of which cannot be provided here but have been factored into this decision). The expectation of confidentiality will eventually expire when the DHSC produces its final report but that is unlikely to be published before the Summer 2025 parliamentary recess.

### **The Commissioner's view**

57. The DHSC's argument regarding section 41 of FOIA is again too generic to engage the exemption. He is not persuaded that any of the requested information will have been obtained from another party. The

Commissioner does not accept that confidentiality applies with regard to limited information already placed in the public domain. As regards part four of the request, the figure requested will consist of individual amounts that have either been offered by the organisations concerned, negotiated, or possibly imposed. Whichever way, the request is for the total recouped which is presumably the DHSC's own information. The exemption doesn't cover information generated by the public authority itself<sup>5</sup>.

58. Therefore, the Commissioner's conclusion is that the exemption at section 41 is not engaged and that the requested information at parts one, two and four must now be released.

### **Procedural matters**

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59. Section 17(1)(b) of FOIA states that if a public authority is relying on a claim that information is exempt it must, within the time for compliance with section 1(1) give the applicant a notice specifying the exemption in question.
60. Although the DHSC did cite an exemption, it only cited further exemptions it was relying on at the investigation stage, breaching section 17(1)(b) of FOIA.

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<sup>5</sup> [information-provided-in-confidence-section-41.pdf](#)

## **Right of appeal**

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61. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Janine Gregory**  
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