

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2021

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

Decision (including any steps ordered)

1. The complainant has requested the Department of Health and Social Care (the DHSC) to disclose the number of lateral flow test kits to be supplied under the contracts of two referenced TED notices. The DHSC refused to disclose the requested information, citing section 43 (commercial interests) of the FOIA.
2. The Commissioner's decision is that the DHSC is entitled to refuse to disclose the requested information in accordance with section 43 of the FOIA. She does not therefore require any further action to be taken.

Request and response

3. On 23 November 2020, the complainant wrote to the DHSC and requested information in the following terms:

"I wish to request the number of test kits to be supplied under the contracts to which the following TED notices refer:

2020/S 203-494882 [1], and

2020/S 217-533961 [2]

For the avoidance of doubt, number of test kits refers to 1. the number of tests which could be carried out as per the manufacturers instructions with the materials to be supplied under the contract in question, and 2.

any contractual parameters (e.g. ranges) relating to the number of tests supplied in the event that the contract does not specify an exact number.”

4. The DHSC responded on 8 January 2021. It refused to disclose the requested information, citing section 43 of the FOIA.
5. The complainant requested an internal review on 10 January 2021.
6. The DHSC carried out an internal review and notified the complainant of its findings on 15 January 2021. It upheld its previous application of section 43 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 15 January 2021 to complain about the way his request for information had been handled. He does not agree the information is commercially sensitive. If it is, the complainant considers the public interest rests in disclosure.
8. The Commissioner considers the scope of her investigation to be to determine whether or not the DHSC is entitled to refuse to disclose the withheld information (i.e. the number of units under the said contracts) under section 43 of the FOIA.

Reasons for decision

Section 43 – commercial interests

9. Section 43 states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority itself and/or a third party.
10. 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 demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
11. The DHSC advised that, in undertaking commercial activities on these contracts, it relied upon a secure and confidential tendering process in order to obtain best value for the taxpayer. It argued that if it was obliged to disclose the withheld information, it would be likely to undermine its ability to ensure a fair and secure competition on price and overall value for goods and services in the future.

12. The DHSC advised that the total cost of both contracts is in the public domain via the TED notices mentioned in the complainant's request. If it were to disclose the withheld information (i.e. the number of units) it would then be possible for members of the public and, more importantly, other manufacturers/competitors to work out the cost per unit.
13. It commented that the contractual negotiation required a secure information process where parties could openly discuss and debate the price and services that fell under the contracts. The DHSC stated that it is a common feature of commercial contracts that both pre-contractual negotiations and the final agreement on a unit price are kept confidential, as it was in this case. It confirmed that if it were obliged to disclose the withheld information it would be likely to damage the commercial interests of the contractor and the DHSC.
14. It stated that it had contacted the contractor concerned and it was both the contractor and the DHSC's view that the withheld information would be useful to the contractor's competitors. Disclosure would reveal the cost per unit it secured and this would enable the contractor's competitors to use this information to the commercial detriment of the contractor. In any future tendering exercise the contractor's competitors would know up front the cost per unit the contractor had previously secured and this would enable the contractor's competitors to tailor their bids accordingly and potentially outbid the contractor. It would influence the bid they put forward and potentially lead to them putting forward a less competitive offer to the DHSC than it would have done. It would also create an unlevel playing field.
15. The DHSC went on to say that if it was obliged to disclose the withheld information it would place the DHSC in breach of contract and this could lead to adverse consequences in the form of litigation, which would not be in keeping with good stewardship of the public funds.
16. The DHSC also said that disclosure would reveal to other manufacturers the price it was willing to pay per unit in these contracts. It would be likely to lead to less competitive bids being put to the DHSC in future tendering exercises for the same or similar services and bids that truly reflect what the manufacturer could offer competitively. It would be likely to hinder the DHSC's ability to negotiate competitively and fairly in future contracts, potentially leading to the DHSC receiving a poorer deal and prevent it from securing more favourable terms.
17. The Commissioner is satisfied from the information in the public domain and the withheld information itself that it would be possible to work out the price per unit secured under these contracts. She accepts that this information, if it were disclosed, would be likely to prejudice the

commercial interests of the contractor concerned and the DHSC. She agrees with the DHSC that this information would be very useful to the contractor's competitors and could be used to outbid the contractor in future tendering exercises for the production of further lateral flow tests. She also accepts that disclosure would reveal to other manufacturers/contractors looking to secure similar contracts as they come up, the price per unit the DHSC was willing to pay on these occasions. It would potentially hinder the DHSC's ability to negotiate competitively and secure the best possible deal for the public in further contracts for the production of such tests.

18. For the above reasons the Commissioner is satisfied that section 43 of the FOIA applies in this case.

Public interest test

19. The DHSC said that it has considered the public interest in being transparent, in particular, the significance of the spend of public money on COVID-19 contracts. However, it has also acknowledged that there is a public interest in the DHSC being in a position to negotiate competitively and securing the best possible deal for the public. Disclosure of the withheld information would be likely to prevent or hinder the DHSC from doing that, which is not in the interests of the wider public.
20. It also said that disclosure would be likely to lead to adverse consequences in the form of litigation and this would no doubt need to be funded by the public purse. This would not be in the interests of the wider public and it could also lead to the pool of willing contractors to enter into future contracts narrowing.
21. Overall, the DHSC reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
22. The Commissioner considers there are strong public interest arguments in favour of disclosure. Disclosure would promote openness, transparency and accountability and enable members of the public to scrutinise more closely the contracts concerned and the services provided for the amount paid. These contracts involve a significant amount of public money and it is recognised that the COVID-19 pandemic has cost the country billions. The Commissioner considers there is a strong public interest argument in members of the public understanding more precisely how that money has been spent, on what and allow them to assess for themselves whether value for money has been achieved.

23. However, in this case, due the nature of the withheld information and what this would reveal to the contractor's competitors, and the likelihood of very similar contracts coming up for tender in the near future, the Commissioner considers the public interest rests in maintaining the exemption.
24. The Commissioner has accepted that disclosure of the withheld information would enable the public and other manufacturers (which could compete against the contractor in future bids for similar services) to work out the price per unit under both contracts. It would reveal what the DHSC and the contractor secured. This information would be useful to the contractor's competitors and enable them to see what was previously negotiated and agreed and enable them to tailor future bids for the same or similar services accordingly. It could lead to the contractor being outbid unfairly in future tendering exercises and potentially lead to those competitors not putting forward their most competitive price. The Commissioner does not consider it is in the interests of the wider public to prejudice the ability of the contractor to compete in the market place or to create an unlevel playing field. It is also not in the interests of the wider public for those competitors to be influenced by the price per unit secured under these contracts. It would influence any bid for the same or similar services put forward and could potentially led to those competitors not putting the most cost efficient tender to the DHSC that they could manage.
25. The Commissioner has also accepted that disclosure would be likely to hinder the DHSC's ability to negotiate fairly and competitively in future contracts for the same or similar services. Competitors would know up front what price per unit was secured under these contracts and this would be used by those competitors to the commercial detriment of the DHSC. The DHSC would be hindered from securing the most favourable terms possible, at the most competitive and fair price available. It could lead to the DHSC having to pay more for the services it requires, which is not in the interests of the wider public.
26. For these reasons the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

27. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

28. 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.
29. 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

Samantha Coward
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