

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 29 March 2022

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to Department of Health and Social Care (DHSC) contracts for PPE with a number of different companies.
2. The Commissioner's decision is that DHSC correctly applied section 43(2) (commercial interests) FOIA to the withheld information.
3. The Commissioner does not require DHSC to take any steps as a result of this decision notice.

Request and response

4. On 9 February 2021, the complainant wrote to DHSC and made the following request for information:

"I wish to see full and unredacted copies of contracts that the Department holds with the following companies:

Ayanda Capital
Pestfix
Clandeboyne
DTC Consulting
Elite Creations UK
Trade Markets Direct
Radox
PPE Medpro

P14 Medical
Meller Designs
Medwell Medical Products
Globus (Shetland) Limited
Clipper Logistics
Rehear Labs Limited
Saiger LLC
Hotel Logistics Limited
Chanzo Limited"

5. On 5 March 2021 DHSC responded and refused to provide the requested information citing section 43 and section 40 as its basis for doing so. DHSC provided an internal review on 19 March 2021 and upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 23 March 2021 to complain about the way their request for information had been handled.
7. Given the time elapsed between the complaint being made and the allocation of a case officer, the Commissioner wrote to the complainant on 23 November 2021 asking if they wished to continue. He further noted that they did not appear to be challenging the application of section 40 – personal data, and therefore the focus of his investigation would be on whether DHSC were correct to apply section 43(2) FOIA to the withheld information.
8. The complainant confirmed they wished to continue with their complaint but did not refer to section 40. Therefore the Commissioner has continued with his focus on section 43(2).

Background

9. In preparing contract award documents for publication, DHSC follows guidance issued by the Cabinet Office entitled: Guidance on the Transparency Requirements for Publishing on Contracts Finder, which can be found here: PPN 09/21: Requirements to publish on Contracts Finder - GOV.UK (www.gov.uk).
10. This guidance underpins regulations 48-52, 106, 108, 109, 110 and 112 of the Public Contracts Regulations 2015 ("PCR 2015").
11. Under Part 2 'Additional policy guidance for central government authorities', section 2 ('Publishing contract documentation at the award stage') sets out that bodies within scope should aim to publish the

awarded contract documents with the awarded opportunity notice and that the awarded contract documents would include the signed contract and other associated documents that may include:

- the specification;
 - terms and conditions (T&Cs);
 - any associated schedules (which may include the winning tenderer's bid).
12. Section 3 ('Preparing documents for publication') states that the guiding principle is that contracts should be published in full, "subject to any applicable exemptions and redactions being made".
13. It states that it is ultimately for the In-Scope Organisation to assess and decide what information should be published and that the following information should generally be disclosable:
- the identity of the parties, the contract term, options for extension, overall value (if fixed);
 - information setting out the essential obligations of the parties, including e.g. specification/description of services, manner of provision etc.;
 - warranties, indemnities and other protections (unless the existence of those clauses would be commercially sensitive) but with values redacted (where appropriate).
14. It then goes on to say under the heading 'Exemptions and Redactions' that exemptions from publication are permitted by following the provisions of the Freedom of Information Act 2000, for example:
- on national security grounds (e.g. publication of the information has the potential to cause harm to the UK);
 - on data protection grounds (e.g. names and contact information of individuals should not be published);
 - on commercial sensitivity grounds (see below).
15. Below this, there is a separate heading 'Commercial information', which states that outside of the obligations stated in the PCR 2015, the Transparency Principles set out categories of information which could be reasonably withheld on the grounds of commercial confidentiality, the first part of which concerns pricing:
- Pricing. The way the supplier has arrived at the price they are charging including:

- o individual pricing elements;
 - o financial models and business plans including details of profit margins and overheads;
 - o matters which enable the make-up of the bid to be determined, and financial information, which would affect the outcome of re-bid or future procurement etc., but this should not be grounds for withholding the contract value itself.
16. It states that each contract should be considered on a case-by-case basis and that only genuinely sensitive information should be withheld.

Reasons for decision

Section 43(2)

17. Section 43(2) of FOIA states that

“Information is 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).

18. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
19. In the Commissioner’s view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party’s commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.
20. 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.

DHSC's position

21. DHSC explained that in line with the guidance above, it publishes information on all contracts it has awarded on Contracts Finder (Contract Finder Notices). This includes most of the contracts within scope of this FOI request, although it first apologised for an oversight in its original and subsequent internal review response to the complainant: DHSC has not awarded a contract to Medwell Medical Products and the contract to Clipper Logistics was awarded as a sub-contract by NHS Supply Chain, a separate organisation.
22. DHSC also publishes Contract Award Notices, formerly in the Official Journal of the European Union ((OJEU) (available on Tenders Electronic Daily (TED)) and latterly on Find a Tender Service (FTS) as it is legally required to do.
23. DHSC stated it should be noted that in line with Paragraph 13 above, in observance of the guidance a considerable amount of information is disclosed in the Contract Finder Notices – the identity of the parties, the contract term, award date and options for extension, general contract terms and conditions; and the reasons for using the particular procurement route under the Procurement Regulations (e.g. a direct award).
24. With regard to observing Paragraph 14 and 15 above in considering what information should not be released when the contracts are published on Contracts Finder, DHSC redacts from these published versions information on payment terms, delivery schedules and suppliers' costing mechanisms that could allow others to deduce unit pricing, discounts and pricing strategies, the disclosure of which would weaken a suppliers' competitive advantage when bidding on future contracts. So, for example, as information on the total value of the contract is always published in the Notices, the precise quantities of products to be supplied are often redacted where that further information will reveal the unit cost of products (i.e. value divided by quantity).
25. Section 43(2) of the FOI is a qualified exemption and in line with the guidance, once DHSC has identified that a qualified exemption applies to certain information contained within the contract, it then applies the public interest test to establish whether or not the exemption is justified.
26. The guidance is then followed in that if part of a contract is deemed to be exempt from publication, this does not automatically mean that the whole contract is withheld, as each individual element of the contract should be assessed separately. It is only those elements of the contract to which exemptions apply and can be justified (where it is a qualified exemption) that are withheld from publication.

27. DHSC referred to the ICO guidance which specifically states that revealing information such as a pricing mechanism can be detrimental to negotiations on other contracts and procurements. If an organisation knows how an item or service is costed, for example, then it can exploit this for profit or other gain.
28. The ICO states that it is also the case that it is in the public interest for public authorities not being disadvantaged by their FOIA obligations when in commercial negotiations with the private sector. It is important to note that the principles set out above in relation to implementing the Cabinet Office guidance and PCRs and the corresponding application of FOI exemptions applies to all contracts DHSC publishes i.e. not just those which have been awarded as part of the response to COVID-19 – such as those within scope of this FOI – and which have attracted a great deal of attention.
29. All the suppliers and the contracts in scope of this FOI request were awarded as part of DHSC's response to the pandemic and it is important to note that the worldwide demand for PPE – which most of these contracts are for – and other products and support services remains high (albeit not as high as at the start of the pandemic) and this is likely to continue, if not at the same level.
30. It is also the case that DHSC has an ongoing need for a variety of other products and services to combat COVID-19 and potential variants of the original virus – these are across the headings of Test and Trace, Medicines, Logistics and Professional Services. Contract Notices and the contracts themselves across these other headings are published by DHSC in exactly the same way i.e. generally providing information on the value of the contract, award date, supplier name the type of products and services to be supplied but redacting information concerning unit pricing and payment terms.
31. DHSC recognises the significant public interest in the spending of public money on procurement in response to COVID-19 and is strongly committed to transparency. However, any publication of information must be handled in such a way as to protect DHSC's ability to provide value for money for the taxpayer. Whether or not a contract is live or expired, any unit price information that is published could be used, together with other industry information, to establish a price point. By establishing a historic price point, this together with contemporary market research and analysis, could facilitate the ability of suppliers to estimate the current price point. This would enable competitors and current suppliers to drive up the cost of goods and therefore prejudice DHSC's bargaining and negotiating position in securing best value for money on future contracts.

32. DHSC noted that the onus rests with it to evidence that the exemption is engaged. It considered contacting the suppliers within scope of this request, but believed it was unlikely that any supplier would give a reasoned and impartial view in the current circumstances. This is because of the widespread media coverage about most of these COVID-19 related contracts, which used mainly direct contract awards - i.e. without the usual advertised competitive tender - which has led to questions and, in DHSC's view, misrepresentations about the fairness and transparency of these awards. These particular suppliers are more likely to want to engage on wider issues which would not be relevant to this particular exercise.
33. On balance, DHSC considered that there is sufficient evidence for it to reach the view that disclosure of the information requested would indeed be likely to prejudice the commercial interests of the relevant suppliers without contacting them to seek their views in this instance.
34. As evidence of how seriously DHSC takes this, it referred to a number of Judicial Reviews that have been brought against DHSC concerning the award of COVID-19 related contracts.
35. One of these involved the award of contracts to Pestfix, Ayanda and Clandeboye, three of the suppliers listed in this FOI request. Given the duty of candour applicable in both cases, DHSC's solicitors, the Government Legal Department and DAC Beachcroft, conducted an extensive document collection across multiple Government departments at great expense. To protect the commercially sensitive information of the three suppliers, supported by DHSC, a confidentiality ring was considered by the parties and ultimately ordered by the Court.
36. This was done on the basis that commercial parameters on which suppliers operate should not be put out to the public domain since there is no guarantee the circumstances of the pandemic will not be repeated and that further such procurement activity may be required for all types of PPE and other COVID-19 related products and services as explained above, in which many different suppliers are currently and will be competing in a highly competitive environment.
37. Contract Finder Notices have been published for well over 1,000 contracts awarded in response to COVID-19. DHSC are sure that the commercial interests of itself would be prejudiced by disclosure of unit pricing and payment information from the contracts for the suppliers listed in the FOI request - and by extension all these contracts - as this would affect the behaviour of bidders by introducing apparent benchmarks and precedents into a highly competitive marketplace.
38. This would obviously prejudice the bargaining and negotiating position of DHSC in seeking to secure best value for money in the future. As

discussed above, further procurement activity may be required for all types of PPE and DHSC is still active in procurement in other areas of COVID-19 related products and services.

39. It is important to state that the argument above about distorting competition and prejudicing DHSC's ability to secure value for money if such information were to be released applies equally to the normal non-COVID-19 procurement activity as well as securing the vital products and services required in response to COVID-19.
40. 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. He accepts that this information, if it were disclosed, would be likely to prejudice the commercial interests of the contractors concerned and the DHSC.
41. He agrees with the DHSC that this information would be very useful to the contractor's competitors and could be used to outbid them in any future tendering exercises for the procurement of PPE and other related items. He 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. Potentially it would hinder the DHSC's ability to negotiate competitively and secure the best possible deal for the public in future contracts. The Commissioner is therefore satisfied that section 43 of the FOIA applies in this case.

Public interest test

42. Section 43(2) is a qualified exemption and we considered whether the balance of the public interest favours our release of these the redacted information in the contract documents. We recognise there is a definite public interest in openness and transparency of Government's commercial activities and public service delivery, enabling accountability in terms of the use of public funds. Additionally, we acknowledge there is increased public interest in relation to contracts awarded in response to the COVID-19 pandemic.
43. Against these points we have weighed the public's interest in DHSC being able to retain the commercial confidence of parties when they choose to engage in commercial activities with DHSC; and the interests of DHSC and the taxpayer in being able to secure best value for money when it enters into negotiations and then signs contracts with suppliers. We believe that the explicit, detailed potential commercial in confidence exemptions set out above in Paragraphs 1 to 5 above from the Cabinet Office guidance, which itself underpins the Public Contract Regulations; the FOI Act itself and then the ICO guidance clearly support the conclusion that the financial implications of a Government department's

ability to negotiate competitively and secure best value for money outweighs any public benefit in having access to this redacted information, especially in light of the fact that key information relating to these contracts has already been published.

44. After careful consideration, we have determined therefore that the public interest in withholding the information on almost all these contracts outweighs the public interest in disclosure in this case, in particular given the high level of transparency already provided in relation to contracts awarded.
45. The one exception to this is the Randox contract, where DHSC accepts that there is a different situation due to a unique set of circumstances relating to the wider concerns about the conduct of Mr Paterson which were investigated by the House Authorities and which reported in October 2021.
46. We can confirm that the NAO will be publishing historic expired contract data on this first contract with Randox, which ran between March – September 2020. We have agreed to this publication because we recognise the unique nature of the interest in this matter, and because it forms part of the wider parliamentary enquiries. The anticipated publication of the NAO report into this contract is during March 2022 and therefore we would request that Mr. Lloyd is directed to that source for this part of his request under the Act.
47. However, DHSC does not view this as the basis for an agreement to publish historic data for any other contracts; this is only owing to the exceptional circumstances as outlined above.
48. 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.
49. 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.
50. 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.

51. The Commissioner has accepted that disclosure of the withheld information would enable the public and other manufacturers (which could compete against the contractors in future bids for similar services) to work out the price per unit. This information would be useful to the contractor's competitors and enable them to see what was previously negotiated and agreed, enabling them to tailor future bids for the same or similar services accordingly.
52. Furthermore, it could lead to the contractors being outbid unfairly in future tendering exercises and potentially lead to those competitors not putting forward their most competitive price or cost efficient tender. The Commissioner does not consider it is in the interests of the wider public to prejudice the ability of contractors 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.
53. The Commissioner has also accepted that disclosure would be likely to hinder DHSC's ability to negotiate fairly and competitively in future contracts for the same or similar services. Competitors would know in advance 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 which could lead to the DHSC having to pay more for the services it requires. Clearly this is not in the interests of the wider public.
54. The Commissioner is satisfied that the public interest is met by the publication of Contract Finder Notices and Contract Award Notices, formerly in the OJEU TED and latterly on Find a Tender Service (FTS).
55. 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

56. 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

57. 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.
58. 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

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