

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2022

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 information relating to the cost of lateral flow devices (LFD).
2. The DHSC is withholding the requested information under section 43(2) (commercial interests) of FOIA.
3. The Commissioner's decision is that section 43(2) is not engaged and therefore the DHSC is not entitled to withhold the information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
5. The public authority must take these steps within 35 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 21 March 2021 the complainant wrote to the Department for Health and Social Care ('DHSC') and requested the following information:
 - "1. How much does a COVID-19 Lateral Flow test cost to supply and process the result.
 2. How much has it cost the DHSC in total."
7. The DHSC responded on 22 April 2021. It confirmed that it held information in response to part 1 of the request but that it was exempt from disclosure under section 43(2). The DHSC confirmed that it did not hold any information in response to part 2 of the request.
8. Following an internal review the DHSC wrote to the complainant on 21 May 2021. It upheld its previous position.

Scope of the case

9. The complainant contacted the Commissioner on 21 May 2021 to complain about the way that their request for information had been handled. The complainant stated 'I do not see how a figure with no other piece of information could impact on future deals.'
10. During the course of this investigation, the DHSC clarified to the Commissioner that aspects of the total cost of LFD testing are merged with Polymerase Chain Reaction (PCR) testing. The DHSC confirmed that to extract the information required to comply with part 2 of the request would require 'significant analysis' and would exceed the appropriate limit to do so.
11. Given this change in position, the Commissioner asked the DHSC to justify its application of section 12 (cost of compliance would exceed the appropriate limit) in relation to part 2.
12. The DHSC then changed its position again. It confirmed to the Commissioner that, 'further work has happened as part of year end analysis which has enabled the DHSC to provide this information.'
13. The DHSC confirmed its final position, information that fell within both parts 1 and 2 of the request is exempt under section 43(2).
14. The Commissioner will not consider the DHSC's previous positions as part of this decision notice. This decision notice will only analyse the DHSC's current position.

15. The scope of the Commissioner's investigation is to determine if the withheld information engages section 43(2). If so, the Commissioner will go on to consider whether the public interest lies in disclosure or in maintaining the exemption.

Background information

16. The Commissioner notes that the withheld information relates to one specific LFD manufacturer, Innova Medical Group (IMG).¹ IMG is based in California and secured exclusive global rights to LFDs made by a Chinese company called Biotime Biotechnology. The Government's decision to acquire LFDs from IMG, and subsequently awarding IMG a contract to provide LFDs, has met controversy during the pandemic.²
17. There have been studies into the efficiency of the IMG LFDs,³ especially following the U.S Food and Drug Administration's (FDA) announcement that the test should not be used for diagnostic purposes.
18. IMG is no longer the supplier of LFDs to the UK government.⁴ However, as it was at the time that this request is made, the Commissioner is satisfied that the withheld information relates to the cost of LFDs supplied by IMG only.

Reasons for decision

Section 43(2) Commercial interests

19. Section 43 of FOIA states:

'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).'

¹ [Innova Medical Group | Global Leader In Antigen Testing \(innovamedgroup.com\)](https://www.innovamedgroup.com)

² [How UK spent £800m on controversial Covid tests for Dominic Cummings scheme | Coronavirus | The Guardian](https://www.theguardian.com/uk-news/2020/apr/23/how-uk-spent-800m-on-controversial-covid-tests-for-dominic-cummings-scheme)

³ [Covid-19: Innova lateral flow test is not fit for "test and release" strategy, say experts | The BMJ](https://www.bmj.com/content/369/bmj.m1111); [Covid-19: Tests on students are highly inaccurate, early findings show | The BMJ](https://www.bmj.com/content/369/bmj.m1111)

⁴ [UK government announces partnership with British rapid test manufacturers - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/uk-government-announces-partnership-with-british-rapid-test-manufacturers)

20. The Commissioner's guidance⁵ 'Section 43 - Commercial interests' states '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.' In this instance, the DHSC represents the legal person.
21. The DHSC has explained that 'approximately every three months, DHSC is likely to place a new order for Lateral Flow Devices ('LFD') purchases. In doing so, it follows a competitive tender process to ensure value for money is achieved.' With this in mind, the Commissioner is satisfied that the purchase of LFDs represents commercial information.
22. In order to engage a prejudice based exemption such as section 43 three criteria must be met. This is what is known as the prejudice test.⁶
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
23. Consideration of a qualified exemption such as section 43 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

⁵ [Section 43 - Commercial interests | ICO](#)

⁶ [the prejudice test.pdf \(ico.org.uk\)](#)

The applicable interests

24. The DHSC has explained that disclosure of the requested information would 'adversely affect the ongoing price negotiations, which DHSC has been pursuing with all suppliers.'
25. The DHSC has explained that 'LFD supply and process have multiple activities such as, kit price, logistics and the price of carrying out tests vary depending on the delivery method used, i.e. self-test or assisted testing.'
26. The DHSC has elaborated that 'It is not possible to provide a value, which could be misinterpreted or misunderstood without the details behind it. Providing these details however would have an adverse effect on the current contracts we hold with a number of suppliers.'
27. It is important that the Commissioner considers whether it was appropriate for the DHSC to withhold the information at the time that the request was made. The DHSC is clearly concerned that disclosure would affect its ability to obtain, and process, LFDs at a competitive rate. The Commissioner is satisfied that the first criteria as outlined in paragraph 22 has been met.

The nature of the prejudice

28. The Commissioner must now consider if the DHSC has successfully demonstrated a causal relationship between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect.
29. The Commissioner must be satisfied that this causal relationship is based on more than mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.
30. In *Hartlepool Borough Council v The Information Commission* EA/2017/0057, (14 March 2018),⁷ the Tribunal noted that 'the onus rests with the party making the assertion that the exemption is engaged to make good its claim.' Therefore the Commissioner asked the DHSC to provide a detailed explanation to support its position that disclosure would prejudice its commercial interests.

⁷ [Hartlepool Borough Council v The Information Commission EA/2017/0057, \(14 March 2018\)](#)

31. The DHSC explained that 'LFD supply and process have multiple activities such as, kit price, logistics and the price of carrying out tests vary depending on the delivery method used, i.e. self-test or assisted testing.'
32. The DHSC elaborated that 'It is not possible to provide a value, which could be misinterpreted or misunderstood without the details behind it. Providing these details however would have an adverse effect on the current contracts we hold with a number of suppliers.'
33. The Commissioner notes that the request asks for the total cost of supplying and processing both a single LFD unit and the total cost to the DHSC. There is no request for a breakdown of the supply and processing cost for each figure.
34. First the Commissioner will consider the information being requested in part 1 of the request which is the total cost of supply and processing a single LFD unit. The Commissioner recognises that if a manufacturer or supplier knew that the DHSC spent a certain amount on a single unit, inbound or outbound logistics, kitting, storage or testing of LFDs, they may be able to use this figure as a starting point for negotiations as supply and demand for LFDs fluctuated throughout the pandemic.
35. The Commissioner also recognises that, with the evolution of the pandemic, the DHSC had to be allowed to enter into a competitive tender process to ensure value for money and releasing unit cost information to the public may have impeded upon its ability to successfully negotiate with suppliers.
36. However, to reiterate the complainant is not requesting this breakdown; they have only requested the total cost of a single LFD. Putting aside the breakdown of the cost information, the Commissioner is struggling to identify the casual relationship between disclosure and the DHSC's commercial interests.
37. Part 2 of the request looks at the total cost of supply and processing all LFD units. The DHSC has explained 'By being obliged to produce the information requested, the DHSC would undermine its ability to ensure a fair and secure competition on price and overall value paid for goods and services in future.'
38. The DHSC has also explained that 'It would also lead to any competitor being able to calculate cost per unit if the DHSC were to provide the cost of tests purchased because the LFD dispatch volumes are in the public domain.'
39. The Commissioner notes that the request was made in March 2021 when the government was still providing free LFD's to the public. It is important that, at this time, the DHSC was able to obtain value for

money in its procurement of LFDs as the pandemic evolved. However, once again the Commissioner is unsure as to how the DHSC's negotiating position would be compromised without the disclosure of any breakdown into the total cost – just the total cost itself.

40. The total includes the money spent on the LFDs units, storage, inbound and outbound logistics and deployment. The Commissioner doesn't agree that a competitor could calculate the cost paid per LFD unit without the disclosure of the breakdown that accompanies the total. Again, this is not the information that is being requested in this instance.
41. The DHSC has also explained 'if it were known that such information was routinely published, it is highly conceivable that a number of current competitors for government contracts would consider this unacceptable as it would undermine their position should they bid for the same contract in the future and it could further undermine their position in the wider market place. The result of this is that the pool of willing competitors would narrow, and it would have an adverse impact on the quality of available goods and services and could increase the cost paid by the DHSC in its procurement.'
42. The Commissioner notes that the DHSC has not sought the views of any of the suppliers in question to ascertain whether they would find disclosure unacceptable.
43. Furthermore, the Commissioner considers it unlikely that each stage of the cost and processing of LFDs will involve the same supplier. Without the associated price breakdown, the Commissioner does not see how the contract value of each stage can be deduced.
44. Even if this was the case, the Commissioner considers that a certain amount of scrutiny is to be expected when providing services, particularly pandemic related services, to the government. Private companies providing these services should always be aware of the possibility of disclosure of commercial information under FOIA.
45. Again, the Commissioner does not see how the total cost of supply and processing LFD units, which is the information that is being requested, without any further breakdown, can prejudice the commercial interests of the DHSC.

The likelihood of prejudice

46. The DHSC has confirmed that it is relying upon the 'higher threshold that the disclosure would have a prejudicial effect.' It has provided no further analysis in support of its application of the higher threshold of prejudice.
47. The Commissioner's guidance⁸ states that the higher threshold of prejudice means 'the chain of events is so convincing that prejudice is clearly more likely than not to arise.'

The Commissioner's view

48. In the Commissioner's view the information being withheld in response to parts 1 and 2 of the request does not engage the exemption. Therefore, he has ordered disclosure of this information.
49. The Commissioner acknowledges the DHSC's concerns that, to truly understand the cost of LFD testing, you need to break down the supply and testing process. The DHSC is concerned that to provide a total cost without this information would be misleading.
50. However, the Commissioner believes that the process of supplying and processing an LFD is fairly obvious. At the height of the pandemic there were daily news reports about the difficulties that the government faced in purchasing, storing, transporting and processing LFD tests. Even the wording of the request itself indicates the complainant is aware of such logistics.
51. It is also not the DHSC's role to assume that the general public will misinterpret or misunderstand any information that is being requested. If the DHSC is really concerned about this matter, it may wish to publish a supplementary statement to accompany the total figures.
52. When a public authority receives a request under FOIA it is important to identify the information that is actually being requested which, in this case, is total figures and not the associated breakdown that the DHSC appears to have based all of its prejudice arguments on.
53. The Commissioner notes that the DHSC's prejudice arguments have been framed in quite vague terms. It is insufficient for the DHSC to claim that disclosure of the total costs would affect its ability to successfully negotiate in upcoming tenders, or discourage current or

⁸ [the_prejudice_test.pdf \(ico.org.uk\)](https://ico.org.uk/the_prejudice_test.pdf)

future contractors from working with the DHSC. To the Commissioner, these arguments are not based on any cogent evidence.

Right of appeal

54. 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

55. 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.
56. 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

Alice Gradwell
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