

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 20 January 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 companies and individuals who made bids for contracts to supply PPE in March 2020.
2. The Commissioner's decision is that Department of Health and Social Care (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. The complainant originally wrote to DHSC on 2 December 2020 and made the following request:
 - "1) Please provide a list of the 493 companies and individuals that were processed through the high-priority lane for PPE procurement, as referenced in the NAOs report into PPE procurement.
 - 2) Please provide a list of the 47 companies and individuals that were processed through the high-priority lane and received contracts, as referenced in the NAOs report into PPE procurement.

There is no possible justification for an exemption under section 43 for this request, as there are no reasons to suppose that disclosure that an individual or company was on this list would compromise it or the government's commercial position, and this information is not a trade secret. Given the NAO's reporting into this matter, and widespread

concern over the procurement system, there is an overwhelming public interest in full transparency.”

5. DHSC responded on 29 March 2021 and refused to provide the requested information by virtue of section 43(2) FOI (prejudice to commercial interests). Following intervention by the Commissioner DHSC provided an internal review on 6 August 2021. It amended its position with regard to the successful bidders stating this would be published once it had been checked and verified. However, it did not specifically cite section 22 FOIA. The information was published on 19 November 2021¹.
6. With regard to the unsuccessful bidders, it maintained its position that section 43(2) applied.

Scope of the case

7. The complainant contacted the Commissioner on 16 August 2021 to complain about the way their request for information had been handled, stating:

“For the unsuccessful bidders, the department argues that "disclosure would reveal that those suppliers failed to meet the technical and commercial assurance processes for this particular procurement exercise, which is likely to affect their commercial reputation and the confidence that their customers, suppliers or investors may have in their products or commercial operations. This in turn would deter companies from bidding for such Government contracts in the future.

It is not clear that disclosure would have the effect that the government claims. There are perfectly innocent reasons why the offers may not have met government requirements, such as not meeting the kind of

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<https://eur03.safelinks.protection.outlook.com/?url=https://www.gov.uk/government/news/ppe-procurement-in-the-early-pandemic&data=04%7c01%7cicocasework%40ico.org.uk%7c2a46efb6436046ebe77408d9ab3cef0e%7c501293238fab4000adc1c4cfefba21e6%7c1%7c0%7c637729100462164579%7cUnknown%7cTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6I6I1haWwiLCJXVCI6Mn0%3D%7c3000&sdata=YWji5ToBMO8xd8JRDBMNZmjDgk2WGa6i43Odr8wxarY%3D&reserved=0>

products the government was trying to standardise around. There can be no reasonable inference that the products offered were defective, and it is not at all clear that disclosing that a firm appeared on such a list would damage the reputation of companies in any way.

On the other hand, if wildly unsuitable companies were being referred to the list because of their links to ministers, officials or MPs, possibly delaying the procurement process, this is clearly something that needs proper scrutiny, and there is the clearest of public interests in transparency around the companies referred in this manner, even if they were unsuccessful.

Given the very clear public interest in timely disclosure to ensure no corrupt practices took place in the operation of the VIP lane”

8. The complainant also noted that DHSC appeared to be relying of section 22 (information intended for future publication) although it had not been specifically referred to.
9. DHSC has now published details of all qualifying PPE contracts on Contracts Finder in line with its usual transparency obligations. It has also published Contract Award Notices, latterly in the Official Journal of the European Union (OJEU) (available on Tenders Electronic Daily (TED)) and now on Find a Tender Service (FTS) as it is legally required to do.
10. Therefore the Commissioner considers the scope of this investigation to be to determine if DHSC has correctly cited section 43(2) to the withheld information.

Reasons for decision

Section 43(2) – commercial interests

11. 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.
12. 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
13. In its submission to the Commissioner DHSC maintained that the names of suppliers who were processed through the high priority lane but were not awarded contracts are exempt from disclosure under section 43(2) of FOIA.

14. It considered that the commercial interests of both suppliers and Government would be likely to be prejudiced as a result of disclosure of this information.
15. Regarding the commercial interests of suppliers, it was DHSC's view that disclosure of the names of the 'unsuccessful' suppliers, and in turn the knowledge that their offerings to Government had been rejected, would be likely to harm the business reputation of those suppliers.
16. The reasons suppliers were not successful were varied, ranging from failure to meet particular specification requirements for specific products to failure to demonstrate adequate financial standing.
17. Many of the suppliers referred to the high priority lane operate within a very competitive commercial environment, in which other suppliers of PPE or related products are seeking to sell these products to Government departments and other bodies, both in the UK and abroad.
18. The worldwide demand for PPE remains high (albeit not as high as at the start of the pandemic) and this is likely to continue for some time. Disclosure of their names, given the very high publicity which this would receive (see further below) would reveal that they failed to meet the technical and commercial assurance processes for this exercise and would potentially adversely affect their ability to attract the financial services, investment and supply chain support from other businesses, which could go elsewhere, as well as their business opportunities for future sales.
19. DHSC considered that releasing the names of these suppliers as 'unsuccessful' would be likely to weaken their position in the PPE and related markets vis a vis their competitors. By related markets, DHSC is referring to suppliers whose existing business activity is in related areas (such as the manufacture of clothing) which can be repurposed for PPE.
20. For these suppliers, disclosure may harm not only their business interests in PPE markets but also in related markets.
21. DHSC acknowledged and agreed with the ICO that it is not always necessary to contact suppliers for evidence in this regard. It considered this very carefully and, in this case, determined that it would not be practical to contact the unsuccessful suppliers. This is for two reasons. Firstly, there are approximately 400 of them, which is many, many more than would have been invited to submit bids in response to a standard Government competitive tender exercise. It would be impractical to write out to all these unsuccessful suppliers, await and process responses and deal with the inevitable queries and subsequent correspondence.

22. Secondly, and linked, is that there has been widespread coverage in the media about the operation of the high priority lane and the "open-source" approach for this PPE procurement exercise, using mainly direct contract awards – i.e. without the usual advertised competitive tender - which is an option under the Public Contracts Regulations 2015 in cases of extreme urgency.
23. This has led to questions and in DHSC's view, misrepresentations about its fairness and transparency, which is likely to mean that suppliers are far less likely to provide impartial and reasoned views on the matters DHSC would be asking them about and are more likely to want to engage on wider issues which would be irrelevant to this exercise.
24. On balance, DHSC considered that there was 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.
25. This evidence is founded on the department's and the Government's experience of engaging with unsuccessful suppliers on a range of different contracts throughout the pandemic. The consistent view from suppliers is that they are concerned about the impact on their business and commercial reputation of their names appearing publicly as 'unsuccessful' when they voluntarily put themselves forward to help at a time of crisis. Some of this supplier engagement has been through ongoing judicial review proceedings in relation to the award of contracts during the pandemic.
26. DHSC stated that in recent cases, information relating to unsuccessful suppliers has been kept within a confidentiality ring 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.
27. DHSC considers there are parallels here with the names of unsuccessful suppliers: there is a continued need for PPE, which those suppliers may be well placed to bid for and disclosure of their name as having been unsuccessful with this opportunity could well prejudice their position to bid for and win future opportunities.
28. In relation to the likely prejudice to Government's own commercial interests, it is DHSC's view that release of the requested information would be likely to deter suppliers from participating in and competing for future opportunities as they would potentially face adverse publicity unrelated to the terms of their particular contracts or ability to deliver contracted outcomes. This would therefore negatively affect the quality and quantity of the Governments' supplier base, potentially leading to

higher prices for essential equipment and services and/or lack of availability of suitable equipment and services.

29. DHSC, and indeed Government, must retain commercial confidence of third-party potential suppliers when they choose to engage in commercial activities with it. The release of this information may jeopardise this commercial confidence thus impairing commercial relationships at a critical juncture in the Government's response to the pandemic.
30. DHSC think this is particularly pertinent for the type of procurements undertaken during the pandemic when compared with a conventional procurement exercise.
31. In this case, as mentioned above, suppliers rapidly approached Government in response to the urgency of PPE supplies, many diversifying their business activities to meet the need. It is therefore reasonable to reach the view that the information they provided, and their expectations of how this would be handled, including decisions about whether they would be 'named', are different from if they had been part of a conventional competitive procurement exercise.
32. DHSC stated it is also important to emphasise that only a small proportion of suppliers – the NAO report stated 493 of the over 15,000 – were processed through the high priority lane route.
33. A 'UK Make' workstream, for example, handling offers from UK-related sources sought to establish a resilient domestic manufacturing base for PPE that would provide security of supply for the future. Other offers were specifically processed through a 'China Buy' workstream whose caseworkers could harness the expertise of our embassy in Beijing to identify and secure priority opportunities within China, the market-leader at that time for supplying PPE.
34. A total of 339 PPE contracts were ultimately awarded and published from the 24,000 offers from the over 15,000 suppliers. The potential impact on Government's commercial interests of disclosing the names of those suppliers processed through the high priority lane goes far wider than just these suppliers and extends to a substantial number of suppliers across a range of markets.
35. This could result in significant harm to a huge amount of business engagement with Government.

The Commissioner's position

36. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:

- 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
37. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DHSC does relate to the interests which the exemption contained at section 43(2) is designed to protect.
38. With regard to the second and third criteria, the Commissioner is satisfied that the disclosure of the withheld information has the potential to harm suppliers' commercial interests in respect of related markets in their existing business activity.
39. In the Commissioner's opinion it is plausible to argue that this could risk harming the supplier's commercial interests. The Commissioner therefore accepts that there is a more than hypothetical risk of prejudice occurring to the supplier's commercial interests, and in relation to this party, the second and third criteria are met.
40. Furthermore, he accepts that if this (and other) suppliers are dissuaded from offering their services to DHSC then there is a real risk for DHSC's commercial interests to be harmed with regard to the procurement of such services in the future. He is therefore satisfied that there is a causal link between disclosure of the withheld information and DHSC's commercial interests and moreover that there is a real risk of such prejudice occurring. The second and third criteria in relation to this party are therefore also met.
41. To summarise the above, the Commissioner is satisfied that section 43(2) is engaged because disclosure of the withheld information would

be likely to harm the commercial interests of the supplier, DHSC, and Government.

42. For the avoidance of doubt, the Commissioner does not need to have determined that prejudice would be likely to occur to all three groups for the exemption to be engaged.
43. Even if just one of these groups' commercial interests were harmed then the Commissioner would still have concluded that section 43(2) applied.

Public interest

44. Section 43(2) is a qualified exemption and, in considering the request, DHSC considered whether the balance of the public interest favours release of this material.
45. DHSC recognised 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.
46. Additionally, there is a public interest in understanding the UK's conduct of economic, industrial and commercial policy during the COVID-19 pandemic.
47. Against these points DHSC weighed the public's economic interest in it being able to retain commercial confidence of parties when they choose to engage in commercial activities with the department.
48. Although private sector companies engaging in commercial activities with the public sector must expect some information about those activities to be disclosed throughout the lifecycle of all commercial arrangements, DHSC consider that this should really apply to those that have been awarded contracts; as mentioned earlier there are already extensive legal obligations to publish information and, in addition to this, Government has clear policy and guidance on more detailed information that must be published concerning these contracts to show how taxpayers money is being spent.
49. However, none of this law, policy or guidance requires publication of the names of unsuccessful suppliers, reflecting the public interest in not disclosing this information.
50. In inviting companies to work with Government and participate in procurement exercises it is very much in the public interest that Government operates in a way that at every opportunity minimises the damage to a supplier's reputation or competitive position in their field. This is necessary to maintain the integrity of the Government and how it engages in commercial activities.

51. It is vitally important that Government is able to secure high quality and good value offers. This is particularly crucial in times of crisis, to ensure continued provision of important goods or services to the public (such as PPE). The possibility that suppliers would decline to engage with Government in future exercises is a particular concern given the current context and potential for future requirements of PPE.
52. DHSC acknowledged that the public interests in transparency is finely balanced against the public interest in maintaining supplier confidence in Government.
53. After careful consideration, DHSC determined that the public interest in withholding the information outweighs the public interest in disclosure in this case, in particular given the high level of transparency already provided in relation to contracts awarded and the number and breadth of suppliers whose confidence in Government may be affected by disclosure and the ongoing requirements for that confidence to be maintained in this particular context.

The Commissioner's decision

54. The Commissioner has viewed the withheld information and notes the wide range of businesses included on the list. Having selected a random sample to review further he is satisfied that there is no evidence of 'wildly unsuitable companies' having been referred to the VIP list due to connections to Ministers, Government or officials.
55. He is further satisfied that disclosure of the successful bidders has met the public interest as they are open to public scrutiny, had there been any 'corruption' it would have become evident when that list was published. Although not part of this review, DHSC confirmed it has also undertaken to publish the names of the individual referrers who sourced these suppliers.
56. The Commissioner is not persuaded by the complainant's argument that referrals to the list may have slowed down the acquisition of PPE.
57. There is a clear public interest in ensuring that the best value for money for the taxpayer is secured. The Commissioner acknowledges that there is the potential for a range of economic actors across different sectors of economy to have their commercial interests impacted as a result of the disclosure of the withheld information and that such a broad ranging outcome is also against the public interest.
58. On balance the Commissioner has concluded that the public interest favours maintaining the exemption. He has reached this conclusion because in his view the fact that the disclosure of the withheld information risks harming the commercial interests of three separate

and distinct groups provides a significant, and ultimately compelling reason, to withhold the information.

Other matters

59. The Commissioner is mindful of the recent High Court ruling with regard to 'VIP lanes'. However, the judge found that even though some bidders received unlawful preferential treatment via the VIP lane, they would likely have been awarded contracts anyway. As this request pre-dates the court ruling and relates to successful bidders it has no bearing on this decision.

Right of appeal

60. 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

61. 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.

62. 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
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