

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2021

Public Authority: National Audit Office
Address: 157-197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Decision (including any steps ordered)

1. The complainant has requested details of suppliers who bid for contracts with the Department of Health and Social Care through the so-called "VIP lane." The National Audit Office ("the NAO") denied holding information within the scope of most of the request. It withheld the remaining information and relied on section 33 of the FOIA (prejudice to audit function) in order to do so.
2. The Commissioner's decision is that the NAO is entitled to rely on section 33 of the FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 16 February 2021 the complainant requested information of the following description:

"This is a request for information under the Freedom of Information Act. My request refers to Figure 6 on page 28 of 'Investigation into government procurement during the COVID-19 pandemic' (please see: <https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf>).

- (1) *Figure 6 ('High-priority lane for the procurement of personal protective equipment') says the following: 'Established by the cross-government PPE team as a dedicated lane used to assess and process high-priority leads for PPE, that it considered more credible or where it considered more urgency was needed. This lane sat alongside a normal lane to process over 15,000 offers of support to supply PPE. A total of 493 suppliers came through this lane, of which 47 were awarded contracts.'*

In light of this, please disclose the names/company names of the 493 suppliers that came through this lane. Please also disclose the names/company names of the 47 suppliers that were awarded contracts.

- (2) *Figure 6 also says the following: 'Leads came to a dedicated mailbox. There were no written rules that determined what went into this mailbox. The existence and nature of the mailbox was publicised across the PPE procurement programme and to relevant private offices across government and parliament. The cross-government PPE team told us that these leads had been pre-sifted for credibility by being referred by a senior credible source.'*

It then goes onto say: 'Fewer than 250 sources for these leads were recorded: 144 leads came from the private offices of ministers, including referrals from MPs who had gone to ministers with a possible manufacturer in their constituency and where private individuals had written to the minister or the private office with offers of help; 64 leads were direct from MPs or members of the House of Lords not in government; 21 leads were from officials, such as a Department of International Trade network that was looking for sources worldwide, and the private office of the Permanent Secretary of the Department of Health & Social Care; and three leads were from other identified sources that did not fall into the categories above.'

In light of this, I would like to request the following information:

- (2)(a) *In regards to the 144 leads that came from the private offices of ministers, including referrals from MPs who had gone to ministers with a possible manufacturer:*
- (i) *Please disclose the names/company names of the 144 suppliers*

6. The complainant requested an internal review on 16 March 2021. The NAO sent the outcome of its internal review on 10 May 2021. It maintained that section 33 of the FOIA applied to the information in question, but now additionally relied on section 36(2)(c) of the FOIA (would otherwise prejudice the effective conduct of public affairs) to withhold the information.

Scope of the complaint

7. The complainant contacted the Commissioner on 14 May 2020 to complain about the way her request had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether the NAO is entitled to rely on section 33 of the FOIA to withhold the information. If section 33 does not apply, she will also consider whether the NAO is entitled to rely on section 36 of the FOIA.

Reasons for decision

9. Section 33 of FOIA states that:
 - (1) *This section applies to any public authority which has functions in relation to—*
 - (a) *the audit of the accounts of other public authorities, or*
 - (b) *the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.*
 - (2) *Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).*
10. Whilst section 33 is not a commonly-used exemption, like any other prejudiced-based exemption, its application is based on the three step test originally set out in *Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030).
11. First, the public authority must demonstrate that it has an applicable audit function. Whilst this can be formal or informal, it must have a function to investigate *other* public authorities – internal audit functions are not covered.

12. Secondly, the public authority must describe the nature of the prejudice and explain why its audit functions may be harmed by disclosure. It must be able to show that there is a causal link between disclosure and the harm identified.
13. Finally, the public authority must demonstrate the likelihood of the prejudice occurring and must decide whether disclosure "would" prejudice the audit function or whether it only "would be likely to" have that effect.
14. In order to demonstrate that the higher bar of "would prejudice" applies, the public authority must demonstrate that the chance of prejudice is more likely than not. The lower bar of "would be likely to" is passed if the possibility disclosure is lower than 50%, but remains more than a remote or hypothetical possibility.
15. The NAO clearly has statutory functions to carry out audits of other public bodies. In this case, the NAO originally relied on the section 33(1)(b) limb of the exemption but, during the course of the investigation it argued that the other limb of the exemption (33(1)(a)) would also apply. The Commissioner accepts that the NAO has interests which are relevant to the exemption and therefore the first step of the test is satisfied.
16. During the course of the investigation, events took a slightly unusual turn. The Commissioner had been investigating a separate complaint (IC-94513-N5H8) that had been made about a request to the Department for Health and Social Care (DHSC) for the list of 47 suppliers held by the NAO. The DHSC is the original owner of the information being withheld in this case and provided this information (as well as the larger list of 493 suppliers) to the NAO in the context of an audit.
17. In complaint IC-94513-N5H8, the DHSC originally withheld the requested information and relied on section 43 of the FOIA in order to do so – as it considered that disclosure may lead to commercial prejudice. However, having carried out an internal review, the DHSC satisfied itself that the exemption no longer applied to the list of 47 successful companies and said that it would disclose the information. Unfortunately the DHSC then failed to disclose the information, despite having promised to do so and despite the Commissioner's informal attempts to encourage it to do so. As the DHSC had stated that it was satisfied that the exemption no longer applied and had not attempted to rely on any other exemption, the Commissioner issued a decision notice

finding the DHSC in breach of its duty under section 1(1) of the FOIA. She therefore ordered that the list of 47 suppliers be disclosed.¹

18. At the date of this notice, the DHSC has yet to disclose the information or to appeal the Commissioner's decision. To the Commissioner's knowledge, this information is not yet officially in the public domain.
19. In view of this development, the Commissioner drew attention to her earlier decision and asked the NAO to ensure that its response considered the DHSC's semi-willingness to disclose some of the information.

The NAO's position

20. The NAO recognised that some of the information would shortly be in the public domain, but it noted that:

"We believe that our reliance on the section 33 and 36 FOIA exemptions is appropriate in the circumstances of this request. We consider this position remains valid until such time as the anticipated detriment to our statutory audit functions and the conduct of public business is no longer relevant – for example, by government placing the requested information into the public domain or confirming to us that previously expressed sensitivities no longer apply. We will continue to consult relevant departments to inform our position going forward."

21. In addition, the NAO also pointed out that, whilst the DHSC had recently indicated that it was preparing to disclose the list of 47 suppliers awarded contracts, it would not be disclosing the list of all 493 suppliers who had applied for the "VIP lane" as it still maintained that this was commercially sensitive.
22. The NAO went on to explain that:

"Where third parties raise reasonable concerns about the disclosure of their information – in particular, where such sensitivities are evidenced by a third party's own refusal to disclose information under the FOIA or to Parliament (as in this case) – then we consider that the NAO's disclosure of such third party information has

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4018805/ic-94513-n5h8.pdf>

important implications for the future conduct of the public audit functions.

"The audit process is enhanced significantly by audited bodies or other third party entities volunteering information to support a constructive, timely and effective audit – for example, through offering audit evidence and the completion of surveys. The disclosure by NAO of sensitive third party information beyond that required for audit reporting purposes and in the face of representations against such disclosure would impair the provision of audit information in the future – it would reduce, if not cut off, this critical flow of additional information. It would incentivise audited bodies to take a minimalist approach to NAO information requests or, in the case of bodies whose engagement is optional, serve to discourage such information sharing.

"It is also the case that audited bodies regularly challenge the extent of the NAO's access rights and seek to place conditions around meeting information requests. Such issues consume time and resources as we work them through. The disclosure of this sensitive information would encourage audited bodies to approach our audit work in this way in the future. Section 17(3) of the Budget Responsibility and National Audit Act 2011 places a duty on the [Comptroller & Auditor General] to 'aim to carry out functions effectively and cost effectively'.

"Given the above factors, we consider that our disclosure of the information requested would be at odds with this statutory requirement - it would serve to undermine the effectiveness and increase the cost of the C&AG's public audit functions."

23. The NAO also provided the Commissioner with examples of correspondence it had received from other public authorities in respect of previous requests, where the public authorities urged the NAO to rely on section 33 of the FOIA and noted the effect that this might have on their willingness to be candid with the NAO in future.
24. Whilst the NAO accepted that it did have formal powers to compel public authorities to provide information, it noted that:

"An effective, efficient audit is supported through an open and constructive approach between the NAO and the audited body. As such it is critically important that we have a safe space to gather information and knowledge and can engage in a free and frank way with audited bodies. The release of this information would remove this safe space - precipitating a backdrop of increased challenge and procedure around requests for audit information. This would

require the NAO to formally assert our statutory access rights more frequently and potentially seek to enforce them, leading to significant delay, formal challenge and increased audit costs

"...we regularly obtain valuable information from third parties who are not subject to the C&AG's statutory powers. The release of sensitive information as encompassed by this request would constrain the provision of such voluntary information in the future. Our work would be less collaborative, more inhibited and so less effective if people thought audit information would be released subsequently."

25. Finally, the Commissioner asked the NAO to assess the likelihood of the prejudice occurring. The NAO explained that:

"In the context of this particular request, we have taken a prudent approach and asserted that prejudice 'would be likely' in relevant correspondence. We judged that this formulation was a fair reflection of the specific exchanges we have had with DHSC and the Cabinet Office about this case to date...It is our view that if we release the information requested against the advice of government, it would build on existing fears that the NAO's audit functions can be used as a 'back door' to sensitive third party information, effectively causing entities to lose control of their own information. The NAO's release of the requested information in this case and in other sensitive cases 'would' cause prejudice to our audit functions for the reasons explained above."

The Commissioner's view

26. The Commissioner accepts that section 33 is engaged in respect of this information.
27. The crux of the NAO's argument is that it only possesses the information in question because it acquired it from another public authority whilst exercising its audit functions. The decision to disclose or not disclose the information should be one for the public authority that originally provided the information – as that public authority is best place to judge the sensitivity of the information in question. If the NAO's status as a public authority becomes used as a "back door" to information that would not otherwise be available, other organisations will be less willing to share information with it voluntarily. That is an argument that is clearly relevant to the exemption and it is one which the Commissioner accepts.
28. Whilst the NAO does have statutory powers to compel information to be provided, the Commissioner also accepts that this exemption does not

relate to the NAO's ability to acquire information at all, but its ability to discharge its audit functions effectively.

29. If the NAO has to exercise its formal powers every time it requires information, that will slow the process of completing an audit considerably. Acquiring information by consent will, in most circumstances, be much quicker and more effective.
30. The NAO has demonstrated to the Commissioner that public authorities have previously expressed concerns about the NAO being used as a back door and that they may be less willing to provide information in the future if this were to happen. The Commissioner therefore accepts that, even if these organisations merely insist on the NAO exercising its formal powers before they will provide information, that will still harm the NAO's ability carry out its audit work effectively. That is a harm that is actual and of substance.
31. Finally, the Commissioner has considered whether decision notice IC-94513-N5H8 should affect her view. She considers that it should not.
32. Had this request been made after the DHSC completed its internal review and confirmed that the information was no longer sensitive, the NAO may have had more difficulty in demonstrating the likelihood of prejudice occurring. It is much less reasonable for another public authority to expect the NAO to withhold information that it has itself agreed is not sensitive.
33. However, the correct point for assessing the likelihood of prejudice (as well as the public interest in disclosure) is the point at which the public authority completes its internal review. At the point at which the NAO completed its internal review (10 May 2021), the DHSC was still maintaining that it could not disclose the same information without causing commercial harm. It was not until four months later that the DHSC changed its position.
34. Therefore, at the point the NAO dealt with the request, it was entitled to believe that the DHSC did not wish to disclose the same information itself. The fact that the DHSC subsequently changed its position and that the Commissioner has now ordered the DHSC to disclose that information does not mean that NAO was not entitled to make the assessment that it did.
35. The NAO was entitled to believe, at the point it completed its internal review, that the DHSC still considered the information to be sensitive and would therefore have a reasonable expectation that the NAO would not disclose the information itself. For the NAO to have disclosed the

information, against the reasonable expectations of the public authority that provided it, would have led to the harms identified above.

36. The Commissioner also notes that the DHSC has only indicated its willingness to disclose one of the lists that both it and the NAO hold. It maintains that the other list is commercially sensitive and the Commissioner has, as yet, made no decision on that matter.
37. The Commissioner is therefore satisfied that the exemption is engaged and has gone on to consider the public interest test.

Public interest test

38. Information that might harm a public authority's audit functions must still be disclosed – unless the balance of the public interest favours maintaining that exemption.
39. As the Commissioner has identified that the NAO's audit functions would be harmed by disclosure, there will always be an inherent public interest in preventing that from occurring. The weight that should be afforded to that interest will depend on the likelihood and severity of the prejudice.
40. As the Commissioner has found that it is more likely than not that prejudice will occur, there will be a strong public interest in maintaining the exemption.
41. In explaining why there was a public interest in favour of disclosure, the complainant argued that there was:

"a huge amount of public interest in the release of the suppliers that went through the high-priority lane, as well as those who received contracts. As the NAO highlighted, companies processed through the high-priority lane were 10 times more successful in securing PPE contracts, and there are questions over whether some firms profited from political connections. It must be revealed to the public in full which companies went through this lane.

"I concluded that there has been an unnecessary amount of secrecy surrounding the high-priority lane, where contracts worth millions have been awarded. There must be more transparency and accountability, and this would be served by the names of suppliers being released by the NAO."

42. The NAO, by contrast, argued that the balance of the public interest should favour maintaining the exemption because:

"In assessing this FOI request, we considered the public interest in the effective operation of our public audit functions as follows:

"The C&AG (supported by the NAO) is independent of government and scrutinises public spending on behalf of Parliament. The work of the independent C&AG is a cornerstone of a democratic society and serves the public interest by helping Parliament hold government to account, providing transparency on matters of public interest and driving improvement in the use of public resources. In this instance, the information we obtained was used to inform our Investigation into government procurement during the COVID-19 pandemic which has been published on our website and laid in Parliament. This report formed the basis of an inquiry by the Public Accounts Committee (PAC) and subsequent publication of their own Report. In due course, the government will be required to respond to the PAC report through the Treasury Minute process.

"We also considered government's representations regarding the commercial sensitivity of the information requested. This allowed us to sense-check government's arguments for non-disclosure and assess its strength of feeling about potential disclosure and hence the risk to the public audit functions. In so doing, we were mindful of not second-guessing the government's decision making around commercial confidentiality or stepping into the ICO's investigative role.

"We concluded that in the circumstances of this case (and until such time as the risk to the effective performance of our public audit functions has receded) the public interest in NAO's disclosure of the information requested was outweighed by the broader and enduring public interest in safeguarding the effective performance of our statutory role. We consider that ensuring our ongoing ability to "effectively and cost effectively" report publicly on important matters and help Parliament hold government to account is consistent with the balance of public interest in this case."

The Commissioner's view

43. The Commissioner considers that the balance of the public interest in this case favours maintaining the exemption.
44. The work of the NAO in scrutinising government spending is extremely valuable. Any disclosure that would undermine the ability of the NAO to carry out this audit work effectively should be avoided – unless there are compelling reasons to do so.
45. The NAO has highlighted the damage that might be caused by disclosure and the Commissioner has already accepted that this is more likely than not to occur.

46. The Commissioner does recognise that the operation of this "VIP lane" is controversial because suppliers were awarded contracts without having gone through the due diligence checks that would usually have been required.
47. The government has argued elsewhere that the extreme circumstances of the time meant that it prioritised speed. It is not for the Commissioner to judge whether such a decision was justified – but she does consider that the lack of checks at the time increases the need for subsequent scrutiny.
48. However, the Commissioner considers that such a public interest balancing exercise would be more appropriately carried out in relation to a request made to the public authority that took that decision – the DHSC. The strong public interest in disclosure can then be balance against any remaining commercial sensitivities – rather than the prospect of damaging the audit work of the NAO. The fact that the NAO has already carried out its own scrutiny of the DHSC's decision and published its findings, lowers the public interest in disclosure. It is not the NAO's actions that are being scrutinised.
49. On the facts of the case, the Commissioner is therefore satisfied that section 33 of the FOIA is engaged and that the balance of the public interest favours maintaining that exemption.

Right of appeal

50. 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

51. 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.
52. 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

Roger Cawthorne
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