

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 April 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Health and Social Care (DHSC) concerning an agreement between the DHSC and Amazon Digital Services LLC (Amazon). The DHSC explained that it did not hold some of the requested information but it did provide a master content agreement between itself and Amazon that had been redacted. Some of the agreement was withheld under section 43(2) FOIA (commercial interests) and section 40(2) FOIA (personal information).
2. The Commissioner's decision is that the DHSC was entitled to withhold most of the redacted information from the agreement and that the public interest favours maintaining the exemption. However, she does not agree that one part of the statement of work from the agreement has been correctly withheld as it does not engage the section 43(2) exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the clause specified in the confidential annex.

4. 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 the Act and may be dealt with as a contempt of court.

Background

5. The agreement that the DHSC redacted was awarded in December 2018 and is described as follows on the government contract finder site -

"This agreement is about using content from the NHS website to provide reliable and informative answers to basic health questions asked to Amazon's virtual assistant voice service, Alexa.

*This contract is an open ended agreement and future notices will be published if the agreement is still in place when this contracts notice expires."*¹

Request and response

6. On 8 October 2019 the complainant made the following request for information under the FOIA -

"Thank you for your email dated 4 October 2019. I note that you state that you hold information relevant to the request. I am prepared to refine the request. I note that you suggest for example refining question 10. Please find below the refined questions. If this still takes the request over the threshold, please advise further refinements.

Questions

1. *Please provide a copy of the contract / relevant documentation recording the agreement between the Department of Health and Social Care and Amazon, pertaining to the use of the NHS website as content source for Amazon Echo (Alexa) devices.*
2. *Please provide documents relevant to any tendering or procurement process for collaboration with a home assistant. Alternatively, if no*

¹ [Amazon Master Content License Agreement - Contracts Finder](#)

procurement or tendering process took place, please confirm this.

3. Please provide a copy of the following impact assessments, if carried out in relation to the collaboration between Amazon and the NHS in relation to Amazon Echo(Alexa) devices. This should include: data protection impact assessment, equality and human rights impact assessment, privacy impact assessment. If any of these have not been carried out, please confirm this.

4. If the issue of sharing data with third parties is not covered in any contract or relevant documentation disclosed in response to question 1, please provide a copy of relevant documentation that confirms sharing arrangements (including confirmation that data not be shared with third parties).

5. Please provide a copy of communications between Amazon.com <http://amazon.com/> Inc (or subsidiary companies) and the Department of Health and Social Care pertaining to the use of the NHS website as a content source for Amazon Echo (Alexa) devices for the period of 1st July 2018 - 31st August 2019.

Please note that if question 5 takes the request over the cost limit, it can be responded to as a separate and consecutive request whose deadline should start after the response to the initial request containing questions 1-4. If this is not possible, then question 5 can be excluded..."

7. The DHSC responded on 5 November 2019 as follows -

Question 1 – Provided a link to a redacted version of the agreement. The redacted parts were withheld under section 43(2) and section 40(2).

Question 2 – Information was provided.

Question 3 – Information not held.

Question 4 – Response covered by agreement.

Question 5 – It was explained that this part of the request would exceed the fees limit (section 12) and the DHSC stated that it would be considered at a later point as a new request, as suggested by the complainant.

8. The complainant made a review request on 20 December 2019, asking that the citing of section 43(2) be looked at again but did not query the citing of section 40(2). The complainant asked for several clarifications and also limited question five to a timeframe of four months.

9. The DHSC provided an internal review on 31 January 2020 in which it maintained its original position, confirmed that it had applied section 12

to the original question five and acknowledged that the question had been resubmitted as a new request.

Scope of the case

10. The complainant contacted the Commissioner on 19 March 2020 to complain about the way their request for information had been handled.
11. On 14 December 2020 the DHSC responded to the Commissioner's investigation letter by stating that it did not have the capacity to respond to her due to the pandemic and the large increase in requests for information.
12. As the complaint had previously been delayed due to the pandemic, the Commissioner explained that she was unable to await a response beyond the timeframe normally given.
13. On 27 January 2021 the Commissioner asked again for a response and the DHSC immediately replied to say that it still did not have the capacity to respond to the Commissioner's questions.
14. On 1 February 2021 the Commissioner issued an information notice requiring the DHSC to provide the withheld information and a response to her questions.
15. The DHSC responded on 19 March 2021.
16. The information withheld under section 40(2) related only to very limited information, for example, the names of signatories and did not form part of this complaint. The Commissioner therefore considers the scope of this case to be the DHSC's citing of section 43(2) to the withheld information.

Reasons for decision

Section 43(2) – commercial interests

17. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
18. The DHSC applied section 43(2) with regard to the redacted parts of the information from the agreement (question one of the request). The Commissioner has been provided with the unredacted copy of the agreement.

19. The Commissioner has defined the meaning of the term "commercial interests" in her guidance on the application of section 43 as follows:

"...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."²

Although most commercial activity relates to the purchase and sale of goods, it also extends to other fields such as services.

20. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
21. The exemption is subject to the public interest test which means that, even if it is engaged, the Commissioner also needs to assess whether it is in the public interest to release the information.
22. Section 43 is a prejudice based exemption. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of the party. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real actual or of substance for it to be successfully engaged.
23. The DHSC identified itself as one of the parties suffering prejudice to its commercial interests and the other party as Amazon. The public authority needs to establish that the actual harm that it alleges would or would be likely to occur if the withheld information was disclosed relates to its commercial interests.
24. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged - ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
25. The DHSC is relying on the higher threshold. The term "would...prejudice" means that prejudice is more probable than not to

² [Section 43 - Commercial interests | ICO](#)

occur (ie a more than a 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).

26. The DHSC explained that it had held a number of discussions with Amazon and its legal team when this request was received. Lawyers from NHS Digital and the Government Legal Department were also involved. However, the Commissioner is unable to reproduce certain arguments here that resulted from those discussions for reasons of confidentiality.
27. However, the DHSC put forward the following arguments in its refusal notice -

"In this case, we consider that the release of the redacted clauses would be likely to prejudice the commercial interests of Amazon on the basis that it would make public the non-standard terms that Amazon has been willing to enter into in respect of this agreement. We consider that this would harm Amazon's negotiating position when entering into agreements with other parties in the future, which in turn would be likely to prejudice their commercial interests. Additionally, disclosure of the redacted clauses is likely to prejudice existing agreements between Amazon and other parties, which could result in other parties challenging Amazon over the terms and conditions of their agreements."
28. In their request for a review the complainant asked what were the reasons given by Amazon in support of non-disclosure of the full contract because of prejudice to its commercial interests. The DHSC was also asked to provide all materials which set out Amazon's position. Essentially the complainant asked for more details as to why the DHSC did not believe it to be in Amazon's commercial interests to disclose the whole agreement.
29. The complainant suggested to the Commissioner that the DHSC had not offered any evidence to prove that it was not merely speculating on the impact of disclosure on Amazon's commercial interests.
30. The DHSC's review did not provide any further reasons, repeating that disclosure would make public the non-standard terms that Amazon has been willing to enter into in regard to this agreement.
31. Having seen the redacted information, the comments and the arguments the DHSC has provided that the Commissioner is unable to set out here, the Commissioner accepts that the majority of the redacted information engages the exemption as regards Amazon, and to a lesser extent, the DHSC. She considers that a causal link has been established between disclosure of this information and Amazon's commercial interests.

Clearly Amazon is in a position of some dominance in the market. Nonetheless, disclosing the terms of the agreement that have been redacted would leave Amazon in a prejudicial situation in negotiations with its existing and future customers who may expect similar terms. The prejudice to Amazon is real, actual and of substance, and she agrees that the redacted information is at the higher level, with the exception of the information set out in the paragraph below which is not engaged.

32. The Commissioner is not persuaded that one of the redacted clauses engages the exemption because she is unable to understand how the disclosure of what appears to be a standard contractual clause would affect Amazon's commercial interests. Therefore, the Commissioner has specified in the confidential annex that this clause should be disclosed to the complainant.
33. Although the Commissioner accepts that the disclosure of most of the redacted information is prejudicial, she has gone on to consider whether it is in the public interest to release this information.

Public interest test in favour of disclosing the information

34. DHSC recognises that there is a general public interest in the disclosure of this agreement given its high-profile nature and the general obligation of the government to act with transparency and accountability. There is also a public interest in securing the best use of public resources and in ensuring fair commercial competition.
35. The complainant emphasised in their review request that section 43(2) FOIA is a qualified exemption. As such the public interest in favour of disclosure should be balanced against the commercial interests of Amazon against such disclosure. Referring to the DHSC's refusal notice, the complainant highlights the DHSC's statement that the public interest in this case pertains to the sharing of personal data. The complainant believes that the definition of public interest in this case has been defined narrowly and, as such, has not been properly incorporated into the DHSC's assessment whether the clauses in question should be disclosed.
36. The complainant then referred to the Commissioner's guidance which underlines that "*Public authorities should bear in mind the strong case for openness and transparency in their affairs when balancing public interest arguments.*" The guidance includes the promotion of competition as one of the reasons justifying a decision in favour of disclosure when balancing public interest against commercial interests. The complainant contended that the public interest was not only focused

on the issue of sharing personal data but also on Amazon's dominant position in the online services sector which, in turn, relies on the powers Amazon attains by the concentration of vast amounts of user data. This accumulation of users' personal data raises wider concerns, first, as to the general processing of personal data by the company, namely not only the sharing but also the collection, disclosure, or any other processing of data, in accordance with the Data Protection Act 2018.

37. In the complainant's view, Amazon, similarly to other dominant digital platforms, is increasingly relying on the availability of consumers' data and is engaging in various forms of data exploitation. The complainant stated that the power of personal data increases as more and more data is combined with it, and this incentivises companies to pursue business strategies aimed at collecting as much data as possible. The complainant went on to say, more specifically, the issue of personal data and the dominance of big tech companies is not new and that Amazon has been under scrutiny by competition authorities for abusing its dominant position in the market. More recently the European Commission opened a formal antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.³
38. The complainant states that Amazon's position in the online services market raises significant concerns regarding various aspects that should affect the public interest balance test. First, it is in the public interest that UK citizens need to be fully informed regarding the collection of their sensitive health data that may be exploited by Amazon to further its corporate interest and potentially increase its dominance. Second, it is in the public interest to have a full disclosure of an agreement that may or may not facilitate the use of this personal data as a negotiating instrument for Amazon to establish its dominant position in the UK market against other contracting parties and competitors. Finally, in the case of the agreement with NHS, this would mean that Amazon could be potentially abusing its dominant position in the online services market to subject the UK's national health care provider to restrictive or abusive terms. As a result, this could have onerous implications not only for the protection of personal data but also for the surfacing of potential inequalities with respect to the social care, treatment and dignity of a wider population. Similar concerns relating to access to health care and social rights should also be taken into account.

³ https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

39. Therefore, the complainant believes that not all the relevant elements have been taken into account in the assessment of public interest by the DHSC's assessment. Taking into account the above, the complainant argues that the public interest in favour of the full disclosure of the contract outweighs the specific commercial interests Amazon might have.

Public interest in favour of maintaining the exemption

40. The DHSC argues that, in the case of this agreement, there is a general public interest in protecting the commercially sensitive information from disclosure. The DHSC's view is that disclosure would be likely to cause all third parties to be reluctant to enter into agreements with public authorities if they knew that commercially sensitive information contained within agreements could be disclosed and therefore prejudice their commercial position.
41. The DHSC has stated that release of the withheld information would disadvantage itself in entering similar commercial negotiations in the future. The collaboration with Amazon did not involve payment, and the administrative costs of putting in place the agreement were very modest.
42. The DHSC explained in its refusal notice that it considered that the public interest in the disclosure of the agreement with Amazon is largely focused on the issue of sharing personal data. The DHSC's view was that the redacted clauses in the agreement cover unrelated commercial issues and therefore do not advance the public understanding of the issue of sharing personal data. Although the DHSC acknowledged that there is a public interest in understanding that arrangements between itself and Amazon it considered that this had been achieved by publishing the unredacted information in the agreement.

Balance of the public interest

43. The Commissioner has outlined above the only public interest arguments the DHSC has put forward that can be reproduced here. The argument at paragraph 40 is generic, and would be a reason not to disclose any contract between a public authority and a private company. In this case though, a significant part of the agreement has been disclosed.
44. The complainant's arguments are persuasive, particularly as the contract involves the collection of sensitive personal data. The DHSC's view is that the redacted clauses in the agreement cover unrelated commercial issues and therefore do not advance the public understanding of the issue of sharing personal data. Whether the involvement of the collection of sensitive personal data can be entirely separated from the

commercial terms of the agreement is a difficult point to determine. However, having seen the withheld information the Commissioner accepts the DHSC's view that the redacted information in the agreement is concerned with commercial issues, otherwise the exemption would not be engaged. In this instance, the public interest in the whole contract being disclosed and the non-standard terms negotiated, is outweighed by the commercial prejudice to Amazon and the potential implications for the DHSC that might arise from their release.

Right of appeal

45. 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

46. 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.
47. 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

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