

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2021

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 on financial due diligence checks made by the Department of Health and Social Care (DHSC) into a named PPE supplier. The request also asked for correspondence between the DHSC and a senior figure at the supplier on the procurement. The DHSC aggregated this request with three earlier requests and refused them on the basis that complying would exceed the cost limit under section 12 of the FOIA.
2. The Commissioner's decision is that the DHSC was entitled to aggregate the requests and that the DHSC has demonstrated that it would exceed the cost limit to confirm what information is held under section 12(2) of the FOIA. The DHSC has also complied with its duty under section 16 of the FOIA by providing advice and assistance.

Request and response

3. On 21 July 2020 the complainant made a request to the Department of Health and Social Care (DHSC) in the following terms:

"Can you please explain the technical due diligence that was undertaken in the award of the contract 2020/S 137-338136 to ZENITH GUILD ENTERPRISES LTD in the sum of £18,400,000 for face masks on 20 May 2020. Can you please also provide details of all emails, correspondence transcripts of phone calls between the company, NHS Supply chain and DHSC. In particular please provide correspondence with [name

redacted]. Please also provide details of when payment was made to the company when goods were received and for what value."

4. On 26 July 2020 the complainant made a second request for the following information:

"Please describe the technical and financial due diligence carried out on DTC Consulting Ltd prior to awarding it a £2.5m contract for supply of face masks under award 2020/S 141-348165. Please also supply emails, correspondence and transcripts of phone calls between DHSC, NHS Supply Chain and the complaint and in particular with DTC Consulting Ltd Director, Douglas Thornton. Please also supply details of correspondence, emails and transcripts of phone calls with [name redacted], Director of Dr Adams Laboratories Ltd in connection with the contract."

5. A revised information request, following an earlier refusal under section 12 of the FOIA, was made on 5 August 2020 in the following terms:

"1. Please supply copies of the proposals made by [name redacted] or [name redacted] of Avenits Solutions Ltd to DHSC offering to supply PPE to DHSC.

2. Please supply copies of DHSC's replies and its requests for proof of financial, technical and logistical ability of Aventis Solutions to fulfil any contract.

3. Please indicate whether any prepayment was made.

4. Please indicate the price paid for each item.

5. Please indicate when the times were paid for and when they were delivered and passed as meeting required standards."

6. A fourth information request was made on 7 August 2020 in the following terms:

"Procurement reference 546119 Contract for PPE in the sum of £3,832,500

The above contract was published on Contracts Finder web site on 24 July. A search of Cos House shows no such company. A company called Trade Markets Direct Ltd is dormant. Please provide details of the due diligence undertaken in the financial standing of the organisation with whom you have contracted and please confirm the name of that organisation. Please confirm whether any prepayment was paid to the organisation and whether the items procured have been delivered and

when, when payment was made and when they passed any necessary certification.

Please provide details of correspondence between the DHSC and Mr [name redacted] in relation to the procurement."

7. The DHSC responded to the final one of these four requests on 18 August 2020. The DHSC stated it was refusing this request and the three earlier requests under section 14(2) of the FOIA as they were substantially similar to a previous request that had been refused under section 12 of the FOIA.
8. The complainant requested an internal review on 23 August 2020. The complainant argued the requests were not similar to previous requests as, although they were all about PPE contracts, there were no other similarities.
9. The DHSC conducted an internal review and responded on 21 September 2020. The DHSC accepted that section 14(2) had been incorrectly applied but still maintained the information in each of the requests could be aggregated and refused under section 12 of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 9 October 2020 to complain about the way their request for information had been handled.
11. The Commissioner considers the scope of her investigation to be to determine if the DHSC has correctly aggregated the requests under section 12(4) of the FOIA and, if so, if the requests have been correctly refused as it would exceed the cost limit under section 12 of the FOIA to respond.

Reasons for decision

Section 12(4) – Aggregation of related requests

12. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") can be satisfied.
13. Section 12(4) of FOIA states:

"The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."

14. Regulation 5 of the Fees Regulations states:

"(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concern or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which –

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

15. The Commissioner has reviewed the complainant's four requests aggregated by the DHSC. These requests were submitted on 21 and 26 July and 5 and 7 August 2020. She is satisfied that all four of the requests were made by the same complainant and within 60 working days of each other, fulfilling the criteria at regulations 5(1)(a) and 5(2)(b).

16. The Commissioner must now consider whether these requests relate, to any extent, to the same or similar information. The Commissioner's view

on aggregating requests can be found in her guidance on requests where the cost of compliance exceeds the appropriate limit¹. Paragraphs 44 and 45 state:

"Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.

A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested."

17. The Fees Regulations' wording of "relate, to any extent, to the same or similar information" makes clear that the requested information does not need to be closely linked to be aggregated, only that the requests can be linked.
18. Having reviewed the wording of the complainant's previous requests made within a 60 day period, the Commissioner is satisfied that there is an overarching theme in that they all request information on various PPE contracts. More specifically, the requests all ask for details of financial due diligence checks made by the DHSC about the companies awarded or considered for PPE contracts.
19. The Commissioner, therefore, finds that the DHSC was entitled to rely on section 12(4) of FOIA to aggregate these three earlier requests with the one currently under consideration here.

Section 12 – cost of compliance exceeds the appropriate limit

20. *Section 1(1) of FOIA states that:*

"(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

¹ [costs of compliance exceeds appropriate limit.pdf \(ico.org.uk\)](#)

(b) if that is the case, to have that information communicated to him."

21. Section 12(1) of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

22. Section 12(2) of FOIA states that:

"Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

23. The Fees Regulations set the appropriate limit at £600 for the DHSC; they also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that the appropriate limit for local government organisations equates to 18 hours.

24. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

25. In determining whether the DHSC has correctly applied section 12 of FOIA in this case, the Commissioner has considered the DHSC's rationale provided to her during the investigation.

26. The DHSC has provided the Commissioner with some background information to understand the difficulties in establishing what information relevant to the request is held. The DHSC explained that to address the challenge of increased demand for PPE a new task force was set up to focus solely on procuring PPE supplies for the public sector.

27. This task force adopted an 'open-source' approach to procurement, calling for help from across the UK business community to help ensure critical supplies were maintained.

28. The "Coronavirus Support from Business" Scheme was launched in March 2020 and encouraged businesses supplying a range of products

and services, including PPE, to register on an online portal, indicating how they may be able to assist the government's response to the pandemic.

29. Through this scheme over 24,000 offers of support were received from over 15,000 potential suppliers for PPE. The Government set up a Parallel Supply Chain bringing together over 400 staff and procurement specialists from DHSC, NHS England, NHS Supply Chain, the Ministry of Defence and other Government departments to create a centralised buying team to prioritise offers on the basis of how urgently the particular product was needed, the quantity on offer, value for money, certainty of supply and lead times.
30. The DHSC has explained that staff were organised into teams as offers went through a staged process of initial assessment and verification; commercial & technical assessment; and a 'Deals' or closing team. Once the closing team finalised the commercial terms of the proposed contract, it was only at this stage that details would be sent to senior officials at the DHSC for a final decision to award a contract). Before being presented to the DHSC those working in the Parallel Supply Chain worked on their Departmental/NHS emails.
31. The DHSC has therefore explained that to provide details of due diligence undertaken on the financial suitability of any supplier or proposed supplier of PPE is not a straightforward process. The DHSC states it would need to contact each of the 400 staff of the centralised buying team to ask them if they had dealt with a particular supplier at any particular stage of the process.
32. Those staff would then have to go through their inboxes from the time to locate, extract and collate and information relevant to the request. The DHSC considers it is only at this point it would be able to determine how much information in scope of the request may be held by the DHSC in the first place.
33. The DHSC is therefore of the view that even providing confirmation if information is held in response to the request would exceed the cost limit. The cost limit in this case is £600 based on one person carrying out work at a rate of £25 per hour, equating to 24 hours work in total. The DHSC considers that each of the 400 members of staff would have to be contacted to review their communications. DHSC has estimated each member of staff would need to set aside about half a day of work (3.5 hours) to review all of their correspondence and this would far exceed the cost threshold. DHSC considers that each request on its own would exceed the cost limit.

34. The Commissioner has considered the DHSC's arguments and she accepts there would be some difficulties in determining if relevant information was held. The Parallel Supply Chain set up to assess offers for PPE supply was made up of 400 staff from across the public sector. Within this centralised buying team staff were organised into teams depending on their expertise – some might be involved in the initial assessment whereas others may be looking at the more technical viability of an offer. As these staff were drawn from other public bodies or Government departments as well as from the DHSC determining what information is held and by whom is not as straightforward as simply doing a keyword search of relevant DHSC staffs inboxes. The DHSC would have to coordinate its searches across departments and, as the DHSC states, there were over 24,000 offers under consideration. The Commissioner therefore accepts it is unlikely any one person would remember all of the offers they assessed.
35. On this basis the Commissioner accepts the DHSC assertions that it would need to contact all of the 400 staff to ask them to search for any information they may have in relation to the supplier in question. The Commissioner is not minded to accept this exercise would take 3.5 hours in each case as most of the records are likely to be electronic and there are keywords that can be used to reduce search times. However, it is likely to require staff to take some time to search their records and it is difficult for the DHSC to estimate this exactly as different IT systems will be in place in different public bodies. Even if the Commissioner considered it may only take 10 minutes per person to conduct relevant searches this would still be a combined time of over 65 hours for all staff to check their inboxes and electronic records to establish if information was held. If information was held, this may then increase further as the DHSC would be able to factor in the time to extract and collate any relevant information.
36. The Commissioner should stress this is the estimate to comply with one request. She has already found that the DHSC was entitled to aggregate the three earlier requests by the same complainant, within a 60 working days' period, because there is an overarching theme. Given the analysis above she can only conclude that complying with the requests would exceed the cost limit and the DHSC was not obliged to respond to the current request or the earlier requests by virtue of section 12(2) of the FOIA.

Section 16 – duty to provide advice and assistance

37. Section 16 of FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do

so, to persons to propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

38. Paragraph 14 of the section 45 Code of Practice² states:

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the 'appropriate limit' (i.e. the cost threshold) the authority should consider provide an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

39. The Commissioner's view is that, where a public authority refuses a requests under section 12(1) of FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.

40. The Commissioner's guidance states that where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:

- either indicate if it is not able to provide any information at all within the appropriate limit; or
- provide an indication of what information could be provided within the appropriate limit; and
- provide advice and assistance to enable the requestor to make a refined request.

41. At the time of the internal review (the first time the DHSC refused the requests under section 12), advice and assistance was offered to the complainant. The DHSC advised that a refined request may come under

² [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

the cost limit, specifically the DHSC advised focusing on one or two of the requests.

42. In the circumstances of this case, the Commissioner is satisfied that the DHSC has complied with its section 16 FOIA obligations.

Right of appeal

43. 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

44. 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.
45. 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

Jill Hulley
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