

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2022

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

Decision (including any steps ordered)

1. The complainant has requested information relating to high priority lane procurement during the COVID-19 pandemic. DHSC refused to provide some of the requested information under section 21 FOIA (information reasonably accessible). DHSC initially withheld the information requested in relation to successful and unsuccessful bidders under section 43(2) FOIA. It subsequently withdrew its application of section 43(2) to information relating to successful bidders and confirmed that this information would be published. Information in relation to successful bidders has now been published. Information in relation to unsuccessful bidders remains withheld under section 43(2) FOIA. Finally it refused to comply with the part of the request for names of leads for unsuccessful suppliers under section 12 FOIA as it would exceed the cost limit to do so.
2. The Commissioner's decision is that section 43(2) FOIA was applied correctly to the withheld information relating to unsuccessful applicants. DHSC was also correct to refuse to comply with the part of the request for names of leads for unsuccessful suppliers under section 12 FOIA. DHSC however failed to comply with section 16 FOIA in the provision of advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance under section 16 FOIA as to how the request could practically be refined to fall within the cost limit or explain that it would not be possible to provide advice and

assistance to refine the part of the request to which section 12 FOIA is applicable.

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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 16 February 2021 the complainant made the following request for information under the FOIA for:

"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 on to 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

(ii) For each 144 leads, please indicate which minister referred them (and please indicate whether this referral had originated from an MP)

(iii) For all ministers and MPs involved in these 144 leads, please disclose their names.

(2)(b) In regards to the 64 leads that came directly from MPs or members of the House of Lords:

(i) Please disclose the names/company names of the 64 suppliers

(ii) For each 64 leads, please indicate which MP or member of the House of Lords referred them.

(iii) Please disclose the names of these MPs and members of the House of Lords.

(2)(c) In regards to the 21 leads that were from officials:

(i) Please disclose the names/company names of the 21 suppliers

(ii) For each 21 leads please indicate which official referred them.

(iii) Please disclose the names of these officials that referred them, and indicate which network/department/organisation they represent.

- (2)(d) In regards to the three leads that were from other identified sources:
- (i) Please disclose the names of names/company names of three suppliers
 - (ii) For each three leads, please indicate who referred them.
 - (iii) Please disclose the name of the source that referred them, and indicate which network/department/organisation they represent."
6. On 16 April 2021 DHSC responded. It refused to disclose the requested information under section 21 (information reasonably accessible to the applicant) and section 43(2) (commercial interests).
7. The complainant requested an internal review on 13 May 2021 in relation to DHSC's application of section 43(2) FOIA. DHSC sent the outcome of its internal review on 6 August 2021. It withdrew its application of section 43(2) in relation to the 47 successful bidders and the individuals who referred these suppliers into the high priority lane. It confirmed this information would be published in due course once it had been checked and verified. In relation to unsuccessful bidders and for the individuals who provided the leads into the high priority lane for the unsuccessful suppliers, it upheld its application of section 43(2) FOIA. It also upheld its application of section 21 FOIA to information already reasonably accessible.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled, in particular they were dissatisfied with DHSC's application of section 43(2).
9. During the course of the Commissioner's investigation, DHSC confirmed that the information relating to successful applicants had been published. This information has not therefore been considered within this Notice. Furthermore the complainant has not disputed DHSC's application of section 21 FOIA and so this has not been considered as part of this Notice.
10. DHSC also revised its position in relation to the part of the request for names of leads for unsuccessful suppliers. It confirmed it was unable to

comply with this part of the request under section 12 FOIA as it would exceed the cost limit to do so.

11. The complainant has confirmed that in addition to DHSC's application of section 43(2) FOIA, she also disputes the application of section 12 FOIA.
12. The Commissioner has considered whether DHSC was correct to withhold the information relating to unsuccessful bidders under section 43(2) FOIA and whether it was correct refused to comply with the part of the request for names of leads for unsuccessful suppliers under section 12 FOIA. He has also considered whether DHSC complied with its obligations under section 16 FOIA.

Reasons for decision

Section 43(2) – Commercial interests

13. 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.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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. 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.
19. 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 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.
20. 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.
21. For these suppliers, disclosure may harm not only their business interests in PPE markets but also in related markets.
22. 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. 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 DHSC'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 Government's 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 such suppliers. 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 thinks 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 commercial interests which section 43(2) is designed to protect. That is the procurement of goods, in particular PPE.
38. With regard to the second, the Commissioner is satisfied that if these bidders were named as 'unsuccessful', this would have the potential to harm suppliers' commercial interests in respect of related markets in their existing business activity.
39. In relation to the third criteria, the Commissioner accepts that there is a more than hypothetical risk of prejudice occurring to the supplier's commercial interests, and therefore accepts the prejudice claimed would be likely to occur. This is because if it were disclosed that these suppliers failed to meet the criteria in this process (which could have been for various undisclosed reasons) this would be likely to put the suppliers at a commercial disadvantage to their competitors in the wider market (not limited to PPE) in which they ordinarily operate outside of pandemic requirements.
40. Furthermore, the Commissioner accepts that if suppliers are dissuaded from offering their services to DHSC under such critical circumstances then there is a real risk for DHSC's commercial interests to be harmed with regard to its ability to procure such goods in the future and at

best value should such an urgent requirement for PPE arise again. The Commissioner is careful to accept arguments such as these as businesses are unlikely to be easily dissuaded from bidding for lucrative contracts however given the urgent quantity required in a pandemic, even if some business were deterred DHSC would be less likely to be in such a strong position to secure procurement of PPE at best value to the public purse. 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 DHSC 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 suppliers, DHSC, and Government.

Public interest

42. 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.
43. 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.
44. Additionally, there is a public interest in understanding the UK's conduct of economic, industrial and commercial policy during the COVID-19 pandemic.
45. 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 DHSC.
46. 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.

47. 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.
48. 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.
49. 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.
50. DHSC acknowledged that the public interests in transparency is finely balanced against the public interest in maintaining supplier confidence in Government.
51. 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

52. The Commissioner considers that disclosure of the successful bidders goes a significant way to meet the public interest in this case as this is open to public scrutiny as to how public money has been spent.
53. 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 against the public interest.
54. 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.

Section 12 – cost of compliance exceeds appropriate limit

55. DHSC said that it was unable to comply with the part of the request for information regarding the source of the referrals of the suppliers not awarded contracts under section 12(1) of the FOIA.
56. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:
 - either comply with the request in its entirety, or
 - confirm or deny whether the requested information is held.
57. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - (a) determine whether it holds the information
 - (b) locate the information, or a document which may contain the information
 - (c) retrieve the information, or a document which may contain the information, and
 - (d) extract the information from a document containing it.
58. The appropriate limit for DHSC is £600 or the equivalent of 24 hours work.
59. DHSC explained that the source of referrals to the high priority lane were not routinely recorded at the time of receipt as all offers, no matter how they were received, were assessed against the same criteria.
60. Information relating to the source of referrals to the high priority lane could be held in various locations, such as:
 - The high priority mailbox which was established in April 2020 and contains over 2,600 emails in relation to the high priority lane.

- Individual email accounts of staff working in the Parallel Supply Chain along with individual email accounts of external advisers and those working in the Private Offices of Ministers and senior officials at a number of departments, such as Cabinet Office, No.10, DHSC, DfE.
 - The Mendix system - an internal database that was introduced in April 2020 to help manage systems and data relating to offers of support from business.
 - The 4 GB archive of PPE files and messages held on the Ministry of Defence's shared platform.
61. DHSC explained that its experience of searching for the source of referrals for the 'successful' suppliers has shown that the search process is not as straightforward as undertaking a simple search for emails relating to a particular supplier name. Approaches came from a variety of sources including individuals and subsidiary companies meaning that searching by supplier name often yields no relevant results. In these cases, the only way to locate the source of referral is through extensive examination of records. This involves reviewing many emails in the high priority mailbox along with all emails received during a specified period in individual email accounts, and crosschecking information held in the Mendix system and the Ministry of Defence's archive. The defence archive is particularly challenging to search as the information is compressed. In addition, it said that these checks sometimes require coordination with staff who are not based in the DHSC, for example, Departmental staff who worked temporarily in the Parallel Supply Chain.
62. The National Audit Office's report on Government procurement during the Covid-19 pandemic, published in November 2020, referenced that some information - fewer than 250 records - about the source of referrals was recorded. This information was collated as part of a fast-paced exercise to see proportionately where referrals came from. All information would need to be verified by locating the original referral email which may be stored in any of the locations described above. This process, in itself, would take DHSC over the designated cost limit. It would not be reasonable for us to release the names of referrers without undertaking this due diligence.
63. DHSC estimates that it would take one official familiar with the material and electronic platforms an average of 15 minutes for each supplier for the initial check in the primary source, the high priority mailbox. However, if this didn't yield the required information then further searches in the locations described above would have to be undertaken, which could take up to several days. There are almost 400 suppliers which need to be reviewed.

64. Given the volume of unsuccessful suppliers and the fact that information regarding referrals of these suppliers could be held in various locations, the Commissioner accepts that it would exceed the cost limit to comply with this part of the request. DHSC has estimated it would take on average 15 minutes per supplier to carry out the initial check in the primary source, the high priority mailbox. However it is likely that for some suppliers further searches would be required. Even if this estimate were reduced to 5 minutes per supplier, this would exceed the cost limit to comply.
65. On this basis the Commissioner considers section 12 FOIA has been correctly applied to this part of the request.

Section 16

66. Under section 16 FOIA a public authority has an obligation to provide advice and assistance as to how a request could be refined where it exceeds the cost limit under section 12 FOIA. If it is not possible to provide advice and assistance under section 16 as to how a request could be refined a public authority should confirm this.
67. In this case DHSC has advised the complainant that they could specify one or two particular individuals to refine the request.
68. The Commissioner is not clear how the complainant could specify particular leads as this is the information they are seeking. The Commissioner is aware that the request seems to discuss categories of leads but this would not enable the complainant to specify one or two individually.
69. The advice and assistance provided does not appear to be meaningful or usable by the complainant therefore the Commissioner does not consider DHSC complied with its obligations under section 16 FOIA.
70. In a previous Decision Notice issued by the Commissioner under FS50503796, which was upheld by the Upper Tribunal in *Commissioner of the Metropolitan Police v Information Commissioner and Donnie Mackenzie* [2014] UKUT 0479 (AAC), the Commissioner found that the public authority had complied with its obligation under section 16 FOIA by confirming to the complainant that it was unable to suggest a practical way to refine the request.
71. In this case to comply with section 16 FOIA, the Commissioner considers that DHSC should provide advice and assistance which would practically enable the complainant to submit a refined request or explain that it

would not be possible to provide advice and assistance as to how to refine this part of the request to fall within the cost limit.

Right of appeal

72. 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

73. 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.
74. 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.....

Gemma Garvey
Senior Case Officer

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