

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 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 costs of COVID-19 tests. DHSC refused to disclose the requested information under 43(2) FOIA.
2. The Commissioner's decision is that section 43(2) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 14 July 2021 the complainant made the following request for information under the FOIA for:

"Please provide me with the actual cost per test of a NHS Track and Trace PCR COVID test and a Lateral Flow COVID test as are being carried out on a daily basis throughout the United Kingdom"
5. DHSC responded on 9 September 2021 and refused to provide the requested information citing section 43(2) FOIA.
6. The complainant requested an internal review on 23 September 2021. DHSC provided the internal review on 14 December 2021 upholding its original position.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether DHSC was correct to withhold the requested information under section 43(2) FOIA.

Reasons for decision

Section 43(2)

9. 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.
10. 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."
11. Although most commercial activity relates to the purchase and sale of goods, it also extends to other fields such as services.
12. DHSC explained that the party whose commercial interests would be prejudiced would be the United Kingdom Health Security Agency (UKHSA), its parent organisation, the Department of Health and Social Care (DHSC) and ultimately HM Government. It explained that the UKHSA is actively engaged within the global marketplace for the ongoing procurement of both Lateral Flow Devices (LFD) and Polymerase Chain Reaction (PCR) tests as part of their response to the continued presence of COVID-19 within the United Kingdom.
13. The Commissioner considers that the procurement of such goods/services is a commercial activity.

14. 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.
15. DHSC argued that due to the nature of the breadth of pricing and the impact different factors (distribution channel, outbound costs etc) have on the final cost of a test, publishing this information could give signals to suppliers and the wider market about the approach to pricing they might decide to take, depending on where on the 'scale' their pricing approach and costs sit. This could prejudice the commercial interests of DHSC/UKHSA as it may disadvantage its negotiating position in procuring such goods/services in the future.
16. 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.
17. 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.
18. In this case DHSC has argued that the prejudice claimed would be likely to occur. This means there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
19. DHSC explained that there are strong commercial reasons why Government departments do not publish commercially sensitive details relating to price. Primarily, it does not provide commercially sensitive information (such as unit costs) as this would compromise its ability to negotiate the best deal.
20. It went on that releasing average or specific unit costs for LFDs and PCR tests would damage its ability to negotiate the best deal. Essentially, doing so would establish a benchmark for pricing, compromising its negotiating position. The average unit cost covers a range of factors that are not be easily or directly comparable, including the product itself, the distribution channel, outbound and inbound logistics and processing costs involved, making it difficult to establish any single price which all suppliers should meet.

21. It said that with a benchmark to aim at, suppliers currently providing at costs below an average, or at the lower end of any range, may perceive a commercial opportunity to be able to adjust their prices upwards. Suppliers providing at a cost above the average, or at the higher end of a range, and unable to reduce their costs significantly (because of the factors noted above) might then choose to prioritise other markets over working with UKHSA. Any disclosure would therefore ultimately mean higher prices and lower value for money for the taxpayer, which would be prejudicial to its commercial interests.
22. In this case having seen the information withheld under section 43(2) FOIA and the arguments DHSC has provided, the Commissioner accepts that this information engages the exemption as regards to UKHSA/DHSC. He considers that a causal link has been established between disclosure of this information and the UKHSA/DHSC's commercial interests. Disclosing individual unit prices and breakdown of costings is likely to disadvantage UKHSA/DHSC's negotiating position in any future procurement exercise for such goods/services. It is clear that the prejudice of disclosure to the UKHSA/DHSC is real, actual and of substance. The Commissioner accepts therefore that section 43(2) FOIA was correctly engaged.
23. The exemption is qualified and is subject to the public interest test which means that, even though it is engaged, the Commissioner also needs to assess whether it is in the public interest to release the information.

Public interest test

Public interest in favour of disclosure

24. DHSC recognises the public interest in transparency across Government, particularly surrounding the COVID-19 pandemic, as this both builds public trust and ensures that a suitable level of scrutiny is provided around the actions of Government.

Public interest in maintaining the exemption

25. The information to be withheld is directly linked to the ability of DHSC to provide a value for money service to the public in procuring LFDs and PCR tests from a variety of sources to meet the emerging and changing national testing demand. DHSC has therefore considered the need to adhere to transparency and accountability while maintaining fair commercial competition so as not to jeopardise any current or pending commercial agreements.

26. The information requested would not be able to be provided without giving a detailed range of cost prices for the tests across the different distribution channels. The price of both LFDs and PCR tests has multiple components such as, kit price, distribution channel, outbound and inbound logistics and the delivery method used, i.e. self-test or assisted testing and therefore costs for tests are not directly comparable on a like for like basis.
27. DHSC's procurement exercises are ongoing and are driven by the consumption, stock levels and demand projection for tests. As a result, at any given time DHSC is likely to be engaged on one or more stages of a procurement exercise for tests. In doing so, it follows a competitive tender process to ensure value for money is achieved. Releasing cost information to the public would jeopardise this position by way of sharing commercially sensitive information and causing potentially commercially harmful pricing reactions within the supply base fuelled by any pricing information released. Releasing the requested information would further establish a clear historic benchmark for pricing, compromising its negotiating position for future procurements.
28. With a benchmark released to the public, suppliers currently providing at costs at the lower end of any range, may perceive a commercial opportunity to be able to adjust their prices upwards. Suppliers providing at the higher end of a range, and unable to reduce their costs significantly might then choose to prioritise other markets over working with the UKHSA.

Balance of the public interest test

29. The Commissioner does consider there is a public interest in DHSC operating transparently, particularly in relation to the spending of public money in its response to the Covid-19 pandemic. He also considers that DHSC should be held accountable for decisions made in this regard.
30. However the Commissioner also accepts that disclosure of unit prices along with varying factor breakdowns would hinder UKHSA/DHSC's negotiating position in future procurement exercises for such goods/services. It would not be in the public interest to hinder UHSA/DHSC's ability to negotiate such contracts to obtain best value for money for the goods/services it requires to tackle the pandemic.

31. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

32. 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

33. 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.
34. 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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