Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**23 May 2023**
Public Authority:	**UK Health Security Agency ("UKHSA")**
Address:	**Nobel House** **17 Smith Square** **London** **SW1P 3JR**

Decision (including any steps ordered)

1. The complainant has requested information on the settlement agreement between the UK Government and the vaccine company Valneva SE.

2. The Commissioner's decision is that UKHSA is entitled to rely on FOIA section 43(2) – commercial interests, to withhold the information and the public interest favours maintaining the exemption.

3. The Commissioner does not require further steps.

Request and response

4. On 1 July 2022 the complainant wrote to the Department for Business, Energy and Industrial Strategy ("BEIS")[1] and requested information in the following terms:

[1] At the time the Vaccines Taskforce was part of BEIS, it is now part of UKHSA. The UKHSA is not listed as a separate public authority in Schedule 1 of the FOIA because it is an Executive Agency of the DHSC. The Commissioner will refer to "the UKHSA" for the purposes

"Further to the attached correspondence please can you tell me the value of the settlement agreement between the UKG and Valneva as per the following press statement:

Saint-Herblain (France), June 15, 2022 – Valneva SE, (Nasdaq: VALN; Euronext Paris: VLA), a specialty vaccine company, today announced that it has entered into a settlement agreement with the Government of the United Kingdom ("HMG") in relation to the termination of the supply agreement for Valneva's COVID-19 vaccine candidate, VLA2001. The Company announced on September 13, 2021 that it had received a termination notice from HMG, and the termination, which Valneva accepted on the basis of HMG's discretionary right to terminate for convenience, became effective on October 10, 2021.

The settlement agreement resolves certain matters relating to the obligations of the Company and HMG following the termination of the supply agreement and in relation to the separate agreement relating to clinical trials of VLA2001 in the United Kingdom, which remains in place."

5. BEIS responded on 20 July 2022. It confirmed holding information in the scope of the request but withheld it in reliance on FOIA section 43(2) – Commercial interests.

6. Following an internal review BEIS wrote to the complainant on 18 August 2022 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 19 August 2022 to complain about the way their request for information had been handled. They explained:

"The main thrust of my appeal is there is a clear public interest in disclosing the settlement amount. The harm in disclosure argument has not been demonstrated, in my opinion. Indeed, Valneva has provided ample commentary on the issue and, crucially, put some numbers on the impact of the government's decision to withdraw from the deal in its 2021 annual report (p29 of this https://valneva.com/wp-content/uploads/2022/03/Comptes-consolides-2021-EN-Final-pour-publi.pdf)

of this notice – although the public authority is, ultimately, the Department of Health and Social Care.

If the government is going to make decisions on behalf of the taxpayer then it is only right the taxpayer should see the financial impact of these decisions."

8. The Commissioner considers that the scope of his investigation is to determine whether UKHSA is correct in its application of section 43(2).

Reasons for decision

Section 43 – Commercial interests

9. Section 43(2) of FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

10. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes 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, i.e. disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring 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.

11. UKHSA provided the Commissioner with the information it holds in the scope of the request, which comprises the withheld information. It explained that disclosure of the information would prejudice Valneva SE and UKHSA due to the commercial sensitivity of the information.

12. UKHSA explained its view that Valneva would be commercially prejudiced regarding supplying other countries with the vaccine. Valneva continues to offer the vaccines to the market, working with agencies outside the UK and European Union for potential future approvals and

additional purchase agreements. Its ability to negotiate and compete in the commercial environment would be prejudiced with impediment to income generation. UKHSA pointed out that the agreement contains specific requirements to maintain the confidentiality of the terms of the agreement. If the terms were disclosed UKHSA considered that Government would be reputationally damaged and impacted in terms of its ability to negotiate commercial terms with future suppliers.

13. The Commissioner specifically asked UKHSA if it was possible to consult with Valneva regarding disclosure of the requested figure as it appears that Valneva is happy to have disclosed a considerable amount of information in its 2021 Financial Statements, regarding the government's decision to terminate the Settlement Agreement. UKHSA has not responded to the Commissioner on this point.

14. The Commissioner accepts that it may not be necessary to explicitly consult a relevant third party, however any arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns. In this case it appears that UKHSA is relying on the confidentiality clauses contained in the Settlement Agreement regarding the terms of the agreement to represent Valneva's position.

15. The Commissioner notes that UKHSA considers that it is unable to simply provide a value, as requested, but finds it would be necessary to refer to the Settlement Agreement and the related terminated agreement.

16. The Commissioner has seen the Settlement Agreement and notes its complexity. In his reading of the document it does not indicate a single figure which could be taken as "the value of the settlement agreement".

17. In these circumstances the Commissioner considers that he must accept that the harm alleged by UKHSA relates to both the commercial interests of Valneva and the UK Government. He therefore accepts that the alleged prejudice is relevant to the section 43 exemption and that the first criterion set out in paragraph 10 is met.

18. With regard to the second criterion the Commissioner notes that the request asks for the "value of the settlement agreement". He understands this to be a request for a figure not the Settlement Agreement in its entirety. Notwithstanding this, for the reasons set out above, he accepts that there is a causal relationship between the disclosure of the requested information, when subject to a confidentiality agreement agreed by both parties, and the prejudice the exemption is designed to protect.

19. In regard to the level of prejudice, in the third criterion at paragraph 10, UKHSA advised that disclosure 'would' result in prejudice. The Commissioner notes that throughout its submissions UKHSA relies at

different points, on 'would' and also 'would be likely' to result in commercial prejudice. The Commissioner is not convinced by the evidence provided by UKLHSA that the anticipated prejudice is more likely than not. He therefore accepts the lower threshold that there is a real chance of prejudice.

20. The Commissioner has concluded that the prejudice test has been met and the exemption at section 43(2) is engaged. He will now go on to consider the public interest.

Public interest test

Public interest in favour of disclosing the information

21. The complainant's view is set out above in paragraph 7 above. He considers that the requested cost was funded by tax payers and there is therefore a public interest in disclosure of government spending of public funds.

22. UKHSA stated that it recognised the general public interest in greater transparency making government and decision making more open and accountable.

Public interest in maintaining the exemption

23. UKHSA advised the Commissioner that there is a public interest in ensuring that the commercial interests of suppliers are not damaged or undermined by disclosure of information which is not in the public domain and which could adversely impact future business.

24. UKHSA also advised that it had taken into account the public interest in the Government being able to negotiate effective commercial terms with suppliers and to obtain vaccines at a price which secures value for the taxpayer. It referenced the importance of not causing damage to the ability of the Government to secure further deals in the future as a result of the disclosure of information contrary to Valneva's:

"…legitimate expectation of confidentiality and would cast doubt on the Government as a trustworthy partner in maintaining such confidentiality in the future."

25. Furthermore UKHSA explained:

" The information requested could not be disclosed without reference to the settlement agreement and the related terminated agreement, both of which are commercially confidential and contain confidentiality provisions which are binding on UKHSA.

If UKHSA were to breach those confidentiality obligations, the ensuing loss of confidence in it by the market would have a significant impact on its ability to protect the public health and ensure value for money. It would also be likely to incur costs of settling any resulting claim for damages by Valneva for any losses resulting from a breach of commercial confidentiality."

The Commissioner's considerations

26. The Commissioner agrees with the complainant that in the circumstances of this case there is a significant public interest in disclosure of the cost to public purse of a change in government contracts concerning the Covid-19 vaccine.

27. The disclosure of the "value", if possible, would inform the public of a figure which in itself would not provide significant insight into government decision making. The Commissioner is not convinced that disclosure would inform the public on the rationale of terminating the agreement or the complex considerations involved with the settlement.

28. The Commissioner considers that the competing public interests in this case can be summarised as, on the one hand, the public interest in understanding the cost to the taxpayer of government terminating the agreement with Valneva, and on the other, the public interest in not creating commercial prejudice to both Valneva which remain active in the same marketplace and the government. There is a public interest in the government being a trusted party with respect to future negotiations concerning vaccine supplies and more widely suppliers having confidence in sharing confidential commercial information with government. The Commissioner notes that there is an on-going likelihood that the government will require vaccine supplies to maintain public health. Any damage to negotiations for such supplies, resulting from disclosure, would not serve the public interest.

29. On balance, the Commissioner has decided that the public interest favours maintaining the exemption and withholding the requested information.

Right of appeal

30. 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

31. 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.

32. 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 .....

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF