

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 March 2024

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

#### Decision (including any steps ordered)

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1. The complainant requested a document that was about to be placed in the public domain - the impact assessment into the cost effectiveness of the COVID-19 autumn 2023 vaccination programme<sup>1</sup>. The Department of Health and Social Care (DHSC) refused to provide the requested information, citing sections 21(1) of FOIA and 43(2) of FOIA.
2. The Commissioner's decision is that section 21(1) is not engaged but that section 43(2) is engaged regarding the withheld information and the public interest favours non-disclosure.
3. The Commissioner does not require further steps.

#### Request and response

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4. On 14 September 2023 the complainant wrote to the DHSC and requested information in the following terms:
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<sup>1</sup> [COVID-19 autumn 2023 vaccination programme: cost effectiveness impact assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

"I would like to make a formal freedom of information request.

Specifically, I am interested in the cost effectiveness analysis that was behind the JCVI's decision to limit covid autumn boosters this year to the over 65s and certain other high risk groups.

This announcement from the JCVI states that a bespoke cost effectiveness analysis was done, but does not provide details of the analysis: Please could you send me the detailed report of that cost effectiveness analysis.

JCVI statement on the COVID-19 vaccination programme for autumn 2023 - update 7 July 2023 - GOV.UK ([www.gov.uk](http://www.gov.uk))

Specifically, I would be interested to know whether only direct healthcare costs were included (eg hospitalisations in NHS hospitals) or also wider societal costs (eg time off work if people are ill with covid).

I would also like to know what assumptions were made about both the direct healthcare costs and the wider societal costs of long covid, and the extent to which they would be reduced by vaccination.

I would also like to know how the non-monetary costs of morbidity and mortality were accounted for.

There is no need to respond to those questions separately if they are all answered within the cost effectiveness analysis report and you can send me the report, but please do your best to answer them if they are not included in the report or if for some reason you are unable to send the report."

5. On 11 October 2023 the DHSC responded, citing section 21 (information accessible to the applicant by other means) and providing a link to information on its website - the impact assessment into the cost effectiveness of the COVID-19 autumn 2023 vaccination programme that had been published in a redacted form. It also referred to the redacted information as "commercially sensitive". There was also a link provided for an update to the guidance.
6. On 14 October 2023 the complainant requested an internal review questioning the redactions that had been made to what had been requested as they did not accept that the information was adequate for the purpose of assessing whether the cost-effectiveness analysis carried

out on the vaccine program was reasonable. The complainant provided an example of Table 13 (p.34) of the report.

7. Following an internal review, the DHSC wrote to the complainant on 13 November 2023 maintaining its position, providing some explanation regarding section 21 of FOIA but stating that requesting the unredacted report was a new request. However, it did address Table 13, arguing that it would affect procurement if the information was disclosed. It also said that it had provided on "a discretionary basis...additional information" relating to the complainant's interest in seeing the redacted information.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 23 January 2024 to complain about the way their request for information had been handled.
9. The DHSC asked for a meeting with the Commissioner in an effort to resolve this complaint. On 30 January 2024 this meeting took place and resulted in the DHSC sending another response to the complainant. In that response on 12 February 2024 the DHSC acknowledged that section 21 was not in line with the Commissioner's guidance. This further response repeated the review's point that the redactions were not related to the complainant's request but had been "considered in the normal course of Government business".
10. Although the DHSC had not received another request, it said that it was clear that the complainant had an interest in the redacted information and provided a response. The DHSC exempted the redacted figures under section 43(2) – commercial interests - even though it did not consider that it fell within the scope of the complainant's request and that the complainant had not made a request for it when invited to do so.
11. On 17 February 2024 the complainant told the Commissioner that the response from the DHSC "really makes no sense at all".
12. The DHSC responded to a further investigative email from the Commissioner on 7 March 2024 by reiterating that the numerical information did not fall within scope of the original request but that it maintained that it was exempt under section 43(2).
13. The Commissioner considers that the scope of his investigation is to consider the DHSC's citing of sections 21 and 43(2) of FOIA. He will also look at any procedural matters that may have occurred.

## Reasons for decision

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### Section 21 - information accessible to the applicant by other means

14. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
15. Section 21 is an absolute exemption which means that there is no requirement to carry out a public interest test, if the requested information is exempt.
16. Unlike most exemptions, the circumstances of the applicant/requester can be considered, as the information must be reasonably accessible to them.
17. Unless a public authority is aware of any particular circumstances or contrary evidence, it is reasonable to assume that information is accessible to the applicant/requester as a member of the public.
18. On 12 February 2024 the DHSC explained to the complainant that it had considered it would be "unhelpful" to provide a section 22 response. In other words to state that the information would be published in the future because "publication was imminent and within the statutory limit for response". Therefore it "decided to wait" until the information "went live". It also decided that the "questions did not request numerical information and were qualitative in nature; asking whether certain factors were or were not considered". The DHSC's view is that the information that had been requested "was materially answered by the link provided" in its response. The redacted information was considered to be out-of-scope. If information had been provided at the time of the request (if no exemption had been cited) it would have been "identical" to what was provided via the link.
19. It is not clear whether the above meant that the DHSC was withdrawing its citing of section 21 of FOIA. Although the Commissioner can understand DHSC's reasoning, at the time of the request the information was not "reasonably accessible" to the complainant because it was not accessible to any member of the public. Delaying a response in order to fit an exemption is a risky strategy and meant, in this instance, that section 21 was not engaged.

### Section 43(2) – commercial interests

20. Section 43(2) of 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.

21. The Commissioner has defined the meaning of the term "commercial interests" in his 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."<sup>2</sup>

22. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services. 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.

23. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for it to be successfully engaged.

24. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.

25. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.

26. The DHSC argues that release of the withheld information would prejudice the DHSC's and/or its Arm's Length Bodies' (ALBs) commercial interests.

27. It describes the report as follows -

"the overall purpose of the impact assessment document is to assess whether the proposed programme is cost effective, in particular, whether the benefits of each policy option outweigh their costs. When DHSC or its ALBs initiate a vaccine procurement process we determine a breakeven point; the maximum amount we are 'willing to pay' to purchase the vaccine from manufacturers. This is where the benefits exactly match the costs. The redacted figures in the document conceal factual elements of cost that might reveal

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<sup>2</sup> [Section 43 - Commercial interests | ICO](#)

DHSC's detailed assessment of costs and benefits and would directly or indirectly reveal 'the willing to pay' amount".

28. The DHSC contends that "this information would be converted into a 'willingness to pay' variable" in future procurement processes. If the "breakeven point" was revealed prior to a "procurement exercise [it] would harm DHSC's financial interest" when it is seeking to "secure the best possible commercial price for future vaccines".

29. The DHSC explained the applicable interests concerned to the Commissioner at some length:

"DHSC operates on a restricted and fixed budget for procuring treatments or interventions. To discharge its fiduciary duties, DHSC and its ALBs seek to purchase vaccines that are cost effective and that provide maximum levels of protection and assurance to the public within available budgets, and in a way that delivers cost effective outcomes."

30. Releasing the withheld information to the public is also releasing it to "vaccine manufacturers and other treatment or intervention suppliers". This would "substantially weaken DHSC's bargaining position for any future procurement of similar vaccines". DHSC cited this exemption to protect the commercial interests of itself and ALBs "in procuring COVID-19 vaccines for future programmes (and/or any/other similar treatments or interventions)". The "willingness to pay" amount could be deduced or estimated and, "Each element of the information...in its own right...[is] sufficient to provide an interested third party with insight into DHSC's willingness to pay". This "willingness to pay' amount could be used by vaccine manufacturers to inform their pricing, which would be set to maximise their profits for supplying" vaccines.

31. Increased prices and consequently increased procurement prices for the vaccines would have "a damaging effect in distributing DHSC's overall budget". If the DHSC has to pay more for one treatment/intervention it will have less money to fund other treatments/interventions – the "opportunity cost of this inefficiency – for each £15k foregone, the DHSC fails to provide £70k of health benefits, on average".

32. Drilling down into the granular reasons why the release of certain figures would reveal the "willingness to pay' amount":

“Revealing the ‘Net Benefit (Present Value) figures if combined with other unredacted elements of the Impact Assessment would provide enough information to infer the ‘willingness to pay’ amount.

Revealing the benefit values for the three different policy options would provide enough information to determine the ‘willingness to pay’ by dividing the total benefits by the total uptake of the given policy option.

Information is withheld in table 13 and 14 to avoid the reader dividing the total benefits by the size of each age and risk-based cohort, which would enable the reader to determine the willingness to pay for each proposed dose within those cohorts. These tables provide the information for table 15, which details the willingness to pay and is withheld information. Providing the average cost per dose figure would enable the reader to use the redacted colour coded table (on page 33) to determine the minimum willingness to pay of cohorts.”

Disclosing these details would place the DHSC at a “competitive disadvantage in negotiating procurement of COVID-19 vaccines for any future booster programme”.

33. The withheld information would also reveal “DHSC’s considerations of the benefits of the proposed vaccination programme (in terms of valued health benefits delivered to the population)”. This could be used by vaccine manufacturers and other future suppliers to the DHSC “to inform their pricing”.
34. The DHSC describes the prejudice as “real and of substance” and it contends that it has established the causal link “between disclosure and the prejudice on commercial interest of DHSC is established in all cases of different types of costs withheld in this Impact Assessment”. The DHSC says “there is a high likelihood of prejudice occurring” whilst the DHSC and its ALBs are procuring COVID-19 vaccines and release -

“would be prejudic[ial] if any of the withheld information in relation to procurement of this type of vaccines were to become available to manufacturers of COVID-19 or similar vaccinations in negotiations on any subsequent transaction”.

35. The complainant acknowledges -

"that the purchase cost of the vaccine may be commercially sensitive, but the purchase cost of the vaccine is also entirely irrelevant to the cost effectiveness calculations, as the vaccines had already been bought and so were treated as a sunk cost".

36. The complainant added -

"The DHSC is trying to claim that the costs arising covid itself (healthcare costs, time off work, etc) are commercially sensitive. This does not seem at all reasonable to me."

37. The Commissioner agrees that the withheld information is "commercial" as it relates to the purchase and sale of vaccines. He accepts that the DHSC has provided a clear and significant causal link between its release and detriment to the DHSC's commercial interests. The exemption is engaged at the higher level of prejudice.

### **Public interest test**

38. The Commissioner will now consider the public interest in continuing to withhold the requested information or disclosing it.

### **Public interest factors in favour of disclosing the requested information**

39. The DHSC acknowledges that there is a public interest in transparency and accountability in how it spends public money. There is also a public interest in ensuring that due process, good decision-making and the best use of public resources have been carried out.

40. The complainant acknowledges that there "may be a valid reason for the procurement cost of the vaccine.

"However, the cost effectiveness analysis noted that vaccine procurement contracts had already been signed, and so the procurement costs were treated as sunk costs and therefore not included in the analysis. I do not therefore see the need for all the redactions of other costs and benefits of the vaccination programme, particularly the QALY<sup>[3]</sup> benefits. A particularly

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<sup>3</sup> Quality adjusted life year = one year of life in perfect health. These are calculated according to NICE "by estimating the years of life remaining for a patient following a

egregious example of what appears to be unnecessary redaction is Table 13 on page 34 of the report”.

### **Public interest factors in favour of maintaining the exemption**

41. DHSC contends that “there is little weight in the public interest argument for disclosing the withheld information” due to the information that has been placed in the public domain.

42. Conversely it is in the public interest -

“to maximise the cost benefit value of the COVID-19 vaccines or any similar vaccinations and minimise the cost paid to commercial companies for procuring vaccines for any future programme [as] ...vaccine procurement is funded through public money”.

The DHSC argues the importance of protecting the “willingness to pay’ amount for COVID-19 procurement to prevent manufacturers fixing their prices according to this value” to “maximise their profit margin”. It does not consider that the public interest in “withholding the information” diminishes “over time as DHSC regularly conducts commercial negotiations with the private sector to procure similar treatments or interventions”.

43. It is also obliged by -

“The Health Protection (Vaccination) Regulations 2009 [that] place an obligation on the Secretary of State to accept certain recommendations of the JCVI<sup>[4]</sup> regarding national vaccination programmes and make arrangements for such programmes to be implemented via the NHS. The vaccines provided by NHS are free at the point of access but are funded by public money. Should the breakeven information be released, and further recommendations be made by the JCVI on COVID-19 vaccine and other vaccine programmes, there is a risk that these duties could only be discharged at a higher cost to the taxpayer.”

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particular treatment or intervention and weighting each year with a quality-of-life score (on a 0 to 1 scale)”.

<sup>4</sup> Joint Committee on Vaccination and Immunisation

## **Balance of the public interest**

44. The complainant has accepted that some of the withheld information may be commercially prejudicial. However, they do not accept that other costs and benefits – particularly the QALY benefits in Table 13 have been appropriately withheld under this exemption.
45. The Commissioner has noted that this information has the potential to impact significantly on many individuals in terms of their health but also has financial implications for the NHS. The Commissioner understands that the complainant's view is that it is in the public interest to be provided with the means to assess whether the cost effectiveness analysis the DHSC had carried out on the vaccine program was reasonable. The DHSC's view is that it has provided as much information as possible to the public without risking its own commercial interests. The DHSC argues that there is limited public interest in the information it has withheld. On balance, the Commissioner accepts that the DHSC has published the information that it has determined would not cause prejudice to its commercial interests. The majority of the withheld information would clearly cause commercial prejudice and it is not in the public interest to cause detriment to the DHSC's negotiating power and increase the costs of purchasing vaccines. The Commissioner understands that information that may seem less clearly detrimental can, when put together with other disclosed information, lead to the same consequences.

## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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