

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 August 2024

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a meeting that took place between the Secretary of State and the Phoenix Partnership (TPP). The DHSC provided some information but withheld some documents under sections 41 and 43 FOIA.
2. The Commissioner's decision is that the four documents provided by TPP have been correctly withheld under section 41 FOIA and the remaining two documents produced by the DHSC (a briefing note and minutes) have been correctly withheld under section 43 FOIA.
3. The Commissioner does not require any steps.

#### Request and response

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4. On 27 June 2023 the complainant wrote to the DHSC and requested information in the following terms:

"On the 17/7/22 Minister Steve Barclay meet with The Phoenix Partnership (TPP) to discuss "Technology and Product Development in healthcare".

link: <https://openaccess.transparency.org.uk/?meeting=84817>

MY REQUEST

1 - Please can you provide a copy of the following information regarding the July 2022 meeting:

- A - A copy of any meeting minutes
- B - Full attendance list
- C - Agenda
- D - Ministerial briefing documents
- E - Emails between the ministers office and TPP regarding the July meeting"

5. The DHSC responded on 15 November 2023 confirming it held some information in scope of the request. It provided a list of attendees, provided some documents and confirmed no agenda was held. DHSC redacted some information under section 35(1)(d) as it related to the operation of a ministerial office.
6. DHSC withheld the information in several other documents in its entirety under sections 41 and 43 FOIA.
7. An internal review was requested on 8 December 2023 challenging the DHSC's application of section 43 and 41 to withhold documents in full. The internal review request did not challenge the DHSC's use of section 35(1)(d).
8. An internal review was conducted by the DHSC upholding its position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 13 February 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine if the DHSC has correctly relied on either sections 41 or 43 FOIA to refuse to provide the remaining information.

### **Reasons for decision**

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#### **Section 41 – information provided in confidence**

11. The Commissioner has first considered the application of section 41 as this has been applied by the DHSC to four documents provided by TPP to the DHSC.
12. TPP is a provider of healthcare technology software and its core product, SystemOne is used widely throughout the NHS to provide a single

electronic health record for each patient that can be shared across different healthcare settings.

13. The meeting that took place in July 2022 between the Secretary of State for Health and TPP was, as the request states, to discuss technology and product development in healthcare and was an opportunity for TPP to provide insight into the current digital health landscape using their knowledge and expertise.
14. Section 41(1) of FOIA states that information will be exempt if:
  - it was obtained by the authority by any other person;
  - its disclosure would constitute an actionable breach of confidence
  - a legal person could bring a court action for that breach of confidence;
  - and the court action would be likely to succeed.
15. Section 41(1)(a) states that the information must have been obtained from “any other person”.
16. The DHSC confirmed that the information in the four documents was provided by TPP to the DHSC. The Commissioner is therefore satisfied that section 41(1)(a) has been met. He must now consider whether or not its disclosure to the public would constitute a breach of confidence ‘actionable’ by that or any other person. A breach of confidence will be actionable if:
  - The information has the necessary quality of confidence;
  - The information was imparted in circumstances importing an obligation of confidence; and
  - There was an unauthorised use of the information to the detriment of the confider.

**Does the information have the necessary quality of confidence?**

17. In the Commissioner’s view, information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
18. The DHSC states the meeting with the Secretary of State and TPP took place to allow TPP to impart their knowledge and understanding of the current digital health landscape. The information TPP supplied to inform this meeting was provided in confidence with no expectation it would be put into the public domain, particularly as some of it was commercially

sensitive in nature. The DHSC consulted with TPP about this request and they made it clear they had provided this information with an expectation it would be confidential to the meeting.

19. The Commissioner has viewed these documents and notes they do contain specific information on TPP products and services, that was not otherwise accessible and was not trivial in nature. The Commissioner therefore accepts the information clearly has the necessary quality of confidence.

**Was the information imparted in circumstances importing an obligation of confidence?**

20. As noted above, the documents were provided by TPP to inform discussions in the meeting and TPP has explicitly stated they did not expect this information to be shared. Based on the content of the information and the manner in which it was shared with the DHSC, the Commissioner is satisfied this criterion is met.

**Would disclosure be of detriment to the confider?**

21. The DHSC has explained that if it were to disclose the information, there would be a detriment to TPP's commercial interests. Whilst the Commissioner cannot describe the contents of the information in the documents in detail, he can state that it contains information that would provide an insight into TPP's future plans, methodologies and proprietary information. If this information were to be disclosed this would give competitors an insight into TPP's business practices, models, products and future plans that would not otherwise be accessible, placing them at a disadvantage.
22. The Commissioner is satisfied that disclosing the information would be likely to be detrimental to TPP as a commercial organisation operating in a competitive environment where no one company has a monopoly over healthcare software products, specifically the provision of electronic healthcare records systems. The Commissioner also accepts there may be reputational damage to the DHCS if it was considered to be releasing confidential information.

**Is there a public interest defence to the disclosure of the information?**

23. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under

FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.

24. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the DHSC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
25. The DHSC recognises the public interest in openness and transparency around Government's commercial activities and public service delivery. However, it considers there is a considerable public interest in being able to retain the commercial confidence of parties when they choose to engage in commercial activities with the DHSC. TPP currently has many contracts with NHS bodies for the provision of IT services, many of which will be subject to re-procurement in the near future and the interests of the DHSC and the taxpayer are in being able to secure best value for money when it enters negotiations and signs contracts with suppliers.
26. The DHSC therefore considers, given the confidential nature of the documents and TPP's strong objections to disclosure, disclosure would not be in the public interest as it would impact the DHSC's future commercial relations with TPP and others and prejudice the ability of the DHSC to secure best value for money on future procurement exercises.
27. With no compelling arguments to support disclosure of this information the Commissioner has to conclude that the DHSC was correct to apply section 41 to withhold the information in the four documents provided by TPP. Accepting the information is confidential in nature it follows there is an inherent public interest in maintaining the principle of confidentiality and the DHSC has argued there would also likely be commercial detriment from disclosure. As such the Commissioner must conclude section 41 has been correctly applied to this information.
28. He will now go on to consider the DHSC's application of section 43 to the remaining information held in two documents created by the DHSC.

### **Section 43 – commercial interests**

29. 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.
30. The first document withheld under section 43 is a 'Background Briefing' note, this was an internal DHSC briefing document and contains the frank views of DHSC officials specifically about TPP's performance across

the portfolio of contracts it holds with NHS bodies - information which would normally be raised and discussed at contract management discussions DHSC officials would regularly hold with suppliers on a one to one basis and which would, the DHSC states, clearly be confidential in nature.

31. The second document is a 'read-out' or minutes document. The information in this document is not a record of a general discussion about TPP's and DHSC's commercial interests but is focused on very specific service needs and business opportunities. The Commissioner has viewed the information and notes there are very specific examples given.
32. The DHSC has argued disclosing the information in these documents would prejudice both its own and TPP's commercial interests.
33. With regard to TPP's commercial interests, the DHSC did consult with TPP to get their view and the Commissioner has had sight of TPP's response. In summary, TPP considers the information is commercially sensitive and not otherwise publicly available and disclosure would be likely to harm its services offering, business strategy and other future activities concerning healthcare services.
34. TPP believes disclosure could allow its competitors an insight into their future plans, methodology and proprietary information, allowing competitors and other private entities to commandeer and exploit TPP's commercial and technical know-how, and potentially engineer a detrimental position for both TPP and DHSC. This would facilitate an unfair competitive advantage.
35. Thus disclosure of the information would give TPP's competitors a distinct commercial advantage and stepping stone which would be likely to prejudice TPP's ability to engage in a fair and level playing field for their commercial activities. TPP does not have access to similar information on its competitors, so TPP believes it would be at a significant disadvantage.
36. In relation to the likely prejudice to DHSC's commercial interests, it argues release of this information would be likely to deter suppliers from participating in and competing for future opportunities as they would potentially face external scrutiny on issues which both parties would normally expect to be treated as part of a confidential contract management process. This would therefore negatively impact on 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. The DHSC argues it

must retain the commercial confidence of third party potential suppliers when they choose to engage in commercial activities with it.

37. In considering whether section 43 has been properly applied the Commissioner must be satisfied there is a causal link between the prejudice argued by the public authority and the information in question.
38. The DHSC's arguments are somewhat speculative in that they state that disclosure of the information would impact on the quality of its supplier base and might lead to higher prices or lack of availability of equipment and services but does not explain exactly how this might happen. The Commissioner notes the briefing note and read-out contain opinions (from both parties) on NHS products/services and TPP's products/performance. Disclosing information such as this may impact, positively or negatively, on the reputation of third parties and this could have a commercial impact. However, the Commissioner is sceptical this would impact on the DHSC in the way it has argued.
39. That being said, there is a more clear case for accepting that disclosure may prejudice the commercial interests of TPP. Firstly, any information that may affect the reputation of a company cannot be dismissed as this will have a commercial impact on an organisation in one way or another.
40. Secondly, the documents do contain information on specific service needs and business opportunities and would provide competitors with information on TPP's plans and proprietary products. There is a clear argument that this information, not being otherwise accessible, would be likely to create an imbalance for TPP as competitors would have access to information that could aid them in competing with TPP in future bids. The DHSC has stated that re-procurement will be happening so there is a real risk of a commercial impact to TPP if the information were to be disclosed.
41. As such the Commissioner accepts that the section 43 exemption has been correctly engaged in relation to the information in the briefing document and read-out.

### **Public interest test**

42. The DHSC recognises there is a 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.
43. Against this the DHSC argues it is in the public interest that Government, when inviting companies to work with it and participate in procurement exercises, operates in a way that at every opportunity minimises the damage to supplier's reputation or competitive position. This is necessary to maintain the integrity of the Government and how it



engages in commercial activities and it is important in ensuring Government is able to secure high quality and good value offers.

44. The DHSC has reiterated TPP has many current contracts with NHS bodies for the provision of IT services in the areas covered in the documents and many of these contracts will be subject to pre-procurement in the near future. Disclosing information that might disadvantage any supplier and impede future procurement exercises would not be in the public interest.
45. The DHSC further argues disclosure could prevent TPP and other suppliers from participating in candid consultations with DHSC in future. This would have negative consequences for the scope for improvement of healthcare services. This would not be in the public interest.
46. In balancing the public interest arguments, the Commissioner accepts that disclosure would, to some extent, give an insight into the issues discussed at high level meetings about the use of technology in healthcare. It would provide more transparency about public service delivery.
47. The Commissioner acknowledges that there is a public interest in allowing public authorities to withhold information which, if disclosed, would affect their, or someone's, ability to negotiate or compete in a commercial environment.
48. The Commissioner has considered the public interest arguments and accepts that disclosure would help to increase openness and transparency. However, given the nature of the commercial harm that would occur should the information be disclosed, the Commissioner finds that the balance of the public interest favours maintaining the exemption at section 43(2) of FOIA.
49. The Commissioner's decision is, therefore, that the DHSC was entitled to rely on section 43 of FOIA to withhold the information in the background briefing note and the read-out.



## Right of appeal

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50. 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)

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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