Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**17 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 contract signed by the government with Pfizer to supply COVID-19 vaccinations. UKHSA provided links to redacted copies of contracts between the two parties and relied on FOIA sections 43(2) – Commercial interests, and section 40(2) – Personal information, to withhold the redacted information.

2. The Commissioner's decision is that UKHSA correctly applied section 43(2) and the public interest favours maintaining the exemption. However, he finds that section 40(2) is partially upheld.

3. The Commissioner requires UKHSA to take the following steps to ensure compliance with the legislation.

    - Disclose the redacted personal data set out in the confidential annex.

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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 January 2022 the complainant wrote to the Department for Business, Energy and Industrial Strategy (BEIS)[1] and requested information in the following terms:

> "Please provide a copy of the contract signed with Pfizer to supply Covid-19 Vaccinations."."

6. BEIS responded on 24 January 2022. It provided links to contract notices on the gov.uk website. The contracts there are redacted in reliance of FOIA section 43(2) – commercial interests.

7. Following an internal review BEIS wrote to the complainant on 18 February 2022 upholding its initial response and providing specific links to the contracts rather than the contract notices (which contained the contracts).

Scope of the case

8. The complainant contacted the Commissioner on 28 February 2022 to complain about the way their request for information had been handled.

9. Following the Commissioner's request for submissions on the complaint UKHSA also sought to rely on FOIA section 40(2) regarding some limited redactions of names and contact details in the requested material which it had not originally applied to the request. The Commissioner has therefore also considered this application although it is noted that no arguments were provided by UKHSA on section 40(2) other than to indicate its application on the withheld information provided to the Commissioner.

10. The Commissioner considers the scope of his investigation to be to determine whether the requested information has been appropriately redacted in reliance of FOIA sections 43(2) and 40(2).

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

Reasons for decision

Section 43 – Commercial information

11. Section 43 FOIA states that:

> "(2) 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).

12. 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.

13. UKHSA advised the Commissioner that it considered both UKHSA and Pfizer Ltd would be commercially prejudiced if the redacted information in the contracts is disclosed.

14. UKHSA explained that the information is recent and the contracts are still being delivered. The information is not available elsewhere in the public domain. It stated that disclosure of the redacted information would harm both parties' ability to negotiate and compete in the commercial environment and:

> "…so impede the parties from generating income or providing value for money."

15. UKHSA added that the result of disclosure would be both parties having a weakened negotiating position on other contracts and procurements which would prevent UKHSA from obtaining the best value for money for the public purse and cause Pfizer to be competitively disadvantaged.

16. Furthermore UKHSA advised that it is in the process of negotiating with COVID-19 vaccine suppliers for future supply of the vaccines to support future vaccination campaigns. Disclosure of the withheld information now would "severely prejudice UKHSA's ability to negotiate with the suppliers. In addition:

    "…the release of information agreed between parties as confidential would cause unwarranted reputational damage to UKHSA as future suppliers would not be confident that their commercially confidential information will be kept confidential. The loss of reputation may in turn damage UKHSA's commercial interests through loss of trade. Any such damage would hamper UKHSA in its function to provide COVID-19 vaccines, or other products or services,"

17. The redacted information includes information such as price, incoterms, indemnities, liabilities and other terms and conditions. Having seen the withheld information the Commissioner accepts that it is commercially sensitive. He notes that the information was redacted from publication (ie prior to this request being submitted) under Sections 50(6)(b) and (c), and 108(3)(a), (b) and (c) of the Public Procurement Regulations 2015[2] following discussion between UKHSA and Pfizer.

18. With regard to the first criterion of the three limb test set out in paragraph 12, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.

19. The Commissioner is satisfied that the second criterion of the test has been met as he accepts the explanation provided by UKHSA, in consultation with Pfizer, demonstrates that disclosure of the redacted information has the potential to prejudice the commercial interests of both parties.

20. In the circumstances of this case the Commissioner agrees with UKHSA's determination that the resultant prejudice from disclosure of the redacted content, which remains current, is more probable than not.

[2] https://www.legislation.gov.uk/uksi/2015/102/contents/made

He accepts that the higher threshold of 'would' cause commercial prejudice has been met.

21. The Commissioner therefore considers that FOIA section 43(2) is engaged in regard to the redacted information.

Public interest test

22. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Public interest in favour of disclosing the information

23. UKHSA recognises the public interest in the disclosure of the cost of COVID-19 vaccines which would provide greater transparency and accountability in government decision making.

24. The complainant explained their view:

"If public money is spent, I demand full transparency. I want to know what it is I bought with my money and what I and my children were signed up to- I don't think that is an unreasonable request…

If we let these companies do what they like behind closed doors with government officials, with little to no transparency then we make a perfect environment for corruption."

25. The complainant advised the Commissioner that they do not consider the redacted information to be commercially sensitive but politically sensitive. They went on to explain their view that the vaccine companies have not disclosed exactly what is contained in the vaccines nor have those companies adequately explained to the public how they "supposedly work".

Public interest in favour of maintaining the exemption

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

27. It considers that it is important for vaccine suppliers to be able to share commercially sensitive information with the government with the confidence that it will not enter the public domain and damage their wider commercial interests and opportunities. It also pointed out that disclosure:

"would be contrary to the legitimate expectations of confidentiality provided for under the Act."

28. Furthermore UKHSA advised:

"Were this information to be released, it would not only prejudice the commercial interests of suppliers, who continue to negotiate vaccine deals with other countries, and potentially with the UK in future, but would also significantly damage the ability of the Government to secure further deals in the future, as the disclosure of this information would be contrary to the company's legitimate expectation of confidentiality, casting doubt on the Government as a trustworthy partner in maintaining such confidentiality in the future."

The Commissioner's view

29. The Commissioner understands the complainant's point that a significant amount of public money was spent by the government in purchasing COVID-19 vaccinations for the population. He understands their wish for transparency particularly as there has been debate in the UK and elsewhere regarding the public resources used in the production and purchase of vaccines with contracts agreed during the pandemic.

30. The Commissioner is aware of numerous committee and National Audit Office ("NAO") reports[3] which are available online examining the government's actions in securing vaccines and other elements of its response to the pandemic, including a Covid-19 cost tracker[4] and an NAO report on vaccines from February 2022[5]. He therefore considers that the public has the opportunity to be informed on the government's actions. The Commissioner also notes that the redacted contracts which are already in the public domain provide, at least to some extent, openness and transparency.

31. The Commissioner must disagree with the complainant regarding their view of the redacted information, as with the benefit of having seen the information he considers that it is commercially sensitive. He would also

[3] https://committees.parliament.uk/work/904/covid19-planning-for-a-vaccine-part-1-preparations-for-potential-covid19-vaccines/

https://www.nao.org.uk/reports/investigation-into-preparations-for-potential-covid-19-vaccines/

[4] https://www.nao.org.uk/overviews/covid-19-cost-tracker/

[5] https://www.nao.org.uk/reports/the-roll-out-of-the-covid-19-vaccine-in-england/

comment that withholding information in the circumstances of this case does not equate to creating an environment for corruption.

32. The Commissioner considers that there is a significant public interest in maintaining current and future supplies of the vaccines and saving lives, particularly of the most vulnerable members of society requiring on-going booster vaccines. In this regard he recognises the importance of trust between the government and suppliers to ensure continuity of supply.

33. Consequently, the Commissioner considers that the particular circumstances of this case are such that there is a compelling the public interest in favour of maintaining the exemption and not compromising the UK government's commercial interests in the respects specified or prejudicing the commercial interests of private sector suppliers.

Section 40 – Personal information

34. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

35. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles') as set out in Article 5 of the UK General Data Protection Regulation ('GDPR').

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

37. In the circumstances of this case, having considered the withheld information which comprises names and contact details, the Commissioner is satisfied that the information that has been withheld is personal data.

38. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA.

39. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

40. In the case of an FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

41. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

42. The Commissioner considers that in this case, the complainant is pursuing a legitimate interest as the names of signatories to the contracts are those ultimately responsible for the negotiation and agreement of those contracts.

43. The Commissioner has considered whether disclosure of the personal information is necessary to meet the legitimate interest in disclosure of information concerning the procurement of the vaccines. This test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question. The Commissioner is not aware of the redacted information being otherwise in the public domain in this context, therefore disclosure would be necessary to achieve the legitimate interest in question. He considers that it is not necessary to disclose the signatures and contact details as to do so would not be the least intrusive way of meeting the legitimate interest identified. However, he considers that it is necessary to disclose the names in order to meet the legitimate interest and provide sufficient transparency and accountability in the circumstances of this case.

44. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms in respect of the names. In doing so, the Commissioner considers the impact of disclosure. For example, if the data subjects would not reasonably expect their information would be disclosed to the public under the FOIA in response to a request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override the legitimate interests in disclosure. The Commissioner's guidance[6] explains that where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that

[6] https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf

their public actions will be subject to greater scrutiny than would be the case in respect of their private lives.

45. In this case the Commissioner considers that the signatories to the contracts could not reasonably expect their names to be withheld. The individuals concerned hold very senior positions, with their names being used in their professional capacities as signatories to the contracts. The individuals' names and roles are already in the public domain online albeit not in this specific capacity. The Commissioner considers it unlikely that disclosure in these circumstances would result in harm or distress. The Commissioner considers that the names of the signatories provide confirmation of the importance with which government addressed the procurement as well as the more general public interest in transparency and accountability.

46. Consequently, the Commissioner's decision in the specific circumstances of this case is that where individuals are at Senior Civil Servant grade or higher the legitimate interest in disclosure overrides the rights and freedoms of the data subjects as these individuals would not have a reasonable expectation that their names would not be disclosed under an FOI request. In regard to representatives of other organisations, private sector employees, the Commissioner's guidance[7] advises that the more senior the representative of such organisations the more likely it is that it is reasonable to release their names.

47. Based on the above, the Commissioner has determined that there is a sufficient legitimate interest which outweighs the data subjects fundamental rights and freedoms in respect of their names. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of this information would be lawful.

48. The Commissioner therefore finds that the section 40(2) exemption is not engaged in regard to the names set out in the confidential annex. He finds that the exemption is engaged with regard to contact details and signatures.

[7] https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

Right of appeal

49. 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

50. 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.

51. 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
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