# Freedom of Information Act 2000 (Section 50)

## Decision Notice

### Date: 10 January 2011

**Public Authority:** Department of Health
**Address:** Richmond House
79 Whitehall
London
SW1A 2NS


## Summary

The complainant requested several pieces of information surrounding the cost of the swine flu vaccination programme. Although the DoH provided some information, it withheld details of the purchase price of the swine flu vaccine under sections 41(1)(b) and 43(2). During the Commissioner's investigation the DoH also sought to rely upon section 44(1)(b), on the basis that disclosure of this information was prohibited by the Public Contract Regulations 2006. After investigating the case the Commissioner decided that some of the withheld information was exempt under section 43(2). However, he also found that some of the information should be disclosed as the DoH had incorrectly applied sections 41(1)(b), 43(2) and 44(1)(b). In addition to this, the Commissioner also decided that the DoH had not met with the requirements of sections 1, 10 and 17.


## The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

2. The vaccine in question in this case is a pandemic specific influenza vaccine ("PSV"). The Department of Health ("DoH") sought tenders from vaccine manufacturers in October 2005 for the future provision of a PSV.

The contracts to supply this vaccine to the UK in a pandemic were awarded in 2007 to two companies, GlaxoSmithKline ("GSK") and Baxter Healthcare Ltd ("Baxter").

3. The contracts took the form of Advanced Purchase Agreements. These secured the production and purchase of agreed amounts of vaccine, at agreed prices, were an influenza pandemic to be declared.

## The Request

4. The complainant wrote to the DoH on 2 February 2010 and made the following request:

> *"Please disclose under the Freedom of Information Act the total spend by the Department of Health on the Swine Flu Vaccination.*
>
> *Please provide an overall total, and a breakdown of the costs involved for all the different elements for example its development, purchase, distribution and promotion. Please provide as much information as possible."*

5. The DoH responded in an email dated 25 February 2010. It confirmed that it held relevant information, and provided details of the costs of development, distribution and promotion of the vaccine. However, it withheld details of the purchase costs under section 43(2).

6. The complainant contacted the DoH by email on 25 February 2010 and requested an internal review.

7. The DoH carried out an internal review and responded on 17 March 2010. It upheld its use of section 43(2) to withhold details of the purchase costs of the vaccine, and informed the complainant that it believed that this information was also exempt under section 41.

## The Investigation

### Scope of the case

8. The complainant contacted the Commissioner on 22 March 2010 to complain about the way her request for information had been handled.

9. The Commissioner wrote to the complainant on 1 September 2010 and informed her that he intended to focus his investigation on the DoH's refusal to provide details of the purchase costs of the swine flu vaccine. The complainant responded on the same day and confirmed that she

wanted the Commissioner to focus on whether it is in the public interest to withhold the purchase costs of the swine flu vaccine.

10. As noted at paragraph 13 below, during the investigation of the case the DoH informed the Commissioner that it was also relying upon section 44(1)(b) to withhold the information in question.

11. Therefore the scope of this case has been to consider the DoH's use of sections 41, 43(2) and 44(1)(b) to withhold details of the purchase costs of the swine flu vaccine. The Commissioner has also considered whether the DoH complied with the requirements of sections 10 and 17.

**Chronology**

12. The Commissioner wrote to the DoH on 1 September 2010 and requested a copy of the withheld information, together with its further submissions to support its use of sections 41 and 43. He asked for a response by no later than 30 September 2010.

13. The DoH contacted the Commissioner on 23 September 2010 and asked for an extension to the deadline to respond. A new deadline of 15 October 2010 was agreed.

14. The DoH wrote to the Commissioner on 5 October 2010 and provided a copy of the withheld information, together with submissions to support its use of sections 41 and 43. In addition to this, it informed him that it believed that the information in question was also exempt under section 44(1)(b).

15. The Commissioner contacted the DoH on 26 October 2010 and asked for some further details about the withheld information. He also asked some further questions in relation to its use of sections 41, 43 and 44.

16. The DoH responded in an email dated 8 November 2010 and provided the Commissioner with the information he had requested.

17. The Commissioner contacted the DoH again in an email dated 10 November 2010 and requested further information in relation to the withheld information.

18. The DoH provided this additional information in an email dated 19 November 2010.

## Analysis

19. The DoH has relied upon sections 41(1), 43(2) and 44(1)(b) to withhold the information in question. The Commissioner has first considered the application of section 43(2).

## Exemptions

### Section 43

20. Section 43(2) states that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.

21. The full text of section 43 can be found in the Legal Annex at the end of this Notice.

22. In this case the DoH has argued that the disclosure of the withheld information would prejudice the commercial interests of the vaccine manufacturers, GSK and Baxter; its own commercial interests; and those of NHS bodies.

23. The Commissioner has first considered whether the withheld information, and the prejudicial effects described by the DoH, would relate to commercial interests.

24. The withheld information in this case consists of two types:

- The purchase costs that had been paid by the DoH (in relation to each company) at the time of the request on 2 February 2010, i.e. how much money the DoH had spent on the doses of the swine flu vaccine it had purchased by this date. The Commissioner has referred to this as the "**high level pricing information**".

- The more detailed figures, showing the agreed pricing arrangements for the production and supply of the individual vaccines from the two companies concerned. The Commissioner has referred to this as the "**pricing breakdown information**".

25. Given the nature of the withheld information, the Commissioner is satisfied that it relates to commercial interests. Furthermore, after considering the DoH's arguments the Commissioner is satisfied that the potential prejudicial effects would relate to the commercial interests of the vaccine manufacturers, the DoH and NHS bodies. Therefore he is

satisfied that the withheld information falls within the scope of the exemption.

26. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of the DoH, NHS bodies or the vaccine manufacturers.

27. After considering the DoH's submissions to him the Commissioner notes that it has argued that disclosure of the withheld information:

- would prejudice the commercial interests of the vaccine manufacturers,
- would prejudice the commercial interests of the DoH, and
- would prejudice the commercial interests of NHS bodies.

28. The Commissioner has first considered whether the disclosure of the withheld information would prejudice the commercial interests of the vaccine manufacturers.

**Prejudice to the commercial interests of the vaccine manufacturers**

29. In reaching a decision on the question of prejudice the Commissioner has been mindful of the views of the Tribunal in *Hogan v ICO and Oxford City Council* [EA/2005/0026 & EA/20005/0030] which noted that,

> *"The […] prejudice test is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge."*[1]

The Commissioner has interpreted this to mean that in cases where a public authority has argued that disclosure would cause prejudice, whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.

30. In cases where a public authority argues that disclosure of the requested information would or would be likely to prejudice a third party the Commissioner is guided by the views of the Tribunal in *Derry City Council v ICO* [EA/2006/0014]. In this case the Council argued that the commercial interests of a third party, Ryanair, would be likely to be prejudiced if the requested information were disclosed. The Council did not ask Ryanair for its views as to whether it believed its commercial

[1] EA/2005/0026 and EA/20005/0030, para 36.

interests would be likely to be prejudiced nor did Ryanair present any evidence to the Tribunal. The arguments put forward by the Council to the Commissioner as well as to the Tribunal were based upon the Council's thoughts on the point and not on representations made by Ryanair. In the absence of any evidence from Ryanair the Tribunal stated that it was unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.[2]

31. The Commissioner acknowledges that the approach taken by the Tribunal may not be appropriate in every case and therefore public authorities may sometimes have to formulate their arguments based on their prior knowledge of a third party's concerns rather than directly contacting a third party. However the Commissioner still expects a public authority to provide evidence that these arguments genuinely reflect the concerns of the third party involved rather than merely speculate about the prejudice that may be caused to the third party.

32. After considering the information provided to him during the course of his investigation, the Commissioner is satisfied that the DoH has consulted with GSK and Baxter, and that the arguments it has submitted in relation to the potential prejudice reflect the concerns of those companies.

33. The DoH has argued that the disclosure of the withheld information would prejudice the vaccine manufacturers' position in other tenders for pandemic specific influenza vaccine programmes, as it would reveal information about their pricing strategy.

34. Although the DoH has provided separate arguments in relation to the commercial interests of GSK and Baxter, given the close similarities of those arguments the Commissioner believes that it is appropriate, to consider them as one.

35. The DoH has pointed out that the market for pandemic specific influenza vaccines is a competitive one, and that at the time of the request there were only four companies in Europe who produced an approved H1N1 pandemic influenza vaccine. Although the catalogue/list prices of vaccines are in the public domain, the DoH has explained that the prices are not the same across the global market. Vaccine manufacturers may offer lower prices in lower income countries, and higher prices in higher income countries. This 'tiered pricing' is seen as *"a way to ensure equitable access to vaccines for the poor, and a profit incentive for*

[2] EA/2006/0014, para 24.

*vaccine producers through sales in higher income countries."*[3] The UK is one such higher income country.

36. Further to this, the DoH added that,

> *"…UK pharmaceutical prices have a special status in the global market, as other countries use published UK prices as reference points. The Office of Fair Trading has reported that "other countries set many of their prices with reference to those in the UK…" Furthermore, UK prices are used in specific price comparisons (that is, as part of negotiations), even where they are not used in formal international reference price schemes."*

37. Therefore, the DoH has argued, disclosure of the withheld information would give GSK's and Baxter's competitors a significant advantage in judging, for example, how high or low they would pitch their prices in future tenders for the UK, or for other countries of a similar income. This would enable their competitors to adjust their prices accordingly.

38. The Commissioner has considered these arguments in detail.

39. The Commissioner notes that the DoH's comments that the market for the production of pandemic specific influenza vaccines is highly competitive, and that at the time of the request there were only four competitors in Europe for the production of this vaccine. He also notes that the withheld information in this case relates to two out of those four companies. Given the limited amount of competition in this highly competitive market, and the tiered pricing approach referred to by the DoH, he believes that the disclosure of information that revealed relevant details of the pricing strategy of any of the vaccine manufacturing companies would give a significant commercial advantage to their competitors, by allowing them to predict their behaviour in future tenders for a pandemic specific influenza vaccine in countries with a similar income to the UK.

40. The Commissioner notes that this is the central point of all of the DoH's arguments as to how the disclosure of this information would prejudice the commercial interests of GSK and Baxter.

41. Bearing this in mind, the Commissioner has considered carefully the withheld information in this case.

42. As noted at paragraph 24 above, the Commissioner has grouped the withheld information into two types,

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[3] http://www.who.int/immunization_financing/options/en/briefcase_vacproduction.pdf

- the high level pricing information, and
- the pricing breakdown information.

The Commissioner has considered the application of these arguments to each of these in turn.

High level pricing information

43. In relation to the high level pricing information, the Commissioner notes that this shows how much money the DoH had spent on the doses of vaccine it had purchased at the time of the request on 2 February 2010. Although the Commissioner accepts that this shows how much money the DoH had paid to both GSK and Baxter at the time of the request, he notes that it does not contain any other detail.

44. In order to reach a view on the sensitivity of this information, during the course of the investigation the Commissioner asked the DoH the following questions:

- Has the DoH put details of the amount of doses of this vaccine that it has purchased into the public domain?
- If so, would it be possible to use this published information, together with the high level pricing information withheld on this case, to deduce the purchase cost per dose from both GSK and Baxter? If so, how could this be done?
- Does the high level pricing information withheld on this case represent the overall purchase costs incurred by the DoH for this vaccine, or did the DoH incur further purchase costs following the date of this request?

45. In response to these questions the DoH confirmed that:

- The total number of doses purchased has not been disclosed publically.
- Therefore, it would not be possible to deduce the purchase cost per dose from either GSK and Baxter from the high level pricing information.
- The high level pricing information only covered payments up to the time of the request, and that the DoH had incurred further purchase costs following this date.

46. Bearing these points in mind, whilst the Commissioner accepts that the high level pricing information does show the overall purchase cost per company for the supply of this vaccine, he does not believe that it shows

the significant detail that the DoH has argued would be revealed, were this information to be disclosed. As such, the Commissioner is not persuaded that the disclosure of this information would reveal any significant detail of the pricing strategies of GSK and Baxter. As noted at paragraphs 39 and 40 above, the Commissioner believes that this is the central point of the DoH's arguments as to how the disclosure of this information would prejudice the commercial interests of GSK and Baxter. Therefore, and bearing in mind the test of actual prejudice as outlined in paragraph 29 above, the Commissioner does not believe that the disclosure of the high level pricing information would prejudice the commercial interests of the vaccine manufacturers.

47. The Commissioner has gone on to consider whether the disclosure of the high level pricing information would prejudice the commercial interests of the DoH and NHS bodies at paragraph 70 below.

Pricing breakdown information

48. In relation to the pricing breakdown, the Commissioner notes that it gives significant details of the agreed pricing arrangements for the production and supply of the individual vaccines from GSK and Baxter. The Commissioner is satisfied that it shows the discounted prices (including the unit costs) offered by GSK and Baxter to the DoH in relation to the supply of this vaccine. Therefore, he is satisfied that the pricing breakdown does reveal significant details of the pricing strategies of GSK and Baxter in relation to the provision of a pandemic specific influenza vaccine to the UK. The Commissioner has next considered whether the information was still relevant and sensitive at the time of the request.

49. The DoH has argued that the withheld information was highly commercially sensitive at the time of the request. During the course of the investigation, the Commissioner noted that the contracts to provide the vaccine had both been awarded in 2007, and that therefore the pricing information contained therein was over two years old at the time of the request. Therefore, he asked the DoH for further submissions to support its position that this information was still highly commercially sensitive. In particular he asked whether it was up to date, and whether it was still of use to GSK's and Baxter's competitors at the time of the request.

50. The DoH provided these further submissions in an email dated 19 November 2010. It confirmed that both GSK and Baxter believed that the pricing information was still sensitive and up to date at the time of the request. It quoted comments from both companies, including the following,

> *"The pricing information from the last UK tender will continue to provide an indication of* [the vaccine manufacturer's] *pricing strategy, and so will remain of use to* [the vaccine manufacturer's] *competitors, unless and until a new tender is awarded in the UK. The pricing information would, for example, provide a competitor with valuable insight into* [the vaccine manufacturer's] *strategy on both the actual price and the exchange rates applied.*
>
> *Where, as is the case for pandemic flu vaccine, there is little or no commercial market for the product but only tender business with the central purchasing authority, the latest tender price remains the up to date price until the next tender is awarded."*

51. Although this was a comment from one of the companies concerned, having considered the DoH's submissions the Commissioner is satisfied that both believe that the pricing breakdown information would be of significant use to their competitors by giving them a valuable insight into their pricing strategy, and allowing them to predict their behaviour in future bids. The Commissioner notes that the submissions provided by the DoH reflect the concerns of both GSK and Baxter, and that the concerns of both of these companies closely mirror each other. Bearing these comments in mind, the Commissioner is satisfied that the pricing breakdown information was still relevant at the time of the request.

52. The DoH has also provided specific arguments in relation to one of these companies. The Commissioner is unable to details these in this Notice, and has instead referred to them in the Confidential Annex attached to the end of this Notice. However, he has noted that these arguments provide evidence as to how the disclosure of relevant information relating to its pricing strategy, at the time of the request, would have been particularly harmful to that company's commercial interests.

53. Taking into account the amount of insight that would be given into the pricing strategies of GSK and Baxter, the highly competitive nature of the market in the supply of this vaccine, and the small number of vaccine manufacturers, the Commissioner is satisfied that the disclosure of the withheld pricing breakdown information at the time of the request would have prejudiced the commercial interests of GSK and Baxter.

54. The Commissioner has gone on to consider whether the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.

**Public interest arguments in favour of disclosing the requested information**

55. The complainant has stated that the disclosure of this information is important for the sake of transparency, and in order to hold the Government responsible for the spending of public money. She has also argued that there is an overwhelming public interest in disclosure so that the public can adequately scrutinise the decision making processes of the Government. She has also argued that the public have a right to know how much money the Government has spent to try and protect public health and safety, *"especially since it now seems the vaccine will not be necessary in the quantities initially ordered."*

56. The Commissioner believes that there is a strong public interest in increasing the transparency of the actions of public authorities. He also believes that there is a strong public interest in encouraging accountability in the spending of public money, especially when this spending comes from the budget of the DoH, and the potential knock on effect this will have in other areas of health spending.

57. In addition to this, and as referred to by the complainant, the Commissioner notes that there has been substantial public debate about the procurement of the swine flu vaccine by the DoH. He believes that the disclosure of this information would help inform that debate.

**Public interest arguments in favour of maintaining the exemption**

58. In considering the public interest arguments in favour of maintaining the exemption the Commissioner has been mindful of his conclusions that disclosure of the withheld pricing breakdown information would have caused actual prejudice to the commercial interests of GSK and Baxter. He believes that there is a strong public interest in avoiding unwarranted prejudice to the commercial interests of third parties (GSK and Baxter). As he has found that disclosure of the withheld information in this case would cause actual prejudice, he finds the public interest in avoiding this prejudice (by maintaining the exemption) particularly weighty.

59. In particular the Commissioner has again noted the limited nature of competition in the market for the production of pandemic specific influenza vaccines. He does not believe that it is in the public interest to give the other competitors in that market an unfair advantage over the vaccine manufacturers in this case.

**Balance of the public interest arguments**

60. In balancing the public interest arguments in this case the Commissioner has been particularly mindful that disclosure of the withheld information would cause actual prejudice to the commercial interests of GSK and Baxter.

61. Whilst the Commissioner believes that the arguments in favour of accountability and transparency are particularly strong in situations involving the spending of large amounts of public money, this has to be weighed against the public interest in avoiding any unwarranted prejudice to the commercial interests of private companies. In this case the Commissioner believes that the withheld information would give a valuable insight into the pricing strategies of these two companies. Given the highly competitive nature of this market, and the limited number of vaccine manufacturers, the Commissioner believes that the disclosure of the withheld information at the time of the request would have given a significant advantage to GSK's and Baxter's competitors. He finds the argument that it is in the public interest to avoid such an unwarranted prejudice particularly weighty.

62. The DoH has argued that a lot of information has already been put into the public domain in order to inform public debate about its procurement of this vaccine, and that this has promoted accountability. It has also argued that it is itself accountable under the procurement process, as set out in the Public Contracts Regulations 2006.

63. Therefore, the DoH has argued that the public interest in increasing the accountability in the spending of public money has already been somewhat satisfied.

64. Although the Commissioner has acknowledged that there is a public interest in helping inform the debate about the procurement of the vaccine, he also believes that the effect that the disclosure of the withheld information would have on this public interest factor would be limited.

65. The complainant has argued that it is in the public interest to scrutinise the decision making process of the Government. In this case the Commissioner believes that the decision making process in question would be the decision to award the contracts for the provision of a pandemic specific influenza vaccine to GSK and Baxter. The question of whether the DoH should have decided to secure the provision of such a vaccine would not – in the Commissioner's opinion – be answered by the provision of the withheld information in this case. Instead, he believes that the relevant question is whether the DoH obtained value for money. However, although the catalogue/list prices of this vaccine are in the

public domain, the discounted prices offered by any competing bids are not. Without this additional information the Commissioner believes that even if the withheld information were to be disclosed, it would be difficult to establish whether the decision to award the contracts to GSK and Baxter had obtained value for money.

66. Therefore, whilst the Commissioner believes that the disclosure of the withheld pricing breakdown information would increase transparency and help inform public debate, that beneficial effect would be somewhat limited.

67. After considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. Therefore the withheld pricing breakdown information should not be disclosed.

**Prejudice to the commercial interests of the DoH and NHS bodies**

68. As the Commissioner has decided that the pricing breakdown information should be withheld on the basis that it would prejudice the commercial interests of the vaccine manufacturers he has not gone on to consider whether the disclosure of this information would cause actual prejudice to the DoH's commercial interests, or those of NHS bodies.

69. The Commissioner has however gone on to consider whether the disclosure of the high level pricing information would prejudice the commercial interests of the DoH and NHS bodies.

70. In relation to the potential prejudice to its own commercial interests the DoH has argued that actual prejudice would be caused, *"by disclosing either of the two suppliers pricing terms."*

71. This prejudice would come about because of the potential reaction of GSK and Baxter to the disclosure of details of their pricing arrangements in relation to the provision of this vaccine. In particular, the DoH stated that,

> *"GSK and Baxter have advised* [the DoH] *that disclosure…would cause changes in their pricing policy for the UK…so that* [they] *may put in higher offer prices in any future procurement in the UK."*

72. It has explained that given the commercial sensitivity of the details of the pricing, and the potential for the disclosure of the withheld information to reveal their pricing strategies to their competitors, these companies may – in future tenders – offer a less discounted price, in order to protect their negotiating position for tenders in other countries.

73. In addition to this, it has also argued that the disclosure of information that would allow GSK's and Baxter's competitors to predict their behaviour in future vaccine tenders will weaken competition, by leading to offers from competitors which reflect a more accurate prediction of GSK and Baxter's pricing behaviour. This would lead to less competitive bids.

74. This would prejudice the DoH's ability to obtain discounted prices for the procurement of this vaccine, and other pharmaceutical products, in the future. The DoH stated that, *"the scale of the loss of potential procurement savings to the UK taxpayer over the lifetime of any future* [pandemic specific influenza vaccine] *contract as many millions of pounds."* This would cause actual prejudice to the DoH's commercial interests.

75. The DoH has argued that if GSK and Baxter were to react in this way, this would also cause actual prejudice to the commercial interests of NHS bodies – including Primary Care Trusts, Acute Care Trusts and Foundation Trusts. It has stated,

> *"NHS bodies also purchase vaccines, medicines and pharmaceuticals through their own procurement process which is governed by EU law. The impact of non-agreed disclosure [of the] PSV price in a* [DoH] *contract would extend to companies' behaviour in pharmaceutical procurement conducted by NHS bodies under comparable arrangements of contractual confidentiality. In line with our consideration of price discounting behaviour as it would affect* [the DoH], *we consider that the commercial interests of NHS bodies would be prejudiced by disclosure of the requested information."*

76. After considering these arguments in detail the Commissioner believes that the key point to all of them is that if highly commercially sensitive information, revealing relevant details of the pricing strategy of either GSK or Baxter were to be disclosed, this would result in a change in that company's bidding behaviour in future. This change in behaviour would, in turn, lead to the adverse effects set out above.

77. However, and as noted at paragraph 46 above, the Commissioner does not believe that the disclosure of the high level pricing information shows the significant detail that the DoH has argued would be revealed, were this information to be disclosed. As such, the Commissioner is not persuaded that the disclosure of this information would reveal the significant detail of the pricing strategies of GSK and Baxter. In particular, he notes his previous conclusion that the disclosure of this information would not cause the actual prejudice to the commercial

interests of the vaccine manufacturers that has been argued by the DoH.

78. The Commissioner notes that the contract to supply a PSV vaccine to the UK was a high value contract, and of significant commercial value to GSK and Baxter. Given this, and his conclusions that the disclosure of this information would not cause actual prejudice to the commercial interests of the vaccine manufacturers, the Commissioner is not persuaded that the disclosure of the high level pricing information would lead to the change in GSK's or Baxter's future bidding behaviour.

79. Therefore, and bearing in mind the test of actual prejudice as outlined in paragraph 29 above, the Commissioner does not believe that the disclosure of the high level pricing information would prejudice the commercial interests of the DoH or NHS bodies.

80. Therefore, the Commissioner does not believe that the high level pricing information is exempt under section 43(2).

81. The Commissioner has gone on to consider the application of section 41(1) to this information.

**Section 41**

82. Section 41(1) provides that information is exempt from disclosure if:

(a) it was obtained by the public authority from any other person; and

(b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The full text of section 41 can be found in the Legal Annex at the end of this Notice.

83. The Commissioner's has adopted the approach to confidentiality taken by the court in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. In that case it was decided that disclosure would constitute an actionable breach of confidence if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- disclosure would be an unauthorised use of the information and to the detriment of the confider.

If these parts of the test are satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

84. The Commissioner has first considered whether the information was obtained from a third party or parties.

Was the information obtained from a third party or parties?

85. The information in question is the high level pricing information. This shows the sum of money that the DoH had spent on the purchasing of the swine flu vaccine at the time of the request on 2 February 2010. The Commissioner believes that this information does not show any details of the pricing arrangements provided to the DoH by GSK or Baxter during the tender process.

86. Bearing this in mind the Commissioner does not believe that this information, in itself, was obtained from a third party. Consequently this exemption is not engaged in relation to this information.

87. Therefore, the Commissioner does not believe that the high level pricing information is exempt under section 41.

88. The Commissioner has gone on to consider the application of section 44 to this information.

**Section 44**

89. Section 44(1) provides that information is exempt if its disclosure (otherwise than under the Act) by the public authority holding it:

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

The full text of section 44 can be found in the Legal Annex at the end of this Notice.

90. During the course of the investigation the DoH sought to rely upon section 44(1)(b) to withhold the requested information, because disclosure would be incompatible with the Public Contract Regulations 2006, which implement EU Directive 2004/18/EC. As the issue relates to a possible contravention of another statutory provision, the Commissioner has exercised his discretion and has considered the late claim of this exemption.

91. Although the DoH has not specified which part of the Public Contract Regulations 2006 it believes prohibits disclosure, it has referred to regulation 43.

92. Regulation 43 of the Public Contract Regulations 2006 provides that,

    (1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

    (2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

93. The Commissioner's view is that in order for information to fall within regulation 43 it must be:

    - forwarded to the public authority by the tendering party, and
    - reasonably designated by the tendering party as being confidential.

94. The Commissioner again notes that the information in question is high level pricing information. This shows the sum of money that the DoH had spent on the purchasing of the swine flu vaccine at the time of the request on 2 February 2010. The Commissioner believes that this information does not show any details of the pricing arrangements provided to the DoH by GSK or Baxter during the tender process

95. Bearing this in mind, the Commissioner does not believe that the high level pricing information contains information which has been fowarded to the DoH by GSK or Baxter. Therefore he is not persuaded that the high level pricing information comes within regulation 43 of the Public Contract Regulations 2006. Consequently, he does not believe that this information is exempt from disclosure under section 44 of the Act.

**Procedural Requirements**

96. Section 1(1) states that:

> *"Any person making a request for information to a public authority is entitled –*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him."*

97. Section 10(1) states that:

> *"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

98. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under the exemptions cited by the DoH, he believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The DoH's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the DoH also breached section 10(1).

99. The Commissioner has also considered whether the DoH has complied with its obligations under section 17(1).

100. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice which,

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

101. During the course of the investigation the DoH sought to rely upon section 44(1)(b) to withhold the requested information. However, it did not cite this exemption in the refusal notice or the internal review in relation to this request. For this reason the Commissioner believes that the DoH did not comply with the requirements of section 17(1).

102. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

## The Decision

103. The Commissioner's decision is that the DoH did not deal with the request in accordance with the requirements of the Act in that it incorrectly withheld the high level pricing information under sections 41(1)(b), 43(2) and 44(1)(b).

104. However, the Commissioner has also decided that the DoH did correctly rely upon section 43(2) in order to withhold the pricing breakdown information.

105. In addition to this, the Commissioner also decided that the DoH failed to meet the requirements of sections 10 and 17.

## Steps Required

106. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:

- The DoH should disclose the high level pricing information.

107. The DoH must take the steps required by this Notice within 35 calendar days of the date of this Notice.

## Failure to comply

108. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

109. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

110. 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.

111. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 10th day of January 2011**

**Signed ……**

**Steve Wood**
**Head of Policy Delivery**

**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**

## Legal Annex

### Section 1

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

**Section 10**

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.

(5) Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section –

the date of receipt" means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

**Section 17**

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under section (1), (3) or (5) must –

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

**Section 41**

(1) Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

**Section 43**

(1) Information is exempt information if it constitutes a trade secret.

(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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

**Section 44**

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).