

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2021

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested the Department of Health and Social Care (DHSC) to disclose the number and names of all key subcontractors employed by Serco and Sitel to work on NHS Test & Trace. The DHSC confirmed that Sitel does not use subcontractors. In respect of Serco it provided the number of subcontractors used but refused to disclose the names of these companies under section 43 of the FOIA.
2. The Commissioner's decision is that the DHSC has failed to demonstrate sufficiently that the withheld information is exempt from disclosure under section 43 of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the names of all 21 subcontractors used by Serco to work on NHS Test & Trace (the withheld information).
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 16 October 2020, the complainant wrote to the DHSC and requested information in the following terms:

“This is an FOI request for a list of all the key subcontractors employed by Serco to work on NHS Test & Trace. How many are there and what are the companies' names?

Please also provide a list of all the key subcontractors employed by Sitel to work on NHS Test & Trace. How many are there and what are the companies' names?

Is the department aware of any cases where subcontractors working on NHS Test & Trace have subcontracted out work? If so, please provide the names of companies involved.”

6. The DHSC responded on 17 December 2020. With regards to Serco, it advised that there are 21 subcontractors on its contract for the Trace initiative but considers the names of these companies to be exempt from disclosure under section 43 of the FOIA. In respect of Sitel, the DHSC said that this company does not use subcontractors to deliver its service. Concerning the last element of the request, the DHSC confirmed that it does not hold this information.
7. The complainant requested an internal review on 17 December 2020.
8. The DHSC carried out an internal review and notified the complainant of its findings on 18 January 2021. The DHSC upheld its previous application of section 43 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 7 January 2021 to complain about the way his request for information had been handled. He disagrees the names of the subcontractors should be withheld under section 43 of the FOIA. He believes the DHSC has failed to demonstrate how this information is commercially sensitive and how the public interest rests in maintaining the exemption.
10. The Commissioner considers the scope of her investigation to be to determine whether or not the DHSC is entitled to withhold the names of 21 subcontractors under section 43 of the FOIA. The complainant has raised no concerns over the DHSC's 'not held' response in relation to the

other aspects of his request. The Commissioner has therefore not considered these elements of the request in her investigation.

Reasons for decision

Section 43 – commercial interests

11. Section 43 states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority itself and/or a third party.
12. It is a qualified exemption. So in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority and/or a third party, the public authority must demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
13. The DHSC confirmed that disclosure of the withheld information would be likely to prejudice the commercial interests of Serco and it provided a letter to the Commissioner from Serco itself expressing its concerns over disclosure.
14. The DHSC explained that it is Serco's view (and that of the DHSC itself) that disclosure of the names of the subcontractors used would be in breach of Serco's contracts with those subcontractors and would impede its commercial interests. Serco argued that disclosure would be detrimental to its business and to other bids for contracts. It commented that it is aware that the current contract is due to be re-procured in the near future and disclosure of the withheld information could potentially get into the hands of its competitors. Serco advised the DHSC that if the withheld information is disclosed it would have to carefully consider what information it is willing to share with the DHSC in future.
15. Serco also felt that disclosure would be likely to prejudice the subcontractors' ability to gain further work in the future and this may cause them an unnecessary financial burden.
16. In addition the DHSC stated that disclosure would be likely to prejudice its own commercial interests. It argued that it relied upon a secure and confidential tendering process in order to obtain the best value for the taxpayer. If it was obliged to disclose the withheld information, it would be likely to undermine the DHSC's ability to ensure that a fair and secure competition on price and overall value paid for goods and services is achieved in the future.

17. It commented further that this contractual negotiation also required a secure information process where parties could openly discuss and debate the price and services that fell under the contract. It said it is a standard feature of commercial contracts that both the pre-contractual negotiations and the final agreement on a price are kept confidential, as was in this case. Should the DHSC be required to disclose the withheld information, it would place it in breach of contract, which could also lead to adverse consequences in the form of litigation, which would not be in keeping with good stewardship of the public finances.
18. Additionally, it said that if it were known that such information was routinely published, it is highly conceivable that a number of current competitors for government contracts would consider this unacceptable as it would be likely to undermine their position should they bid for the same contract in the future and it could further undermine their position in the wider market place. The DHSC confirmed that the result of this could be the pool of willing competitors narrowing and it would have an adverse impact on the quality of available goods and services that DHSC could procure. It said, ultimately, this would be likely to increase the cost paid by the DHSC in its procurement and the net outcome of this would likely mean that the DHSC was unable to fulfil its obligations of providing the best value to the taxpayer.
19. The Commissioner is reminded that the withheld information is the names of the 21 subcontractors used by Serco for its NHS Test & Trace. Just the names of the companies involved; no detailed information on costings, prices or specific or unique terms and conditions secured. She accepts that section 43 of the FOIA is designed to protect genuinely commercially sensitive information of either the public authority involved and/or third parties, on the basis that disclosure would or would be likely to hinder their abilities to compete fairly and competitively in the market place. However, for this to apply the arguments presented must relate to the information in question and how that information, if it were disclosed, would be likely to have the effects described. The submissions received in main referring to pricing and the services negotiated but this is not the withheld information being considered here.
20. The Commissioner also accepts that all contracts will have confidentiality clauses. But this alone is not enough to warrant the non disclosure of information under the FOIA. If it was it would defeat its purpose. The legislation has been in force for some time and all public authorities and private sector companies wishing to bid for public sector contracts should be aware of its requirements and implications. Those clauses (as is section 43 of the FOIA itself) are designed to protect genuinely confidential and commercially sensitive information and the determination of that should be based on a review of the information contained within a contract; not a blanket approach to non disclosure.

21. The Commissioner cannot see how the disclosure of the names of the 21 subcontractors alone would be likely to be prejudicial to the commercial interests of the DHSC or Serco. She also fails to see how disclosure would be likely to be detrimental to the subcontractors themselves. She notes this is a passing comment in Serco's own submission to the DHSC and there is no evidence that such concerns have come from the subcontractors themselves. If they have, both have still failed to expand on this point and explain in sufficient detail why.
22. The onus is on a public authority to demonstrate why a particular exemption applies. It is not for the Commissioner to argue on a public authority's behalf. The submissions received do not demonstrate how disclosure would be likely to have the effects described and the DHSC has failed to demonstrate any causal link between those effects and the specific withheld information in this case.
23. For these reasons, the Commissioner has decided that section 43 of the FOIA is not engaged. As she is satisfied that it is not engaged, there is no need to go on to consider the public interest test.

Right of appeal

24. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

Samantha Coward
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