

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 April 2023

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

Decision (including any steps ordered)

1. The complainant requested a copy of a Memorandum of Understanding between the Department of Health and Social Care (DHSC) and BioNtech SE. The DHSC withheld the information under the exemptions for information provided in confidence (section 41) and commercial interests (section 43).
2. The Commissioner's decision is that the DHSC correctly relied on section 41 to withhold the information.
3. The Commissioner does not require the DHSC to take any steps.

Request and response

4. On 8 January 2023 the complainant wrote to the DHSC and requested the following information:

"Subject: New partnership to boost research into mRNA vaccines for cancer

I refer to the above subject and attach press release published by the DHSC 6 January 2023. I would be pleased to receive a copy of the "Memorandum of Understanding" between DHSC and BioNTech SE, signed 6 January 2023."

5. On 3 February 2023 the DHSC confirmed that it was withholding the information under the exemption for commercial interests (section 43).
6. On 2 March 2023 the DHSC issued an internal review response which confirmed that it was maintaining its reliance on section 43. It further confirmed that it was also relying on the exemption for the formulation or development of Government policy (section 35) to withhold the same information.

Scope of the case

7. On 3 March 2023 the complainant contacted the Commissioner to complain about the way their request for information had been handled. They confirmed that they wished the Commissioner to consider whether the DHSC had correctly withheld the requested information.
8. During the Commissioner's investigation the DHSC dropped its reliance on the exemption in section 35 and confirmed that, in addition to the exemption in section 43, it was now also applying the exemption for information provided in confidence (section 41) to refuse the request.

Reasons for decision

Section 41 – Information provided in confidence

9. This section sets out why the Commissioner has concluded that the DHSC correctly withheld the requested information under section 41 of the FOIA.
10. Information is exempt from disclosure if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.
11. The withheld information consists of a Memorandum of Understanding between BioNTech SE and the DHSC relating to a vaccine research partnership.

Was the information obtained from another person?

12. The DHSC confirmed that a third party (BioNTech SE – “BioNTech”) supplied information to DHSC to develop the Memorandum of Understanding (MOU) for a strategic partnership.

Would disclosure constitute an actionable breach of confidence?

13. To determine whether disclosure constitutes an actionable breach of confidence the Commissioner considers four tests.
14. First, the Commissioner has considered whether the information has the necessary quality of confidence. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
15. The DHSC confirmed that a Confidential Disclosure Agreement (CDA) was signed by all parties to ensure all information was provided in confidence. It further confirmed that the information is not trivial and includes commercially sensitive information about BioNTech’s commercial operations.
16. Second, the Commissioner has considered whether the withheld information was imparted in circumstances importing an obligation of confidence.

17. The DHSC has confirmed that the mutually signed CDA (an explicit obligation of confidence) is legally binding and breaching confidence with unauthorised disclosure would make the DHSC liable for litigation.
18. Thirdly, the Commissioner has considered whether unauthorised disclosure of the information would cause a specific detriment to either the party which provided it or any other party. The Commissioner has noted that the approach taken by the courts in some cases is that detriment is not always a pre-requisite to an actionable breach of confidence.
19. The DHSC has stated that unauthorised disclosure of the information would cause multiple detriments to both BioNTech and DHSC as the information was shared with the understanding that it would be treated in confidence. The DHSC has submitted that the specific detriments cover broken trust between parties, the compromising of commercial interests and risk to the future of the partnership.
20. Finally, with reference to the three criteria above, the Commissioner has considered whether disclosure of the withheld information to the public would constitute an actionable breach of confidence.
21. The DHSC confirmed that it has signed CDAs (with liability uncapped) to secure the trust of BioNTech and information disclosure would amount to a breach of this. The DHSC confirmed that there is a legally binding clause in the MoU that states the MoU itself will not be published.
22. Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. The Commissioner asked the DHSC to explain the public interest arguments it considered in this case and explain why it was concluded that there was not a sufficient public interest in disclosure of the information in order to defend any actionable breach.
23. The DHSC confirmed its understanding that the common law duty of confidence contains an inherent public interest test. With regard to section 41(1), it confirmed that this test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. The DHSC has argued that it is in public interest to withhold the information held as the information is more than trivial and would likely compromise a project worth millions of pounds in brand new NHS infrastructure and clinical trials and could delay UK patient access to innovative cancer medicines.

24. In relation to the public interest in disclosure, the complainant referred to reports of the Medicines & Healthcare products Regulatory Agency (MHRA) regarding adverse reactions and deaths resulting from the Covid 19 vaccine.
25. The Commissioner recognises these concerns, however, he is not convinced that they are directly relevant to the specific information that is being withheld, at least not to the extent that they would warrant the breach of confidence that disclosure would cause.
26. The Commissioner considers that the oversight that the MHRA provides constitutes a remedy for public concerns around these matters and he does not see how disclosing the MOU, which sets out the arrangements for the partnership going forward, would assist the public in this regard. He is also mindful that information about the scope and operation of the partnership has been published on the DHSC's website¹.
27. For the above reasons, the Commissioner is satisfied that section 41 of FOIA applies.
28. As the Commissioner has concluded that section 41 applies he has not gone on to consider the DHSC's application of section 43 in this case.

¹ <https://www.gov.uk/government/news/new-partnership-to-boost-research-into-vaccines-for-cancer>

Right of appeal

29. 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

30. 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.
31. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF