

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2024

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

Decision (including any steps ordered)

1. The complainant requested information about personal protective equipment (PPE) contracts associated with the COVID-19 pandemic. The Department of Health and Social Care (DHSC) relied on section 43(2) of FOIA to withhold information in scope of four parts of the request, which concerns commercial interests. DHSC has subsequently advised that it considers that the information to which it has applied section 43(2) is also exempt under section 23(1) of FOIA, which concerns information supplied by, or relating to, bodies dealing with security matters.
2. The Commissioner's decision is that DHSC has correctly applied section 23(1) of FOIA to the information it's withholding under that exemption.
3. It's not necessary for DHSC to take any steps.

Request and response

4. The complainant made the following information request to DHSC on 13 February 2024:

"On the points on legal review, the Thirteenth Report of Sessions 2021-22, Initial Lessons from the Government's Response to the COVID-19 Pandemic highlights that 35 contracts with DHSC are subject to commercial decisions with the dissolution team, with one in litigation.

It also highlights that 35 contracts from SCCL [Supply Chain Coordination Ltd] were in dispute, but have now been resolved, are

these 35 included in the above 36, or are all of the 35 currently in dispute still in dispute and DHSC specific, with the SCCL awards no longer counted?

If not, does this mean that the dissolution team does not currently consider any company to be either in breach of its obligations or subject to further efforts to recoup money?

[1.1] Could you please tell me, how much of the £1.04 - £1.09 billion of at risk and disputed contracts the government has been able to recoup for the taxpayer so far.

[1.2] I'd like the same for the £548 million in contracts awarded by SCCL, and **[1.3]** for the department to confirm that the above figures represent the total value of all contracts issued during the covid 19 pandemic that were at risk. If not, can the department please tell me how much TOTAL was at risk, and **[1.4]** how much has been recouped so far please.

[1.5] I'd also like to know the percentage of money awarded by the department on relevant contracts was in dispute or the dissolution team are engaged with, but on all of the above, so as not to engage the commercial exemption clause, you do not need to identify specific companies.

Regarding Modern Slavery, the department says it holds no information, which I believe to be incorrect, as the same response letter outlines that at last count 386,000,000 items of PPE were on temp hold due to allegations of modern day slavery.

The same is outlined for the two requests asking after PPE not usable in any setting, and PPE not currently being distributed.

Or for all of the above three points, is the department specifically stating that all of this information is now held by SCCL, and that the department no longer has access to it?"

5. DHSC addressed the complainant's questions. Its final position was that information requested in parts 1.1, 1.2, 1.4 and 1.5 of the request was exempt from disclosure under section 43(2) of FOIA and that information relevant to part 1.3 was exempt under section 21.
6. In its initial submission to the Commissioner DHSC advised that on reconsideration, its view was that section 22 of FOIA applied to the above four parts: 1.1, 1.2, 1.4 and 1.5. Section 22 concerns information intended for future publication.

7. Having then discussed this with the Commissioner, DHSC subsequently confirmed that it couldn't categorically say that the specific information requested in the four different parts of the request would be published and it therefore agreed that section 22 couldn't be engaged.
8. However, DHSC confirmed that it still considers the four parts of the request engage section 43(2) and, on 16 July 2024 also confirmed to the Commissioner that it considers those parts engage section 23(1) of FOIA.

Reasons for decision

9. In their complaint to the Commissioner, the complainant disputed DHSC's application of section 43(2) of FOIA to parts of their request. This reasoning therefore focuses on parts 1.1, 1.2, 1.4 and 1.5 of the request, and DHSC's application of section 23(1) or section 43(2), or both, to these parts.

Section 23 - information supplied by, or relating to, bodies dealing with security matters

10. Parts 1.1, 1.2, 1.4 and 1.5 of the request are for how much money DHSC has been able to recoup, and recoup so far, from 'at risk' and disputed DHSC and SCCL contracts, and the percentage of the money that DHSC awarded on relevant contracts that were in dispute or that the Contract Dissolution Team (CDT) was engaged with.
11. Under section 23(1) of FOIA, information is exempt information if it was, directly or indirectly, supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).
12. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3). This means that if the requested information falls within this class, it's absolutely exempt from disclosure under FOIA. There's no requirement on the public authority to demonstrate that disclosing the requested information would result in some sort of harm. This exemption isn't subject to the public interest test.
13. One of the agencies listed under section 23(3) is the National Crime Agency.

14. In a submission associated with a separate complaint about a request for similar information – IC-292871-Q2S3¹ - DHSC explained that because investigations/proceedings relating to PPE contracts are ongoing, the information associated with those investigations [which includes that requested in the current case] is being held particularly securely and only a very limited number of people have access to it.
15. In that submission, DHSC explained that the awarding of PPE contracts during the Covid pandemic and the ongoing disputes and attempts to recover some of the money paid has received widespread media attention. The National Crime Agency (NCA) and DHSC both have legal investigations/proceedings in train against PPE Medpro. DHSC says it's public knowledge that PPE Medpro, a company linked to Baroness Mone, is the subject of an ongoing potential fraud investigation and on 12 June 2024 it was announced that a person linked to PPE Medpro had been arrested.
16. DHSC also advised that it and other public bodies, including Cabinet Office, Public Sector Fraud Authority and the NCA, backed by legal advice, have agreed that section 23 (and section 31, which concerns law enforcement) are to be applied to all cases involving PPE Medpro, Baroness Mone, Doug Barrowman, or any other individuals connected to the company/contracts.
17. In addition to PPE Medpro there are, DHSC said, several other parties that would be affected if the requested information were to be disclosed. These are:
 - DHSC
 - The National Crime Agency
 - PPE suppliers – especially PPE Medpro.
 - Other companies (including Visage) affected by the Contract Dissolution Team process.
 - The taxpayer
18. DHSC noted that some companies that have been party to the CDT process have mutually binding confidentiality clauses contained in the recent agreements signed by DHSC and these companies.
19. It's DHSC's view that to release previously undisclosed information mid-litigation is irresponsible and possibly in contempt of court.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4030317/ic-292871-q2s3.pdf>

20. Based on the earlier submission DHSC provided to him, which DHSC confirmed is also relevant to this case, the Commissioner is again satisfied that the withheld information in the current case is exempt from disclosure on the basis of section 23(1) of FOIA. He's reached this conclusion because he accepts that there's a sufficiently close connection between the requested information and the NCA's investigation into PPE contracts, such that the information can be said to relate to a section 23(3) body.
21. The Commissioner is aware of the public interest arguments the complainant gave for the information's disclosure, in relation to the section 43(2) exemption. However, as above, section 23(1) is an absolute exemption and other than in some cases involving historical records, it isn't subject to the public interest test.
22. Because the information being withheld in the current case engages section 23(1) of FOIA, it's not necessary to consider DHSC's application of section 43(2) to the information.
23. The Commissioner has noted DHSC's somewhat blanket approach at paragraph 16; he will consider complaints brought to him about that subject on a case by case basis.

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: 0203 936 8963
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.

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