

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2023

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

Decision (including any steps ordered)

1. The complainant has requested DHSC to disclose a copy of all letters sent to and received from trusts in the New Hospital Programme (NHP) by DHSC and NHP from 25 May to date of the request. DHSC disclosed some information but withheld the remainder citing section 43 of FOIA.
2. The Commissioner's decision is that DHSC is entitled to rely on section 43 of FOIA and the public interest rests in maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 8 June 2023, the complainant wrote to DHSC and requested information in the following terms:

"A copy of all letters sent to trusts in the New Hospital Programme (NHP) by the DHSC and NHP since 25 May to date

All letters received by DHSC/NHP from trusts within the NHP since 25 May."

The complainant then lists the trusts within the NHP.

5. DHSC responded on 6 July 2023. It disclosed redacted versions of 34 documents and confirmed that it is withholding information under section 43 of FOIA.
6. The complainant requested an internal review on 7 July 2023. They stated that such information was not withheld on the grounds of commercial sensitivity for previous indicative allocations for scheme. They provided links to some examples where the withheld information can be found in the public domain.
7. DHSC carried out an internal review on 20 July 2023. It upheld its application of section 43 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They again raised the issue that previous allocations from 2019 had been disclosed by the trusts and therefore they could not see how the indicative funding range for these trusts is commercially sensitive.
9. The Commissioner considers that the scope of his investigation is to determine whether or not DHSC is entitled to withhold the remaining withheld information under section 43 of FOIA.

Reasons for decision

Section 43 – commercial interests

10. Section 43 of FOIA states that a public authority is entitled to 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. It is also subject to the public interest test.
11. DHSC advised that the information request followed an oral statement on NHP in the House of Commons by Steve Barclay, Secretary of State on 25 May 2023. The statement announced the inclusion of five additional hospitals (with Reinforced Autoclaved Aerated Concrete (RAAC) into the programme and was the first time that the programme was said to have a total investment of over £20billion. DHSC confirmed that following this statement 28 trusts in Cohorts 3, 4 and RAAC were given indicative funding allocations for the first time and these were shared with the trust through individual letters (the requested information).

12. DHSC maintains that the withheld information is commercially sensitive, as its disclosure would be likely to prejudice the trusts' negotiating power with contractors. The trusts (with the exception of Cohort 1 schemes and the National Rehabilitation Centre in Cohort 2) are still progressing through their Business Cases as per HM Treasury Green Book guidance – this includes the strategic outline, outline and full business cases. It argued that the individual indicative allocations will be used to go to market and this will happen in phases amongst all 28 trusts involved.
13. DHSC confirmed that more recently the National Audit Office (NAO) published its value for money report into NHP¹. In Appendix 3, pages 58 to 63 the estimated cost ranges are provided for each of the schemes. It stated that given the commercial sensitivity of the information, DHSC reached agreement with NAO that a less specific set of data would be provided in the public facing report. The figures provided in the money report disclose to the public a range estimate for each scheme.
14. With regards to information disclosed under previous FOI requests and those disclosed by the trust themselves in the past (as referenced by the complainant), DHSC advised that these schemes have had their Final Business Cases approved and so at this stage, it was felt the commercial sensitivities had decreased. This is not the case for the trusts covered by the request.
15. It went on to say that each trust will be going through a competitive tendering process to select a contractor and that process would be likely to be undermined by having a cost estimate in the public domain. DHSC argued that this would be likely to weaken the trusts' negotiating positions and lead to a worse value for taxpayers' money. It confirmed that potential bidders would be inclined to set their rates against the disclosed ranges of rates contained in the withheld information. This would prejudice the trusts' ability to negotiate the best possible terms and lead to a higher price having to be paid for products and services than would otherwise have potentially been offered.
16. DHSC explained further how most of the 28 schemes are at a very early stage in the planning process and therefore there is a high degree of uncertainty around the design, scope and costs of the final outcome. If the indicative allocations were disclosed, it would set expectations in the market and with the public, and the preferred option would crystallise

¹ [Progress with the New Hospital Programme - NAO report](#)

around that amount regardless of whether it represented the optimal solution to the trust and the local public.

17. Additionally, it said that DHSC's contingency for the programme could be worked out from disclosure of the withheld information. The public, trusts and potential contractors would be able to add up the funding amounts and subtract that from the total overall figure for NHP of £20billion. Trusts and contractors would then be able to use this information to alter their plans and tailor their plans/bid accordingly based on the assumption that there is a certain amount of contingency money available. Contractors would increase their prices, weakening the negotiating position of the NHP and trusts in agreeing a contractor and the most beneficial deal.
18. The DHSC drew the Commissioner's attention to an earlier decision notice he issued, where section 43 of FOIA was upheld for very similar information:

[ic-251411-v6z2.pdf \(ico.org.uk\)](https://www.ico.org.uk/our-work/cases/ic-251411-v6z2.pdf)
19. The Commissioner notes from the NAO money report published that only funding ranges have been openly published against the relevant schemes. The withheld information is however indicative allocations to each trust, which offer an individual and more customised range to enable each trust to begin putting together their Business Cases.
20. With regards to the information previously disclosed (whether previous FOI requests or by trusts themselves around 2019) the Commissioner accepts the circumstances in this particular case are different. DHSC has said that for these trusts the information was revealed as they were further along the new health infrastructure programme and had had their Business Cases drawn up and approved, thereby reducing the commercial sensitivity of the requested information for these cases. Also in 2019 estimates were only provided, not funding allocations that related to an overarching programme funding envelope, in contrast to the 2023 letters.
21. In this case and for the 28 trusts involved the current circumstances are quite different. The funding letters had only just been sent to these trusts, following the government's announcement in 25 May 2023 and DHSC has confirmed that the majority are at the very early stages of the planning process. At the time of the request there was a high degree of uncertainty around design, scope and the cost of the final outcome for the vast majority of these trusts and they were yet to develop their Business Cases and commence negotiations with contractors.

22. The Commissioner notes the difference between the information publicised in the NAO money report and the rates redacted from the 28 letters, falling in the scope of the request. Also, the difference DHSC has described between the estimates given to some trusts in 2019 (and for some those estimations made it into the public domain) and the funding allocations contained in these letters. He accepts that the withheld information would be likely to prejudice the commercial interests of the trusts, NHS England and DHSC.
23. Disclosure would enable potential bidders to see what allocation the trust had been awarded and tailor their bids accordingly. Knowing what the range is, a bidder would be inclined to tailor their bids towards the higher end, thereby prejudicing the ability of trusts, NHS England and DHSC (more broadly) to secure the best deal possible deal and to secure the most cost effective agreement for the public. For these reasons, the Commissioner is satisfied that section 43 of FOIA is engaged.

Public interest test

24. DHSC advised that there is the general public interest in openness and transparency and in gaining access to information which enables the public to understand more closely how public money is spent and assess for themselves whether value for money is being achieved. It stated that in May 2023 the government announced that NHP is expected to be backed by over £20billion. There is a public interest in understanding how this will be split between the different regions, trusts and individual schemes.
25. However, it considers the public interest rests in maintaining the exemption. It argued that disclosure would be likely to impact on the trusts' negotiations with suppliers and this would then have a knock on effect on DHSC's ability to secure the best possible deal and achieve value for money for the taxpayer's money allocated to this programme. It does not consider this is in the interests of the general public.
26. It also said that if the withheld information was released, the public, trusts and any potential contractors would be able to add up the amounts and, taking away from the overall £20 billion figure, work out DHSC's contingency for the programme. It would enable trusts and potential contractors to modify their plans, thinking that there is more money available. DHSC confirmed that this is not in the wider interests of the public. It would prevent DHSC from securing the best possible deal for the public purse.
27. It referred to the NAO report and how a rough indication of the values for each of the hospital schemes has been published. It said that broad funding allocations are already publicly available, meeting the public

interest in disclosure and without causing commercial harm. DHSC also advised that once individual schemes have their Final Business Case approval, it is happy to share the total agreed funding for each scheme as at this point contracts would have already been made and sharing this information will no longer impact on any commercial activities. It said the only exception to this would be if there were multiple tenders for a particular cohort scheme that were to run consecutively. In a case like this, it would be its view that the information should not be disclosed until all tendering activity for that individual scheme had been completed.

28. The Commissioner acknowledges the public interest in openness, transparency and accountability. He notes that there is always a strong public interest in disclosure of information which relates to the expenditure of large amounts of public money. There is a need to be transparent and allow members of the public to see how that money is being spent and assess for themselves whether value for taxpayer's money is being achieved.
29. That being said, in this case, there are stronger public interest arguments in favour maintaining the exemption, considering the very early stages at which the trusts are within the programme. There is a real risk that if the information is disclosed at this time, it would be likely to prejudice the ability of the trust's, NHS England and DHSC more widely, to secure the best possible deal for the funds allocated. If bidders knew what each trust has been allocated and the range, showing lower and upper amounts, it would allow them to tailor their bids accordingly know just how much funding is available. A bidder would not be inclined to submit a bid towards the lower end of the range. They'd see that more money is available and produce a bid towards the end of the range even if they could legitimately and profitably offer a bid for less. This would have a knock on effect on the programme securing the most cost effective deal for the public. Such consequences are not in the wider interests of the public.
30. Similarly, DHSC has said that disclosure would enable potential contractors and trusts to work out any contingency plan or allocation. This would enable them to alter their plans, knowing that more money is in fact available. Again this would prevent DHSC and NHS England from securing the best possible deal for the public from the funds available. It would more than likely lead to the programme costing more than it would otherwise have done, had this information not be disclosed at this stage.
31. For the above reasons, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by public interest in favour of maintaining the exemption.

Right of appeal

32. 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

33. 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.
34. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF