

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2015

Public Authority: The Department of Health (DoH)
Address: 79 Whitehall
London
SW1A

Decision (including any steps ordered)

1. The complainant has requested copies of all emails involving the Chief Medical Officer relating to Ebola within particular time periods. The DoH refused to provide the requested information under sections 22, 27, 35(1)(a), 38, 40(2) and 43 of the FOIA.
2. The Commissioner's decision is that the DoH has correctly applied section 35(1)(a) FOIA to all the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 17 October 2014 the complainant requested information of the following description:

"Please provide copies of all emails involving the Chief Medical Officer (Professor Dame Sally Davies) relating to Ebola on the following dates/time periods: August 22 to August 26; September 18 to September 21; October 8; October 11; October 16. By involving I mean sent or received by Professor Davies (including 'copied in' emails)."
5. On 14 November 2014 the DoH responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so: sections 22, 27, 35(1)(a), 40(2) and 43 FOIA.

6. The complainant requested an internal review on 14 November 2014. The DoH sent the outcome of its internal review on 17 December 2014. It revised its position and stated that in addition to the previous exemptions cited, it also considered that section 38(1) of the FOIA applied.

Scope of the case

7. The complainant contacted the Commissioner on 9 January 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DoH has correctly applied any of the exemptions it has cited to the withheld information.

Reasons for decision

9. Section 35(1)(a) of the Act provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test.
10. The Commissioner has first considered whether the withheld information to which this exemption has been applied relates to the formulation or development of government policy.
11. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
12. The DoH considers the information being requested relates to the formulation of the UK Government's emerging policy on its fight to eradicate the Ebola virus. This policy is still under development. The policy development work began at the outset of the current, on-going, crisis but it remains unclear when the work is likely to be completed.
13. The DoH also highlighted that the ICO has acknowledged that there will be instances (such as Ebola) in which the necessary policy making has had to be progressed in an impromptu fashion as a reaction to events, rather than planned in advance, and could be construed to be a form of

crisis management (as in the previous Decision Notice issued by the ICO under case reference FS50451254).

14. Having considered the withheld information, and the submissions presented by the DoH, the Commissioner is satisfied that all the withheld information relates to the formulation and development of Government policy on the fight to eradicate the Ebola virus.

Public Interest Test

15. Section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DfES v The Information Commissioner and the Evening Standard (EA/2006/0006)* the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

Public interest arguments in favour of disclosing the requested information

16. The DoH fully acknowledges that there will be circumstances where there is a public interest in making information available to the public, which could help to inform debate.
17. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which provides the public with a better understanding of the decision making process and which enables the public to contribute where possible in relation to policies which are potentially of worldwide significance.
18. Due to the subject matter of the withheld information in this case, the Commissioner accepts there is a particularly strong public interest in disclosure as the subject matter of the withheld information is a serious threat to human life throughout the world. Therefore a greater understanding of the Ebola virus and what is being done to prevent it from spreading is of significant public interest.

Public interest arguments in favour of maintaining the exemption

19. The DoH presented various public interest arguments in favour of maintaining the exemption. In summary, these were:

Safe Space

It is important at this early stage of the policy development cycle to protect the information until the policy has been properly formulated and delivered with all the relevant key third party stakeholders. To release the information, in whole or in part, before the policy development process has been completed would jeopardise the progress being made. The DoH provided further arguments in support of this assertion. These cannot be recited here, as to do so would disclose exempt information. Details are contained within the Confidential Annex to this Notice which, for obvious reasons, is being sent only to the DoH.

Impact on International Collaboration

Disclosure would compromise the important on-going international collaborative effort to eradicate the Ebola virus. Relationships with key third party organisations and governments involved in this work would most likely be adversely affected.

The Timing of the Request

The information being requested relates to the formulation of the UK Government's emerging policy on its fight to eradicate the Ebola virus. The policy development process is not yet concluded.

Balance of the public interest arguments

20. The Commissioner considers there is a public interest in the government being open and accountable. He considers that greater transparency leads to a better public understanding of particular policies and enables the public to assist in the decision making process where possible. In this case, the withheld information relates to an issue which has far reaching, global implications for human health and life. This heightens the public interest in disclosure.
21. The Commissioner considers that good policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Furthermore evidence based policy is considered to be more robust and, in the Commissioner's opinion, is essential where the policy concerns life-threatening disease, as in this case. Experts or industry stakeholders may be reluctant to offer their opinions if there cannot be the assurance of non-disclosure where there is a clear need for confidentiality within the policy-making environment. Finally government policy proposals need to be thoroughly evaluated before they can be properly implemented and this can only

happen when all parties have the confidence that there is no risk that those candid exchanges will be disclosed prematurely.

22. In this case the policy development process is still live, which gives greater weight to the public interest arguments in favour of maintaining the exemption. The nature of the international dimension to the policy-making process in this case adds to the need for confidentiality. The subject-matter here is a life-threatening disease which presents a major challenge to world health. International cooperation is vital and any premature disclosure of information which might undermine the collaborative efforts to combat the Ebola virus would clearly be contrary to the public interest.
23. The Commissioner has therefore concluded that, in the circumstances of this case, there is a stronger public interest in allowing policy to be developed in a safe space than in disclosing the requested information. On balance, the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by those in favour of maintaining the exemption. Section 35(1)(a) FOIA was therefore correctly applied in this case.
24. As the Commissioner considers section 35(1)(a) FOIA was applied correctly to all the withheld information in this case, he has not gone on to consider any of the other exemptions any further. It is, however, clear to him, without undertaking a forensic analysis, that other exemptions would apply to some of the withheld information and that the public interest arguments would be broadly the same.

Right of appeal

25. 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@hmcts.gsi.gov.uk

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

26. 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.
27. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF