

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2019

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 information about Tier 2 visa refusals. DHSC refused to disclose the requested information under section 35(1)(a) FOIA.
2. The Commissioner's decision is that section 35(1)(a) FOIA was applied incorrectly to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose 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 25 April 2018 the complainant requested information of the following description:

"FOI request I understand the DHSC recently asked NHS trusts in England for data on the numbers of Tier 2 visa refusals they had experienced and the impact this had had on patient care and service delivery. Please send me DHSC documentation concerning the summary results of this exercise."

6. On 5 June 2018 DHSC responded. It withheld information relevant to the request under section 35(1)(a) FOIA.
7. The complainant requested an internal review on 15 June 2018. DHSC sent the outcome of its internal review on 14 February 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the DHSC was correct to apply section 35(1)(a) FOIA to the withheld information.

Reasons for decision

Section 35(1)(a)

10. Section 35(1)(a) provides that information is exempt if it relates to the formulation and 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. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.
13. The DHSC has explained that in late 2017 and early 2018, the number of Tier 2 visas applied for breached the overall national cap. As a result, a large number of doctors were refused visas, making it difficult

- for NHS trusts to recruit from overseas to vital posts. DHSC therefore worked with the Home Office, Cabinet Office and the Prime Minister's Office to gather evidence about the extent of the difficulties and whether a change in Government policy was warranted. The withheld material is the "summary results" of this information-gathering.
14. DHSC confirmed that in June 2018, the Government changed the immigration rules to remove both doctors and nurses from the annual visa cap, thereby preventing further refusals. However, it said that as published correspondence¹ between the Home Secretary and the Migration Advisory Committee makes clear, this decision was temporary, pending the introduction of the new immigration system that will take place once the UK has left the European Union.
 15. The exemption is interpreted broadly and will capture a wide variety of information. At the time of the request in April 2018 the Government had not made the policy decision to change the immigration rules as described at paragraph 14 above.
 16. The Commissioner accepts that the information that is being withheld relates to the policy decision taken in June 2018 regarding immigration rules. The withheld information which fed into this policy decision was therefore live at the time of the request in April 2018. It can therefore be said to relate to the formulation and development of government policy and section 35(1)(a) is engaged.
 17. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

18. The DHSC acknowledged that there is a public interest in promoting openness and transparency in the way in which public authorities manage current events.
19. DHSC went on that while the 2018 discussion around Tier 2 visas is not live in the same form, measures relating to sponsorship of Tier 2 visas

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747553/Home_Secretary_to_Prof_Alan_Manning__002_.pdf

for doctors and nurses remain open to debate and scrutiny, and it therefore recognises the public interest argument in favour of disclosing information specifically related to this.

20. Additionally, it recognises the strong public interest in making information on NHS staffing readily available, along with the importance of openness and transparency in Government. These measures rightly continue to remain at the forefront of the public mind, as demonstrated by the national media coverage they receive. Therefore, DHSC recognises the weight this places on the public interest in disclosure.

Public interest arguments in favour of maintaining the exemption

21. DHSC considers that the policy is still live, given the continued discussions on the Future Borders and Immigration System, and that the requested information should be withheld to protect good working relationships between DHSC and NHS trusts, the perception of civil servants' neutrality, and, ultimately, the quality of Government.
22. DHSC has said that as the current arrangement is only temporary, and there is likely to be further consideration of the evidence provided by NHS trusts in the future, it considers that releasing the requested information still carries the same risks as at the time of the initial request. The working of the immigration system and the assessment of its impact on the NHS will always be an ongoing policy issue, especially as there are internal-to-Government discussions currently ongoing regarding the shape of the future immigration system. DHSC will need, at various points in the future, to have honest input from individual trusts and representative groups about the impact it is having on them. If they think the evidence they submit, or even a summary of it, is likely to be placed in the public domain, then they are less likely to be free and frank in what they say (for example, in terms of the impact on safety and continuation of services). DHSC believes it is not in the public interest to do anything that has the potential to censor the evidence they provide, especially if this evidence has been provided in confidence.
23. DHSC went on that the exemption under section 35(1)(a) is intended to protect the policy making process by ensuring that the possibility of public exposure does not deter from full, candid, and proper deliberation of policy development and formulation. The ICO has recognised that there is a strong public interest in Government having a safe space to develop ideas, debate live issues, and reach decisions away from external interference. DHSC said that as this continues to be a live policy issue, it believes that the Government still needs a safe place to debate and discuss ideas around this policy.

24. Additionally, DHSC argued that disclosing this information may cause a chilling effect by inhibiting free and frank discussion and the quality of advice received by the Government. In this case, there is a particular risk that individual trusts or representative groups will be less likely to submit evidence to DHSC in the future, if they believe that the evidence will be released into the public domain. Furthermore, this evidence was used by DHSC to convince the Home Office and the Prime Minister at the time to change Government policy. Making this evidence public could highlight divisions in thinking between Government departments, hindering the important public perception of collective Government responsibility and inhibiting civil servants from engaging in frank, reasoned and evidenced debate in the future. Without the ability to use evidence gleaned from the NHS, this could lead to poorer decision making in the future. The release of this data could prejudice good working relationships and the perception of civil servants' neutrality.

Balance of the public interest

25. In this case the Commissioner accepts that at the time of the request in April 2018, the policy decision to which the withheld information relates had not yet been taken. It was not until June 2018 that the Government made the policy decision to temporarily change the immigration rules following the information gathering exercise undertaken by DHSC. On this basis the Commissioner accepts the exemption is engaged.
26. However the balance of the public interest test can be considered up to the time the internal review is carried out which was endorsed in Supreme Court in *R (Evans) v Attorney General* [2015] AC 1787 at paragraph 72. In this case the relevant date for considering the public interest test is therefore up to February 2019. The Commissioner does not accept that the policy to which the withheld information relates was ongoing at this time as the decision had been taken in June 2018. Whilst the Commissioner accepts that it is likely this policy will be further developed in the future as DHSC has said this is likely to be necessary at the point the UK leaves the European Union, it cannot be said the information gathering exercise which led to the decision to change the Government policy in June 2018 presently remains live and ongoing or under development. On this basis the Commissioner has considered the balance of the public interest test at the time of the internal review in February 2019 at which point she does not consider the policy to which the withheld information relates was live or under development.

27. The Commissioner does not therefore consider that there remained any need to maintain a safe space for government to assess the withheld material as this had already been completed and a decision taken back in June 2018. DHSC has said that there is only likely to be further consideration of the evidence provided by the Trusts and furthermore it has confirmed that the June 2018 decision was temporary, pending the introduction of the new immigration system that will take place once the UK has left the European Union. This policy is therefore unlikely to be under any further real development or review until such a time. The Commissioner has not therefore attributed any significant weight to this argument.
28. Likewise the chilling affect argument described by DHSC at paragraph 24 above is similarly diminished given the policy decision had been taken by the time DHSC carried out the internal review. DHSC has said that because the policy decision taken is temporary it is likely the evidence provided by NHS trusts will be considered further in the future. However whilst this material may still have some value, it is more likely it will be outdated and more up to date information would be required to present a more accurate picture at any point of reconsideration in the future. Whilst the withheld information may be useful to provide background and context it is likely to be outdated by more recent evidence. The Commissioner therefore considers that this public interest argument is significantly diminished.
29. In addition, upon viewing the withheld information, particular Trusts or interest groups are not identified in terms of the information they may have individually provided and this again weakens DHSC's argument that individual Trusts or interest groups would be less likely to submit evidence in the future.
30. As DHSC has identified, measures relating to sponsorship of Tier 2 visas for doctors and nurses remain open to debate and scrutiny. NHS staffing is of significant public and media interest given its wide impact upon the population as a whole.
31. Given that at the time of the internal review the policy decision to which the withheld information relates had been made, the weight that attaches to DHSC's public interest arguments in favour of maintaining the exemption is significantly reduced. Given the extremely strong public interest in staffing within the NHS and the wider impact decisions relating to this have, the Commissioner considers that public interest in maintaining the exemption is outweighed by the public interest in disclosure in this case.

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: 0300 1234504
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.....

Gemma Garvey
Senior Case Officer

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