

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 8 July 2020

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

Decision (including any steps ordered)

1. The complainant has requested information on the advice given by the Department of Health and Social Care (DHSC) to NHS Trusts about how to respond to freedom of information requests for Brexit self-assessments. The DHSC refused the request on the basis of section 35(1)(a).
2. The Commissioner's decision is that the section 35 exemption is engaged but the balance of the public interest favours disclosure of 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 24 April 2019 the complainant made a request to the DHSC in the following terms:

"I am requesting copies of documents held by the Department of Health and Social Care (DHSC) outlining how advice given to NHS Trusts nationwide was formulated. The advice I refer to was not to share information when receiving Freedom of Information requests relating to Brexit impact self-assessments.

This has been published by news outlets, including the following <https://www.hsj.co.uk/policy-and-regulation/revealed-government-instructs-trusts-to-withhold-brexit-impact-assessments-/7024705.article>

I wish to be provided with electronic copies of diaries, agendas, emails and minutes of meetings involving DHSC staff issuing guidance over Brexit impact assessments to NHS Trusts.

I would like this request to cover the last six months."

6. The DHSC responded on 27 June 2019 confirming that information relevant to the request was held but was exempt from disclosure by virtue of section 35(1) as it related to the formulation or development of government policy.
7. The complainant requested an internal review on 9 July 2019. He pointed out he had asked for a wide range of information types so it was unclear how the exemption would apply to all of these types of information.
8. The DHSC conducted an internal review and responded on 2 August 2019 upholding their decision.

Scope of the case

9. The complainant contacted the Commissioner following the internal review on 6 August 2019 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if the DHSC has correctly withheld information within the scope of the request on the basis of section 35(1) of the FOIA.

Reasons for decision

Section 35 – formulation or development of government policy

11. Section 35(1)(a) of the FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands these terms to refer to the design of new policy, and the process of reviewing or improving existing policy. However, the exemption will not cover information relating purely to the application or implementation of established policy.
12. The Commissioner recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
13. Consideration of this exemption involves two stages. First, the exemption must be engaged by the information in question falling within the class described in this section. Secondly, this exemption is qualified by the public interest test.
14. The withheld information in this case consists of advice provided by the DHSC to NHS Trusts on how to respond to freedom of information requests for any Brexit impact self-assessments and internal discussions on the advice to provide.

Does the withheld information relate to the formulation or development of government policy?

15. The Commissioner's approach to defining government policy is set out in her guidance¹. That guidance clearly indicates that policy can be developed in many ways and in a wide range of circumstances.
16. The DHSC has explained to the Commissioner that the withheld information relates to the government policy on the medicine and medical products supply programme within the DHSC, which at the time of the request related to no-deal preparations.
17. The DHSC acknowledges that the UK has now left the EU but maintains that the information gathered from companies remains commercially sensitive and is part of ongoing policy development to strengthen the UK's health and social care supply chains.

¹<https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

18. The Commissioner is satisfied that there is a government policy on the medical supply programme and that the impact assessments done by NHS Trusts were part of the development of the government's policy in this area and its Brexit preparations. That being said, the information in question is not actually the impact assessments but is the advice the DHSC provided to NHS Trusts who had received freedom of information requests.
19. The Commissioner's previously mentioned guidance discusses the term 'relates to' and interprets this broadly. The information does not have to be created as part of the activity and any significant link between the information and the activity is enough for the information to 'relate to' the government policy in question.
20. The Commissioner is satisfied that the withheld information relates to the government policy on medical products supply programme. Whilst this link is not direct, the withheld information is advice given to NHS Trusts on how to respond to requests for the impact assessments which were conducted as part of the Government's Brexit planning and, more specifically, its formation of its medical supply programme. The impact assessments themselves are clearly related to the government policy in question and the advice relates to the impact assessments. This information is therefore exempt by virtue of section 35(1)(a).
21. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. Section 35(1)(a) is a qualified exemption, so the information must nevertheless be disclosed if the public interest in maintaining the exemptions does not outweigh that in disclosure.
22. In considering the DHSC's submissions the Commissioner has taken into account the comments of a key Information Tribunal decision² involving the application of section 35(1)(a). In that case the Tribunal confirmed there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.
23. Also in forming a conclusion on the public interest balance in this case, the Commissioner has, of course, taken into account the general public interest in the transparency and openness of the DHSC, as well as factors that apply in relation to the specific information in question.

² DFES v Information Commissioner and Evening Standard (EA/2006/0006)

24. The DHSC has emphasised that the information relates to live policy and guidance which is commercially sensitive. It states that in order to deliver on this policy the DHSC is reliant on suppliers and the NHS to provide it with information that is treated in confidence. Disclosing this information would have affected these relationships, risking the delivery of the programme and having a negative impact on patient care.
25. The DHSC states that as the policy development is ongoing, it would not have been able to properly contextualise the information released and may have increased patient concern, putting additional strains on the NHS. The DHSC concluded that as the only argument for disclosing the information was transparency, the operational risk and risk to patients outweighed the need to be transparent.
26. When considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential.
27. The fact that the DHSC provided advice and the nature of this advice is for the most part publicly available as it was the subject of an online article³.
28. The Commissioner considers that the information published online already reveals that the DHSC provided advice to NHS Trusts on how to respond to requests and gave suggestions as to relevant exemptions that could be relied upon. The withheld information therefore would not add significantly to that which is already known but would add some detail about the thought process around offering the advice.
29. The Commissioner fails to understand how disclosing the withheld information would have any of the suggested impacts that the DHSC has cited. There is no suggestion that the internal advice and discussions on this matter were unsuitable for public disclosure or confidential. The content of the information does not reveal any detail that the Commissioner considers would be commercially sensitive or require a duty of confidence to third party companies as the information is not the risk assessments themselves and is not based on confidential information provided to the DHSC. The only information provided by a

³ <https://www.hsj.co.uk/policy-and-regulation/revealed-government-instructs-trusts-to-withhold-brexit-impact-assessments-/7024705.article>

third party is the request for advice itself and the fact that advice was asked for and given is publicly known.

30. Similarly it is difficult to follow the argument that disclosure would impact on the DHSC's ability to deliver on its policy. The information relates to the policy but indirectly so the argument that disclosure would risk the delivery of the programme and affect patient care is not supported by the content of the information that is being withheld.
31. Whilst the Commissioner accepts that policy development in this area was ongoing at the time of the request, she finds that the withheld information only loosely relates to this and the majority is already in the public domain.
32. On balance, although the Commissioner accepts there is usually a strong public interest in maintaining the integrity of the policy-making process, on this occasion she is not persuaded that the DHSC has evidenced any harm in disclosure of this particular information and she considers the withheld information is largely peripheral to the actual policy-making itself.
33. Conversely, she can accept that any information relating to the government's preparedness for Brexit is of public interest. Again the Commissioner stresses this information is only indirectly linked to this but it does provide some insight into the willingness of government departments to be transparent about their Brexit planning. There is a public interest in allowing the disclosure of information which shows how the DHSC is responding and advising others to respond to information requests for information on this topic.
34. The Commissioner's decision is that section 35(1)(a) of the FOIA is engaged in relation to the remaining withheld information, but that the balance of the public interest favours disclosure.
35. The Commissioner requires the DHSC to disclose all the withheld information to the complainant.

Right of appeal

36. 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

37. 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.
38. 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

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