

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 September 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 the Department of Health and Social Care (the DHSC) to disclose a copy of the final Impact Assessment (IA), produced in July 2019, for the 'Community Pharmacy Contractual Framework 2019/20 to 2023/24' (CPCF). The DHSC refused to disclose the requested information citing sections 35(1)(a) and 43(2) of the FOIA.
2. The Commissioner's decision is that section 35(1)(a) does not apply. However, section 43(2) of the FOIA does apply to the sections of the IA identified by the DHSC.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The DHSC should disclose all sections of the IA not identified as exempt from disclosure under section 43(2) of the FOIA to the complainant.
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 19 September 2019, the complainant wrote to the DHSC and requested information in the following terms:

"Under the Freedom of Information Act 2000, I am requesting the following information on the Community Pharmacy Contractual Framework 2019/20 to 2023/24:

Please could you provide me with a copy of the final Impact Assessment, produced in July 2019, for the 'Community Pharmacy Contractual Framework 2019/20 to 2023/24'."

6. The DHSC responded on 10 October 2019. It refused to disclose the requested information citing sections 35(1)(a) and 43(2) of the FOIA.
7. The complainant requested an internal review on 14 October 2019.
8. The DHSC carried out an internal review and notified the complainant of its findings on 25 October 2019. It upheld its previous application of the exemptions cited.

Scope of the case

9. The complainant contacted the Commissioner on 29 October 2019 to complain about the way her request for information had been handled. The complainant stated that a financial settlement for the next five years had already been reached and the public interest in understanding its impact on community pharmacy is substantial. She therefore considers that the withheld information should be disclosed.
10. The Commissioner will first consider the application of section 35(1)(a) of the FOIA, as this has been applied to the withheld information in its entirety. She will only go on to consider section 43(2) if she finds that section 35(1)(a) does not apply.

Reasons for decision

Section 35(1)(a) - formulation or development of government policy

11. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.

12. For information to be exempt under section 35(1)(a) it simply has to relate to the formulation or development of government policy; there is no requirement for the disclosure of the information to be in any way prejudicial to either of those policy processes.
13. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. This means that any significant link between the information and the policy process is sufficient to engage the exemption.
14. The DHSC confirmed that the IA was developed to support Ministers' decisions on the direction of travel set out in the CPCF five year deal. It sets out its very early thinking and relates to the development and formulation of the five year deal. The DHSC also argued that the IA relates to and is required for ongoing and continual negotiations with the Pharmaceutical Services Negotiating Committee (PSNC), for the duration of the framework, with yearly agreements for each of the five years.
15. The Commissioner has reviewed the withheld information and she is satisfied that it relates to the development and formulation of the CPCF. Section 35(1)(a) of the FOIA therefore applies.

Public interest test

16. The DHSC confirmed that it appreciates there is a public interest in transparency and accountability to promote public understanding and to safeguard democratic processes. It confirmed that there is a public interest in the services to be provided to community pharmacy and in providing certainty for contractors to understand the planned changes to the sector and the impacts to enable them to plan their business models.
17. However, it considers disclosure of the withheld information would not further benefit the public in understanding the government's policy in this area. It is of the opinion that this is met by the publication of the Framework Document and each subsequent year's agreement.
18. It stated that there is a stronger public interest in maintaining the need for safe space to allow the development and formulation of government policy. It stated that the CPCF requires continual negotiations with the PSNC for the duration of the framework, with yearly agreements for each of the five years. It therefore requires the safe space to carry this out. It argued that the IA is highly sensitive and is a key document for the DHSC, NHS England and NHS Improvement to inform its position in the ongoing formal negotiations with the PSNC.
19. It also stated that the IA contains information that, if released, would be likely to prejudice the government's ability to negotiate the best value

for tax payers' money in ongoing policy development on the expansion of the role of community pharmacy. It argued that prejudicing the government's ability to secure best value for money in this contract and, in parallel, the GP contract will mean there is less money to spend elsewhere in the health service, reducing the overall health gain that can be achieved for the fixed health service budget allocation. It argued that this is not in the interests of the wider public.

20. The Commissioner's guidance on section 35 highlights that the underlying purpose of this exemption is the protection of the policymaking process and preserving a safe space to debate live policy issues away from external interference and distraction. The exact timing of the request will be very important. If the information reveals details of policy options and the policy process is still ongoing at the time of the request, the need for safe space may carry significant weight. If the policy process has ended, however, the need for safe space is no longer required and this argument will carry less weight in the public interest consideration.
21. At the time of the request the Commissioner notes that the CPCF had been published and outlined a five year deal. The withheld information is the IA that was used to put that framework together and inform ministers prior to its agreement and publication of the options available. The CPCF states itself that further IA's will be required during the five years as individual strands of the framework and any changes are later negotiated and agreed. The DHSC has also stated that there will be further and continual negotiations with the PSNC for the duration of the framework, with yearly agreements for each of those five years.
22. The Commissioner considers the need for safe space to discuss and agree the CPCF had ended by the time of the request and the withheld information is the IA that was used to agree and finalise that framework. She appreciates that there will be further negotiations but she considers that although these are related to the overarching framework and will touch on matters discussed in the withheld information, they will be separate, more focussed, individualised negotiations for the specific year in question within the overall 5 year timeframe. The CPCF also confirms that there will need to be future IA's specific to these future negotiations, supporting the Commissioner's view that the formulation and development of the governmental policy (i.e. the CPCF) had ended and whilst still useful, further IA's will be required to tackle the yearly agreements that will be required.
23. She appreciates that safe space will be required to put the yearly agreements together and any further IA's that are required, to discuss and agree these and the withheld information will be of use to such deliberations. However, she considers this further need for safe space,

whilst closely related and connected, is separate to the safe space that was required to consider the withheld information and the now published CPCF and this further need for safe space will be for further policy development processes. The withheld information was produced to inform ministers over the CPCF and at the time of the request this particular policy process was complete. As a result the Commissioner considers the DHSC's public interest arguments relating to safe space carry little weight in this case.

24. The Commissioner considers the public interest in favour of disclosure is therefore more convincing, particularly as she considers the need for safe space to consider the specific policy formulation of the CPCF had ended. There are the general public interest arguments for openness, transparency and accountability and the weighty public interest argument that the framework relates to the operation of and planned changes to community pharmacy. It is a five year deal which will affect pharmaceutical services, how these are delivered, what services are delivered, the associated costs and proposed benefits. It will clearly be of significant public interest as those plans and changes will affect all communities across the UK and all those members of the public that access pharmacies and the services they currently provide on a regular basis.
25. As the exemption is designed to protect the policy formulation process and the need for safe space and the Commissioner has decided in this case that the specific policy process to which the withheld information relates had ended by the time of the request, she has concluded that the public interest rests in favour of disclosure of the withheld information.
26. However, she notes that the DHSC has also applied section 43(2) to certain elements of the withheld information in the alternative. She will therefore now go on to consider the section 43 exemption.

Section 43 – commercial interests

27. Section 43 of the FOIA states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority itself, a third party or both.
28. This exemption is also qualified. Therefore, in order to rely on this exemption a public authority must also consider the public interest test. It must consider the public interest arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.

29. The DHSC stated that it is legally obliged to negotiate the CPCF with the PSNC. It argued that these negotiations are undertaken in confidence with representatives from across the community pharmacy sector, but their outcome is not communicated until the deal is struck. The withheld information comprises of pricing and costing information, services to be commissioned and de-commissioned and the pending success of pilots. It stated that this information has not been shared with the PSNC and is yet to be negotiated with PSNC. The DHSC confirmed that one key point of contention is the PSNC's view that they should share in any savings to the NHS that any new services create. If the withheld information was disclosed it would be likely to damage the relationship between the DHSC and PSNC and compromise the negotiation processes. It would be likely to prejudice current and future negotiations with PSNC and allow PSNC access to the DHSC's negotiating position. If PSNC had prior knowledge of the withheld information, it would be likely to hinder the DHSC's ability to negotiate effectively and achieve the best possible deal for the public and the public purse. Prior knowledge of this information would enable PSNC to demand better terms for itself than those that may otherwise have been suggested or agreed had disclosure not taken place.
30. The Commissioner has reviewed the sections of the IA that the DHSC considers are exempt under section 43(2) and she is satisfied that disclosure would be likely to prejudice the DHSC's commercial interests. She acknowledges that the relevant sections contain costings and pricing information and the potential savings and benefits from the proposed plans. The Commissioner agrees with the DHSC that disclosure of this information would reveal to PSNC the DHSC's negotiating position prior to and whilst negotiations are ongoing. This would hinder the DHSC from negotiating and securing the best possible terms for the NHS and therefore the wider public. It would allow PSNC to see upfront what the DHSC's negotiating position is and secure more favourable terms for itself.
31. For the above reasons the Commissioner is satisfied that section 43(2) of the FOIA applies to the sections of the withheld information highlighted by the DHSC.

Public interest test

32. The DHSC stated that it appreciates that there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. However, the DHSC considers again that disclosure of the withheld information would not further benefit the public in understanding the government's policy in this area. It considers the public interest is already met by the publication of the CPCF and each of the subsequent years agreements.

33. It argued that disclosure would be likely to prejudice the DHSC's ability to negotiate best value for tax payers' money in ongoing and future negotiations with PSNC. Prejudicing the DHSC's ability to negotiate best value for money would mean less money to spend elsewhere in the health service reducing the overall health gains that can be achieved for the fixed health service budget allocation. This is not in the wider interests of the public.
34. The Commissioner acknowledges the public interest in openness and transparency and in members of the public having access to information to enable them to understand more clearly why governmental policies are made and why. She disagrees with the DHSC that disclosure would not add to public understanding or be of benefit. She agrees the publication of the CPCF goes some way to meeting the public interest. But having access to the withheld information would enable the public to understand more closely the costs involved, the likely savings and benefits to the pharmacy sector and the general public. It would aid public debate and this can often lead to better policy decisions being made.
35. However, she notes that the DHSC was in current negotiations and would be entering into further negotiations with PSNC in the very near future. Revealing the DHSC's costings, pricing, benefits and associated savings identified in the IA would allow the PSNC to tailor its negotiations accordingly and potentially secure itself a more favourable deal than would otherwise have been agreed. This would be likely to damage the DHSC's ability to negotiate efficiently and secure the best possible deal for the public and the public purse. The Commissioner accepts that this is not in the interests of the wider public. It would hinder the DHSC's ability to deliver this 5 year deal and the associated benefits it has for the pharmacy sector and the services offered to the public and if it did secure a less favourable deal, this would mean less money is then available for other areas of the NHS.
36. For the above reasons, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

37. 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

38. 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.
39. 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