

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2022

Public Authority: UK Health Security Agency (Executive Agency of
Address The Department of Health and Social Care)
Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to a COVID-19 policy. The UK Health Security Agency (UKHSA) refused to provide the requested information, citing sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that section 36(2)(b)(i) and (ii) are engaged and the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 7 July 2021 the complainant wrote to Public Health England (PHE) and requested the following information:

"I would like to make a request under the Freedom of Information Act. Please would you supply me with any emails, texts,Whatsapps or other written correspondence sent between 1 March 2020 and 2nd April 2020 in which the contents of this document – or earlier drafts of the document - were discussed before its release: Coronavirus (COVID-19): admission and care of people in care homes

[Coronavirus \(COVID-19\): admission and care of people in care homes - GOV.UK \(www.gov.uk\)](#)

Please would you also supply me with any earlier drafts of the document. I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents and it is the department's responsibility to provide the information I require. If you need further clarification, please contact me by email or phone."

5. PHE responded on 1 September 2021. It disclosed two bundles of information: PHE interim advice on managing COVID-19 cases and outbreaks in care homes, and care homes and infection prevention and control draft amendments. It withheld the draft copies of the policy and internal PHE correspondence, citing section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c).
6. The complainant requested an internal review on 2 September 2021.
7. PHE sent the outcome of its internal review on 29 September 2021. It upheld its original position.
8. From 1 October 2021 PHE, an executive body of the Department of Health and Social Care ('DHSC'), was disbanded and its public health functions were transferred to the UKHSA.

Reasons for decision

Prejudice to the effective conduct of public affairs

9. Section 36(2) of FOIA states:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

 - (b) would, or would be likely to, inhibit –
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."
10. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised Qualified Person ('QP') for that public authority. The QP's opinion must also be a 'reasonable' opinion for the exemption to be engaged.

11. The opinion does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
12. The information being withheld in this instance is draft copies of the guidance, including comments and tracked changes, and internal correspondence in which the guidance is being discussed. There is 600 pages of information being withheld.

Who is the qualified person and how was their opinion sought?

13. In this case, since the request was received by PHE, the QP was Helen Whately MP, Minister for Care at the Department of Health and Social Care.
14. The opinion of the QP was sought on 18 August 2021. The QP was provided with a submission which encouraged them to apply section 36(2) on the basis that officials need a 'safe space' to develop ideas and debate issues away from external interference otherwise this could cause a 'chilling effect' on future discussions. Whilst the submission did not put forward any arguments as to why section 36 should not be applied, it did emphasise the need for transparency and openness.
15. Alongside this submission, the QP was provided with: the information that had been disclosed, the information that was still being withheld and the PHE's draft response to the complainant.
16. On 1 September 2021 the QP cleared the submission with no comments, effectively confirming that the requested information should be withheld.

Is the qualified person's opinion reasonable?

17. The Commissioner must be satisfied that the QP has given a reasonable opinion that disclosure would, or would be likely to, prejudice the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or otherwise prejudice the effective conduct of public affairs.
18. It is important at this stage to note that section 36(2)(b) and section 36(2)(c) are distinct and separate exemptions. Section 36(2)(b) relates to the 'chilling effect' and 'safe space' arguments but in order for section 36(2)(c) to be engaged it must 'otherwise' prejudice the effective conduct of public affairs. The use of the word 'otherwise' indicates that the prejudice must be different and distinct to that which section 36(2)(b) is designed to protect.
19. In its refusal notice to the complainant, PHE explained that 'Premature disclosure would detract from PHE's important work to promote public

health and reduce health inequalities.' Because this argument does not relate to the free and frank provision of advice or exchange of views for the purposes of deliberation, it can relate to section 36(2)(c). However, the Commissioner notes that the submission provided to the QP only focused on the 'safe space' and 'chilling effect' arguments.

20. Since the QP was not provided with any arguments as to why disclosure would, or would be likely, to otherwise prejudice the effective conduct of public affairs, it follows that section 36(2)(c) cannot apply.
21. It is not clear to the Commissioner, from the submission provided to the QP, PHE's refusal notice, internal review outcome or its submission to the Commissioner, which threshold of prejudice the UKHSA wishes to rely upon to engage the exemption; disclosure 'would' or 'would be likely to' result in the prejudice.
22. However, the Commissioner does accept that the QP's opinion is a reasonable one and, in the absence of clear evidence that the prejudice is more likely to occur than not, he has accepted that section 36(2)(b)(i) and (ii) are both engaged on the lower threshold of prejudice. As section 36(2)(b) is a qualified exemption, the Commissioner has gone on to consider whether the public interest lies in disclosure or in maintaining the exemption.

The public interest test

Public interest in disclosure

23. The UKHSA has acknowledged that there is a public interest in openness and transparency.
24. It also acknowledged that there is a public interest in presenting a full picture of how the care home guidance developed, so this guidance and the decision-making processes can be fully scrutinised.
25. In their internal review request, the complainant explained 'Moreover, urgent disclosure is overwhelmingly in the public interest, given that the pandemic is still unfolding and that lessons can be drawn from the way key decisions were handled in the early days of the crisis, if those decisions are subject to proper scrutiny.'

Public interest in maintaining the exemption

26. The UKHSA has largely repeated its 'safe space' and 'chilling effect' arguments as reasons for maintaining the exemption. The UKHSA is concerned that disclosure would be likely to inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

27. The Commissioner notes that any disclosure that might undermine the effectiveness of official's discussions and lead to poor decision making and less robust policies, is not in the public interest.

The balance of the public interest

28. The Commissioner must consider where the public interest lies at the time that the request was made. Though he notes that this is a finely balanced case, he has determined that the public interest lies in maintaining the exemption.
29. There are clearly strong arguments for disclosure. At the time that the request was made, there was criticism of the policy and the government's decision to discharge patients from hospital to care homes, without 'adequate testing or isolation'.¹
30. At the time that the request was made, former Health Secretary Matt Hancock's claim that a 'protective ring'² had been thrown around care homes was being repeatedly challenged. On 12 May 2021, the former Prime Minister Boris Johnson MP announced that a public inquiry into the government's handling of the COVID-19 pandemic would take place.
31. The Commissioner has not underestimated the interest in the withheld information, which demonstrates how the policy was formulated and developed and, most importantly, what considerations were given to the possibility of transmission, from asymptomatic patients, in adult social care settings. The Commissioner has also not underestimated just how many residents, and families of residents, were directly impacted by the policy and with this comes the need for transparency and accountability.
32. However, the Commissioner also recognises the speed at which the government needed to formulate and develop its policies during the pandemic, given the pace at which infection rates and variants developed. He recognises the need to protect the 'safe space' required for ministers and officials to freely and frankly exchange views and provide advice. The Commissioner is acutely aware that, at the time that this request was made, the policy in question was still live. The former Prime Minister, Boris Johnson MP, announced the beginning of the COVID-19 pandemic on 19 March 2020. The first version of the guidance was published on 2 April 2020 but it was basically revised every month during the pandemic.

¹ [Covid: What happened to care homes early in the pandemic? - BBC News](#)

² [Care leaders reject government claim of 'protective ring' around care homes at start of pandemic](#)

33. Throughout this investigation, the Commissioner has reminded himself of why the policy was introduced in the first place, to prevent the NHS becoming overwhelmed in the midst of the pandemic. It is not the role of the Commissioner to comment on, or challenge, the appropriateness of the policy. It is only his role to consider if, at the time of the request, the public interest would have been best served by disclosure or in maintaining the exemption.
34. It is clear from the withheld information that officials, ministers and stakeholders, all working on the policy in question, were working in a highly pressurised environment. They were not only facing intense scrutiny from involved stakeholders and the outside world but they were having to make difficult decisions based on a rapidly evolving, unprecedented, crisis situation.
35. The Commissioner agrees that, if these challenging conversations were made public whilst they were ongoing, it would have obstructed the discussions and decisions being made. Officials and ministers had to be allowed a safe space in which to discuss all options, contingencies and scenarios, both good and bad, even if these policies did not end up being implemented. If this safe space was compromised and this in turn hampered these discussions, the policy, which was designed to alleviate the stress on the NHS, would have been affected.
36. Again, it's not the role of the Commissioner to comment on the substance, methods or objectives of the policy but, returning to the pandemic as it was at the time that the request was made, the Commissioner considers that the public interest lies in maintaining the exemption.

Other matters

37. In the Commissioner's view, the timing of the request is the crux of this case. The request was made at the time when the pandemic was ongoing and the policy was still live; it was not withdrawn until April 2022.
38. More recently, a high court judgment ruled that the policy in question was 'irrational in failing to advise that where an asymptomatic patient (other than one who had tested negative) was admitted to a care home, he or she should, so far as practicable, be kept apart from other residents for 14 days.'³ Whilst the Commissioner has determined that in

³ <https://www.judiciary.uk/wp-content/uploads/2022/07/Gardner-Harris-v-DHSC-judgment-270422.pdf>

this case the public interest lies in maintaining the exemption, he cannot say for certain where the public interest would lie if the request was made today.

Right of appeal

39. 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 <mailto:GRC@hmcts.gsi.gov.uk>

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

40. 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.
41. 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

Alice Gradwell
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