

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 January 2023

**Public Authority:** Department of Health & Social Care

**Address:** 39 Victoria Street  
London  
SW1H 0EU

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Department of Health & Social Care (DHSC) seeking an unredacted copy of parts of a Public Health England report into 'Exercise Alice' a hypothetical exercise about Middle East Respiratory Syndrome Coronavirus conducted in 2016. DHSC argued that the redacted parts of the report were exempt from disclosure on the basis of sections 27(1)(a) (international relations) and 38(1)(b) (health and safety) of FOIA.
2. The Commissioner's decision is that DHSC can rely on the exemptions cited to withhold the redacted information.
3. No steps are required.

#### **Request and response**

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4. The complainant submitted the following request to DHSC on 30 March 2022:

'This request relates to the Public Health England report entitled 'Report - Exercise Alice, Middle East Respiratory Syndrome Coronavirus (MERS-CoV)' dated 15 February 2016.

Please provide an electronic copy of the complete text of paragraph 2 (headed "Scenario").<sup>1</sup>

5. DHSC responded on 29 April 2022. It confirmed that it held the requested information but explained that it considered this information to be exempt from disclosure on the basis of sections 27(1)(a) (international relations) and 38(1)(b) (health and safety) of FOIA.
6. The complainant contacted DHSC on the same day and asked it to conduct an internal review of this refusal on the grounds that:
  - '- Section 27 is not engaged because it is wholly unrealistic to suggest that any sensible foreign government would have a hissy-fit on the basis of the withheld information being disclosed, and
  - Insofar as you seek to rely on section 38, your refusal notice is inadequate as it does not explain why the exemption applies.'
7. DSHC informed him of the outcome of the internal review on 10 May 2022. The review upheld the application of the exemptions cited in the refusal notice.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 20 May 2022 in order to complain about the way his request for information had been handled. He disputed DSHC's reliance on the exemptions it had cited to withhold the requested information.

## **Reasons for decision**

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### **Section 27 – international relations**

9. DHSC relied on section 27(1)(a) to withhold part of the information. This exemption states that information is exempt if its disclosure would, or would be likely to, prejudice 'relations between the United Kingdom and any other State'.
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<sup>1</sup> DHSC had disclosed a redacted version of this report in October 2021.

10. DHSC argued that release of this withheld information would be likely to prejudice relations between the UK and the state named in the purely hypothetical scenario upon which Exercise Alice was based.
11. DHSC provided the Commissioner with additional submissions to support this position but as these relate to the content of the withheld information these submissions have not been included in this decision notice.
12. As noted above at paragraph 6, the complainant was sceptical about disclosure of the information actually having the impact on international relations that DHSC envisaged.
13. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
14. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.<sup>2</sup>

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<sup>2</sup> Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

15. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that DHSC believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 27(1)(a) of FOIA.
16. With regard to the second and third criteria, the Commissioner is satisfied, based on DHSC's submissions to him, that there is causal link between disclosure of the withheld information and harm occurring to the UK's relations with the state in question. Furthermore, the Commissioner is also satisfied that the risk of such prejudice occurring is one that is more than a hypothetical risk. In reaching these findings the Commissioner has taken into account the findings of the CAAT decision above and is satisfied that disclosure of the particular information would be likely to require a diplomatic response that would otherwise not have been necessary. The Commissioner cannot elaborate on these findings without revealing the content of the withheld information.
17. Section 27(1)(a) is therefore engaged.

### **Public interest test**

18. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 27(1)(a) outweigh the public interest in disclosing the information.
19. DHSC acknowledged that there is a strong public interest in information being made as freely available as possible, allowing the general public to understand decisions made by public authorities that affect their lives. However, DHSC argued that such an interest in this case is outweighed by the public interest in ensuring that relations between the UK and the state in question were not harmed. It also argued there was limited value in the disclosure of information in identifying the state in question as this was named only in a purely hypothetical scenario upon which Exercise Alice was based.
20. The Commissioner accepts that there is limited value in the disclosure of the identity of the state in question given it was used purely hypothetically and that knowing the state in question would not add to the public's understanding of the remainder of the report. In contrast the Commissioner considers there to be a strong public interest in the UK maintaining effective international relations and that it would be firmly against the public interest to disclose information which would be likely to harm these interests, particularly for such limited benefit as in this case.

21. Therefore, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 27(1)(a) of FOIA.

### **Section 38 – health and safety**

22. Section 38(1)(b) of FOIA states that '(1) Information is exempt information if its disclosure under this Act would, or would be likely to...endanger the safety of any individual.'
23. DHSC explained to the Commissioner why in its view disclosure of the information would be likely to endanger the safety of individuals. Such submissions make direct reference to the content of the withheld information and therefore are not replicated here.
24. However, based on the content of these submissions, and the content and context of the withheld information, the Commissioner is satisfied that there is a causal link between disclosure of the information and harm occurring to the safety of individuals. Furthermore, the Commissioner is satisfied that the likelihood of this occurring is one that is more than hypothetical. Section 38(1)(b) is therefore engaged.

### **Public interest test**

25. Section 38 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 38(1)(b) outweighs the public interest in disclosing the information.
26. DHSC acknowledged that the public has an interest in this information. However, it argued that as releasing it would be likely to endanger the safety of individuals it therefore considered that the balance of the public interest favours withholding this information. The DHSC elaborated on these arguments in submissions to the Commissioner which refer to the content of the withheld information.
27. As noted above, the Commissioner considers the public interest in the disclosure of the withheld information to be rather limited and that the redaction of this information from the report does not impede the public's understanding of 'Exercise Alice'. In contrast, the Commissioner considers there to be a significant public interest in ensuring that the safety of individuals is not endangered. On balance, the Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 38(1)(b) of FOIA.

## Right of appeal

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28. 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@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.
30. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**