

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant submitted a request to HM Treasury (HMT) seeking copies of equalities information provided by the Department of Health and Social Care to HMT in relation to the 2020 spending review. HMT disclosed an extract from the requested information but argued that the remainder of it was exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) and that the public interest favoured maintaining the exemption.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a). However, the Commissioner has decided that the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
3. The Commissioner requires HMT to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information which it has withheld on the basis of section 35(1)(a).
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. The complainant submitted the following request to HM Treasury (HMT) on 11 February 2022:

"Our request continues to relate to the discharge of responsibilities under section 149 of the Equalities Act 2010 in connection with determining central government funding allocations to local social services authorities. We ask for this information in relation to HM Treasury's Spending Review of 2020, including funding available to such authorities to use in fulfilling their responsibilities under the Care Act 2014.

In our requests we refer to the information gathered, provided and/or considered for the purpose of the discharge of the s149 duty in connection with this determination in the relevant spending reviews as 'Equalities Information',

Please could you provide the following information.

(a) Details of the process or processes followed by the Treasury to gather Equalities Information from the Department of Health and Social Care for the purpose of discharging its obligations under section 149 of the Equalities Act 2010 in relation to the 2020 spending review.

(b) Copies of Equalities Information provided by the Department of Health and Social Care in full to the Treasury in relation to the 2020 spending review."

6. HMT responded on 11 March 2022. It provided information in response to part (a) of the request. In relation to part (b) of the request HMT confirmed that it held information falling within scope but considered this information to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA.
7. The complainant contacted HMT on 14 April 2022 and challenged the decision to withhold information on the basis of section 35(1)(a) of FOIA.
8. HMT completed the internal review on 17 May 2022. It concluded that the information sought by part (b) of the request was exempt from disclosure on the basis of section 35(1)(a) of FOIA. The only exception was in relation to a small extract of information which HMT disclosed.

Scope of the case

9. The complainant contacted the Commissioner on 10 August 2022 in order to complain about HMT's decision to withhold information on the basis of section 35(1)(a) of FOIA. They argued that the withheld information did not fall within the scope of the exemption, and even if the exemption was engaged, then in their opinion the public interest favoured disclosure of the information. The complainant's submissions to support this position are set out below.
10. It should be noted that the Commissioner's role is limited to considering the application of any exemptions (including the balance of the public interest test) to the point at which the request was submitted (or at the latest, the time for compliance with the request, ie 20 working days after it was submitted). Therefore, the scope of the Commissioner's investigation is to determine the circumstances as they existed at the time of the request.

Reasons for decision

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

11. Section 35(1)(a) of FOIA states that:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy”

12. Section 35(2) specifically deals with statistical information and states that:

“(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy’

13. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
14. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are

generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

15. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
16. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
17. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.

HM Treasury's position

18. By way of background, HMT explained that for the 2020 spending review it collected information from government departments to inform the process of setting budgets for the period 2021/22 to 2023/24. As part of this process, information was collected from the Department of Health and Social Care (DHSC) about the impact of the current pattern of spending and new spending proposals on people with protected characteristics. HMT explained that this information was collected to enable it to carefully to consider the impact of its decisions on those with protected characteristics in line with both its obligations under section 149 of the Equalities Act 2010 and its strong commitment to promoting fairness.
19. HMT explained that after the collection of equalities information from DSHC relating to 2021/22 to 2023/24, the decision was taken to only set budgets for the financial year 2021/22. This was in contrast to the approach taken in previous years when budgets were generally set for a longer period, as a result of the Covid-19 pandemic.
20. HMT explained that the 2020 spending review was a major fiscal event for the whole of government. HMT explained that since the information in scope was collected, DHSC budgets for 2023/24 were the set as part of the spending review settlement. However, these budgets were undergoing a further reprioritisation at the time of the original request,

have undergone several further reprioritisations since then and are currently undergoing further reprioritisation.

21. With regard to the engagement of section 35(1)(a), HMT explained that when setting or revising DHSC's budget, it is required to consider the funding that will be provided for each different area of healthcare spend. This process means that HMT has to weigh up the merits and demerits of spending more or less in relation to different areas of healthcare, which necessarily involves considering sensitive trade-offs between areas such as the NHS, social care, and public health.
22. HMT explained that the information in scope sets out the impact of both current spending and funding proposals in relation to various areas of healthcare spending on different protected groups for the period 2021/22 to 2023/24. HMT argued that this information was, and continues to be, considered by officials and ministers when assessing whether to proceed with particular funding decisions or modify them to mitigate their equalities impact. However, HMT explained the equalities impact of funding decisions is only part of officials and ministers' consideration and needs to be assessed alongside other important factors, such as clinical outcomes.
23. HMT acknowledged that the spending review 2020 was published on 25 November 2020. However, it argued that policy development in this area continued after the publication of the spending review 2020 in several forms. As noted above, even though the information in scope was collected for the period 2021/22 to 2023/24, HMT decided at the time only to set budgets for the financial year 2021/22. Since then, as noted above, DHSC budgets were set for 2023/2024, but these budgets have undergone several reprioritisation processes in the time since and are currently undergoing another process of reprioritisation.
24. HMT acknowledged the Commissioner's view, as confirmed in Tribunal decisions, that policy making is not inevitably a continuous process or a 'seamless web'. However in this particular case, it explained that DSHC budgets for 2023/24 are subject to continuing review and revision. This involves officials and ministers reconsidering different policy options and their likely impact on protected groups. For example, the information in scope considers spending related to the NHS, adult social care, public health, technology investment, the healthcare workforce and R&D. Policy development and funding decisions are still ongoing in relation to all of these areas of healthcare spend. HMT explained that this was the case at the time of the request, and it continues to be the case today. Therefore, HMT argued that the publication of the spending review 2020 cannot be said to mark the end of the policy development process in respect of which the information in scope was produced.

25. HMT accepted that it is true that further equalities information has been provided by DHSC since the information in scope was produced (in particular in relation to the spending review 2021). However, it explained that the information in scope is still being considered by officials and ministers to inform decisions in relation to DHSC's budgets for 2023/24. HMT argued that the information in scope, and the more recent DHSC equalities assessments, together form one body of evidence that is used to support policy development in this area.
26. As noted below, the complainant argued that HMT had failed to take into account the provisions of section 35(2). In response, HMT explained that it did not accept that the information in scope contained any "statistical information". It noted that the Commissioner's guidance described "statistical information" as "statistics (ie factual information presented as figures), and any further mathematical or scientific analysis of those figures. It is not simply a view or opinion which happens to be expressed numerically". HMT argued that in contrast the withheld information in scope is largely of a qualitative and descriptive nature. Where it contained figures, these reflect officials' views rather than being merely factual information. In any event, HMT explained that even if it was determined that the withheld information contained statistical information, given that in its view the information relates to live policy making, then it was not the case that a decision had been 'taken' in relation to government policy and therefore section 35(2) was not applicable.

The complainant's position

27. The complainant did not accept that the exemption was engaged because in their view the policy making to which the information related was not live at the point that the request was submitted.
28. For clarity, in order for section 35(1)(a) to be engaged, the information in question does not need to relate to live policy making. Information will be exempt if relates to the formulation or development of government policy making, even if by the point of the request that formulation or development is complete. It is however the case that whether the policy making is live will have an impact on the balance of the public interest test.
29. Nevertheless, in the circumstances of this particular case the complainant's submissions to support their view that the policy was not live at the point of the request are still relevant to the Commissioner's decision on the engagement of the exemption. Firstly, because of the provision of section 35(2). Secondly, because the complainant's view is essentially that the withheld information relates to a smaller, narrower area of policy making in comparison to the areas of policy to which HMT maintain the information relates to.

30. In the complainant's view the policy making to which the withheld information relates to is simply the decisions about the 2020 spending review. (And furthermore in their view, such decisions were no longer live by the point that the request was submitted). In contrast, for the reasons set out above, HMT take the view that the withheld information relates not only to the formulation and development of policy making for the 2020 spending review (which it does accept was complete at the point of the request), but also relates to the formulation and development of policy making in relation to 2023/24 budgets (policy making which in HMT's view was ongoing at the time of the request).
31. The complainant argued that it would be concerning if it was being suggested that department returns provided at the end of 2020 for the year 2021/22 justified being withheld over concerns of the impact over a longer term up to 2023/24. The complainant argued that there will always be future impacts of past policy decisions and ongoing live future policy discussions in all departmental areas of work. The complainant argued that the approach being taken by HMT risked a fundamental undermining of transparency and accountability. The complainant argued that the decision of the First-tier Tribunal had rejected a similarly broad approach adopted by another public authority.¹ The complainant argued that the fact that a decision will have long-lasting effects does not change the fact that the decision has been made and is no longer being deliberated.
32. In relation to section 35(2) the complainant argued that the request would clearly capture information that would fall within the definition of statistical information. Furthermore, as set in the preceding paragraphs, in the complainant's view the government policy decision to which the requested equalities information relates had already been taken by the time of the request.

¹ Committee on Climate Change v Information Commissioner and Montford EA/2020/0231

The Commissioner's position

33. The Commissioner understands that it is commonly agreed between the two parties that the withheld information relates to policy making about the 2020 spending review. The Commissioner agrees that the information clearly relates to the formulation or development of policy making in terms of that spending review. On this basis alone the Commissioner is therefore satisfied that the withheld information falls within the scope of the exemption contained at section 35(1)(a) on that basis.
34. However, the Commissioner appreciates that there is a fundamental disagreement between the parties as to whether the information also relates to the formulation and/or development of policy in relation to future spending decisions, namely policy making concerning spending for the financial year 2023/24.
35. In relation to this point the Commissioner has considered both parties' submissions carefully, alongside the content of the withheld information. Having done so the Commissioner is more persuaded by HMT's view that the information does not relate simply to policy making in respect of the 2020 spending review. In reaching this finding, as HMT indicated, the Commissioner does not accept that policy making is a seamless web. The Commissioner also acknowledges the complainant's point that there will always be future impacts of past policy decisions on future policy making.
36. However, in the specific circumstances of this case the Commissioner has taken into account that the withheld information contains predicted spending data for four financial years from 2020/21 to 2023/24 along with narrative analysis not restricted simply to matters concerning the 2020 spending review. The Commissioner has also taken into account HMT's position that the withheld information formed part of the information being considered by officials and ministers when determining funding decisions in relation to DHSC's budgets up to 2023/2024, and that such decisions were subject to revision at the point of the request. Therefore, whilst the Commissioner accepts that future data for spending reviews beyond 2020 have been submitted to HMT, he nevertheless accepts that the information in question still relates to the formulation and development of policy relating to financial planning for the financial year 2023/24. That is to say, the Commissioner accepts HMT's position that the information in scope, along with the more recent DHSC equalities assessments, together form one body of evidence that is used to support policy development in respect of 2023/24 budgets. Furthermore, the Commissioner accepts that although that year's budget had been set prior to the request being submitted, there was ongoing and active work in respect of prioritising that budget. On this

basis that the Commissioner accepts that it is plausible to argue that the withheld information relates to the formulation and development of policy making regarding the 2023/24 financial year. In relation to this conclusion the Commissioner has considered the Tribunal decision cited by the complainant but not is not persuaded that this supports their position.

37. With regard to the applicability of section 35(2), there is limited numerical data contained within the withheld information. In terms of the information that is expressed numerically, having considered such information and its context, the Commissioner favours HMT's position that this amounts to views or opinions expressed numerically rather than being statistical information.
38. In summary, the Commissioner has therefore concluded that the withheld information is exempt on the basis of section 35(1)(a) because
 - i) it relates to policy making in relation to the 2020 spending review and
 - ii) it relates to policy making in relation to the budget setting for later years, namely 2023/24.

Public interest test

39. Section 35 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 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the information

40. As explained above, in the complainant's view the policy making process was not live at the time of the request.
41. In support of this position the complainant noted that the 2020 spending review was published in full on 25 November 2020 and as a result the underlying policy decisions had been finalised by that date and what followed was an implementation of that policy. The complainant argued that the development and formulation of the new policy which encapsulated the 2021 spending review was undertaken as part of the process leading to the publication of that review in October 2021 and information relating to the equalities information impacts on that review would have been considered during that policy making process. In summary, the complainant's position is that the spending review 2020 policy process was complete, in respect of which the withheld information was provided to HMT, at the point of the request.
42. The complainant highlighted the Commissioner's section 35 guidance which noted that once the policy making is complete the sensitivity of

information relating to the decision making process will wane and the arguments for maintaining the exemption become weaker.

43. The complainant also emphasised that section 35(4) of FOIA states that:
- '(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.'
44. The complainant also noted that HMT's internal review response stated that some of the information is factual, some of it was not. However, the complainant argued that this response did not sufficiently address which elements of the information are factual, and which are not. The complainant argued that in reality it was extremely likely that the vast majority of information would be factual and so could be disclosed without any infringement into the freedom of policy making. The complainant therefore argued that HMT had failed to properly consider section 35(4) and had also failed to consider whether solely factual elements of the response could be disclosed.
45. The complainant noted that HMT's response to the internal review appeared to focus on the impact of disclosing information about 'health' spending on policy discussions related to the provision of, and outcome of, NHS services. However, they noted that the request concerned the funding available to local social services authorities. The complainant argued that this implied a misunderstanding of the nature of the request or a failure to take into account relevant factors in forming a judgment as to where the public interest lies. The complainant's point being that the spend by local authorities is entirely distinct from health spending on NHS services.
46. In any event, the complainant argued that HMT had failed to demonstrate how, and to what extent, provision of information about equalities impacts would harm policy making. They argued that there is no obvious inference that can be drawn from the fact that information about equalities impacts of past decisions will be taken into account in the future alongside other information such as clinical outcomes. Rather, the complainant argued that HMT had simply described part of the policy making process and its suggestion of harm to this remained simply an assertion.
47. The complainant argued that HMT had failed to take sufficient account of the public interest in transparency and accountability in budgetary decision making. The complainant noted that the Commissioner's

guidance highlighted that accountability for spending a large amount of money is a factor in weighing favour of disclosure. They also emphasised that the vital nature of transparency in central government budgetary decision making was recognised by the OECD, of which the UK is a member. The complainant noted that in 2015 the full Council of the OECD adopted the "Recommendation of the Council on Budgetary Governance"² and introduces its recommendation as follows:

"The budget is a central policy document of government, showing how annual and multi-annual objectives will be prioritised and achieved. Alongside other instruments of government policy – such as laws, regulation, and joint action with other actors in society – the budget aims to turn plans and aspirations into reality. More than this, the budget is a contract between citizens and state, showing how resources are raised and allocated for the delivery of public services. **The experience of recent years has underlined how good budgeting is supported by, and in turn supports, the various pillars of modern public governance: transparency, integrity, openness, participation, accountability, and a strategic approach to planning and achieving national objectives. Budgeting is thus an essential keystone in the architecture of trust between states and their citizens.**" [Complainant's emphasis]

48. Furthermore, the complainant argued that accountability is particularly important where the decision concerns allocation of significant sums of money with the potential for significant impacts on those affected and that central government's collection of equalities information informed decisions of this nature. The complainant emphasised that the allocation of such funding was at a time when there was a serious concern about the funding of social care and its implications for fulfilling statutory obligations. The complainant noted that there had been serious and growing concerns about the adequacy of funding for adult social care for sometime with surveys conducted by the Association of Directors of Adult Social Services showing that its members increasingly lacked confidence that budgets would allow them to meet eligible needs. Consequently, in the complainant's view the public interest in disclosure of the information was particularly strong.
49. The complainant suggested that in the internal review HMT relied heavily on information already in the public domain to meet the public interest in transparency and accountability. However, the complainant

² [oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf](https://www.oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf)

argued that none of the information in the public domain addressed the public interest in disclosure of this information.

50. The complainant noted that HMT cited the statement of equalities impacts accompanying the spending review 2020 but this only focussed on areas in which the decisions were said to have a positive impact on people with protected characteristics.³ The complainant noted that this is despite the fact that some of the withheld information also addresses the negative impact. HMT's Equality and Diversity Statement⁴ indicated that negative impacts are considered. It says that:

"When working on policy, our officials look at the impact a policy option might have on those from protected groups, including positive opportunities for promoting greater fairness for them. They also consider if there are options for avoiding or otherwise mitigating against any negative impact on that group. Ministers are advised of the impact a decision has on protected groups, and this is taken into account when a policy decision is made."

51. The complainant argued that this suggested that negative impacts were considered, but, if so, that information was withheld from the equalities impact statement. They argued that the provision of information about process alone in a context where the impact statement refers only to examples of positive impacts does not foster transparency. Moreover, the complainant argued that the decision to withhold the information in effect rendered HMT unaccountable in the performance of its equalities duties.
52. Furthermore, the complainant argued that it was not possible for the public to ascertain whether, and to what extent, effects on groups with protected characteristics have been considered without disclosure of this information in full. In their view given the absence of any information at all on what information was taken into account, what specific advice ministers received on both positive and adverse impacts on particular groups with protected characteristics, what information was given particular weight and for what reason, it is impossible to determine whether HMT has in fact had due regard to the impact of its decisions on the statutory equalities objectives as required by section 149 Equalities Act 2010.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938052/SR20_Web_Accessible.pdf Page 93. A.3

⁴ <https://www.gov.uk/government/organisations/hm-treasury/about/equality-and-diversity>

53. The complainant also argued that disclosure of the withheld information would ultimately contribute to better fiscal outcomes and more responsive impactful and equitable policies. This is on the basis that disclosure would enable the social care sector, and those with care and support needs, to meaningfully respond to the robustness and suitability of current equalities information and make representations for its improvement.
54. For its part, HMT acknowledged that there is an inherent public interest in public authorities being transparent and accountable, particularly where the information relates to the allocation of large amounts of public money. It accepted that disclosure of the information could help increase public trust and understanding in the work that it and DHSC does. More specifically in relation to this case, HMT accepted that there was widespread interest in government policy in relation to healthcare spending, and the impacts of funding decisions on people sharing protected characteristics.

Public interest in favour of maintaining the exemption

55. In support of its position that the public interest favoured maintaining the exemption, HMT emphasised the importance of government having a safe space to develop ideas, debate live issues, and to consider and reach decisions in relation to various policy options away from external interference and distraction. In this context, HMT noted the Tribunal's comments that that ministers and officials should be able to "hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy".⁵
56. HMT argued that the formulation of good public policy requires a degree of freedom to ensure there is space for any and all options to be considered candidly, and for them to be thoroughly tested. In a world of finite resources, decisions on spending will invariably involve trade-offs between competing policy aims, some of which may need to be deprioritised. Officials and ministers therefore need space to consider a range of policy issues, and the perspectives of other government departments, in a free and open way. Without that space, candid debate and discussion, and the formulation and development of policy, would be hampered.

⁵ DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007), paragraph 75(iv).

57. With regard to the specifics of this case, HMT noted that setting and reprioritising DHSC budgets inherently involves making difficult and sensitive decisions, as spending more in relation to one area of healthcare spend (for example, R&D) means less funding is available to be spread across other areas. It is the government's responsibility to make such trade-offs in an impartial, robust and fair way. This involves considering both the equalities impact of funding decisions and other highly important factors, such as clinical outcomes.
58. HMT explained that its main concern if the information in question was disclosed – revealing the specific trade-offs that have been or still are being considered when forming and modifying health spending decisions – is that officials and ministers would feel restricted in their ability to think creatively, advise candidly, and have a free and frank debate about the merits and demerits of different policy options. HMT argued that in its view there was a clear benefit in withholding the information as this will allow officials and ministers to continue to consider in the round what the most efficient and fair overall policy outcomes would be – taking into account all relevant factors – without being distracted by external interference or (the threat of) public clamour around a particular issue. HMT are concerned that such public clamour could undermine the policy-making process by tying the hands of decision-makers, thereby resulting in less robust and effective policies.
59. Furthermore, HMT argued that disclosure of the information could also have a potential chilling effect on future development of evidence to support policy making in this area and the sharing of information between departments. HMT explained that equalities impact assessments are used by officials as an opportunity to present frank and honest assessments of the likely impact of proposed policies on different protected groups. HMT noted that at times the likely impact of some policies can be presented in a direct way, but such candour is crucial to the effective operation of the process.
60. HMT explained that officials prepare equalities assessments in the knowledge that ministers have a legal obligation to consider the equalities impact of policies in their decision making. Based on a such assessment ministers may decide to alter or abandon a policy altogether. However, HMT noted that officials are aware that there is no legal requirement to publish such assessments and that in its view there is a clear benefit to the public interest in protecting the confidentiality of such information. HMT argued that withholding the information allowed DHSC officials to effectively and candidly convey to HMT the likely impact of policy options rather than having to consider issues of public perception when providing such information.

61. HMT stressed that whilst officials are honest, impartial and not easily deterred from sharing their views, it is unavoidable that the potential for the release of equalities assessments such as these could become a factor in how impact assessments are written, and how advice is given by DHSC to the Treasury. It argued that this would reduce the quality and effectiveness of these equalities assessments, and result in poorer decision making and weaker policies. HMT stressed that this was particularly important when, as in this case, policy making the area in question is still ongoing.
62. Having weighed the public interest arguments, HMT explained that it had given the largest weight to the safe space argument taking into account that this related to a live and a particularly sensitive area of policy development, namely the current reprioritisation of DHSC budgets for 2023/2024. HMT explained that it had also given significant weight to the chilling effect arguments given the risk of an impact on both the current reprioritisation process, and any future reprioritisations of DHSC budgets.
63. HMT explained that in concluding that the public interest favoured maintaining the exemption, it had placed less weight on the transparency and accountability arguments. This was because in its view these had, to a large extent, been advanced by the information already available. In support of this position, HMT noted that in its response it had highlighted the legal duties of ministers to consider equalities impacts when taking decisions and explained where the government's commitment to equalities is set out.⁶ HMT also noted that it had provided the complainant with links to documents which set out the impact on groups with protected characteristics of decisions made during the spending reviews of 2020 and 2021⁷, as well as significant information on equality, diversity and health inequalities published by NHS England.⁸
64. HMT also argued that it had given little weight to the possibility of disclosure leading to better quality advice and decision making. It did not accept that disclosure would lead to better policies in this circumstances of this case. It noted that it is already under a legal duty to consider equalities impacts and that there are strong safeguards in place to ensure that it fulfils this duty. In HMT's view disclosure of the

⁶ <https://www.gov.uk/government/organisations/hm-treasury/about/equality-and-diversity>

⁷ <https://www.gov.uk/government/publications/autumn-budget-and-spending-review-2021-documents/autumn-budget-and-spending-review-2021-html#annex-b-impacts-on-equalities>

⁸ <https://www.england.nhs.uk/about/equality/>

information would be unlikely to improve the quality and robustness of equality assessments and advice given to it by DHSC.

Balance of the public interest test

65. The Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, and for the reasons discussed above, the Commissioner accepts that policy making in relation to the DHSC budget for 2023/24 was ongoing at the time of the request. This is on the basis that although the budget had been set, decisions about its reprioritisations remained ongoing and involved the withheld information (amongst other data and evidence).
66. Furthermore, having the considered the content and context of the withheld information, the Commissioner accepts that it has the potential to encroach on the safe space of this policy making. The Commissioner accepts that it contains a direct assessment of the impact of budgeting decisions on equality issues. The Commissioner appreciates that decisions around how DHSC budgets are allocated, including the scope of any reprioritisation of them, is matter of considerable interest to a significant range of stakeholders and one that involves balancing a range of competing demands. The Commissioner therefore accepts that disclosure of the information at the time of the request could have led the government having to defend or to justify particular policy decisions regarding the budget 2023/24. In turn, the Commissioner accepts that this would encroach upon the safe space that ministers and officials need for such ongoing policy making and as a result the safe space arguments deserve considerable weight.
67. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

68. In the circumstances of this case the Commissioner accepts that disclosure of the withheld information potentially risks the candour of such equalities assessments if officials drafting them were aware they may be disclosed in the future. Although officials are expected to be robust and impartial when giving advice, the Commissioner accepts that disclosure could nevertheless affect the tone or manner in which some information is presented. For the reasons noted above, the Commissioner accepts the policy making is still live and ongoing and usually this would add further weight to the chilling effect arguments.
69. However, the Commissioner considers the impact on both the safe space and risk of a chilling effect is arguably lessened by the fact that the live policy making at the time of the request only concerned the reprioritisation of the 2023/24 budgets rather than live policy making in relation to the 2020 spending review itself. That is to say, disclosure at the point of the request would not have interfered with the policy making process for which the information was initially submitted.
70. Turning to the public interest arguments in favour of disclosure, the Commissioner appreciates that the allocation of healthcare and adult social care spending is an area of significant public interest. This includes the basis upon which equalities impacts have been factored into such decision making. In the Commissioner's view disclosure of the withheld information would provide a direct insight into how DHSC took into account the impact of its spending on protected groups as part of the 2020 spending review. Furthermore, given its ongoing use in the policy making process it would also provide some insight into the information being considered by ministers and officials in relation to the decisions about the reprioritisation of 2023/24 budgets. Given the significant public interest in such issues, the Commissioner considers that this factor, namely providing insight into DHSC's assessment of equality impacts, attracts particular and significant weight. In attributing such weight the Commissioner has also taken into account the evidence put forward by the complainant regarding the concerns around adult social care funding.
71. Furthermore, in reaching this decision the Commissioner broadly shares the complainant's views about the information in the public domain to which HMT pointed. As a result the Commissioner is not persuaded by HMT's arguments that to a large extent the information already available in the public domain meets the public interest in transparency and accountability in relation to this information. Whilst some of the information cited by HMT does provide some information about the impact on equalities of the spending reviews 2020 and 2021, in the Commissioner's view it does not provide anywhere near the level of insight that disclosure of the withheld information would. As a result in the Commissioner's opinion disclosure of the withheld information would

add significantly to transparency and accountability around this issue, beyond that already achieved by the information to which HMT pointed the complainant to.

72. The Commissioner acknowledges HMT's point that disclosure of the information may not lead to better quality decision making given the legal duty already in place to produce such assessments and the robust measures in place to ensure that this duty is met. However, in the Commissioner's view there is merit in the complainant's point that disclosure of the withheld information could allow the social care sector, and those with care and support needs, to meaningfully respond to current equalities information and suggest representations for its improvement. In the Commissioner's view such a process could potentially improve the quality of decision making.
73. In conclusion, the Commissioner considers the public interest arguments to be evenly balanced. However, given the presumption in favour of disclosure, the Commissioner has found that the public interest in disclosing the information outweighs the public interest in maintaining the exemption. In reaching this conclusion the Commissioner has also taken into account the fact that although he accepts that the policy making was still live at the point of the request, this was only in relation to the reprioritisation decisions regarding the 2023/24 budget, rather than the policy making in relation to the full 2020 spending review.

Right of appeal

74. 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

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

75. 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.
76. 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
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