

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2023

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

Decision (including any steps ordered)

1. The complainant has requested DHSC to disclose the minutes of meetings of the Cross Whitehall International Recruitment Steering Group from 2018, 2019, 2020, 2021 and 2022. DHSC disclosed some information but withheld the remainder citing sections 35, 27 and 28 of FOIA.
2. The Commissioner's decision is that DHSC is entitled to rely on sections 35, 27 and 28 of FOIA. He therefore does not require any further action to be taken.

Request and response

3. On, 13 July 2022, the complainant requested DHSC to provide the following information:

"1. How many health and social care personnel were recruited from the following countries in 2018, 2019, 2020, 2021 and 2022 –

Afghanistan - Angola - Bangladesh - Benin - Burkina Faso - Burundi - Cameroon - Central African Republic - Chad - Congo - Congo, Democratic Republic of - Côte d'Ivoire - Djibouti - Equatorial Guinea - Eritrea 3 - Ethiopia - Gabon - Gambia, The - Ghana - Guinea - Guinea-Bissau - Haiti - Kiribati - Lesotho - Liberia - Madagascar - Malawi - Mali - Mauritania - Micronesia, Federated States of - Mozambique - Nepal - Niger - Nigeria - Pakistan - Papua New Guinea

- Senegal - Sierra Leone - Solomon Islands - Somalia - South Sudan - Sudan - Tanzania, United Republic of - Togo - Uganda - Vanuatu - Yemen, Republic of Please provide a number of personnel for each of the countries and separately for the years asked.

Please also tell us what kind of personnel were recruited (ie. doctors, nurses etc etc).

2. Please provide reports containing data on health and social care international recruitment activity collected by DHSC and reported to the Cross Whitehall International Recruitment Steering Group.

3. When was the Cross Whitehall International Recruitment Steering Group set up?

4. How many times did it meet in 2018, 2019, 2020, 2021 and 2022?

5. Please provide minutes of meetings of the Cross Whitehall International Recruitment Steering Group from 2018, 2019, 2020, 2021 and 2022.

6. Did the Cross Whitehall International Recruitment Steering Group expressed any concerns about the number of personnel recruited from any of the countries listed in Question 1. If so please provide details of the concerns and what actions were taken to address those.

7. Please send us all progress reports sent by DHSC to WHO with information on international recruitment of health and social care personnel in 2018, 2019, 2020, 2021 and 2022."

4. DHSC responded on 24 August 2022. For questions 1, 2 and 6, it confirmed that the information is not held. It provided a response to questions 3 and 4. For question 5, it refused to disclose the information citing section 35(1)(a) of FOIA. In respect of question 7, DHSC applied section 21 of FOIA and directed the complainant to the relevant source.

5. The complainant requested an internal review on 21 October 2022.

6. DHSC carried out an internal review and notified the complainant of its findings on 2 November 2022. It upheld the application of section 35(1)(a) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 8 January 2023 to complain about the way their request for information had been handled. They dispute the application of section 35(1)(a) and believe there are strong public interest arguments in favour of disclosure of this information.
8. During the Commissioner's investigation DHSC disclosed some further information to the complainant. It also revised its position slightly and confirmed that it now wished to rely on sections 35(1)(a) and 1(b) for some parts and then sections 27(1) and 28 of FOIA for the remaining elements of the withheld information. The Commissioner will address each exemption in turn.

Reasons for decision

Section 35 - formulation and development of government policy

9. Section 35(1)(a) of FOIA allows a public authority to refuse to disclose information if it relates to the formulation or development of government policy.
10. Section 35 is class based, so there is no need to consider the sensitivity of the information in order to engage the exemption and it must simply fall within the class of information described. The classes are interpreted broadly and catch a wide range of information.
11. DHSC confirmed that the withheld information relates to the formulation and development of government policy on the international recruitment of health and social care workers and Official Development Assistance (ODA) funding. The remaining withheld information relates to the consideration of new policy areas and live issues, as well as the revision of current policy. It said that it discusses policy options to explore proposals that would need ministerial sign off and provided a couple of examples to the Commissioner to highlight this point.
12. DHSC advised that the withheld information also refers to discussions on government – to government agreements which are still in progress, where implementation plans have not yet been agreed or where plans have paused but are likely to open up again in the future.
13. The Commissioner has reviewed the remaining withheld information and he is satisfied that it all feeds into and therefore relates to the development and formulation of government policy on the international recruitment of health and social care workers and ODA funding. The ongoing consideration and development of new policy areas, live issues, government-to-government agreements and partnerships (whether

with devolved administrations or internationally) all feeds into (and therefore relates) to the formulation and development of the government's policy on international recruitment for health and social care workers. He is therefore satisfied that section 35(1)(a) of FOIA applies.

Public interest test

14. DHSC has said that it recognises the public interest in openness and accountability and in members of the public understanding how it is addressing international recruitment and whether government is adhering to the Code of Practice.
15. However, it considers the public interest rests in maintaining the exemption. It said that it considers the public interest rests in allowing all involved the safe space to discuss and develop ideas, debate live issues and new policy options and reach a decision on what else can be done in this area, away from external interference and distraction. It argued that premature disclosure would jeopardise the policy making process and the outcome.
16. DHSC advised that where policy has been agreed, finalised and published, the information has been released. Examples are the internal candidate guidance and updates to the Code itself to reduce the level of direction applications from red list countries.
17. The Commissioner recognises the public interest in openness, transparency and allowing members of the public access to this information to enable them to understand more clearly how the government is handling the international recruitment of health and social care workers and how it is developing and formulating policy in this area. Disclosure would enable those interested to see what policy options and new ideas are being discussed and debated and assess for themselves how effective these may or may not be.
18. However, it is the Commissioner's view that the public interest rests in maintaining the exemption and protecting the safe space government requires to discuss and debates those ideas and options freely and frankly, without the fear of premature disclosure. It has said that any agreed changes to current policy or the code would be released once they have been agreed and finalised.
19. Disclosure at this time, when policy officials are discussing live issues, new policy ideas and options would be likely to erode that safe space and government's ability to reached the most appropriate outcome.

20. For these reasons, the Commissioner agrees with DHSC that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
21. Section 35(1)(a) applies to the small redactions made under section 35(1)(b). There is therefore no need to go on to consider section 35(1)(b) separately. The Commissioner's guidance highlights that if section 35(1)(b) applies, quite often section 35(1)(a) will apply as well due to the nature of those communications and them also relating to the formulation and development of government policy. This is the case here.

Section 27 – International relations

22. DHSC is relying on section 27(1)(a) which states that a public authority is entitled to refuse to disclose information if its disclosure would or would be likely to prejudice relations between the United Kingdom and any other State. It advised that there are a number of different states referred to in the withheld information, which it has relations with.
23. It is also a qualified exemption, so it is subject to the public interest test.
24. DHSC confirmed that the withheld information refers to discussions on government-to-government agreements which are still in progress, where implementation plans have not yet been agreed or where plans have paused but are likely to open up again in the future. It considers disclosure would have a prejudicial effect. This is because it needs to ensure the integrity of the negotiations with overseas governments and to protect against ongoing public commentary.
25. It argued that disclosure of details of bilateral discussions that have not been agreed would mean countries will feel unable to negotiate openly and freely with the UK, hampering discussions and making agreement of mutually beneficial agreements much harder. DHSC advised that this would likely lead to other countries being disinclined to enter UK negotiations or stall current discussions. It said that it is diplomatic convention that it does not disclose details of ongoing negotiations on either side, so to do so would be breaching expected behaviour. More broadly, DHSC confirmed that disclosure about discussions that it has had with other countries may jeopardise its broader bilateral relationships with them, complicating diplomatic positions.
26. Similarly, DHSC said that the steering group considers and monitors progress on new bilateral skill partnerships which are led by Health Education England (now NHS England), these are smaller scale and focussed on exchanging skills knowledge and processes and supporting

the development of training and education. It confirmed that it has withheld information which refers to discussions on skills partnerships which have been paused pending the outcome of wider government decisions on the use of ODA funding. Disclosure would provide overseas governments with expectations of wider government ODA funding proposals which have not been finalised. Any amendment to UK government intentions for ODA would cause bilateral tensions with other governments, harming wider bilateral relationships.

27. The Commissioner has reviewed the withheld information. He is satisfied that it does refer to ongoing or pending discussions on government-to-government agreements. For those that are pending, he sees that there is a strong likelihood that these will be opened up again in the future. Disclosure of such discussions would be likely to prejudice ongoing relations with those other states. He agrees that disclosure of ongoing negotiations and candid discussions (even for those that are paused for now but have a real chance of being revisited) would be likely to jeopardise relations and the ability of the UK government to work effectively with those states to secure the most effective and appropriate bilateral agreements. Disclosure would also be likely to undermine the trust and confidence other states and international organisations have in the UK.
28. For the above reasons he is satisfied that section 27(1)(a) applies.
29. In terms of the public interest test, DHSC confirmed that it recognised the public interest in openness and transparency and in understanding more closely how the UK is working with other states on the issues at hand. However, it considers the public interest rests in maintaining the exemption. It argued that the UK enjoys effective international relations with other states and organisations in order to further its foreign policy and domestic policy aims. Undermining the expectation of confidentiality will risk the UK being seen to operate in bad faith, jeopardising current and future agreements.
30. DHSC confirmed that the finalised agreements are published, therefore demonstrating the principles in transparency while not undermining the confidentiality required to effectively make bilateral agreements. It said that while it notes the potential interest in negotiations and the process of getting an agreement, the benefits of providing this to meet the public interest is not commensurate with the risks.
31. The Commissioner acknowledges the public interest in transparency and accountability and in members of the public gaining access to information which will enable them to understand more clearly what discussions are ongoing with other states about the international recruitment of social care and health workers. Disclosure would also

enable those interested to understand more fully how bilateral agreements are processed and what ideas and options are being considered.

32. However, the Commissioner considers the public interest rests in maintaining the exemption. DHSC confirmed that the withheld information relates to ongoing discussions and live issues (or issues that have been parked for now but have a good prospect of being reopened) with other states. Disclosure would be likely to hinder those ongoing discussions and deliberations and prejudice the UK's ability to negotiate and secure agreements with the states mentioned. He accepts that disclosure would be likely to undermine the trust and confidence other states have in the UK and this is not in the wider interests of the public.

Section 28 – Devolved Administrations

33. Section 28 states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice relations between two or more administrations (UK government or the devolved administrations of Scotland, Wales and Northern Ireland) in the UK.
34. It is also subject to the public interest test.
35. DHSC confirmed that it has withheld information where discussion with the devolved administrations (DAs) has included its DA members describing their international recruitment plans, including their targets for internationally recruiting staff and progress against these, which is not publicly available. The withheld information includes early stage policy thinking. It stated that disclosure would compromise future candid and robust discussions about policy and prejudice good working relationships.
36. It commented further that the Steering Group provides a safe space for the DAs to report on their plans, debate any live issues and engage in free and frank exchanges. It therefore needs to protect and maintain the confidentiality of shared information to encourage co-operation between the administrations.
37. DHSC advised that it has released any part of the minutes where the discussions relate to information which is already in the public domain.
38. The Commissioner accepts that disclosure would be likely to prejudice relations between the administrations in the UK. He accepts that the withheld information candidly, openly and robustly discusses early policy thinking and has been shared confidentially in order to assist policy development in this area. Disclosure would be likely to prejudice the relations between the different administrations and their ability to share

and discuss valuable and important information. The Commissioner agrees with DHSC that disclosure would inhibit the frankness and candour of debate and decision making at this stage, as the plans and ideas discussed are still at an early stage and in progress. The devolution settlement relies on trust and on the ability to share information.

39. For the above reasons, the Commissioner is satisfied that section 28(1) of FOIA applies.
40. In terms of the public interest test, DHSC advised that disclosure would promote transparency, accountability and participation. However, it considers the public interest rests in maintaining the exemption. It argued that the withheld information relates to live or current matters, as its DA colleagues update the group on their international recruitment workforce plans. It stated that it is not in the public interest to inhibit the frankness and candour of debate and decision making at this stage as the plans are still in progress or prejudice the trust and opportunity to share information, which the devolution settlement heavily relies on.
41. The Commissioner agrees with DHSC that while there are public interest arguments in favour of disclosure, the public interest rests in maintaining the exemption. The withheld information does relate to live and current issues and policy thinking at the very early stages. It is in the public interest to enable the DAs to discuss openly and candidly those ideas and plans to ensure that the most effective decisions are made. The devolution settlement does heavily rely on trust and the sharing of information. Disclosure at this stage would go against that and hinder the ability of the DAs to work effectively together.

Right of appeal

42. 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

43. 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.
44. 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
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