

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2017

Public Authority: Department of Health

Address: 79 Whitehall

London

SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested copies of official draft versions of the published Childhood Obesity Strategy held by the Department of Health. The Department of Health refused the request on the basis of section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the Department of Health has correctly engaged the exemption but she considers the public interest in disclosure outweighs the public interest in maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the three official draft versions of the Childhood Obesity Strategy
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 17 August 2016 the complainant wrote to the Department of Health ("DH") and requested information in the following terms:

"Please send me word or PDF copies of every official draft version of the Childhood Obesity Strategy. Where I say official, I am aware they are numbered i.e. copy 1,2,3 – so it is these I am referring to."

6. The DH responded on 15 September 2016. It stated that information within the scope of the request was held but was exempt from disclosure on the basis of section 35 of the FOIA.
7. The complainant requested an internal review on 17 October 2016 as she considered the public interest favoured disclosing the information and asked the DH to ensure it had duly regarded the requirements of section 35(4) of the FOIA.
8. Following an internal review the DH wrote to the complainant on 24 October 2016. It confirmed it was relying on section 35(1)(a) of the FOIA and still considered the public interest favoured maintaining the exemption. With regard to section 35(4); the DH explained that as the policy formulation process was still incomplete this provision was not applicable.

Scope of the case

9. The complainant contacted the Commissioner on 14 November 2016 to complain about the way her request for information had been handled.
10. The Commissioner made initial enquiries with the DH regarding the use of the section 35(1)(a) exemption. In the DH's response to the Commissioner it explained that having reviewed the request it now considered that the request should have been refused on the basis of section 14(1) of the FOIA. The DH explained it had undertaken fresh searches and found that it held approximately 70 official draft versions of the strategy. Having viewed a selection of these drafts the DH noted that they were each approximately 60 pages in length and to review all of the draft documents to compare them would be *"disproportionate, overly burdensome and an abuse of the requester's rights under the FOIA."*
11. To support the burdensome nature of complying the DH further explained that the strategy was developed and formulated in close consultation with other government departments including HM Treasury, the Department for Education and the Cabinet Office. The DH would therefore need to consult closely with each department to allow them to consider specific information and whether this should be disclosed. The Commissioner asked the DH to write to the complainant to inform them of the new position and to offer advice on how to narrow or refine the request.

12. The Commissioner asked the DH some further questions about the application of section 14(1) as she understood the DH to initially be considering withholding all information from the drafts on the basis of section 35(1)(a) so was unsure why it would be burdensome to review all of the drafts. The DH explained that, without reviewing all the drafts, it was of the view that it would not be looking to apply section 35(1)(a) as a blanket exemption to withhold all information from the drafts but instead would need to review all of the material as some may be disclosed (particularly if it were the same as that in the published strategy) and other information may engage specific exemptions.
13. After further discussions with the complainant, it was agreed that a refined request would be made. This new, refined request was made on 1 August 2017 and was for:

"Draft 1, Draft 35, Draft 68 (or two before the final version if more than 70). Please also confirm the dates these were completed."
14. This new request is the subject of a separate decision notice (FS50698283) on the subsequent refusal of the request for specific numbered drafts on the basis of section 35(1)(a).
15. During the course of the Commissioner's investigation into the refusal of the refined request the DH wrote to the complainant to explain it needed some further clarification as it had previously stated that there were 70 draft versions of the strategy but these were working drafts. It now considered there were in fact only three "official" drafts of the strategy – these being the versions sent for approval by the Home Affairs Committee. The DH therefore considered it may have interpreted the initial request too broadly and asked the complainant to clarify if they had intended the term "official draft" to refer to the working drafts or to the three official drafts.
16. The complainant clarified that she had wanted all drafts – working and official – and reconfirmed she wanted drafts 1, 35 and 68 as well as the three official drafts prepared for approval.
17. The Commissioner therefore wrote to the DH to confirm the scope of both her investigations. The new request (ICO decision notice FS50698283) was to focus on the specific numbered working drafts that had been requested. However, as the complainant had now accepted the re-scoping of her original request to being for just the official drafts – those sent for approval – the Commissioner confirmed with the DH that she would be continuing with her investigation into the decision by the DH to refuse to provide these three drafts and asked the DH to confirm its reasons for continuing to withhold this information.

18. The DH confirmed it was relying on section 35(1)(a) to withhold all of the information in the three official draft versions of the child obesity strategy and the Commissioner therefore considers the scope of this investigation to be to determine if the DH has correctly applied the provisions of the exemption to the information and, if so, where the balance of the public interest lies.

Reasons for decision

Section 35 – formulation of government policy etc.

19. Section 35(1)(a) of the FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands these terms to refer to the design of new policy, and the process of reviewing or improving existing policy. However, the exemption will not cover information relating purely to the application or implementation of established policy.
20. The Commissioner recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
21. The withheld information in this case consists of the three “official drafts” of the childhood obesity strategy. These are the three drafts sent to the Home Affairs Committee for approval and the DH is seeking to withhold all information in these drafts on the basis of section 35(1)(a).

Does the withheld information relate to the formulation or development of government policy?

22. The Commissioner's approach to defining government policy is set out in her guidance¹. That guidance clearly indicates that policy can be developed in many ways and in a wide range of circumstances.
23. The government's childhood obesity strategy was published on 18 August 2016². The DH states the requested information relates to the formulation of Government policy on tackling childhood obesity, particularly on measures to tackle the issue. It states some of these measures are in the early stages of formulation, are still being developed or are on hold.
24. The complainant has not disputed that the exemption is engaged, her arguments are that the public interest favours disclosure. The Commissioner accepts that draft versions of a strategy do relate to the formulation of a policy as the strategy was part of the Government's plan to tackle childhood obesity and its policy in this area.
25. As it is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in favour of maintaining the exemption and those in favour of disclosure.

Public interest arguments in favour of disclosure

26. The DH recognises there is a public interest in promoting transparency and openness in the way public authorities operate by releasing information.
27. More specifically, the DH understand there is a public interest in transparency of discussions within government and in particular how it plans and implements its strategy for presentation of its policies. Measures to tackle obesity, particularly in children, are live and open to debate and scrutiny and the public interest in disclosing information related to this issue is recognised by the DH.
28. The DH also acknowledges the strong public interest in making information available on measures to tackle childhood obesity as it is an issue at the forefront of the public mind, continuing to receive national media coverage.

¹http://www.ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

² <https://www.gov.uk/government/publications/childhood-obesity-a-plan-for-action>

29. The complainant has provided arguments to support the public interest in disclosure. She has stated the policy is subject to a very high level of public interest and scrutiny from pressure groups and other stakeholders who believe the policy may have been “watered down”. She therefore argues that disclosing the drafts would allow for scrutiny as to how the policy was formulated as well as demonstrating transparency in showing how the strategy came to be.
30. In addition to this, the complainant points out that the policy itself is far-reaching and its impact will be felt by a large percentage of the population as well as industries, businesses, the NHS and the education sector. The policy publication was delayed by a year and did not include some of the recommendations put forward by Public Health England therefore releasing the drafts will give transparency to the process by which the policy was decided.
31. The complainant has provided several links to major news organisation articles³ on the strategy. These articles criticise the “watered down” strategy and focus on the fact that some recommendations were not included in the strategy. One article focuses on a leaked draft of the strategy which showed that several recommendations had been taken out.
32. The complainant has focused on three main areas of debate over the strategy in her submissions and to explain why it is in the public interest to see the drafts and engage in fully informed debates:
 - The effectiveness of a sugar tax alone – the complainant has provided links to articles criticising the strategy for not also including restrictions on junk food advertising and promotions⁴.
 - Businesses have threatened the sugar tax could lead to job losses whilst industry groups consider it has been proven to be ineffective in other countries⁵.

³ <https://www.theguardian.com/society/2016/aug/18/childhood-obesity-strategy-wasted-opportunity-campaigners>; <https://www.theguardian.com/society/2016/oct/30/childhood-obesity-may-government-diluted-plans-claims-dispatches>; <http://www.newsweek.com/leaked-uk-childhood-obesity-strategy-draft-disappoints-public-health-480651>; <https://www.ft.com/content/b945afac-6499-11e6-8310-ecf0bddad227>

⁴ <http://www.telegraph.co.uk/news/2016/08/18/theresa-may-abandons-plans-to-curb-junk-food-advertising-and-ban/>

- Consumer's fear they will be out of pocket as the sugar tax is designed to be passed on to shoppers by way of a price increase.⁶

Public interest in favour of maintaining the exemption

33. The DH considers the information relates to the formulation of Government policy measure to tackle childhood obesity, some of which are still in the early stages of formulation or have been put on hold. Disclosing the information, it argues, could damage the DH's (and other government departments) relationships with key stakeholders by exposing measures being developed that were not included in the published strategy. The DH states that these organisations are responsible for implementing these measures and any compromise to the relationship with the Government would be detrimental to delivering policy and achieving a reduction in childhood obesity.
34. The DH states it has always clearly stated that publication of the strategy was the start of a conversation and much of the ongoing work is explored in previous drafts of the plan, some of which is included in the final version. To demonstrate the ongoing nature of the process the DH has explained that it has recently set out a programme to look at all the available evidence and consult with industry to develop targets for a calorie reduction programme.
35. The DH has explained that obesity is a complex issue which the Government cannot tackle without assistance from businesses, health and care professionals, schools, local authorities, families and individuals. It acknowledges that some of the information in the drafts may also have been in the final plan but states that much of the detail remains under consideration and disclosing this would be detrimental to further development and damaging to relationships with key stakeholders.
36. The DH has also cited the 'safe space' argument that civil servants, policy officials and subject experts require a safe space to consider policy options in private and to engage in free and frank discussions of policy options without fear of disclosure. The DH argues premature disclosure could prejudice good working relationships and the neutrality

⁵ <http://www.independent.co.uk/news/business/news/sugar-tax-uk-effects-obesity-levy-higher-prices-job-losses-businesses-claim-a7193351.html>;
<http://www.telegraph.co.uk/business/2016/07/11/sugar-tax-will-harm-jobs-and-economy/>

⁶ <http://www.bbc.co.uk/news/uk-36410589>;

of civil servants. This would not be in the public interest as it would affect future decision making and public services.

Balance of the public interest

37. The Commissioner acknowledges the purpose of section 35(1)(a) is to offer some protection to the government policy making process and to allow for full consideration of policy options. In this case she accepts the information relates to the formulation of government policy on how to tackle childhood obesity but fails to understand how disclosing this information would impact on the safe space needed by government.
38. At the time of the request, the strategy had been published and had already been widely discussed in the media. It is not clear how disclosing drafts of the strategy would impede civil servants and experts from offering full and frank advice and participating in drafting future policies as the final version was already published. The Commissioner recognises that disclosing this information prior to publication when those contributing would still expect some privacy from scrutiny to fully formulate ideas would potentially have been detrimental to the process but, at the time of the request, this argument carries much less weight. In addition to this, the Commissioner is usually sceptical of arguments which suggest that civil servants will no longer be willing to properly contribute to policy formulation due to disclosure of information.
39. As the DH points out, much of the information in the drafts is probably already published in the final version but the information that is not contains details of options still being considered or formulated in conjunction with stakeholders. The DH has not identified any specific examples of the information which it is referring to. The Commissioner has reviewed the drafts to attempt to identify the information which differs from that in the final version and there do appear to be examples of ideas, strategies and recommendations which differ from the drafts to the final version. However, she is of the view that it is to be expected that some ideas proposed in drafts will not make into the final versions of plans or strategies and this can be for any number of reasons.
40. The Commissioner accepts the point made by the DH that some of these suggestions and recommendations may still be under consideration but were not considered suitable to the published strategy which focused on the areas it considered would have the biggest impact on preventing and reducing childhood obesity. There is therefore some validity to the argument that if these options are still being considered and developed then disclosing details might be detrimental to the continued formulation of the Government's strategy to tackle obesity.

41. That being said, from the numerous articles around the strategy it seems evident that recommendations not featuring in the published strategy are widely known and there is widespread concern as to why the strategy only focuses on the so called "sugar tax" and not on other recommendations. The Commissioner notes there is also evidence to suggest that the final version of the strategy differs significantly from earlier drafts and has been "watered-down". These arguments add a significant weight to the public interest in disclosure of the drafts in order to show a clear evolution of the strategy, allow for fully informed debates and to provide transparency in the Government's approach and decision making.
42. On balance, although the Commissioner accepts there is usually a strong public interest in maintaining the integrity of the policy making process, on this occasion she is not persuaded that the DH has evidenced any significant harm in disclosure of this particular information, particularly given the final version had been published at the time of the request.
43. Conversely, she can see that there are a number of significant public concerns raised by the complainant about this matter and there is substantial and widespread interest in the issue with questions raised about the strategy and how it was arrived at and she considers disclosure of the withheld information would provide clarity about this.
44. The Commissioner's decision is that section 35(1)(a) of the FOIA is engaged in relation to the withheld information, but that the balance of the public interest favours disclosure.
45. The Commissioner requires the DH to disclose the three official draft versions of the strategy.

Right of appeal

46. 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@hmcts.gsi.gov.uk

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

47. 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.
48. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF