

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2020

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 information about non-disclosure agreements (NDAs) relating to the UK's exit from the EU. DHSC refused to disclose the requested information under section 35(1)(a) FOIA.
2. The Commissioner's decision is that section 35(1)(a) FOIA was applied incorrectly to some of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld NDAs with the names of companies/names of company personnel redacted.
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 January 2019 the complainant requested information of the following description:

- "a. Which pharmaceutical companies or companies in related fields have you signed non-disclosure agreements (NDAs) with over no-deal Brexit preparation plans since July 2016? There are at least 16 of them: Which are they?
- b. Which trade associations in the health sector have you signed NDAs with over no-deal Brexit preparation plans since July 2016? There are at least 10 of them: Which are they?
- c. Please provide me with correspondence between you/your representatives and the aforementioned companies/their representatives explaining/showing why these NDAs were sought and signed.
- d. Please provide me with intradepartmental and interdepartmental correspondence/documents explaining the governments thinking in seeking these NDAs."
6. On 5 June 2019 DHSC responded. It withheld the requested information under section 35(1)(a) FOIA.
7. The complainant requested an internal review on 6 June 2019. DHSC sent the outcome of its internal review on 6 August 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the DHSC was correct to apply section 35(1)(a) FOIA to the withheld information.

Reasons for decision

Section 35(1)(a)

10. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
11. The Commissioner takes the view that the formulation of government

policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

12. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.
13. The DHSC has explained that the policy area to which the requested information relates is contingency planning to ensure the continuity of the supply of medicines and medical products in the event of a no-deal exit from the EU.
14. The exemption is interpreted broadly and will capture a wide variety of information. At the time of the request the situation regarding Brexit was unclear. However DHSC has said that the information within the scope of the request would continue to be withheld as it continued to work intensively across Government with the Department for Exiting the European Union and Cabinet Office to negotiate the UK's exit from the EU.
15. DHSC has argued that section 35(1)(a) applies to the requested NDAs and related correspondence on the basis that departments specifically included them within contracts because they are about Brexit preparation work on specific outcomes, and so meet the 'relate to' criteria of the 'formulation of Government policy' protected by section 35.
16. The Commissioner accepts that the information that is being withheld related to Brexit preparation work and as negotiations were ongoing at the time of the request it can therefore be said to relate to the formulation and development of government policy, therefore section 35(1)(a) is engaged.
17. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

18. The DHSC acknowledged that there is a public interest in promoting openness and transparency in the way in which public authorities manage current events. Any policy in this area will have a significant impact on the public, and it recognises the strong public interest in making information regarding DHSC's readiness (at the time of the request) for exiting the EU available, along with the importance of general openness and transparency in Government.

Public interest arguments in favour of maintaining the exemption

19. DHSC takes the view that the section 35 exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options. Civil servants and subject experts need to be able to engage in the free and frank discussion of all the policy options internally, to expose their merits and demerits and their possible implications in order to reach appropriate decisions.
20. At the time of the request, DHSC continued to work intensively across Government with the Department for Exiting the European Union and Cabinet Office to negotiate the UK's exit from the EU. During the policy development phase, civil servants across Government need to be able to have full and frank cross-Government discussions about all possible options to address this important and complex issue. This includes discussing the detail and implications of the information that has been requested. There is a strong public interest in ensuring that officials and ministers are able to fully and candidly consider any benefits and risks of potential proposals. Good working relationships across Government are therefore vital in the policy development process in this area as it continued to negotiate the UK's exit from the EU/prepare for all EU exit scenarios. DHSC said that could have been compromised by premature disclosure of the information relating to the requested NDAs.
21. DHSC believes that disclosure would allow public insights into Government planning work, beyond what has already been disclosed. It is concerned that disclosure of the requested information would potentially allow people to link the named companies to specific medicines/products/services with other information in the public domain on licenses, etc. This could impact on the behaviours of users

of such products, competing companies, Serious and Organised Criminals or fraudulent criminals, to the detriment of public good. Disclosure might also allow interested parties insight into where the UK was substantively preparing and where there may be gaps in planning. Some of this might be inaccurate inference, but it still might be used.

22. Finally it argued that there is a particular risk that individuals or representative groups will be less likely to provide information to DHSC in the future if they believe that it will be released into the public domain. Without this information, the Government will not be able to debate the issue as fully, which may lead to poorer decision making. The release of this data could prejudice good working relationships and the perception of civil servants' neutrality.

Balance of the public interest

23. In considering the public interest arguments the Commissioner has considered the content of the information in question and whether the information contains details of negotiating positions.
24. In terms of the content of the NDAs (which would provide information on why the NDAs were sought), they all seem to be the same or very similar apart from the name of the company to which they relate and the date they were signed. The terms are fairly high level and only appear to reveal the expectations of confidentiality in the event of a no deal Brexit scenario. Given the contents of the withheld information and the fact that there is an extremely strong public interest in information that demonstrates the contingency plans that were being put into place in the event of a no deal Brexit, the Commissioner considers that the public interest favours disclosure of the NDAs with the names of companies or individual staff redacted.
25. In relation to the withheld correspondence explaining the Government's thinking in relation to NDAs, as negotiations were ongoing at the time of the request and at that stage the UK had not exited the EU, the public interest favours maintaining the exemption. The Commissioner accepts that civil servants and subject experts need to be able to engage in free and frank discussion of all possible implications relating to the policy in question.
26. The Commissioner therefore considers that section 35(1)(a) was correctly applied to the withheld correspondence explaining the Government's thinking in relation to NDAs and the names of companies/company personnel included within the withheld NDAs in order to preserve good working relationships at a time when the

Government continued to negotiate the UK's exit from the EU/prepare for all EU exit scenarios.

Right of appeal

27. 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@justice.gov.uk

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

28. 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.
29. 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

Gemma Garvey
Senior Case Officer

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