

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2021

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

Decision (including any steps ordered)

1. The complainant has requested the scientific advice used to inform changes to the shielding policy in July 2020, during the coronavirus pandemic. The Department of Health and Social Care ('DHSC') withheld the information under section 35(1)(a) of the FOIA (formulation or development of government policy) and considered the public interest favoured maintaining the exemption.
2. The Commissioner's decision is as follows:
 - At the time of the request, DHSC correctly applied section 35(1)(a) of the FOIA to the information, but the public interest favoured its disclosure.
3. The Commissioner requires DHSC to take the following step to ensure compliance with the legislation:
 - Disclose the information being withheld under section 35(1)(a), having first redacted the personal data of any less senior officers.
4. DHSC must take this step 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 10 August 2020, the complainant wrote to DHSC and requested information in the following terms:

“1/ Please can you provide me with the scientific advice that you used when making the recent changes to the shielding policy.

2/ Public Health England have told me that they did not provide any scientific advice to you regarding this change of policy, so please will you disclose to me, the source of any scientific advice you received on this matter.”
6. DHSC provided a response to the request on 4 September 2020. It withheld the information it holds under section 35(1)(a) of the FOIA and said it considered the public interest favoured maintaining this exemption.
7. The complainant requested an internal review on 22 October 2020 and DHSC provided one on 29 October 2020; it upheld its position.

Scope of the case

8. The complainant contacted the Commissioner on 25 January 2021 to complain about the way his request for information had been handled.
9. The Commissioner’s investigation has focussed on whether DHSC was entitled to rely on section 35(1)(a) of the FOIA to withhold the requested information, and the balance of the public interest.

Reasons for decision

Section 35 – formulation of government policy, etc

10. Under section 35(1)(a) of the FOIA information held by a government department is exempt information if it relates to the formulation or development of government policy. The Commissioner understands the term “formulation or development of government policy” to refer broadly to the design of new policy, and the process of reviewing or improving existing policy.
11. The Commissioner’s guidance says that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be

discussed in Cabinet and agreed by Ministers. Policies can be formulated and developed within a single government department and approved by the relevant Minister.

12. 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.
13. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. It is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
14. The section 35 exemption does not cover information relating purely to the application or implementation of established policy.
15. The Commissioner's guidance on section 35 also says the following:

"In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives." (paragraph 26)

"To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy." (paragraph 33)
16. The Commissioner recognises that there are no universal rules. Policymaking models are always evolving and may vary widely between departments and situations. It is likely that some policy areas will follow a more rigid, formal development process to maintain stability and certainty, while other policy areas are inherently more fluid and need to evolve more quickly. Depending on the context, policymaking may also be proactive or reactive, formalised or management.

17. DHSC has provided the Commissioner with a copy of the information it is withholding. This comprises briefing documents with annexes and some internal email correspondence with attachments. In its accompanying submission, DHSC has confirmed that the information requested relates to the decision to pause shielding advice in July 2020. It says that that decision is part of an ongoing programme regarding shielding. Although the request relates to a specific month last year, DHSC says the information is intrinsically linked to ongoing decisions around shielding and releasing the information underpinning it could prejudice future policy work. Most notably, DHSC says, the rationale for the decision to which the request refers includes figures on prevalence of the COVID-19 virus last summer. Releasing that information "now" risks creating the impression that there is a defined prevalence threshold for the introduction of shielding, which is not true.
18. DHSC has explained that COVID-19 prevalence rates are currently higher than they were last summer. It considers that releasing the inner workings of last summer's decision will therefore inevitably result in people questioning why shielding has not been reintroduced now, given current infection rates. DHSC has gone on to say that the reality is that the parameters for decision-making now are different to what they were last summer. Back then, much less was known about the virus and shielding was one of the few interventions available to protect vulnerable people. The rollout of the vaccine programme has significantly changed the landscape for vulnerable people and so making data available that would allow people to compare situations based purely on prevalence would be misleading and unhelpful.
19. Having reviewed the withheld information, the Commissioner is satisfied that the related final decision, namely whether or not to pause shielding advice, was to be made by the relevant Minister, the Secretary of State for Health and Social Care at the time of the request. Through its decision the Government clearly intended to achieve a particular outcome or change – the relaxation (or continuation) of guidance on shielding as a means to reduce the risk of exposure to COVID-19. The consequences of that decision would be wide ranging, affecting people's economic and broader well-being and their willingness and ability to participate and take an active role in society, work and education. In addition, at the time of the request the coronavirus pandemic was still very much a 'live' matter and remains so. As such, the Commissioner accepts that the requested information was relevant to future policy decisions about shielding.
20. The Commissioner is satisfied that, at the time it was requested, the information met the key indicators at paragraph 12 and that the section 35(1)(a) exemption was therefore engaged. She has gone on to consider the public interest test.

Public interest test

21. Section 35 is a qualified exemption and so the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1) outweighed the public interest in disclosing the information.
22. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed. As such, the exact timing of a request will be very important.
23. There is often likely to be significant public interest in disclosure of policy information, as it is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.

Public interest arguments in favour of disclosing the information

24. The complainant has argued that the change of policy on shielding on 1 August 2020 affected approximately two million clinically extremely vulnerable people in England who were being advised to shield as a result of the coronavirus pandemic. He considers that the advice on which this decision was based is therefore a matter of considerable public interest. In the complainant's view, many who were shielding were forced to return to work at great risk to themselves and this has caused them significant anxiety and distress. He considers that some of those people will have caught the COVID-19 virus and may have been very ill, with some even dying as a consequence of the August 2020 policy change.
25. DHSC has acknowledged the importance of transparency and openness with the general public. It has acknowledged too that, in principle, understanding the decision-making behind the initiation and pausing of shielding advice may help individuals to assess their own risk based on prevalence levels.

Public interest arguments in favour of maintaining the exemption

26. In its response to the request, and in relation to the public interest test, DHSC advised that premature disclosure of information protected under

section 35 could prejudice good working relationships, the perception of civil servants' neutrality and, ultimately, the quality of Government.

27. In its submission to the Commissioner, DHSC has presented a new argument. That, as has been discussed in the section 35 analysis, disclosing the information could be misleading, as a threshold for the introduction of shielding has never been set. Basing risk decisions purely on prevalence would be inappropriate in light of the subsequent vaccine rollout and other interventions. In DHSC's view, releasing the information is more likely to induce fear in those who have previously been advised to shield when they compare prevalence levels from last summer "to now".

Balance of the public interest

28. The Commissioner has first considered the timing of the request. The requested information is for the scientific advice that informed the government's decision on whether or not to pause the guidance for individuals who were shielding in relation to the coronavirus pandemic. From 1 August 2020 in England, the shielding guidance was paused. As such, at the point of the request on 10 August 2020 and DHSC's refusal in September 2020 that decision had been taken. However, while that particular policy decision had been finalised, the wider coronavirus policy process was still ongoing, was not complete and is not complete still. In the case of the shielding element of the coronavirus response, the shielding guidance had only been 'paused' and could have resumed if the transmission of the COVID-19 virus in the community started to rise significantly.
29. The policy process associated with shielding was therefore not complete since it was possible guidance to shield could have resumed at any point. The withheld information could therefore inform related, future shielding decisions. Disclosing the information could have prejudiced related future policy work by exposing it to external interference and distraction (although that is not an argument that DHSC has articulated itself).
30. The Commissioner understands that those clinically extremely vulnerable people who were shielding received a letter from DHSC dated 22 June 2020 advising that the shielding guidance was to be paused from 1 August 2020. The letter discussed the rationale for pausing shielding, which was that the chances of encountering coronavirus had continued to decline. The complainant's concern is why the shielding advice was paused. On the face of it, that letter and associated news coverage addressed the complainant's question and the public interest in transparency and understanding the reasoning behind the decision that was made.

31. On the other hand, however, while the numbers had reduced, at the time of the request and internal review response COVID-19 was still implicated in a significant number of weekly deaths in the UK. In addition, approximately two million people were directly affected by the Government's decision to pause its shielding advice; with others – family, friends, employers – being indirectly affected.
32. The letter of 22 June 2020 referred to above discussed the rationale for pausing shielding. But it is also the case, in the Commissioner's view that in as much as the letter addresses the complainant's question to a degree, the withheld information simply gives more background, context and detail on the rationale to pause shielding – DHSC has not advised the Commissioner that it considers the information to be especially sensitive or controversial.
33. The complainant is seeking an explanation as to why advice to shield was paused. DHSC's public interest arguments against disclosure have focussed on the effect on civil servants and the quality of Government, and the consequences of releasing the information now, in October 2021.
34. With regard to the first point, the Commissioner does not accept that, 20 years after the introduction of the FOIA, senior civil servants and decision makers would be dissuaded from seeking and considering frank advice, and having frank discussions, out of concern that information that records that advice and discussion could be subject to disclosure under FOIA.
35. Finally, with regard to the public interest test, the Commissioner must consider the circumstances as they were at the time of DHSC's refusal in September 2020 and up to the point of DHSC's internal review in October 2020. But DHSC's submission has focussed on the consequences of disclosing the information **now**, in October 2021; it is concerned that disclosure now could mislead people and make them fearful. However, at paragraphs 17 and 18 of this notice DHSC has explained concisely to the Commissioner the difference between the circumstances at the time of the request and the circumstances now. That explanation and context could accompany the withheld information if it were to be released.

Summary

36. The public interest arguments discussed above are finely balanced in this case. On one side, the fact that:
 - the decision to pause shielding advice had been taken shortly before the request was submitted;

- the overall shielding policy was still ongoing at the time of the request and advice on that matter could potentially change; and that
- the overall rationale behind the decision to pause shielding was known

are arguments that support withholding the information.

37. On the other hand, the fact that:

- the Coronavirus pandemic had serious consequences for thousands of people;
- the withheld information simply provides more detail on the rationale to pause shielding advice; and that
- DHSC can provide a context and explanation to accompany the information were it to be released

are arguments that support disclosing the information.

38. The Commissioner has weighed up the public interest arguments on both sides and has come down on the side of disclosing the information. This is because the public interest argument DHSC has presented to her is focussed on the possible consequences of disclosing the information now – and in the Commissioner’s view this is a consequence that can be mitigated. And, based on DHSC’s correspondence and submission, she does not accept that disclosure would have a detrimental affect on the quality of Government. Against this, in view of the gravity and wide reaching effects of the COVID-19 pandemic, the effect of the Government’s guidance on clinically extremely vulnerable people, and the number of people affected, the Commissioner considers that, at the time of the request, there was greater public interest in the public being as fully informed as possible about the rationale behind the decision that would affect so many of them.

39. While the Commissioner is satisfied that DHSC was entitled to apply the exemption under section 35(1)(a) of the FOIA to the information that the complainant has requested, she has decided that at the time of the request the balance of the public interest favoured disclosing the information.

Right of appeal

40. 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

41. 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.
42. 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

Cressida Woodall
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