

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 22 November 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 information relating to the number of days Professor Whitty, Chief Medical Officer (CMO) and Professor Jonathan Van-Tam (DCMO) worked in their offices.
2. The Commissioner's decision is that Department of Health and Social Care (DHSC) correctly applied section 38(1) FOIA – health and safety, to withhold parts 2 and 3 of the requested information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 13 January 2021, the complainant wrote to DHSC and requested information in the following terms:

"For the time since 20 December 2020 to the day of responding to the request (both inclusive), please let me know the following:

- 1) *The number of days the Chief Medical Officer worked in the office rather than at home*
- 2) *The number of days the Deputy Chief Medical Officer worked in the office rather than at home.*
- 3) *The diaries for those people on the days they were working in the office*
- 4) *Any assessment made as to why those people are required in the office."*

5. DHSC responded on 10 February 2021 and confirmed that it held information relevant to parts 1-3 of the request. However, it refused to provide it citing sections 31(1)(a) – law enforcement, 38(2) – health and safety and 40 – personal information, as its basis for doing so.
6. It stated that it did not hold any information relating to part 4 of the request.
7. Following an internal review DHSC wrote to the complainant on 18 February 2021 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 18 February 2021 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation DHSC discussed the potential for other exemptions to apply and possible response to the request. DHSC then withdrew reliance on sections 31 and 40, and disclosed the information requested at part 1 of the request. However it maintained that section 38(2) was applicable to the information requested at parts 2 and 3.
10. The Commissioner considers DHSC has stated section 38(2) by mistake and actually meant to cite section 38(1), as the arguments presented are to support this exemption. It is on that basis that the Commissioner will determine if DHSC has correctly cited section 38(1) FOIA to withhold the remaining information.
11. It should be noted at the outset that some of the information provided by DHSC in response to the Commissioner's enquiries is of a sensitive nature. It is therefore not appropriate for it to be detailed in its entirety in this decision notice. However, the Commissioner has recorded this information in a confidential annex, which is not available to the complainant or the public.

Reasons for decision

Section 38 – health and safety

12. Section 38(1) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to -

- a) endanger the physical or mental health of any individual, or*
- b) endanger the safety of any individual.'*

Section 38(2) removes the duty to confirm or deny:

'if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)'

13. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.

DHSC's position

14. Whilst DHSC agreed to disclose some information, it stated that it did so with a degree of nervousness and are applying section 38(1)(a) and (b) to parts 2 and 3.
15. DHSC noted that it must be demonstrated that there is a causal link between the endangerment and disclosure of the information. The effect cannot be trivial or insignificant. In the context of section 38, even if the risk falls short of being more probable than not, it needs to be such that there may very well be endangerment. It went on to set out why section 38 applies in this case.
16. COVID-19 has had a significant impact on society, and this has understandably led to deep strength of feeling on the topic. It has also exacerbated previously strongly held beliefs, specifically around vaccination.
17. COVID-19 has also led to clinical and scientific advisers becoming public figures, with the CMO and DCMO two of the highest profile. Due to this high profile, the strength of feeling in a subset of the population and a number of incidents, for example the instance where the CMO was assaulted in a park while travelling between meetings as part of his working day¹.
18. DHSC consider there is credible threat to the CMO consequently disclosing information about where he is and what he is doing will endanger him. Those who wish to do him harm are already looking for information about him. For example, when a crowd went to his former address².

¹ <https://www.youtube.com/watch?app=desktop&v=hg1Qr1bu5LI>

² <https://metro.co.uk/2021/06/30/london-anti-lockdown-mob-shout-murderer-at-chris-whittys-home-14849182/>

19. The DCMO is considered to be at lower risk than the CMO, but still at risk and this risk is considered higher when in London. In regard to part 1 and 2 if DHSC were to provide information on the amount of time they work in the office this will give those who wish to do them harm information about where best to target them.
20. Nevertheless DHSC has disclosed the information for the CMO which shows that of the 52 days in scope (noting that the CMO and DCMO have worked all days of the week during this pandemic) he spent 28 days in the office, 12 days working on a COVID-19 ward in the hospital (or advising hospital colleagues from home) and the rest working from home.
21. Given the fairly broad mix of locations, and that his work in the hospital is likely knowable from news reporting at the time, DHSC is willing to release this information, and not apply section 38 to it.
22. However, this is not the case for the DCMO and this information has been withheld under section 38.
23. In regard to part 3, sharing the diaries of the CMO and DCMO, DHSC state it would provide a huge amount of information on their movements and location over the period in question. Although the exact meetings they are having now will be different, the general patterns of work, and the regular meetings they have in other Government departments, which necessitate travel and increase risk, have remained very similar to those had during the period of time in question.
24. This information would give someone a very good idea of when the CMO arrives and leaves work, and when it is likely he is moving around the Westminster area, or in the Department. This level of detail would be of huge value to someone targeting him, and as such endanger him further.
25. In summary providing the information in part 2 and 3, so that it was available in the public domain, would provide useful information to anyone who wished to do the CMO or DCMO harm. This would allow them to better target them and to be more likely to succeed in causing said harm.
26. Even if one disagrees with these views that it certainly would, then it must be considered more probable than not that it would increase the risk. In addition to these points DHSC highlighted that the ICO guidance provides examples of the kind of information that might pose a risk under section 38.

This includes: any plans or policies relating to the accommodation of individuals, or groups of individuals where disclosure could lead to them being threatened or harassed.

27. This seems directly relevant to this case, where the location of the CMO and DCMO is likely to lead to an increase in them being threatened or harassed.
28. An issue where disclosure might also have an adverse effect is on public health (eg research into the safety of a particular medication). This also seems relevant given that if this information was disclosed, it will increase the risk to CMO and DCMO.
29. If they are harmed or a consensus is formed that the safety of advisers is not considered a top priority, this will reduce the willingness of top calibre scientists to put themselves forward for these key senior roles. An inability to access top public health advice will in the long-term have an adverse impact on public health. Having come to the view that section 38 was met for part 2 and 3, DHSC went on to consider the public interest test.

The complainant's position

30. In his request for internal review the complainant stated:

"Given that the CMO/DCMO are exhorting other people in the country to work at home, it is of great public interest to see whether they are following the advice that they are being given.

In relation to my queries number 1 & 2, I would argue that the exemptions relied upon do not apply as this simply requests the number of days that they work from the office, not their precise working patterns.

I am willing to accept that question three may engage those exemptions as this may give an insight into the CMO/ DCMO working patterns. I am therefore asking for advice and assistance under section 16 to reach a mutually agreeable request which would allow me (and others) to see what the CMO/ DCMO does in the office and why they must be in the office rather than at home."

31. The Commissioner is satisfied that the exemption is engaged on the basis that disclosure of the requested information would not only be a risk to the health and safety of the CMO and DCMO, but also to the general public. The risks to the CMO and DCMO are obvious, but with regard to the general public, the risk lies in other experts not taking key roles in providing advice to the government if they feel their safety is not a priority.

Public interest test

32. The complainant has not presented any specific arguments in support of the public interest.

33. DHSC stated that when considering the public interest it assumed, although could not know for certain, that the purpose of the request is to show whether the CMO and DCMO were working from home during a time when the Government was asking people to do so **where possible**³.
34. If disclosed, the information would tell the requestor how much the CMO and DCMO worked from home. However, both have a clear rationale for not working from home due to being key to the pandemic response including press conferences, and the need to access very sensitive information. Furthermore, in the CMO's case, he was working over Christmas in a hospital ward directly treating COVID-19 patients. This means the number of days could be almost any number, including all days, and would not provide information Government advice was not being followed.
35. Given the clear rationale for not working from home it is not clear that the release of this information provides much public benefit, if any.
36. It is even less clear what benefit is derived from the diaries in this regard. When weighed against the public interest in keeping the CMO and DCMO safe it would seem very clear where the balance of public interest lies.
37. It is also worth considering this matter in the current climate and context. There is of course the tragic case of Sir David Amess, which makes clear the worst possible consequence of someone who wishes to do a public figure harm, knowing where they can gain access to them.
38. It is the Commissioner's view that the public interest lies in favour of maintaining the exemption. The safety and well-being of the CMO and DCMO and the confidence of other such advisers is crucial in ensuring that such specialists feel able to safely be involved when providing similar types of in-put to Government, whether that be health, education or economic.

The Commissioner's decision

39. Although on the face of it, and particularly at the of the request time, it appears straight forward and of minor significance, in reality this has proven not to be the case. The CMO and DCMO have been an integral part in dealing with the pandemic and supporting the Government by providing advice, data and statistics.

³ Commissioner's emphasis

40. There are clear reasons why they would not necessarily appear to be following the 'work from home' advice as it would just not be possible for them to do so when attending or providing daily Covid updates and press briefings with the Prime Minister or Secretary of State for Health.
41. Furthermore, the Commissioner notes that the CMO also spent time working on the 'front-line' as a trained medical professional dealing directly with Covid patients, or assisting and advising colleagues. Clearly this is not a job that can be done from home.
42. Both the physical and mental health of individuals is of paramount importance and it there have been wide reports of a number of incidents whereby the CMO and DCMO have been subjected to verbal abuse, harassment and on occasion unnecessary physical contact.
43. As DHSC pointed out, although the current meeting subjects may be somewhat different to those during the pandemic, it is possible to deduce a working pattern from the diaries and increase the risk to the CMO and DCMO.
44. Given all the circumstances of this case and having considered all the arguments presented to her, the Commissioner considers that DHSC has correctly applied section 38(1) to the withheld information.

Right of appeal

45. 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

46. 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.
47. 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

Susan Duffy
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