

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2023

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 Department of Health and Social Care (DHSC) to disclose the 'internal ways-of-working review' mentioned by Lord Bethell in Parliament. DHSC refused to disclose the requested information citing section 35(1)(a) of FOIA.
2. The Commissioner's decision is that while section 35(1)(a) of FOIA is engaged, the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.
3. The Commissioner therefore requires the DHSC to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
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.

Background

5. This request was the subject of an earlier decision notice dated 1 November 2022, which can be accessed here:

[ic-148369-c4c1.pdf \(ico.org.uk\)](#)
6. This notice ordered the disclosure of the requested information, as it was the Commissioner's view at that time that DHSC intended to disclose the information but it was just waiting for ministerial approval.
7. DHSC appealed this decision to the First-tier Tribunal. This was because it did not obtain ministerial approval and wished to continue with its reliance on section 35(1)(a) of FOIA. Via consent order the decision notice was substituted with an information notice dated 20 December 2022 and this ordered DHSC to provide a copy of the withheld information and its final submissions to support the application of section 35(1)(a) to the Commissioner to enable him to reconsider the handling of the request under section 50 of FOIA.

Request and response

8. The request was made to DHSC on 19 August 2021 and asked for the following information:

"please provide a copy of the "internal way-of-working review" referred to by Lord Bethell at the below Hansard link

Covid-19 Internal Review - Hansard - UK Parliament
[<https://hansard.parliament.uk/lords/2021-05-20/debates/DF0803D5-AD04-44FB-878E-59B7D876E65E/Covid-19InternalReview>]"
9. DHSC responded to the information notice on 17 February 2023. It provided a copy of the withheld information and submissions in support of its application of section 35(1)(a) of FOIA.

Scope of the case

10. The Commissioner accepted the complaint for further investigation on 20 February 2023.
11. The scope of this investigation is to determine whether DHSC is entitled or not to rely on section 35(1)(a) of FOIA.

Reasons for decision

12. 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.
13. Section 35 is classed 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.
14. DHSC confirmed that the review relates to the formulation and development of the government's policy on the Covid-19 response and comparable future incidents. It stated at the time of the request, the government was continuing to formulate and develop those policy issues.
15. It commented that since that time the government's response to Covid-19 has further developed. It stated that this has included the Covid-19 Response: Living with Covid-19, being published on 21 February 2022. However, it advised that the development of policy is not a continuous process of policy review and development but rather development of policy has a series of discrete stages, with a beginning and end and periods of implementation in between. DHSC confirmed that government policy continues to develop on the Covid-19 response and comparable future incidents, including the new strategic approach to pandemic preparedness. It argued that policy on pandemic preparedness continues to evolve, building on the lessons learned from Covid-19 and other incidents and exercises.
16. The Commissioner has reviewed the withheld information and he is satisfied that the withheld information relates to the formulation or development of government policy – its policy on the Covid-19 response and comparable future incidents. He is therefore satisfied that section 35(1)(a) of FOIA is engaged.

Public interest test

17. DHSC confirmed that it recognised the general public interest in making this information available for the sake of greater transparency and openness. It also recognised the topic is a sensitive subject and that there is a public interest in understanding the government's response to the pandemic.
18. However, it considers there are weightier public interest arguments in favour of maintaining the exemption. It said the policy issues

addressed in the Review relate to issues and decisions which were ongoing and developing. As they are of great public importance, it considers it is particularly important to preserve a safe space in which input can be provided and evaluated in candid terms, with conclusions and recommendations being drafted without concerns about public perception. It argued that disclosure would intrude that safe space and would be likely to have a material chilling effect on the candour of comparable exercises in future. It stated that would undermine the effectiveness of such exercises, which would not be in the public interest.

19. DHSC confirmed that it felt disclosure of the Review would be likely to make officials and/or Ministers more circumspect about undertaking such information exercises in future, based on unease about how the output from such exercises may be unfairly characterised. It argued that it would be contrary to the public interest if opportunities for valuable informal learning exercises of this nature were to be declined.
20. DHSC commented further that such consequences were more acute given that the Review was the outcome of an informal exercise that did not purport to be and was not intended to be comprehensive. It also said that the Review was never finalised, but instead remained in draft form and it was intended for internal purposes only. DHSC confirmed that this was made public by Lord Bethell, then the Parliamentary Under-Secretary of State, in the House of Lords on 20 May 2021. Lord Bethell said:

“I can confirm that while DHSC officials carried out a routine internal ways-of-working review, this was absolutely for the purpose of providing advice to Ministers only”.
21. It further stated that the risks of a chilling effect and concerns about the erosion of a necessary safe space are further compounded by the emotive nature of the subject matter of the Review and the likelihood of unfair commentary in the media and elsewhere. It said that taking a realist view of such matters, the risk of a chilling effect and concerns about the loss of a safe space would have been likely consequences of the disclosure of the Review in response to this request.
22. DHSC considers transparency about the government’s response to the early stages of the pandemic are already being adequately delivered through alternative means. Most notably the statutory inquiry, which had been announced in the House of Commons on 12 May 2021, prior to the complainant’s request. Therefore, it believes, at the time of the request, a rigorous and independent scrutiny and

transparency process relating to the matters covered in the Review had already been set in motion. It considers disclosure could potentially interfere with/and or distract the inquiry's process. Disclosure without context could risk undermining its work, through the risk of misinterpretation.

23. Also, DHSC noted that the Joint Inquiry into "Coronavirus: lessons learnt", conducted by the House of Commons Health and Social Care Select Committee and the Science and Technology Select Committee, published a wide-ranging and thorough report in October 2021 of its findings up to that point. It argued that the government issued a full response to that report, which was published on 16 June 2022.
24. It said, separately, that the Science and Technology Select Committee published a report on 8 January 2021 concerning the use of scientific advice in the UK's response to the pandemic. The government's response to that report was published on 13 May 2021.
25. It also said that the Public Accounts Committee of the House of Commons has undertaken numerous inquiries on topics including, but not limited to, the management of PPE contracts, government preparedness for the Covid-19 pandemic (which included lessons learned for government on issues of risk and also on the Test and Trace system), as well as the rollout of the vaccine programme.
26. The Commissioner considers there are significant public interest arguments in favour of disclosure. The Review looked at how DHSC led the health and social care response to Covid-19 from January to June 2020 (the run up to the first lockdown up to the phased reopening of schools and initial relaxation of restrictions) and provided recommendations on how it should improve its approach in the future should a similar event occur.
27. There is a public interest in knowing how DHSC handled various aspects of the pandemic and where it felt improvements or a new or revised approach is required. There is also a public interest in assuring the public that a thorough review has been undertaken and lessons learnt, where there needed to be. Disclosure of the withheld information would assist with that. The public can see what was recommended and why and what timeframe it had set itself.
28. At the time of the request in August 2021 almost 12 months had passed since the Review had been completed and by this time it would be expected that many recommendations had already been

implemented or at least well underway. By this time in the UK we were seeing most legal limits on social contact removed and the final reopening of remaining closed sections of the economy. The UK was well into its vaccination programme with 86.8% of the population 18 years and over having had at least one jab and 67.7% aged 18 years and over have had two (figures as at 18 July 2021).

29. The Commissioner considers there was little need for safe space at the time of the request to debate the issues and recommendations identified in the Review. It was almost 12 months old and DHSC would have been working towards the implementation of those recommendations at that stage. Disclosure at the time of the request would therefore have minimal impact of that process.
30. The Commissioner is sceptical to accept disclosure would have a chilling effect on such discussions and reviews in the future. The Review may well have only been put together for the DHSC itself but DHSC would have known at the time that given its significance and importance moving forward it would more than likely become the focus of FOIA requests. He considers it is unreasonable for a government department to consider that such a Review or the vast majority of any of the work it does would not be subject to FOIA.
31. The Commissioner does not consider officials and ministers are easily deterred from doing the role they are in place to do, especially when the Review itself is almost 12 months old and the need for safe space to debate and consider options within that Review will have diminished by this point.
32. It is also noted that prior to this second consideration of the request, DHSC was considering the disclosure of the Review. When the first decision notice was issued it was understood that disclosure was just awaiting ministerial sign off. It therefore seems that there was a general consensus within DHSC that the Review could be disclosed given the passage of time.
33. Given the circumstances at the time of the request and the significant public interest arguments in favour of releasing the withheld information, the Commissioner has concluded that the public interest rests in disclosure.

Right of appeal

34. 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

35. 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.
36. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF