

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 1 September 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested correspondence relating to compensation payments for victims of infected blood. The above public authority ("the public authority") relied on sections 28 (internal relations), 31 (law enforcement), 35 (formulation of government policy) and 42 (legal professional privilege) of FOIA to withhold the requested information.
2. The Commissioner's decision is that:
  - section 42 is engaged and the balance of the public interest favours maintaining this exemption; and
  - section 35 is also engaged. The balance of the public interest favours disclosure of most of the information, but there is some information where the balance of the public interest favours maintaining the exemption; and
  - neither section 28 nor 31 is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information specified in the confidential annex with appropriate redactions to protect personal data.

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**

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5. On 8 December 2022, the complainant wrote to the public authority and requested information in the following terms:

“Please provide copies of all e-mail correspondence (including attachments) sent to OR from William Vineall (Director of NHS Quality, Safety and Investigations) during the period 10th August 2022 - 31st August 2022 that relate to Infected Blood Interim Compensation Payments.”
6. The public authority responded on 10 January 2023. It refused the request and relied on section 12 of FOIA (cost of compliance) in order to do so.

## **Request and response**

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7. On 12 January 2023, the complainant wrote to the public authority and, referring to his earlier request, requested information in the following terms:

“I can confirm that I am happy to narrow the scope of the original request by narrowing the date range to 10th August 2022 - 28th August 2022 which I trust will bring the request within the cost limit based on the information you provided.”
8. The public authority responded on 2 March 2023. It disclosed a small quantity of information, but withheld the remainder. It relied on sections 28, 35, 40(2) and 42 of FOIA to withhold the remaining information. It upheld this position following an internal review.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 15 June 2023 to complain about the way his request for information had been handled. He did not challenge the public authority's reliance on section 40(2) but did challenge the remaining exemptions.

10. During the course of the Commissioner's investigation, the public authority confirmed that it wished to rely on section 31 to withhold some of the information – in addition to the exemptions already applied.

## **Reasons for decision**

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11. In its submission to the Commissioner, the public authority identified some information that was within the correspondence but did not relate to infected blood interim compensation payments.
12. The Commissioner accepts that, as a matter of principle, such information would not fall within the scope of the request. He also recognises that, in practice, the public authority has correctly identified the information, within the correspondence, that does not fall within the scope of the request.

## **Section 42 – legal professional privilege**

13. Section 42 of FOIA allows a public authority to withhold information that is covered by legal professional privilege.
14. The complainant has indicated that he only wishes to challenge the scope of the information to which section 42 applies. The Commissioner considers that it would be helpful, in light of the conclusions he will set out below, to address this exemption first. This is because its application affects both the balance of the public interest in respect of section 35 and the information which must be disclosed.
15. Legal professional privilege and, specifically, legal advice privilege, will apply to information which records the seeking and the provision of, legal advice, to a client, by a professional legal adviser.
16. The public authority has provided the Commissioner with a total of 11 email chains (some of which overlap substantially) and two attachments. Within some of the email chains there are references to needing to seek advice from Counsel on a particular matter. There is also a summary of the advice that Counsel provided.
17. The Commissioner considers that, to the extent that the emails make reference to the specific subject that Counsel's view was sought on, or where they refer to or paraphrase the advice provided, they will be covered by legal advice privilege and consequently engage section 42.
18. For the public authority's benefit, the Commissioner has identified the information he considers will engage section 42 in the confidential

annex. For the complainant's benefit, the Commissioner records that only a small quantity of the information engages this exemption.

19. Where section 42 is engaged, there always be a very significant public interest in maintaining the exemption. This is because legal privilege is considered to be a fundamental part of the British justice system and it is not in the public interest to undermine it without very good reason.
20. In the circumstances, the Commissioner is not convinced that there are sufficiently strong public interest grounds that justify disclosure of the specific information to which this exemption applies. The balance of the public interest therefore favours maintaining this exemption.

### **Section 35 – formulation or development of government policy**

21. Section 35 of FOIA allows a public authority to withhold information if that information relates to the formulation or the development of government policy.
22. The complainant argued that the information could not relate to the formulation or the development of government policy. He noted that the government had already accepted the "moral case for compensation" and had already made interim payments. Therefore, in his view, the information could only relate to the application or implementation of existing policy – and would therefore not engage the exemption.
23. He also argued that Sir Robert Francis KC had already provided the compensation framework and that the process could not therefore be in the "early stages of development" it could only be in the implementation phase.
24. The public authority argued that the information in question did relate to the formulation or development of government policy because:

"discussions surrounding the first interim payments are intrinsically linked to decisions surrounding the wider issue of future compensation for those infected and affected by infected blood, and work on this is still ongoing at ministerial level."

## The Commissioner's view

25. In the Commissioner's view, neither the public authority nor the complainant has accurately described the withheld information.
26. Sir Robert Francis KC's report looked at the options for a framework for compensating victims of the infected blood scandal. Eligibility for payments and the size of the payments to be awarded would vary depending on individual circumstances. Sir Robert recognised that such a scheme would be complex and would take time to implement.
27. However, Sir Robert also recognised that there was a cohort of people who needed some form of financial assistance more urgently and who could be easily identified. He recommended that the Government make a payment of at least £100,000 to each member of the current schemes set up to support victims. Such a step would, in Sir Robert's view, give victims financial support whilst waiting for a more comprehensive compensation scheme to be put in place so that they could receive their full entitlement.
28. Sir Brian Langstaff, who is currently chairing the public inquiry into the scandal, published his own interim report in July 2022. He endorsed Sir Robert's recommendation of an interim compensation payment.
29. The then-Paymaster General Michael Ellis KC MP wrote to Sir Brian on 16 August 2022 to confirm that the Government would accept this particular recommendation.<sup>1</sup> A public statement was made the following day.<sup>2</sup>
30. The withheld information (with some exceptions that will be dealt with below) does relate to the development of a government policy, but the policy it relates to is the making of **interim** compensation payments, rather than the compensation scheme as a whole. The Commissioner does not accept that the two schemes of payment are as intrinsically connected as the public authority suggests.
31. Whilst the Commissioner recognises that the decision to make an **interim** payment was taken in the context of a need for a policy

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1098749/16082022\\_Minister\\_for\\_the\\_Cabinet\\_Office\\_to\\_Sir\\_Brian\\_Langstaff.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1098749/16082022_Minister_for_the_Cabinet_Office_to_Sir_Brian_Langstaff.pdf)

<sup>2</sup> <https://www.gov.uk/government/news/infected-blood-victims-to-receive-100000-interim-compensation-payment>

decision on a **comprehensive** scheme of compensation, he considers that it is still a discrete policy decision in its own right.

32. Whilst the Government is not obliged to accept Sir Robert's recommendations about the final framework, it seems likely that it will need to do some work to understand the potential risks and benefits of his approach – even if the resulting scheme diverges from Sir Robert's suggestion. Sir Robert's framework involves a range of payments, of differing amounts being made available to victims depending on their individual circumstances – whereas the interim payments are of a single set figure to all those eligible. The considerations relating to the comprehensive framework of eligibility are therefore likely to be far more complex than the considerations necessary to make a single standard payment.
33. Therefore it is not the case that all information relating to the decision to make **interim** compensation payments necessarily relates to the **final** compensation scheme. Whether particular information does or does not relate to the final compensation scheme will depend on its contents.
34. There are a small number of emails that do appear to relate to wider work. These emails were sent on or after 18 August 2022 and look ahead to a future scheme. The Commissioner is satisfied that these emails relate to the design of the final scheme.
35. However, the remaining emails relate to the policy announcement about interim payments and were sent prior to that announcement being made public. Whilst this does not prevent section 35 from being engaged (because the emails still relate to a policy process that was ongoing at the time they were sent), the stage of the policymaking process that the information forms part of will be a relevant factor in assessing the balance of the public interest – to which the Commissioner now turns.

### **Public interest test**

36. There will always be some inherent public interest in withholding information that falls within a class that Parliament decided deserved special protection. However, the weight to be attributed to that public interest will vary depending on the sensitivity of the policy in question and the stage the policymaking process was at when the request was refused.
37. When assessing the balance of the public interest, the Commissioner must consider matters as they stood at the point the public authority refused the request: 2 March 2023.
38. The decision to make interim compensation payments was publicly announced on 17 August 2022 – with most recipients receiving their

payments in October 2022. Therefore by March 2023, officials no longer needed a safe space to discuss the design of this particular policy.

39. Whilst officials may have required (or may possibly still require) a safe space in which to discuss the design of the comprehensive scheme, the majority of the actual information being withheld here simply does not relate to that broader policy work – it is solely focused on interim payments. The aspect of the correspondence most likely to have had a bearing on future payments is already exempt from disclosure under section 42 of FOIA.
40. The Commissioner considers that civil servants should normally be robust individuals, not easily dissuaded from providing candid advice. He is traditionally sceptical of so-called “chilling effect” arguments about inhibitions on future conversations and sees no reason why robust individuals would be inhibited from sending future emails of this nature.
41. Where the emails relate to a consideration of options in relation to the final compensation scheme, the Commissioner accepts that this information forms part of an ongoing policy process and therefore the balance of the public interest favours maintaining the exemption. This information is identified in the confidential annex.
42. However, the Commissioner also considers that there is a strong public interest in the infected blood scandal in general and the compensation to be paid to victims in particular.
43. Whilst the remaining information is more focused on the design and mechanics of the policy rather than on weighing options, the Commissioner does consider that it would shed some light on how those decisions are made and implemented. He is therefore of the view that the balance of the public interest should favour disclosure of most of the information.

### **Section 31 – law enforcement**

44. Section 31 allows a public authority to withhold information whose disclosure would prejudice the prevention or detection of crime.
45. The public authority did not specify, in its response to the complainant, what crime(s) it considered would be more likely to occur if the information were disclosed. It later explained to the Commissioner that it was concerned that disclosure would increase the risk of fraud.
46. The Commissioner has considered whether disclosure of the withheld information itself would encourage fraud or make it more difficult to prevent fraud. He is of the view that it would not.

47. The references to fraud and fraud prevention within the withheld information are high-level and generic. The mere mention of the words "fraud" or "counter-fraud" within emails does not, of itself, make fraud more likely or less preventable. The Commissioner is not persuaded that there is sufficient detail within the majority of the correspondence that would make it easier for any person to commit fraud or harder to identify those who are attempting to do so. Nor does the withheld information indicate any counter-measures likely to be included in the final compensation scheme.
48. The Commissioner also notes some of the material that the public authority has identified as being most sensitive is in any case covered by section 42.
49. The Commissioner is thus satisfied that section 31 of FOIA is not engaged.

### **Section 28 – internal relations**

50. Section 28 allows a public authority to withhold information whose disclosure would prejudice relations either between the devolved administrations (of Wales, Scotland and Northern Ireland) themselves or between those administrations and the UK Government.
51. The public authority asked the Commissioner not to reveal its precise reasons for applying this exemption. It stated that revealing the reason why disclosure of the withheld information would cause prejudice would, in itself, cause the very prejudice it was attempting to avoid.
52. Having reviewed the public authority's arguments, the Commissioner does not consider that disclosure of this information would prejudice the UK Government's relations with any of the devolved institutions. In his view, the public authority's arguments do not draw a direct enough causal link between disclosure and the claimed prejudice to engage the exemption.
53. However, in this case the Commissioner recognises that the public authority's arguments are intrinsically linked to the content of the information being withheld. Whilst he does not agree with those arguments, so as to preserve a meaningful right of appeal for the public authority, he has therefore decided not to reproduce them in this notice.
54. However, the Commissioner does record that section 28 of FOIA is not engaged in respect of the withheld information.



## **Confidential Annex**

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55. So as to preserve a meaningful right of appeal, the Commissioner has produced a confidential annex to this decision that will be provided to the public authority only.
56. The confidential annex specifies the information that the Commissioner has determined can be withheld and the information that should be disclosed. Necessarily this involves reference to the contents of the actual information being withheld.
57. All the Commissioner's reasoning is included in the published decision notice. No further analysis is included in the confidential annex.

## Right of appeal

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58. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.

60. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**