

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

### **Decision notice**

**Date:** 23 January 2024

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

### **Decision**

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1. The complainant has requested information about the Government guidance: 'Coronavirus (COVID-19): admission and care of people in care homes.' The Department of Health and Social Care (DHSC) is withholding 35 documents under section 36(2)(b) and 36(2)(c) of FOIA. These exemptions concern the effective conduct of public affairs. DHSC disclosed other information with information redacted under section 40(2) and 35(1)(d) as well as the section 36 exemptions. Those two exemptions concern the formulation of government policy and personal data.
2. The scope of the complaint to the Commissioner is DHSC's application of section 36 to the 35 documents being withheld in their entirety. The Commissioner's decision is as follows:
  - At the time of the request, DHSC was correct to rely on section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) of FOIA to withhold 35 of the documents that fall within scope of the complainant's request. The public interest favoured maintaining these exemptions.
  - DHSC's response to the request didn't comply with sections 1(1)(a), 10(1) and 17 of FOIA in respect of the timeliness of its response.
3. It's not necessary for DHSC to take any corrective steps.

## Request and response

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4. The complainant made the following information request to DHSC on 9 December 2022:

“Please would you supply me with any emails, texts,Whatsapps or other written correspondence sent between 1st March 2020 and 30th April 2020 in which the contents of this document - or earlier drafts of the document - were discussed before its release: Coronavirus (COVID-19): admission and care of people in care homes

<https://www.gov.uk/government/publications/coronavirus-covid-19-admission-and-care-of-people-in-care-homes> Please would you also supply me with any earlier drafts of the document.”

5. The complainant noted that they’d first requested this information on 20 July 2020. That request had resulted in the Commissioner’s decision in IC-136941-D1Y2<sup>1</sup> in November 2022. The Commissioner had found that, at the time of that request, section 36 was engaged.
6. In respect of the current request, in its refusal of 16 June 2023 DHSC relied on sections 36(2)(b)(i) and 2(b)(ii) and section 36(2)(c) to withhold some of the information the complainant had requested. DHSC advised that the remaining relevant information it holds – three COVID-19 guidance documents - was in the public domain and therefore that information engaged section 21 as it was already reasonably accessible to the complainant.
7. DHSC maintained its reliance on section 36 following its internal review on 28 September 2023.

## Scope of the case

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8. The complainant contacted the Commissioner on 19 October 2023 to complain about the way their request for information had been handled.
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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022815/ic-136941-d1y2.pdf>

9. As a result of this new complaint to the Commissioner, DHSC reconsidered the request and its response. In correspondence to the complainant dated 14 December 2023 it provided a fresh response to the request. DHSC disclosed some of the information – email correspondence – that it had previously withheld in its entirety but redacted some of this information under section 40(2) and 35(1)(d) of FOIA in addition to the section 36 exemptions. DHSC maintained its position with regard to the 35 documents which it continues to withhold.
10. The Commissioner has reviewed the redacted emails that DHSC disclosed. It appears to him that the redacted information comprises some people's names and personal details such as job titles and telephone numbers ie it's personal data. DHSC has withheld this information under section 40(2) and also sections 35 and 36 of FOIA.
11. The Commissioner confirmed with the complainant whether they're content for the personal data to be redacted and they confirmed that they were. As such the Commissioner considers that the information redacted from the disclosed emails is now outside the scope of the complaint; the complainant is content for the personal data to be redacted and, as such, it's not necessary to consider DHSC's application of sections 35 and 36 to that same information.
12. The Commissioner's investigation is therefore focussed on DHSC's application of section 36 to other information that's within scope of the complainant's request; namely, the 35 documents that DHSC is withholding in their entirety. The Commissioner will also consider the timeliness of DHSC's response to the request.

## **Reasons for decision**

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13. DHSC is continuing to withhold 35 documents in their entirety as it believes they're still subject to the section 36 exemptions. DHSC has provided this information to the Commissioner. The documents comprise separate email exchanges and records of Teams 'Chats' and one other document. All this information was generated within the timeframe requested ie March to April 2020.

## **Section 36 – prejudice to effective conduct of public affairs**

14. Section 36(2)(b)(i) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person (QP), disclosing the requested information would prejudice, or would be likely to prejudice, the provision of advice.

15. Section 36(2)(b)(ii) says that information is exempt information if, in the reasonable opinion of a QP, disclosure would prejudice, or would be likely to prejudice, the exchange of views.
16. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a QP, disclosing the requested information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
17. To determine, first, whether DHSC correctly applied these exemptions, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
18. In its submission to the Commissioner, DHSC says that it originally sought the qualified opinion of the Minister on 25 May 2023 and that they gave their opinion on 9 June 2023. A further submission was sent to the QP on 4 December 2023 and that opinion was given on 11 December 2023. The QP on both occasions was the Minister for Social Care, Helen Whately MP. The Commissioner is satisfied that, under subsection 36(5)(a) of FOIA, Helen Whately MP is an appropriate QP and that they gave their opinion at the appropriate time.
19. The Commissioner has considered whether the opinion about sections 36(2)(b)(i) and (b)(ii) and section 36(2)(c) is reasonable. It's important to note that 'reasonableness' isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
20. The test of reasonableness isn't meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
21. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it's in public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this isn't done, then there's a greater risk that the Commissioner may find that the opinion isn't reasonable.
22. In the December submission to the QP DHSC provided the QP with a background to, and copy of, the request; legal advice and discussion of the public interest test. It was noted that in addition to the three published guidance documents to which the complainant had been directed, five other documents had been released to the Covid-19 Public

Inquiry (though that information was now on public record but wasn't necessarily in the public domain).

23. It was recommended to the QP that 13 documents should be disclosed (comprising eight that DHSC had previously recommended should be shared and the five documents shared with the public inquiry) and that the remaining 35 documents – emails, the Teams conversation and the one other document – should be withheld in their entirety. The QP was advised that that information formed part of the sensitive decision-making process. This was because, at the time, due to the fast-moving situation, decision-making sometimes took place through a combination of meetings, emails and direct messaging, as opposed to through formal submissions as would normally be the case. DHSC considered that disclosing the information could prejudice decision-making. In its discussion of the public interest test, DHSC also discussed future policy interventions, and effective working relationships across the sector.
24. In its submission to the Commissioner, DHSC has confirmed that it considers that the envisioned prejudice would be likely to happen, and the Commissioner will accept this lower level of likelihood.
25. DHSC is relying on all three exemptions under section 36(2) of FOIA. These exemptions concern three different things: prejudice to the exchange of views, prejudice to the provision of advice, and any other prejudice to the effective conduct of public affairs. The QP submission discusses section 36 somewhat broadly. However, in its discussion of the public interest, the submission refers to the “issue of free and frank provision of views” and the need for Ministers and officials to be able to have “these kinds of frank discussions.” The Commissioner accepts that these factors broadly fall under section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA.
26. As noted, the QP submission also refers to future policy interventions, to effective working relationships and the quality of decision-making.
27. In addition, in its submission to the Commissioner, and in relation to section 36(2)(c), DHSC says that releasing the information would be likely to prejudice the efficacy of public services to meet their wider objectives, specifically in relation to hospital discharge and delivering on agreed policy objectives.
28. Regarding future policy interventions and effective working relationships across the sector DHSC has provided further information to support its view but has asked the Commissioner not to include that information in this notice, which he’s respected.

29. DHSC also says that partners need to be able to discharge patients from hospital at pace and under circumstances of high pressure. Under these conditions, all stakeholders need to be able to disagree on the direction of policy and need to be able to have frank conversations on why the direction of policy may not be the most effective under these conditions.
30. DHSC also says that, furthermore, it would be prejudicial for the conversations to be made public as it would result in less robust guidance to the sector because the ability for open discussions on options would be compromised.
31. The free and frank provision of views about policy in relation to hospital discharge is an ongoing, live issue. DHSC argues that it's as necessary for Ministers and officials to be able to have these frank discussions on the formulation of hospital discharge policy today, as it was during 2020. Should another pandemic such as flu or further Covid-19 variants occur, this would mean similarly difficult and high-paced decisions would need to be made. The free and frank exchange of views and advice would be inhibited by the release of this information.
32. The argument at paragraph 31 has strayed back to section 36(2)(b) considerations. However, the Commissioner will accept that other factors referred to in the submission to the QP – future policy interventions, effective working relationships and the quality of decision-making - and the quality of resulting guidance that DHSC has noted in its submission to him - broadly fall under section 36(2)(c) of FOIA.
33. The Commissioner is therefore satisfied that the QP had sufficient appropriate information about the request and the three section 36(2) exemptions to form an opinion on the matter of whether reliance on those exemptions was appropriate with regard to the information in scope.
34. Since he's satisfied that the relevant considerations have been addressed, he must accept that the QP's opinions about withholding the information is one a reasonable person might hold. He therefore finds that DHSC is entitled to rely on section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) to withhold information within scope of the complainant's request.
35. The Commissioner will go on to consider the public interest test associated with the exemptions.

## **Public interest test**

### **Public interest in disclosing the information**

36. In its submission to the QP and to the Commissioner, DHSC advised that there's a public interest in Government decision-making being transparent.
37. The complainant has presented the following arguments for disclosure in their request for an internal review (of 5 August 2023) and complaint to the Commissioner:
  - The pandemic is no longer at crisis levels and the guidance at the heart of this request has now been withdrawn. The Commissioner noted at paragraph 42 of his decision in IC-136941-D1Y2 that the High Court has ruled that the policy in question was irrational.
  - The requested information concerns correspondence about policies that arguably put some of society's most vulnerable at risk at the height of the Covid pandemic. The fact that the Government has commissioned a statutory public inquiry is testament to the overwhelming public interest in favour of disclosure. It's key to understanding how and why decisions were made at the height of the pandemic, so that lessons may be learned – ahead of a winter Covid spike, or indeed a future pandemic, the timing of which we cannot know.
  - The public inquiry raises the possibility (but not the guarantee) that the requested information will be disclosed – so the request doesn't itself pose any additional threat to free and frank discussions.
  - The Information Commissioner has also raised concerns about the impact of the Government's use of messaging apps on "transparency and accountability within government." Providing the information requested goes directly to these points.

### **Public interest in maintaining the exemptions**

38. In the submission DHSC provided to the QP, and largely repeated in its submission to the Commissioner, DHSC presented the following public interest arguments:
  - Releasing the documents into the public domain, which contain advice given on decisions about Covid-19 policy made throughout the pandemic, including clinical, financial, and operational considerations, could prejudice future decision-making. In particular, it would inhibit the free and frank provision of advice

between technical experts, policy officials and ministers, and hinder ability to explore conflict and alternatives for robust and thorough decision making.

- Delivery and implementation within the adult social care (ASC) sector, from workforce, local authorities, NHS, service users and governing bodies such as Care Quality Commission would be negatively affected. This is because they all rely on robust policy and guidance to support and safeguard the sector overall. Delivery, and implementation within the ASC sector, from workforce, local authorities, NHS, users of the service and governing bodies such as the Care Quality Commission would be negatively affected, and all rely upon robust policy and guidance to support and safeguard the sector overall.
- Whilst the information discussed within the documents related to 2020, the issue of free and frank provision of views remains very much current and necessary within the department at this time. Therefore, it's as necessary for Ministers and officials to be able to have these kinds of frank discussions in the formulation of hospital discharge policy today as it was during 2020.
- DHSC has provided the Commissioner with a further public interest argument for maintaining the exemptions that it prefers wasn't discussed in this notice.

### **Balance of the public interest**

39. With regard to section 36(2)(b)(i) and section 36(2)(b)(ii), DHSC's position is that there remains a strong public interest in officials and experts being able to exchange views and advice about hospital discharge policy freely and frankly.
40. With regard to section 36(2)(c), DHSC's position is that there remains a strong public interest in the organisations working in the ASC sector being able to deliver their services effectively. To do so they need policy and guidance shaped through good quality decision-making.
41. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
42. The QP in this case was the Minister for Social Care, and, as such, had the requisite knowledge of how their organisation works and the consequences of any disclosure. The Commissioner therefore gives their opinion a measure of respect.



43. Moving on to the timing of the request, timing was key when the request was first submitted in July 2020 as the Covid pandemic was still very much 'live' at that point.
44. In the current case, the request was submitted a second time on 9 December 2022, but DHSC didn't provide a response until June 2023. In line with the Montague<sup>2</sup> decision the Commissioner will consider the circumstances as they were at when the request was submitted and when a response was due, which was mid-January 2023.
45. The disputed communications about the guidance on admissions and care of people in care homes were approximately two and a half years old at the time of the request. And the Commissioner notes that the guidance that's the subject of the request has been withdrawn. However, the issue of admitting and caring for people in care homes remains live. In addition, in January 2023 although formal pandemic lockdowns and measures had ended, the Covid-19 virus was still circulating in the population then (and currently).
46. In addition, the Covid-19 Public Inquiry had formally started on 28 June 2022 when its terms of reference were published. This was before the complainant submitted their request. Preliminary Inquiry hearings began in early 2023, with full public hearings beginning in June 2023. Hearings are expected to continue until 2026. The Commissioner therefore considers that the matter of COVID-19's impact on care homes and discharging people from hospital also remained 'live' in that sense, in January 2023.
47. Finally, the Commissioner has considered the severity and extent of the envisioned prejudice. The Commissioner has found that disclosing the information would be likely to inhibit frank discussion amongst a range of partner bodies working in ASC about hospital discharge policy. He's found that disclosing the information would also be likely to harm decision-making and related policy and weaken guidance on which partner bodies rely.
48. Good decisions, robust policy and reliable guidance for the ASC sector is important. Because these factors would ultimately impact on the users

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[https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA\\_2020\\_000324\\_000325\\_GIA.pdf](https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf)

of ASC services, the Commissioner considers that the prejudice resulting from disclosure would be severe and, given the range of bodies involved and the vulnerability and number of users of ASC services, extensive.

49. The timing of the request, QP's opinion and severity and extent of the envisioned prejudice carry weight. Transparency about how the guidance in question was developed also carries weight. However, in the Commissioner's view that weight is lessened by the guidance having now been withdrawn. If the information were disclosed, the envisioned wider prejudice could be realised for the sake of guidance no longer in use.
50. The Commissioner considers that the public interest in transparency about the Government's response to the pandemic's effects on the ASC sector will be satisfactorily met through the ongoing Covid-19 Public Inquiry.
51. On balance therefore, the Commissioner finds that at the time of the request the public interest favoured maintaining the section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) exemptions.
52. The Commissioner has decided that DHSC has correctly applied these exemptions to the 35 documents it's withholding and that the public interest favoured maintaining the exemptions.

### **Procedural matters**

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53. Under section 1(1)(a) of FOIA a public authority must confirm to an applicant whether or not it holds requested information.
54. Under section 10(1), a public authority must comply with section 1(1)(a) promptly and within 20 working days following the date of receipt of the request.
55. Within the same timescale, and in respect of any exempt information, under section 17(1), a public authority must issue an applicant with a refusal notice. Under section 17(3), the refusal notice should include the outcome of any associated public interest test.
56. In this case, the complainant submitted their request on 9 December 2022. A response was due by mid-January 2023, but DHSC didn't issue the complainant with a refusal notice until 23 June 2023. Clearly DHSC didn't comply with sections 1(1)(a), 10(1) and 17 of FOIA.

## **Right of appeal**

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

58. 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.
59. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**