

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

### **Decision notice**

**Date:** 21 March 2024

**Public Authority:** UK Health Security Agency (UKHSA)  
**Address:** 10 South Colonnade  
London  
E14 4PU

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

---

1. The complainant has requested information about the Government guidance: 'Coronavirus (COVID-19): admission and care of people in care homes.' UKHSA refused to provide a number of documents containing email exchanges and draft versions of the guidance citing sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that at the time of the request UKHSA was correct to rely on section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) of FOIA to withhold the documents that fall within scope of the complainant's request. The public interest favoured maintaining these exemptions.

#### **Request and response**

---

3. On 9 December 2022, the complainant wrote to UKHSA and requested information in the following terms:

"Please would you supply me with any emails, texts, Whatsapps or other written correspondence sent between 1<sup>st</sup> March 2020 and 30<sup>th</sup> 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.”

4. UKHSA responded on 8 February 2023. It stated that it held information in scope of the request, some of which was now publicly available and, under section 21 of FOIA, it directed the complainant to where this information could be accessed online. One document that was not published was also provided to the complainant. For the remaining information in scope of the request, UKHSA relied on sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA to withhold the information.
5. Following an internal review UKHSA wrote to the complainant on 22 May 2023. It stated that it upheld its position.

### **Scope of the case**

---

6. The complainant contacted the Commissioner on 19 October 2023 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to determine if UKHSA has correctly withheld any of the remaining information under any of the limbs of the section 36(2) exemption.

### **Reasons for decision**

---

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

8. 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 inhibit , or would be likely to inhibit, the provision of advice.
9. Section 36(2)(b)(ii) says that information is exempt information if, in the reasonable opinion of a QP, disclosure would inhibit, or would be likely to inhibit, the exchange of views.
10. 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.

11. To determine, first, whether UKHSA correctly applied these exemptions, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
12. In its submission to the Commissioner, UKHSA states that it sought the opinion of the QP on 10 October 2022 and their opinion was given on 18 October 2022. The QP was the Parliamentary Under-Secretary of State for Care at the Department of Health and Social Care (DHSC), Neil O'Brien MP. The Commissioner is satisfied that, under subsection 36(5)(a) of FOIA, Neil O'Brien MP is an appropriate QP.
13. However, it is noted that this opinion was dated before the request was made to UKHSA. UKHSA explained to the Commissioner that both itself and the DHSC received identical information requests on this subject. The Minister provided their opinion in relation to the DHSC request but as the QP is also the QP for UKHSA and the requests were identical UKHSA did not seek a separate opinion from the QP.
14. The information that continues to be withheld in this case is a number of documents comprising of email exchanges and draft versions of documents. The QP's opinion was given in relation to an identical request made to the DHSC and, in that case, the withheld information comprised email exchanges and draft documents. The two requests were made by the same complainant over a similar time period.
15. The QP's opinion is not just incidental to the application of this exemption, it is the defining feature of this exemption. Given the importance placed on the opinion of the QP by the exemption, it therefore follows that that opinion must have been properly obtained. Generally speaking this will mean the QP giving their reasonable opinion that disclosure of the withheld information would (or would be likely to) prejudice the effective conduct of public affairs. The opinion does not have to be given in writing (even though that is obviously preferable) but a public authority should create some form of permanent record showing what the QP's opinion was.
16. The Commissioner has issued a decision notice relating to the earlier DHSC request<sup>1</sup> and found the QP's opinion was reasonable. That decision notice noted that:

"DHSC has provided a copy of an email dated 18 October 2022 in which the QP confirms that section 36 should be upheld and that, in addition, the "documents specified in the annexes" should not be released. The Commissioner is therefore satisfied that the QP provided an opinion."

---

<sup>1</sup> [ic-136941-d1y2.pdf \(ico.org.uk\)](https://www.ico.org.uk/for-organisations/our-work/our-work-2022/2022-10-18-136941-d1y2.pdf)

17. Section 36 requires the QP to consider the circumstances of a particular case before forming an opinion. This would normally involve a QP being consulted about each case individually as 'blanket rulings' may not be reasonable if they don't take account of the circumstances at the time of the request. As these requests were for identical information, and the information being withheld was broadly similar and the opinion was given within a matter of weeks of the request being received, the Commissioner's view is the opinion is relevant to this case and can be relied upon in this instance.
18. In determining whether the opinion about sections 36(2)(b)(i) and (b)(ii) and section 36(2)(c) is reasonable the Commissioner has to determine if the opinion is one that a reasonable person could hold.
19. 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.
20. In the submission to the QP, background to the request was given, along with arguments relating to the public interest test.
21. Of relevance to both section 36(2)(b)(i) and section 36(2)(b)(ii), it was explained why disclosing the information being withheld "would" inhibit the provision of advice and exchange of views. This was because the information included comments, questions and exchanges from ministers and other officials, who were directly involved in the drafting process. At the time, it was explained, 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.
22. It was argued that by releasing the withheld material, there would be likely prejudice to the efficacy of public services to meet their wider objectives, specifically in relation to hospital discharge and delivering on agreed policy objectives. Officials provide regular advice on options for increasing hospital flow into Adult Social Care, involving frank and challenging conversations with sector representatives and the NHS about funding, capacity, workforce and the rights of patients and service users.
23. While those options may not all proceed to implementation, officials and Ministers need to be able to openly weigh up risks throughout the admission and discharge process, including where interventions to mitigate risk may be unpalatable. Hospitals need to be able to discharge patients 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. It was argued it would be prejudicial for the conversations to be made public as it would result in less robust guidance to the sector, as the ability for open discussions on options would be compromised.

24. In its submission to the Commissioner, UKHSA confirmed the QP's opinion in this case is that the prejudice envisioned under section 36(2) exemptions would be likely to occur.
25. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b) exemptions to form an opinion on the matter of whether reliance on those exemptions was appropriate with regard to all the information in scope.
26. The Commissioner accepts that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that UKHSA is entitled to rely on section 36(2)(b)(i), (ii) and 36(2)(c) to withhold all the information.
27. The Commissioner will go on to consider the public interest test associated with the exemptions.

### **Public interest test**

28. The Commissioner has considered the public interest test in a recent decision notice involving the DHSC<sup>2</sup>. This notice considered a request made to the DHSC on 9 December 2022 (the same date as in this case) by the same requester as in this case, for the same information. The requests both followed earlier identical information requests refused under section 36(2) one of which was made to the DHSC<sup>3</sup> and has been referred to earlier in this notice and one which was refused by UKHSA's predecessor, Public Health England<sup>4</sup>.
29. The complainant sought to re-submit these requests to UKHSA and DHSC to see if the passage of time would change the public interest considerations. In the DHSC decision notice (IC-265172-Y8X8) the Commissioner examined the public interest arguments and does not intend to repeat these again here given the identical nature of the requests but he would highlight that he did give careful consideration to the timing of the request, stating:

"The disputed communications about the guidance on admissions and care of people in care homes were approximately two and a half years

---

<sup>2</sup> [ic-265172-y8x8.pdf \(ico.org.uk\)](#)

<sup>3</sup> [ic-136941-d1y2.pdf \(ico.org.uk\)](#)

<sup>4</sup> [ic-142398-t7z2.pdf \(ico.org.uk\)](#)

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).

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."

30. The Commissioner went on to consider the severity and extent of the likely prejudice and the potential harm to decision-making that may occur through disclosure. He has not repeated these arguments in full here but stresses he considers they carry across to this request and are relevant to his decision given the almost identical nature of these requests and the information that is under consideration.
31. 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.
32. The Commissioner has decided that UKHSA has correctly applied these exemptions to the documents it has identified to the Commissioner it's withholding and the public interest favoured maintaining the exemptions.

## **Right of appeal**

---

33. 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)

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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