

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2024

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested, from HM Treasury (HMT), information about a policy that was announced in November 2023. HMT refused to disclose the requested information, on the basis of section 35(1)(a) of FOIA (the exemption for the formulation or development of government policy).
2. The Commissioner's decision is that some of the withheld information is statistical information that doesn't engage section 35(1)(a), by virtue of section 35(2) of FOIA; and that for the remaining withheld information, section 35(1)(a) is engaged, but the public interest favours disclosure.
3. The Commissioner requires the public authority to disclose the withheld information (subject to any appropriate redactions for personal data), to ensure compliance with the legislation.
4. The public authority must take these steps within 30 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 FOIA, and may be dealt with as a contempt of court.

Request and response

5. On 18 November 2023, the complainant made the following request to HMT, for information about:

“... a policy change announced in November 2023 that pertains to **the termination of access to free NHS prescriptions** for Universal Credit claimants in certain situations ... I request any documents or information held by ... [HMT] that pertain to **the evaluation of the safety and necessity of the policy change announced in November 2023 regarding the termination of access to free NHS prescriptions** for Universal Credit claimants in certain situations. This should include any reports, assessments, or internal documents related to the decision-making process ...” (emphasis added).

6. The complainant explained that they were requesting this information because:

“... we have concerns that the threat to terminate **access to free prescriptions** for claimants managing their illnesses may have unintended consequences, such as claimants discontinuing their medication, ending their Universal Credit claims, falling into vulnerable situations, or facing adverse health outcomes ...” (emphasis added).

7. It’s clear from the words highlighted in bold above that the complainant was especially seeking information regarding the issue of access to free prescriptions.
8. HMT responded on 19 December 2023 and refused to provide the requested information, on the basis of section 35(1)(a) of FOIA.
9. HMT provided an internal review on 23 January 2024 in which it maintained its original position. HMT also provided further detail on the policy change in question.

Scope of the case

10. The complainant contacted the Commissioner on 23 January 2024 to complain about the way their request for information had been handled.
11. They disputed that section 35(1)(a) applies and should be maintained.

12. They also complained that HMT didn't sufficiently address issues they had raised in their request for an internal review, and indicated that they hoped their ICO complaint would lead to clarification from HMT on those issues.
13. They emphasised to the Commissioner that the information they're interested in is "assessments and analyses regarding the implications, safety, and necessity" of the policy in question.
14. The Commissioner emphasises to the complainant that internal reviews aren't a requirement under FOIA (but they're a matter of good practice).
15. The Commissioner considers that the scope of this case is to decide whether HMT was correct to rely on section 35(1)(a) of FOIA and refuse to disclose the requested information.

Reasons for decision

16. Section 35(1)(a) of FOIA provides that information held by a government department is exempt information if it relates to the formulation or development of government policy. It's a qualified exemption, so if engaged, the exemption is subject to the public interest test.
17. The Commissioner has published detailed guidance on the exemption¹.
18. In this case, HMT has said that the withheld information relates to "the formulation **and** development" and "the formulation **or** development" (emphasis added) of government policy. HMT has also commented that the withheld information was created in preparation for the Autumn Statement 2023; was used by officials to assess the risks of different options for the Autumn Statement 2023; and refers to the design of new policy.
19. The Commissioner has considered his guidance, as well as HMT's submissions and the withheld information, and he's satisfied that most

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

of the withheld information does relate to the formulation or development of government policy and engages the exemption.

20. Some of it, however, is statistical information, and the Commissioner's guidance² explains that under section 35(2) of FOIA, once a policy decision has been taken, any statistical information that was used to provide an informed background to that decision doesn't engage section 35(1)(a).
21. In this instance, the relevant policy decision was taken by 16 November 2023, when it was announced on www.gov.uk. The request was made after that. Consequently, the statistical information being withheld can't engage section 35(1)(a).
22. Next, the Commissioner will consider the public interest test, in respect of the rest of the withheld information.

Complainant's position

23. The Commissioner has read the complainant's numerous comments on the public interest, but he won't include them all here. Essentially, the complainant has emphasised the importance of transparency and accountability, and considers that it's in the public interest to disclose information relating to government policies that "have a direct impact on vulnerable populations"; they're also concerned about 'unintended consequences' of the policy, like "adverse health outcomes for Universal Credit claimants".

HMT's position

24. HMT acknowledges a public interest in the transparency and accountability of public authorities, and in the work of government departments being open to scrutiny. It also recognised a public interest in policies relating to welfare benefits and the NHS.
25. In the following paragraphs, the Commissioner outlines his understanding of HMT's arguments against disclosure of the information.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#exemptionsstatistical>

26. HMT has argued, in its submissions to the Commissioner, that there's "an ongoing decision-making process", and has commented on the "ongoing development of policy". It said "the announcement at Autumn Statement 2023 was a high-level policy announcement", and has explained that the detail of the policy continues to be developed.
27. The Commissioner's understanding is that HMT is making 'chilling effect' and 'safe space' arguments against disclosure.
28. In relation to 'chilling effect', at internal review stage HMT told the complainant that "If we were to release the information we hold at this time, there may be a chilling effect" and expressed a concern about "external pressures" making it "more difficult for officials and ministers to engage with each other and with stakeholders", leading to delays in policy-making and development in this area. HMT said "releasing this information would not be in the public interest due to the harm it would cause to policy development and delivery for welfare benefit claimants".
29. In its submissions to the Commissioner, HMT said that disclosure "would inhibit future discussions", and emphasised that there's "a strong public interest in protecting against encroachment on the ability of officials and ministers to formulate and develop policy options freely and frankly".
30. Regarding 'safe space', HMT's internal review said to the complainant:

"This policy has only recently been announced and is in the early stages of development meaning that the Government continues to require a safe space to formulate and develop policy options freely and frankly".
31. HMT's submissions to the Commissioner said "whilst the high-level policy has been announced, the need to develop and refine the policy detail is still required", and HMT explained that the Government needs to be given the time and space to make the detailed decisions free from public interference:

"The release of the information ... and any subsequent debate in the media, may have prevented or prejudiced the development of policy by causing undue distraction or hindered the consideration of all options".

Commissioner's position

32. The Commissioner isn't persuaded by HMT's arguments, and he considers the public interest lies in favour of disclosing the information.
33. As noted above, HMT has said that there's "ongoing development of policy" and that the detail of the policy in question is still being developed. However, as the Commissioner's guidance on public interest factors in relation to section 35(1)(a) explains, once a high-level policy objective has been announced (as it has been in this instance – in November 2023), any information about that broad objective becomes less sensitive. The safe space to debate that high-level decision in private is no longer required, even if related debate about the details of the policy remains sensitive.
34. The guidance includes a case-study involving the Department for Work and Pensions, and information about the introduction of identity cards³:

"At the time of the request, a high-level decision had already been taken to introduce ID cards ... Even though detailed policy work was still at an early stage, information mainly about the high-level decision was less sensitive. The Information Tribunal ordered disclosure".
35. The Commissioner considers that the information being withheld in the present case relates to a high-level decision already taken, and a policy already announced (on 16 November 2023⁴ – the Back to Work Plan).
36. He therefore affords little weight to safe space considerations.
37. He gives little weight to HMT's chilling effect arguments too, in the circumstances of this case, including the timing of the request and the content and sensitivity of the information. As his guidance⁵ explains, civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure.

³ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i71/DWP.pdf>

⁴ <https://www.gov.uk/government/news/employment-support-launched-for-over-a-million-people>

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#applypublicinterest>

38. The Commissioner has considered information that has already been published about the Back to Work Plan (see the www.gov.uk article referenced at paragraph 35 above, as well as details in the published Autumn Statement 2023⁶). He considers that the withheld information is less sensitive in light of the published details.
39. The Commissioner also notes that the withheld information contains factual information, used to provide an informed background to decision-taking. Section 35(4) of FOIA specifically provides that there's a particular public interest in disclosing background factual information.
40. He notes the high-profile nature of the policy in question, and considers that transparency and accountability are important factors in this case.
41. In conclusion, the Commissioner has decided that on this occasion, the public interest in disclosing the withheld information caught by the exemption has greater weight than the public interest in maintaining the exemption.

Right of appeal

42. 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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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