

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2024

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 information about the names and contact details of people authorised to participate in negotiations conducted by the Working Group for Amendments to the International Health Regulations (WGIHR), and any associated official Letters of Delegation of Authority. The Department of Health and Social Care ('DHSC') relied on section 40 of FOIA (personal information) and section 38 of FOIA (health and safety) to refuse the request.
2. The Commissioner's decision is that DHSC was entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 28 January 2024, the complainant wrote to DHSC and requested information in the following terms:

"I request the names and contact information of all the people who have been officially authorised to participate in the negotiations being conducted by the Working Group for amendments to the International Health Regulations (WGIHR)

I request any and all official Letters of Delegation of Authority which authorised any employee of the Department of Health and Social Care

(or any non-government employee) to officially represent the United Kingdom in the negotiations being conducted by the WGIHR regarding the proposed amendments to the International Health Regulations.

If such delegation is not done by yourselves, please point me at the agency/department which is responsible for it.

Also, I believe that any such Letter of Delegation of Authority must have been published on gov.uk, so I also request all links to any such official publications."

5. DHSC responded on 26 February 2024. It stated that it held information within scope of the request but it was relying on section 40(2) to withhold it. In terms of Letters of Delegation of Authority, DHSC advised that it did not hold such a document, but it did hold a 'note verbale' which it believed performed the same function. It advised however that it was also withholding the 'note verbale' under section 40(2) of FOIA.
6. Following an internal review, DHSC wrote to the complainant on 24 April 2024. It maintained its reliance on section 40(2) of FOIA and advised that it was also applying section 38 of FOIA (health and safety) to the withheld information.

Scope of the case

7. The complainant contacted the Commissioner on 24 April 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether DHSC was entitled to rely on sections 40(2) or 38 of FOIA, or both, to withhold the requested information.

Reasons for decision

Section 40 - personal information

9. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing

of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

13. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
17. In the circumstances of this case, and having considered the information being requested, the Commissioner is satisfied that the information does relate to the data subject(s). This is because the requested information relates directly to the names of the data subjects and this is quite obviously information that both relates to and identifies those concerned.
18. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

22. In the case of a request under FOIA, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

24. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”¹.

25. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

26. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

27. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

28. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

29. In this case the complainant has argued that

"If the UK government was secret today, revealing the names of ministers would have even greater risk of causing harm or distress. Ministers represent us and their actions impact the lives of many people, in many cases negatively - yet their names are not secret.

It is accepted that this has to be so because people have the right to know who is representing them. This applies equally for our representatives at the Working Group for amendments to the International Health Regulations.

If the people do not know who is representing them, then those representatives are free to serve anyone's interests, including interests directly opposing those of the people."

30. DHSC has accepted that there may be a general legitimate interest in the names of staff members who attended and took actions at the WGIHR for the purpose of transparency and accountability.

31. The Commissioner is therefore satisfied that the complainant has a legitimate interest in the requested information.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make

disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

33. DHSC has argued that disclosure of the requested information is not necessary. It has stated that releasing the names of those authorised to participate in WGIHR does not improve transparency or accountability, as decisions are made at the Ministerial level and Ministerial participation is already public knowledge.
34. DHSC added that if the complainant has questions regarding the WGIHR process, they can direct these to their local MP or to DHSC. It advised that if the complainant would like information relating to the WGIHR process, they can complete a new request under FOIA to DHSC identifying what they would like to know. DHSC considers that there is no need for the complainant to know the names of the UK delegation or to have the ability to contact those who were authorised to participate in the WGIHR personally.
35. The Commissioner agrees that there are other ways that the complainant can obtain information about the WGIHR process, and the decisions made. However, he notes that the complainant has specifically asked for the names of the people involved in the WGIHR, and they would not be able to obtain this information otherwise.
36. The Commissioner is satisfied in this case that there are no less intrusive means of obtaining the requested information.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

37. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
38. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;

- whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
39. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. DHSC has explained that the requested information relates to the UK delegates' public and private life. The information identifies the individuals as public officials and discloses their contact information. As the information requested includes the names and contact details of the delegation, it also relates to the private life of the individuals.
42. DHSC has confirmed that the UK delegates, whose names and contact details are being requested, have asked for this information to not be released in line with their expectations, as per the current guidance that DHSC follows.
43. DHSC has explained that it follows the current Cabinet Office guidance that the general approach to releasing names should be to release those who are Deputy Director (SCS 1) Grade and above, and withhold those who are below that grade. It explained that this is the standard that DHSC has consistently adhered to for a number of years for requests under FOIA. This means that DHSC staff who are below Deputy Director level hold the expectation that their name would not be released in the ordinary course of government business and work. DHSC considers that it is therefore reasonable that staff members who do not hold powers such as signing off official documents and final decision making would not expect for their name to be disclosed in the ordinary course of government business and their work. It considers this is particularly relevant in in this situation where the name of the relevant senior authority has already been released.
44. DHSC added that the WGIHR has been increasingly politicised in the media and there are precedents of UK delegates being personally identified and contacted by members of the public. DHSC believes that the purpose of any legitimate interests in disclosure of the information is ambiguous, as it is not clear why the requestor is asking for specific names and contact details of members of the UK delegation, or how they plan to use this information.

45. DHSC has argued that it would be distressing for the UK delegates to know that their names and contact details are public knowledge, given the politicisation and contentious nature of the issues they have been working on. Targeted correspondence would be likely to increase if the names and contact details were released.
46. DHSC explained that when agreeing to attend the WGIHR meetings, those DHSC staff below SCS level did so on the understanding that their names and contact details would be protected as per the standard approach. It added that staff members may have decided not to participate in the negotiations had they been made aware of the risk of names and contact details being released.
47. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. He considers that the general interest in transparency has been met through information about WGIHR that is proactively published². The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
48. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
49. As the Commissioner has found that section 40(2) has been correctly applied to the withheld information, it is not necessary for him to consider DHSC's reliance on section 38 of FOIA.

² [https://www.who.int/teams/ihr/working-group-on-amendments-to-the-international-health-regulations-\(2005\)](https://www.who.int/teams/ihr/working-group-on-amendments-to-the-international-health-regulations-(2005))

Right of appeal

50. 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

51. 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.
52. 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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