

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to meetings between the Secretary of State for Health and Social Care and Sir Nick Clegg. The Department of Health and Social Care ("the DHSC") provided some information but withheld the remainder, relying on section 35 (development of government policy), section 36 (prejudice to the effective conduct of public affairs) and section 43 (commercial interests) of FOIA to withhold the requested information.
2. The Commissioner's decision is that the DHSC has not demonstrated that either section 36 or section 43 is engaged in relation to the withheld information. Whilst he accepts that section 35(1)(a) has been correctly engaged in respect of some of the withheld information, he considers that the balance of the public interest favours disclosure. In failing to respond to the request within 20 working days, the DHSC breached section 10 of FOIA.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation.
 - Disclose the remaining withheld information. The DHSC may redact the names of junior officials and Sir Nick's email address.
4. The DHSC 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.

Request and response

5. On 10 December 2020, the complainant wrote to the DHSC and requested information in the following terms:

“Please disclose all meetings and correspondence (including but not limited to letters and emails) that Matt Hancock and his private office and special advisers have had with Facebook’s Nick Clegg between January 2019 and present day.

“For any meetings between Nick Clegg and Matt Hancock and his private office/special advisers, please disclose details of where and when the meetings were held, who was in attendance, and any documentation relating to the meeting (including meeting minutes/notes, briefings, memos and presentations).”
6. The DHSC responded on 5 March 2021. It disclosed some information to the complainant, but withheld the remainder. It relied on section 35 and section 43 of FOIA in order to do so.
7. Following an internal review the DHSC wrote to the complainant on 22 June 2021. It stated that it was now relying on section 36 of FOIA instead of section 35 to withhold some of the information, but otherwise its position remained the same.

Scope of the case

8. The complainant first contacted the Commissioner on 10 February 2021 to complain about the way his request for information had been handled. At that point, the DHSC had yet to respond to the request and the Commissioner’s intervention was necessary to bring about a response.
9. When the DHSC failed to complete its internal review within a reasonable timeframe, the complainant contacted the Commissioner again on 16 May 2021. Once again, the Commissioner’s intervention was necessary to get the DHSC to complete its internal review.
10. Following the internal review, the complainant remained dissatisfied and asked the Commissioner to decide whether the exemptions the DHSC had cited had been correctly applied.
11. The Commissioner commenced his investigation on 24 December 2021, asking to be provided with copies of the information being withheld and justifications for the use of each exemption.

12. Despite numerous chasers, the DHSC failed to provide a substantive response to the Commissioner's correspondence and so, on 6 April 2022, the Commissioner served an Information Notice on the DHSC – requiring it to provide the withheld information and its formal submission. The DHSC complied with that Information Notice on 4 May 2022.
13. In its response to the Commissioner, the DHSC noted that, on reconsideration, it no longer wished to rely on section 43 to withhold some of the information within scope. It disclosed this information to the complainant on 5 May 2022.
14. The Commissioner considers that the scope of his investigation is to determine whether the DHSC is entitled to rely on the cited exemptions in respect of the remaining information.

Reasons for decision

Section 35 – formulation or development of government policy

15. Section 35(1) of FOIA states that:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

 - (a) the formulation or development of government policy,
 - (b) Ministerial communications,
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
 - (d) the operation of any Ministerial private office.”
16. The exemption is a class-based exemption meaning that any information of a particular type will automatically be covered. Section 35 is also a qualified exemption, meaning that, even where it is engaged, the information can still only be withheld if the balance of the public interest favours maintaining the exemption.
17. The Commissioner's guidance states that information will relate to the formulation of government policy if it relates to the generation and evaluation of new ideas. Information will relate to the development of government policy if relates to reviews of the effectiveness of existing policy or considers whether the existing policy is fit for purpose.

18. The First Tier Tribunal has previously held that the term “relates to” in the context of this exemption should be interpreted broadly.¹
19. However, the guidance also states that section 35 will not cover information relating to the implementation of existing policy. Not every decision will necessarily be a policy decision. Whilst the term “policy” is not defined in the legislation, the Commissioner interprets the term as referring to a framework or set of rules designed to effect a change likely to affect substantial numbers of people.
20. The DHSC relied on this exemption to withhold: sections from a briefing prepared for a meeting with Sir Nick on 17 July 2020; an email exchange between Sir Nick and the Secretary of State and; a paragraph from a letter Sir Nick sent to both the Secretary of State for Health and the Secretary of State for Culture, Media and Sport on 9 November 2020.
21. In its submission, the DHSC explained to the Commissioner that the withheld information reflected:

“an exploratory discussion with a social media stakeholder to discuss ways in which disinformation and misinformation could be reduced on the Facebook platform. The note covers suggested effective conduct of Ministers with key stakeholders (including lines to take about the Government position in relation to dis and misinformation)...

“...The meeting note sets out a discussion between Facebook, DHSC and DCMS about the steps that could be taken by Facebook to tighten action around misinformation and disinformation, and the Government’s vision and commitments for harnessing the power of social media. In addition, it sets out how the Government could support and also what enablers would need to be put in place to tighten action around target groups. This includes reference to specific officials and work by Government officials to take forward these actions.”
22. Having reviewed the withheld information, the Commissioner accepts that it does relate to government’s strategy to deal with dis- or mis-information – particularly in anticipation of the Covid-19 vaccination.²

¹ See DFES v Information Commissioner & the Evening Standard (EA/2006/0006)

² The Commissioner notes that the latest item in the withheld information is dated 9 November 2020. At that point, no vaccine was commercially available – although clinical

Public interest test

28. Information that relates to the development of government policy must still be disclosed under FOIA unless the balance of the public interest favours maintaining the exemption.

29. In explaining why the public interest should favour maintaining the exemption, the DHSC explained to the Commissioner that:

"It is not in the public's interest to reveal details that could compromise the candour of Ministerial discussions with a key stakeholder such as Facebook, or lead to unwarranted speculation and anticipation about future policy on how the Government works with social media stakeholders and other Government departments (e.g. DCMS) to challenge anti-vax messaging.

"Whilst some of Facebook's role in tackling anti-vax messaging is in the public domain, the role of the Government in working with key social media stakeholders is not always, and in fact exposing this could be damaging to future public campaigns where the Government uses social media partners to distribute key messages (e.g. social media may be seen as a more trusted source than Government, so it may work collaboratively with social media to deliver key messages and may wish to continue to do so without this being a cause for concern).

"Relationships require a free and frank exchange of information to learn about stakeholder positioning, formulate policy and provide advice. Civil servants and subject experts need to be able to engage in discussion of all the policy options internally, to expose their merits and their possible implications as appropriate. This was an initial exploratory discussion, taking place in the first few months of the COVID19 pandemic.

"Similarly, candid future discussions could be affected by the assessment of whether the content of such discussion will be disclosed. Premature disclosure of information protected under section 35 could prejudice good working relationships and the neutrality of civil servants."

30. In explaining why the balance of the public interest should favour disclosure, the complainant pointed to numerous public figures who expressed concern about the ease of using Facebook's platform (and those of its subsidiaries Instagram and WhatsApp) to distribute dis- and mis-information. He also noted that Facebook's founder Mark

Zuckerberg had himself acknowledged that the platform could be used to spread mis-information.³

31. As well as there being a strong public interest in understanding what the government was doing to prevent the spread of mis-information, the complainant also noted that there was a significant public interest in understanding what a company as large and as influential as Facebook was lobbying the government to do behind closed doors.

The Commissioner's view

32. In the Commissioner's view the balance of the public interest should favour disclosure of the withheld information.
33. There will always be some public interest in allowing civil servants a safe space in which to propose and challenge policy ideas – including discussing those ideas with external stakeholders. Civil servants and stakeholders should be able to discuss those matters frankly and candidly. However, the relative weight to be attached to this principle will vary depending on the circumstances of the case. It will be strongest when the policy is at its earliest stages and weakest once a decision has been announced.
34. However, this is not the only factor to be taken into account. The actual contents of the withheld information and its relationship to the process of policy development will be relevant – as will the circumstances in which the information was created and the circumstances that prevailed at the time of the request.
35. As the complainant has pointed out, Facebook is not just any company. It is estimated that around 44% of the UK population uses Facebook every day and around two thirds of the UK population has a Facebook account. In addition, Facebook's parent company (now known as "Meta") also owns Instagram (34m users in the UK) and WhatsApp (40 million users). Even allowing for the fact that many of those users will have accounts with more than one of those platforms (and some will of course have none at all), the company's reach and influence over its users is potentially considerable – particularly when it comes to determining what information those users see – or do not see.

³ <https://www.forbes.com/sites/mnunez/2019/10/23/mark-zuckerbergs-answer-to-an-anti-vaxxer-question-highlights-facebooks-problematic-response-to-misinformation/?sh=2231df7370b7>

36. It is to be expected that when any business or interest group tries to lobby the government, those lobbying activities should be subject to greater scrutiny and greater transparency. As the Tribunal commented in *Corderoy v Information Commissioner & Department for Exiting the European Union* (EA/2019/0109 & 0111)

“Whatever force there is in this argument with respect to policy discussions between civil servants, it is clear that it must have far less traction when applied to the contributions of organisations separate from government. They will make their own contributions because they want to shape policy. Organisations which seek to influence policy formation can, under normal circumstances, expect to see their contributions summarised and publicly disclosed or disclosed by the organisations themselves as part of their own direct engagement with the public or their own widespread stakeholders from which it readily moves into the public domain.”

37. When a company with such reach and influence talks to the government, the potential impact is widespread – hence there is an even strong public interest in transparency.
38. The Commissioner also considers that Sir Nick’s status increases the public interest in transparency. Sir Nick and Matt Hancock (the then-Secretary of State for Health) served in the Coalition Government together (albeit that Mr Hancock was not a member of the Cabinet during that period) and are likely to have known each other. As an ex-minister, lobbying the government, there should be a higher degree of transparency about Sir Nick’s actions.
39. As Sir Nick was a very senior member of the government he should also have been very aware that details of any meetings he held with government ministers or civil servants could be subject to FOIA.
40. The DHSC has not indicated that Sir Nick has objected to disclosure of any of the information (although it is not clear whether he personally, or Facebook generally, were consulted).
41. Having viewed the withheld information itself, the Commissioner does not consider that its contents would be surprising to the general public. Facebook’s issues in striking the balance between freedom of expression and the spreading of harmful information are well-documented. The Commissioner considers that anyone with a vague awareness of these issues would find in the withheld information exactly the sort of comments that they are likely to expect both parties to be making in meetings of this type. The elements of the pre-meeting brief that the DHSC wished to withhold are largely generic.

42. The Commissioner notes that most of the meetings between the DHSC and Sir Nick took place between April and July 2020. Whilst the withheld information does include some floating of ideas, by the time the DHSC responded to the request (5 March 2021) these ideas are likely to have either been completed or discarded.
43. The Commissioner does not accept that, almost a year after the first meetings took place, the DHSC still required a safe space to discuss this policy. The main issues are well known and the withheld information contains few novel or unexpected suggestions.
44. Whilst the Commissioner recognises that countering mis-information is a sensitive subject, he does not consider that this increases the public interest in maintaining the exemption. On the contrary, the Commissioner considers that disclosure would show a government willing to be transparent and honest about the challenges it faces. Withholding the information only serves to reinforce the conspiracy theorists who would believe that secretive deals between the government and big business are being agreed behind closed doors. In this case FOIA should be seen as part of the solution, not part of the problem.
45. Turning finally to the effect on officials, the Commissioner expects civil servants – particularly senior ones – to be individuals of robust character. They should not easily be dissuaded from providing frank and candid assessments to ministers, in the best traditions of the civil service. The Commissioner has seen nothing in the withheld information that would compromise the neutrality of any civil servant and nothing that should reasonably be expected to inhibit robust individuals from providing candid views in future.
46. The Commissioner is therefore satisfied that the balance of the public interest favours disclosure.

Section 36 – prejudice to the effective conduct of public affairs

47. Section 36 of FOIA is similar to section 35 in that it provides an exemption for information whose disclosure might, in the opinion of a Qualified Person, destroy the safe space around the development ideas or have a “chilling effect” on future discussions.
48. However, for section 36 to apply, it is a pre-requisite that the information must **not** be covered by the section 35 exemption.
49. The DHSC did not provide a copy of the opinion it had sought from its qualified person, but its submission noted that:

"While DHSC recognises a general public interest in promoting openness and transparency in Government, and understands that there is a public interest in sharing how we **develop and implement policies** (including with stakeholders such as Facebook), disclosure would inhibit the free and frank provision of advice and exchange of views.

"**Policy design work and implementation planning** to deliver on these commitments remains ongoing. Some delivery work has progressed, e.g., Facebook's COVID-19 information centre includes links to NHS and other authoritative sites.

"A lot of the discussion and material for the roundtable **covered possible policy design**, and implementation choices, which have not yet been fully assessed or agreed upon. It could cause significant **damage to the policy development process** if contents of the discussion are disclosed and lead the public to assume that they **reflect firm or likely policy choices**. If the information from the meeting was to spread into the public domain, it would be difficult to mitigate the risk of misinterpretation. Any **policy decisions** taken by Ministers need to be tested with, and explained to, the public very carefully if they are to succeed. Without this there is a significant risk of losing public support and increased suspicion and concerns about use of social media to deliver important health messages.

"We believe the relevant redactions to fall under this section as to share these would prejudice the conduct of public affairs **which is essential to policy development** and would inhibit the ability of those conducting public affairs to share opinions and express views openly." [emphasis added]

50. The Commissioner considers that there is no qualitative difference between the emails and briefing note the DHSC has applied section 35 of FOIA to and the two meeting readouts to which it has applied section 36. The DHSC has not explained why it considers the former documents to relate to the development of government policy when the latter documents apparently do not – indeed he notes that one of the readouts relates to the same meeting for which the brief was prepared and so concerns the same subject matter.
51. Furthermore, the Commissioner notes that the DHSC's submission as to why section 36 of FOIA applies to the withheld information is scattered with references to the role that information plays (or would have played) in the policy-making process (or the effect disclosure would have on that process).

52. Put simply, either all the information falls within the scope of section 35, or none of it does. Given that the DHSC would be entitled to (and did) stress the importance of preserving the free and frank exchange of ideas and provision of advice in its public interest arguments in respect of section 35, the Commissioner is not clear as to why the DHSC has decided to treat the two categories of information separately.
53. The Commissioner also notes that, in its own internal review, the DHSC appeared to have tried to rely on both section 35 and 36, simultaneously in respect of the same information – which is impermissible.
54. Having considered the withheld information, the Commissioner was of the view that the two meeting readouts would attract the section 35 exemption – and therefore could not be exempt under section 36.
55. Having reached this view, the Commissioner considered whether to invite DHSC to rely on section 35 instead before issuing a decision notice. He decided not to for three reasons.
56. Firstly, the DHSC is a large government department and should be familiar with the FOIA process. It should be capable of delineating these two exemptions and has had three opportunities already to do so.
57. Secondly, the Commissioner notes that, at every stage of the process, the DHSC's response has been late. Its refusal notice was late, its internal review was late and the Commissioner had to issue an information notice to extract the DHSC's submission and the withheld information. He therefore considers that it would be unfair to the complainant to put off a decision in order to allow the DHSC to "have another go" at responding.
58. Finally, whilst the Commissioner makes no formal finding on the matter, he considers it likely, having reviewed the content of the information, that, even if the DHSC were to rely on section 35, the balance of the public interest would again favour disclosure – for the same reasons as given above. He therefore considers that allowing the DHSC to make further representations would only serve to extend the process without making a difference to the overall outcome.
59. The Commissioner thus orders disclosure of all the information to which the DHSC attempted to apply section 36 of FOIA. It may however redact the names of junior officials.

Section 43 – commercial interests

60. Section 43 of FOIA allows a public to withhold information whose disclosure would (or would be likely to) prejudice the commercial interests of any party, including the public authority holding it.
61. In order to demonstrate that the exemption is engaged, the public authority must be able to draw a causal link between disclosure of the withheld information and the prejudice it believes might occur. The exemption is also subject to a public interest test.
62. The DHSC originally applied this exemption to three paragraphs within Sir Nick's letter of 7 November 2020 – although it subsequently withdrew the exemption in relation to two of those paragraphs and indicated that it was willing to disclose that information.
63. In its submission, the DHSC explained why it had originally considered the two paragraphs that it was now prepared to disclose to be commercially sensitive. In relation to the remaining paragraph, the DHSC informed the Commissioner only that:

“We consider the remaining relevant sections to be commercially sensitive and have discussed this decision with the Department of Culture, Media and Sport (DCMS) as the policy and relationship owner with Facebook. DCMS's Minister was also present at this discussion. We understand there is public interest in this discussion taking place and sharing actions the Government is taking to demonstrate action against misinformation. The Government has made subsequent announcements and shared a toolkit to tackle false information in information designed to be shared on social media.”
64. The Commissioner does not consider that the above argument comes close to engaging the section 43 exemption. The DHSC has not identified why the remaining paragraph could, if disclosed, harm Facebook's commercial interests in any way.
65. Having viewed the paragraph in question, the Commissioner recognises that it does make a broad reference to Facebook's commercial considerations. However the statement it makes is not some penetrating insight into Facebook's inner thinking or commercial strategy. It is highly generic and is something that would be a patently obvious assumption for members of the public, with any rudimentary understanding of business practice, to make.
66. It is not clear to the Commissioner how this particular information would be of use to Facebook's rivals and the DHSC has provided no explanation. Nor does the DHSC appear to have sought any confirmation

or explanation from Facebook as to why its commercial interests would be harmed in any way.

67. It is not clear what relevance the Department for Culture, Media and Sport's views have to this situation as it has offered nothing about Facebook's commercial interests and its own commercial interests do not appear to have been affected.
68. The Commissioner is therefore not satisfied that the DHSC has demonstrated that section 43 of FOIA is engaged and consequently the DHSC is not entitled to rely on this exemption to withhold information.

Procedural matters

69. Section 10 of FOIA requires requests to be responded to promptly and no later than 20 working days following the date the request was received.
70. The Commissioner notes in this case that it took the DHSC three months (plus his own intervention) to respond to the request.
71. The Commissioner is conscious of the burden faced by all public authorities during the Covid-19 pandemic – particular those involved in healthcare. At the point the request was made, infection rates were beginning to spiral once again and severe restrictions were in place.
72. That being said, Parliament did not choose to alter the statutory time limits for responding to FOIA requests. The Commissioner is therefore obliged to record a breach of section 10 of FOIA in the DHSC's handling of this request.

Other matters

73. Whilst there is no statutory time limit for carrying out an internal review, the FOIA Code of Practice, issued under section 45 of FOIA, states that internal reviews should normally take no longer than 20 working days – although it recognises that there are circumstances in which an additional 20 working days might be necessary.
74. In this case, the Commissioner notes that despite taking an excessive amount of time to respond to the request, it took the DHSC three and a half months to complete its internal review and inform the complainant of the outcome. Whilst the Commissioner once again recognises the extraordinary pressure on the DHSC at the time it was carrying out its internal review, he still considers that such a delay represents poor practice by the DHSC on this occasion.
75. The Commissioner notes that this is one of several complaints in which he has had to deal with unacceptable delays in obtaining withheld information from the DHSC – particularly where that information has originated in a ministerial private office.
76. Whilst the Commissioner does not seek detailed information until he is ready to begin his formal investigation, he notifies the relevant public authority each time a complaint is accepted. At that point, he expects public authorities to begin preparing for the investigation. That means identifying any withheld information, cataloguing any searches that have been carried out and ensuring that the use of each exemption can still be justified.
77. It is evident to the Commissioner that the DHSC is not carrying out this preparatory work to any significant extent and only begins its work once the formal investigation letter arrives. This is causing repeated delays in dealing with complaints.
78. Clearly, Covid-19 has not disappeared, but legal restrictions have now been lifted and working patterns should be in the process of returning to more normal levels. It is imperative that the DHSC begins to put in place procedures as soon as possible to ensure that it is able to comply with its legal obligations to respond to information requests and to the Commissioner's enquiries. The DHSC will not be able to rely on the pandemic burden indefinitely to excuse its performance.

Right of appeal

79. 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

80. 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.
81. 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

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