

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 May 2021

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

Decision (including any steps ordered)

1. The complainant has requested information relating to Covid tests outside of hospital for Ministers and family.
2. The Commissioner's decision is that Department of Health & Social Care (DHSC) is not entitled to rely on section 40(5B)(a)(i).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response without relying on section 40(5B)(a)(i).
4. The public authority 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 17 April 2020, the complainant wrote to DHSC and requested information in the following terms:

"Covid Tests Outside of Hospital for Ministers and Family This as a FOI request for all information held, including any communications or requests relating to acquiring or requests for Covid tests for: - Ministers (including Ministers of other government departments) - Family Members of Ministers (including Ministers of other government departments) Whilst I appreciate the sensitivity of this information

potentially being personal information. Where any information is not in the public domain I would be more than happy to accept the redaction of employee, family member names or identifiable information if applicable."

6. DHSC responded on 11 September 2020 and refused to confirm or deny it held the requested information citing section 40(5B)(a)(i).
7. In the request for internal review the complainant stated:

"I imagine you would hold information which does not name individuals and even if so you could easily redact information. A civil servant is on record stating there was a testing program that was drawn up to include Ministers - therefore I am sure not all information would include names and be fully considered personal information. If in the public domain there should be no issue with this. Examples of such would be an official statement made by for example the Prime Minister which clearly states he sought advice from the Chief Medical Officer and on his advice was tested in 10 Downing Street by NHS staff. Another would be Michael Gove's comments to the media on the testing of his daughter after advice from the CMO - whilst I wouldn't expect any personal details of his daughter to be included - the fact a test was carried out is however in the public domain."
8. Following an internal review DHSC wrote to the complainant on 25 September 2020 and maintained its position.

Scope of the case

9. The complainant initially contacted the Commissioner 25 August 2020 as he had not received a response to his request. Following receipt of a response and an internal review the complainant contacted the Commissioner again on 25 September 2020 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation is to determine if DHSC has correctly cited section 40(5B)(a)(i) in response to the request.

Reasons for decision

Neither confirm nor deny ('NCND')

11. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
12. The decision to use an NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held. The Commissioner's guidance¹ explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.
13. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
14. DHSC has taken the position of neither confirming nor denying whether it holds the information requested, citing section 40(5) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not DHSC is entitled to NCND whether it holds the information requested by the complainant.

¹ <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

Section 40 - personal information

15. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
16. Therefore, for DHSC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

17. Section 3(2) of the DPA 2018 defines personal data as:-

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. The main focus of the request in this case is not any specific individual, but rather whether any ministers have *acquired or requested Covid tests or their families*. Although the request asks for *all information including communications* and it may be that some of that information would identify individuals, confirming whether it is held or not would not do so.
21. For section 40(5B)(a)(i) to be engaged, the act of confirming or denying whether this information is held must, itself, involve the disclosure of personal data.
22. The Commissioner has had considerable experience of the circumstances in which this exemption is likely to be engaged. However, in this case, the Commissioner cannot see how an individual might be rendered identifiable as a result of the DHSC merely confirming or denying whether it holds the information requested.

23. The fact that Michael Gove's daughter, and Boris Johnson were tested after advice was sought from Chris Whitty has been widely reported and is already in the public domain. Confirming whether any information of this type is held would not identify any specific individuals.
24. DHSC has not offered any arguments capable of supporting its position.
25. For the reasons set out above the Commissioner has concluded that, if DHSC was to confirm or deny whether it holds the requested information, this would not result in the disclosure of any third party's personal data.
26. Therefore, the first criterion set out in paragraph 58 is not met and DHSC cannot rely on section 40(5B)(a)(i) of the FOIA in the circumstances of this case to refuse to confirm or deny whether it holds the information requested.

Other matters

27. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.

Right of appeal

28. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF