

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2019

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 relating to any evaluation undertaken or commissioned by the Department of Health and Social Care (DHSC) into the financial impact to the NHS of the repeal of section 2(4) of the Law Reform (Personal Injury) Act 1948. The DHSC withheld the information under section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the DHSC is entitled to refuse to disclose the requested information under section 35(1)(a) of the FOIA. The Commissioner does not require any further action to be taken.

Request and response

3. On 5 June 2018, the complainant wrote to the DHSC and requested information in the following terms:

"Good morning,

Can you please provide the following under the freedom of information act.

1. Any evaluation undertaken or commissioned by the Department into the financial impact to the NHS of repeal of section 2 (4) of the Law Reform (Personal Injury) Act 1948

I look forward to hearing from you by Tuesday 3 July 2018 (which is 20 working days following this request). If there is any further information you need, please do not hesitate to contact me.

Can you please confirm receipt of this email. Many thanks for your time and help.”

4. The DHSC responded on 3 July 2018. It refused to disclose the requested information citing section 35(1)(a) of the FOIA.
5. The complainant requested an internal review on 24 August 2018.
6. As the complainant received no response, he approached the Commissioner for assistance on 25 January 2019.
7. The Commissioner wrote to the DHSC on 18 February 2019 and requested it to respond to the complainant’s internal review request within 10 working days.
8. The DHSC informed the Commissioner on 19 February 2019 that it had responded to the complainant’s request for an internal review on 11 February 2019.

Scope of the case

9. As stated above, the complainant contacted the Commissioner on 25 January 2019 to complain about the way his request for information had been handled. At this time, the internal review process had not been completed. By the time the Commissioner contacted the DHSC about this the internal review response had been issued. Going forward the complainant’s concerns relate to the DHSC’s refusal to disclose the requested information and its application of section 35(1)(a) of the FOIA.
10. The scope of the Commissioner’s investigation has been to determine whether or not the DHSC is entitled to rely on section 35(1)(a) of the FOIA in this case.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

11. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

(a) *The formulation or development of government policy...*

The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

12. The Commissioner's guidance states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister.
13. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
14. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
15. The Commissioner is satisfied that the withheld information falls into the class of information covered by section 35(1)(a). It relates to the formulation or development of government policy in relation to the rising costs of clinical negligence and the financial impact of the repeal of section 2(4) of the Law Reform (Personal Injury) Act 1948. The DHSC said that this is a complex issue and intensive work is being undertaken across government. It is a developing policy area which was not complete at the time of the request and has not been completed since then, up to the date of this notice.

Public interest test

16. The DHSC stated that it recognises the public interest in promoting openness and transparency in the way in which public authorities

manage current events. It understands that any policy in this area will have a significant impact on the public and it recognises the public interest arguments in favour of disclosing the requested information. Additionally, it acknowledges the strong public interest in making information on NHS spending readily available, along with the importance of general openness and transparency in government. It argued that these measures rightly continue to remain at the forefront of the public mind. Therefore, it recognises the weight this places on the public interest in disclosure.

17. However, it believes the balance of the public interest favours withholding the requested information. It argued that the policy is still being formulated and the requested information should be withheld to protect good working relationships between the DHSC and NHS organisations, the perceptions of civil servants' neutrality and ultimately the quality of government policy and decision making.
18. It stated that the exemption is intended to protect the policy making process by ensuring that the possibility of public exposure does not deter from full, candid, and proper deliberation of policy development and formulation. The DHSC commented that the Commissioner has recognised that there is a strong public interest in government having a safe space to develop ideas, debate live issues and reach decisions away from external interference. As this continues to be a live policy issue, it believes that the government still needs a safe place to debate and discuss ideas around this policy.
19. The DHSC went on to say that it is working intensively across government with the Ministry of Justice, HM Treasury and Cabinet Office to look at the drivers of clinical negligence costs and it is still considering proposals. During the policy development phase, civil servants across government need to be able to have full and frank cross-government discussions about all possible options to address this important and complex issue. This includes discussing the detail and implications of the information that has been requested. It therefore said that there is a strong public interest in ensuring that officials and ministers are able to fully and candidly consider any benefits and risks of potential proposals and good working relationships across government are therefore vital in the policy development process in this area. It argued that this could be compromised by premature disclosure of the information requested.
20. Additionally, the DHSC explained that disclosure may cause a chilling effect by inhibiting free and frank discussion and the quality of advice received by the government. In this case, there is a particular risk that individuals or representative groups will be less likely to provide information to the DHSC in the future, if they believe that it will be released into the public domain. Without this information, the

government will not be able to debate the issue as fully, which may lead to poorer decision making. The release of this data could prejudice good working relationships and the perception of civil servants' neutrality.

21. The complainant does not agree with the DHSC's balance of the public interest test. He stated that the DHSC's arguments do not clearly evidence why and how the disclosure of the requested information would result in the prejudices claimed. In particular he does not consider that disclosure is likely to cause a chilling effect. He argued that the risk of disclosure is unlikely to deter external organisations involved in this area (e.g. Medical Defence Union) from providing information, as they are likely to be doing so with the intention of lobbying the DHSC for reform in this area. He refers to the Commissioner's guidance on section 35 and in particular the following section:

"where lobbyists have been involved in the discussions then they are even less likely to be inhibited in their contributions by the possibility of disclosure as they are trying to further their own agenda by influencing departments".

22. The complainant also stated that there is considerable controversy surrounding this issue, with significant dispute around how clinical negligence costs should be addressed. He argued that this debate involves organisations who continue to argue that legal reform, including the repeal of section 2(4), is necessary. He referred to the following information as an example:

<https://www.themdu.com/press-centre/press-releases/nhs-under-strain-from-rocketing-clinical-negligence-costs>.

23. The complainant confirmed, in contrast, other organisations, including the one he represents, have argued that section 2(4) should not be repealed and that repeal would not reduce clinical negligence costs. He therefore said that disclosure of the requested information could help inform public debate around these issues. He commented that the public interest in this area is significant given the impact changes in NHS funding have on the public and the significant amount spent in this area. As a result, he believes that the public interest in disclosing the requested information remains very strong.
24. The Commissioner acknowledges the strong public interest arguments in favour of disclosure in this case. She notes that in addition to the more general public interest arguments of openness, transparency and accountability there is a public interest in understanding more closely the DHSC's policy thinking and development in this area. The complainant has highlighted that there are different opinions over whether a repeal of section 2(4) of the Law Reform (Personal Injury) Act

1948 would reduce clinical negligence costs or not and disclosure would greatly assist this debate.

25. However, in this case due to the circumstances at the time of the request, the Commissioner considers the public interest arguments in favour of maintaining the exemption are stronger. She notes that the policy issue is still live and the government is still in the process of developing and formulating its policy in this area. The DHSC requires the safe space to consider its policy options in private away from external interference and distraction. If disclosure took place whilst the DHSC was still in the process of formulating its policy in this area and considering its options it would undermine the entire policymaking process and result in a less robust, well-considered and effective outcome. She accepts that it would also hinder the working relationships between the DHSC and the NHS organisations and other government departments it is currently working with on this issue. They would be less likely to discuss and deliberate the issues surrounding clinical negligence claims so freely and frankly and this would have a negative impact on the policy development process and the final outcome. Such consequences are not in the wider interests of the general public.
26. The Commissioner would however point out that she not convinced that disclosure would have a generic chilling effect on future policy debates. She may consider chilling effect arguments presented that disclosure would affect other similar or closely related policy debates. But she would be unconvinced and sceptical in accepting that disclosure would have a chilling effect on *all* future policy debates. Those involved in such deliberations and policy development should expect a level of transparency and accountability and have some acceptance of the likelihood of public disclosure once the particular policy area is formulated and completed. She does not accept that those contributing to the process would be automatically deterred from participating and providing information and advice if disclosure did take place.
27. Overall however the Commissioner is satisfied in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption.

Other matters

28. The Commissioner notes that the DHSC took nearly six months to complete the internal review process. Such delays are excessive and unacceptable. The section 45 code of practice recommends that public authorities complete the internal review process and notify the

complainant of its findings within 20 working days, and certainly no later than 40 working days from receipt.

29. The Commissioner would therefore like to remind the DHSC of the requirements and importance of the code and the need to ensure that future internal review requests are processed in a timely manner.

Right of Appeal

30. 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

31. 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.
32. 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

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