

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2021

Public Authority: Department of Health and Social Care (DHSC)

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested all correspondence between Matt Hancock MP and Jeane Freeman MSP, with reference to Covid-19 testing, between the period 10 March to 22 September 2020. DHSC provided some information to the complainant however it withheld some information in full under section 35(1)(a) and (b) FOIA and redacted some information from the information disclosed under section 35(1)(a) and 40(2) FOIA.
2. The Commissioner's decision is that section 35(1)(a) and (b) have been applied correctly to the withheld information however the public interest in maintaining the exemptions is outweighed by the public interest in disclosure. The Commissioner does consider that section 40(2) FOIA was applied correctly to the information redacted under this exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all information redacted or withheld in full under section 35(1)(a) and (b) FOIA.
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 23 September 2020 the complainant requested information of the following description:

“All correspondence between Matt Hancock MP and Jeane Freeman MSP, with reference to Covid-19 testing, between the period 10th March to 22nd September 2020. This to include all pre-meeting briefings, briefings, meetings, agenda, notes, and minutes, as well as action points.”
6. DHSC responded on 11 November 2020. It refused to disclose the requested information under section 35(1)(b) FOIA.
7. The complainant requested an internal review on 11 November 2020. DHSC sent the outcome of its internal review on 18 November 2020. It upheld its application of section 35(1)(b) FOIA.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. During the course of the Commissioner’s investigation DHSC revised its position. It disclosed some information to the complainant, it provided one document in full and provided four documents in redacted format. Redactions were made to information falling outside of the scope of the request (information not on testing) and information DHSC considers to be exempt under section 35(1)(a) and section 40(2) FOIA. It withheld six documents in full under section 35(1)(a) FOIA and one document was withheld in full under section 35(1)(b) FOIA.
10. The Commissioner has considered whether the DHSC was correct to redact some information as out of the scope of the request and whether it was correct to apply section 35(1)(a) and (b) and section 40(2) FOIA to the withheld information.

Reasons for decision

Information falling outside the scope of the request

11. DHSC has explained that it redacted some information falling outside the scope of the request. This is because the request is focused on testing and the information redacted was on other matters. The information redacted was not therefore applicable to this request.
12. The complainant has argued that because he has stipulated two individuals, it is not acceptable to redact the rest of the conversation.
13. Upon viewing the redacted information the Commissioner is satisfied that DHSC has made redactions to information falling outside the topic of testing which is clearly specified as the subject matter of the request.

Section 35(1)(a)

14. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
15. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
16. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.
17. DHSC has explained that the information requested relates to a live policy process which is under development to improve the Covid-19 testing on offer to the public. It has confirmed that the current policy on Covid-19 testing, including lab capacity, remains a live policy area in development as the response to Covid-19 continues.
18. The exemption is interpreted broadly and will capture a wide variety of

information. The Commissioner understands that policy decisions regarding Covid-19 testing were ongoing at the time of the request in September 2020 as the Government tackled the pandemic and therefore the policy continued to be developed. The Commissioner accepts that the information that is being withheld under this exemption related to a live policy process and falls under the definition of development of government policy. Section 35(1)(a) is therefore engaged.

19. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

20. DHSC has explained that it is not necessarily controversial for the particular decisions contained within the withheld information to be in the public domain, only the potential impact their release may have on future decision making given the absence of context within these documents.

Public interest arguments in favour of maintaining the exemption

21. DHSC argued that civil servants, subject experts and ministers from different administrations need to be able to engage in the free and frank discussion of all the policy options internally, to expose their merits and demerits and their possible implications as appropriate. Their candour in doing so will be affected by their assessment of whether the content of such discussion will be disclosed.
22. The Government relies on the ability to rapidly respond to emerging challenges that impact upon turnaround times of the public receiving Covid-19 test results. If communication around such decision-making were put into the public domain without the full context of the challenges involved, it could lead to the public developing inaccurate assumptions on the testing performance within particular nations. Were these documents to be released, considerable civil service time and effort would need to be invested - now and for potential future requests of this kind - in providing full and extensive context to avoid the formation of inaccurate assumptions.
23. DHSC argued that if released, this information would provide detail on the views of an individual minister on a government decision.

24. The information is dated between March and September 2020, at the time of the request in September 2020 the discussions surrounding development of the testing policy were recent. Furthermore decisions of exactly the same nature continue to this day as the Government tackles the pandemic.
25. Current testing and lab capacity is available on the Government coronavirus dashboard. There is now detailed information on turnaround times for tests which is released weekly on Gov.uk. DHSC considers there to be little public interest in exactly where test samples are analysed within the UK rather the speed at which citizens receive results is more important to the general public.

Balance of the public interest

26. The Commissioner considers there is a particularly strong public interest in transparency behind the policy relating to Covid-19 testing during the pandemic. Given the number of people this decision making affected.
27. The Commissioner also accepts that there is a strong public interest in allowing Ministers a safe space to candidly discuss issues regarding Covid-19 testing and develop the policy in this area accordingly. She also considers there is a public interest in preserving the doctrine of collective cabinet responsibility.
28. In this case DHSC has said that, "it is not necessarily controversial for the particular decisions contained within the withheld information to be in the public domain, only the potential impact their release may have on future decision making given the absence of context within these documents." Given the significant public interest in disclosure of information to further understand Government decision making during the pandemic regarding testing, this provides substantial justification for expending some resources if it is considered necessary to provide any background or further context alongside disclosure.
29. The Commissioner has considered DHSC's argument that there is little public interest regarding the location of testing, however this information still provides information regarding the handling of Covid-19 testing during the pandemic in the round. The Commissioner does not consider that this diminishes the public interest in disclosure.

30. Despite the fact that the decision making was fairly recent at the time the request was made in September 2020, on balance, given the significant public interest in disclosure of information to further understand Government decision making surrounding testing during the pandemic and the fact DHSC has acknowledged the lack of controversy in disclosure of this particular information, the Commissioner considers that the public interest in favour of maintaining the exemption is outweighed by the public interest in disclosure in this case.

Section 35(1)(b)

31. Section 35(1)(b) states that, "Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to Ministerial communications."
32. The document withheld under section 35(1)(b) FOIA is a written piece of correspondence between Matt Hancock MP and Jeane Freeman MSP. This is clearly a ministerial communication and falls within the scope of the exemption.
33. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

34. Please see public interest test arguments as set out at paragraph 20 above in relation to section 35(1)(a).

Public interest arguments in favour of maintaining the exemption

35. In this case DHSC presented similar public interest arguments as that set out at paragraphs 21-25 above in relation to section 35(1)(a) FOIA, however from the perspective of preserving safe space and the doctrine of collective cabinet responsibility for ministerial communications relating to Covid-19 testing.

Balance of the public interest

36. Similar to the reasons set out at paragraphs 26-30 above the Commissioner considers that despite the fact that the correspondence was fairly recent at the time the request was made in September 2020, on balance, given the significant public interest in disclosure of

information to further understand Ministerial thinking surrounding testing during the pandemic and the fact DHSC has acknowledged the lack of controversy in disclosure of this particular information, the Commissioner considers that the public interest in favour of maintaining the exemption is outweighed by the public interest in disclosure in this case.

Section 40(2)

37. Section 40(2) of the 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.
38. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 General Data Protection Regulation ('GDPR').
39. 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 the FOIA cannot apply.
40. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

42. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

43. 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.
44. 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.
45. The information redacted under section 40(2) FOIA is the name of a member of Ministerial support staff.
46. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject(s). She is satisfied that this information both relates to and identifies the data subject(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
47. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

49. In the case of an FOIA request, 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.
50. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

51. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

52. 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”².

53. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

54. 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

55. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s)

² 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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.

can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

56. DHSC has not identified a legitimate interest in the public or applicant having access to the withheld name who was present in the capacity as Ministerial support. DHSC has included in its disclosure all names of Secretaries of State and has explained that it has only withheld the name of a member of Ministerial support staff under this exemption. Therefore it can only be assumed that DHSC does not consider there is a legitimate interest in disclosure of this name.
57. The Commissioner considers that there is very limited legitimate interest in disclosure of the name of an individual present in the capacity of Ministerial support, the Commissioner accepts that it would provide a full picture of all individuals present. She does however acknowledge that there is a greater legitimate interest in the names of Secretaries of State present which DHSC has disclosed.

Is disclosure necessary?

58. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
59. In this case, as acknowledged above, to provide a full picture of all individuals present and named in the withheld information disclosure of the withheld name would be necessary.

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

60. 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 the 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.

61. 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.
62. 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.
63. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
64. In this case given the data subject was present in the capacity of Ministerial support it would have been reasonable to expect that their name would not be disclosed in this context. Furthermore as any legitimate interest in disclosure of this name is limited, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms in this case.
65. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
66. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

67. The Commissioner has therefore decided that DHSC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

68. 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

69. 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.
70. 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.....

Gemma Garvey
Senior Case Officer

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