

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 1 December 2021

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 DHSC 'Performance Update' documents. DHSC relied on section 35(3) of the FOIA to neither confirm nor deny holding the information.
2. The Department of Health and Social Care (DHSC) has failed to justify why it is entitled to rely on the stated exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether information falling within the scope of the request is held, and
 - If the DHSC confirms that it does hold information, either disclose a copy of that information or issue a refusal notice that complies with section 17 of the 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 14 September 2020, the complainant wrote to the DHSC and requested information in the following terms:

"I am writing to request the following information under the Freedom of Information Act 2000:

- All DHSC "Performance Update" documents (in relation to COVID-19 testing) that exist at the time of processing this request"

6. DHSC sought clarification of the request on 6 October 2020, and the complainant provided this the same day stating:
7. *'DHSC "Performance Update" documents (in relation to COVID-19 testing)'; I was referring to documents in the same series as the one photographed below (image taken from tweet by Gabriel Pogrund - https://twitter.com/Gabriel_Pogrund/status/1305047753983225858):*
8. DHSC responded on 3 November 2020 and cited section 35(3) FOIA to refuse to confirm nor deny whether it held any information relating to the request, as this would in itself, disclose exempt information.
9. Following an internal review DHSC wrote to the complainant on 26 November 2020 and maintained its position..

Scope of the case

10. The complainant contacted the Commissioner on 26 November 2020 to complain about the way their request for information had been handled.
11. The Commissioner wrote to DHSC on 27 July 2021 asking for detailed arguments to support its application on section 35(3).
12. The Commissioner allowed DHSC considerable latitude, taking account of the ongoing effects of the pandemic and the increased number of requests made to DHSC.
13. On 26 August 2021 DHSC advised the Commissioner that its response would be delayed. It finally provided a substantive response on 11 October 2021. The Commissioner reviewed the response and determined that additional information was required to substantiate DHSC's position.
14. The Commissioner sought further submissions from DHSC on 11 October 2021. Having not received any response, the Commissioner wrote to DHSC for the final time on 24 November 2021 advising that if no response was received by 29 November 2021, her decision would be based on the information previously provided.
15. As he has received no further response, the Commissioner has proceeded to a decision notice, without further remit to DHSC.

16. The Commissioner considers the scope of this investigation to be to determine if DHSC has correctly cited section 35(3) in response to the request to refuse the request.

Reasons for decision

17. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. The decision to use a "neither confirm nor deny" (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 the 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.
18. A public authority will need to use the NCND response consistently, over a series of separate but similar requests, regardless of whether or not it holds the requested information. This is to prevent a refusal to confirm or deny being taken by requesters as an indication as to whether or not information is in fact held.

Section 35 – Formulation of government policy

19. Section 35 states:

- (1) *Information held by a government department is exempt information if it relates to –*
 - (a) *the formulation or development of government policy,*
- (3) *The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).*

20. To engage section 35(3) of the FOIA, DHSC must demonstrate why the requested information, if held, would engage one (or more) of the main limbs of section 35(1).
21. DHSC considers that if the information was held it would engage the provisions of section 35(1)(a) - the formulation and development of government policy. Section 35 is a qualified exemption and DHSC has considered whether the public interest in maintaining the exemption of the duty to confirm or deny outweighs the public interest in confirming whether or not DHSC holds this information.

22. The issue for the Commissioner to consider is not that of the actual disclosure of any information that may be held, it is solely the issue of whether or not DHSC is entitled to NCND whether it holds any information which *would* come within the scope of section 35(1)(a).
23. In reaching a decision, the Commissioner has not been made aware as to whether DHSC does or does not hold the information requested, as it is not necessary for her consideration of this exemption.
24. DHSC stated it recognises the significant public interest in transparency in relation to its work on the COVID-19 pandemic. However, the purpose of the exemption at section 35 is to protect the internal deliberative process as it relates to policy making. In other words, the exemption is intended to ensure that the possibility of public exposure does not deter from full, candid, and proper deliberation of policy formulation and development, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions. Premature disclosure of information protected under section 35 could prejudice good working relationships, the perceived neutrality of civil servants and, ultimately, the quality of Government.
25. DHSC explained that the requested information, if held, could include internal management information which could be used to inform a different number of on-going policies relating to the coronavirus pandemic. It was therefore relying on section 35(3), by virtue of section 35(1)(a), to NCND whether such information was held.

The Commissioner's decision

26. The Commissioner has decided that DHSC has not presented sufficient evidence to support its application of the exemption. DHSC has not identified any specific policies the information, if held, could be used to help formulate. In addition, it has not expanded on why confirming or denying the information is held could prejudice working relationships.
27. DHSC further stated that confirming if the information was held in the absence of any context may have undermined confidence in the Government's response to the pandemic. The Commissioner is not persuaded by this argument, as it is DHSC could provide context where necessary. Furthermore, it has not explained why it could undermine the Government's pandemic response.
28. DHSC's response to the Commissioner is brief as well as being repetitive in nature. Therefore, the Commissioner does not accept that the exemption is engaged. Consequently, there is no requirement to consider the public interest test and DHSC should take the steps detailed at paragraph 3 of this decision notice.

Other matters

29. The Commissioner is extremely disappointed with the response from DHSC in this case. Despite several attempts to elicit additional arguments, and the willingness of DHSC's FOI Team to engage, it appears that the relevant policy department has not acknowledged the importance of its obligations under FOIA.

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: 0203 936 8963

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

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