

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2021

Public Authority: The Department of Health and Social Care

Address: 39 Victoria Street

London

SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested a copy of the Data Protection Impact Assessment (DPIA) conducted into the NHS test and trace programme.
2. The Department of Health and Social care withheld this information under section 35(1)(a) (formulation or development of government policy) of the FOIA.
3. The Commissioner's decision is that the DHSC is entitled to rely upon section 35(1)(a) as a basis for refusing to disclose the requested information.
4. However, in failing to provide its response within 20 working days, the DHSC breached section 10 (time for compliance with request) of the FOIA.
5. The Commissioner requires no further steps.

Request and response

6. On 15 November 2020 the complainant wrote to the Department of Health and Social Care (DHSC) and requested information in the following terms:

"I refer to an article published in the Times newspaper 18 October 2020...I would therefore be pleased to receive the following information under the Freedom of Information Act 2000.

- (1) *A copy of the Data Protection Impact Assessment [DPIA] undertaken by UK Government, pursuant to S.64 Data Protection Act 2018.*

- (2) *A copy of the Memorandum of Understanding between the Department of Health and Social Care and National Police Chief's Council. If you consider it necessary, any personal data can be redacted to comply with the data management principles set out in the G D P R and Data Protection Act 2018.*
- (3) *Confirmation whether human DNA [unique to individuals], now harvested on an industrial scale under the NHS Test and Trace programme, is also being shared with the police for use in forensic analysis of crime scene."*

The complainant included an extract from the article in question which is outlined in an annex to this notice.

7. The DHSC responded on 6 January 2021 and provided information in response to part 3 of the request.
8. The DHSC also confirmed that it held information in response to parts 1 and 2 of the request. However, it refused to provide the requested information and cited the following exemptions as its basis for doing so: section 35(1)(a) (the formulation of government policy) in relation to the Data Protection Impact Assessment (DPIA) and section 22 (information intended for future publication) in relation to the Memorandum of Understanding (MoU).
9. Following an internal review the DHSC wrote to the complainant on 20 January 2021, upholding its original position.

Scope of the case

10. The complainant contacted the Commissioner on 20 January 2021 to complain about the way that their request for information had been handled.
11. As part of her investigation the Commissioner wrote to the DHSC and requested a copy of the withheld information and detailed submissions in relation to the application of section 35(1)(a) and section 22.
12. The DHSC confirmed to the Commissioner that the MoU had subsequently been published¹ and this had been brought to the complainant's attention.

¹ [Umbrella Memorandum of Understanding between DHSC and NPCC \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

13. The Commissioner therefore considers the scope of her investigation to be to determine if the DHSC is entitled to withhold the DPIA under section 35(1)(a) of the FOIA.

Reasons for decision

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

14. Section 35 of the FOIA states:

- "(1) Information held by a government department is exempt information if it relates to-*
- (a) the formulation or development of government policy.*
 - (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-*
- (a) For the purposes of subsection (1)(a), as relating to the formulation or development of government policy."*

15. The Commissioner's guidance 'Section 35 – Government Policy' states *'the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.'*
16. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of those policy processes. Section 35 only applies to central government departments.
17. Section 35 is also a qualified exemption which means that it is subject to the public interest test. A department may only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
18. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. Information does not have to contain policy options, advice or decisions; any significant link between the information and the formulation or development of government policy is sufficient.
19. Within the Commissioner's guidance it defines statistical information as *'factual information presented as figures, and any further mathematical*

*or scientific analysis of those figures. It is not simply a view or opinion which happens to be expressed numerically.*²

20. The Commissioner will firstly consider if any statistical information is being withheld inappropriately under section 35(1)(a). Having reviewed the DPIA, the Commissioner notes that certain risks are represented numerically. However, these risk ratings are derived using the judgement and opinions of those who conducted the DPIA and, as risk itself is subjective, cannot represent factual information. The Commissioner is satisfied that no statistical information is being withheld under section 35(1)(a).

Formulation or development vs implementation

21. It is obvious that the DPIA itself relates to the test and trace programme, specifically, the consequences of processing personal data in this way. However, the Commissioner must now consider whether the DPIA relates to the *formulation or development* of this policy.
22. The Commissioner understands formulation and development broadly refer to the design of new policy, and the process of reviewing, improving or adjusting existing policy. However, section 35 will not cover information relating purely to the application or implementation of an established policy. It is therefore important to identify where policy development ends and implementation begins.
23. A DPIA is a process designed to help organisations identify and minimise the data protection risks of a project.³ The DPIA was conducted in March 2021. The test and trace programme itself was launched in May 2021. The DPIA clearly explores the risks of the project as identified at the planning and development stage; it relates to the formulation and development of this policy.
24. The DHSC has confirmed that the test and trace policy '*remains under consideration and the DPIA is reviewed regularly and updated where necessary as a result.*' The Commissioner is mindful that any argument which relies upon a continuous process or seamless web of policy review and development must be challenged.
25. The Commissioner notes that information that relates to the design of a policy, and the implementation of that same policy, are not always

² [section-35-government-policy.pdf \(ico.org.uk\)](#)

³ [Data protection impact assessments | ICO](#)

entirely separate and this is the case in working documents such as the DPIA.

26. The test and trace programme is now well-established and therefore the Commissioner must determine if any modification to self-isolation regulations represent decisions on implementation rather than development of the policy itself. As described above, this is not always a clear cut distinction.
27. The Commissioner's guidance states *'Not every decision or alteration made after an original policy was settled will amount to the development of that policy. If policy is a plan to achieve a particular outcome in the real world, the development of that policy is likely to involve a review of its intended outcomes, or a significant change to the original plan. By contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.'*
28. The Commissioner notes that the overall outcome of the test and trace programme, to track and help prevent the spread of the coronavirus, remains unchanged by any adjustments made to the DPIA or policy itself. However, the Commissioner does not consider the development of self-isolation regulations that sit alongside the test and trace programme represent *'minor changes.'*
29. There are no universal rules to help the Commissioner ascertain whether decisions made in relation to a policy represent the formulation or development of that policy or implementation changes. However, the more limited and case-specific the consequences of a decision, the more likely it is to represent the implementation of a policy. The more wide-ranging the consequences of the decision, the more likely that it involves an element of policy review or development.
30. Any changes made to the self-isolation regulations have wide-reaching consequences for the public. Even if only a specific group is affected by these changes, for example, the clinically vulnerable or birthing partners, these consequences affect so many people that they cannot be described as individual.
31. In determining whether information relates to policy development or implementation, the Commissioner considers the following factors relevant:
 - *"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.*"
32. The DHSC has explained *'There has been significant and ongoing ministerial engagement as self-isolation policy has been developed and refined, in the light of the stage of the pandemic, and on the basis of scientific and medical advice.'* The most recent changes to self-isolation policy were announced on 11 August 2021⁴ by the Secretary of Health and Social Care.
 33. The DHSC has explained *'The self-isolation policy and the role of legislation to support compliance will continue to be reviewed and developed as appropriate in response to changes in the incidence and impact of the COVID-19 virus... there will be a clear need for continued policy formulation and ongoing policy adjustment for as long as is necessary to ensure people self-isolate when told to do so.'*
 34. Whilst the overall outcome of the test and trace programme remains the same, any adjustments made to that policy invoke changes of such significance that the Commissioner considers they represent policy review or development rather than policy implementation. Therefore the Commissioner considers the exemption engaged.
 35. The Commissioner's guidance states *'If one purpose, use or subject of that document (or section) is a relevant activity, then everything within that document (or section) will relate to it.'* The DPIA, a whole document, has been created and worked in direct relation to the test and trace programme. The Commissioner therefore considers that the exemption is engaged in relation to the DPIA in its entirety.
 36. Since section 35(1)(a) is engaged the Commissioner will now go onto consider whether the public interest lies in disclosure or in maintaining the exemption.

Public interest test

Public interest factors in favour of disclosure

37. The DHSC has stated it *'recognises the significant public interest in disclosure of policy information, and promoting government accountability, increasing public understanding, and enabling public debate and scrutiny of the policy and the decision-making process.'*

⁴ [Self-isolation removed for double-jabbed close contacts from 16 August - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

38. Disclosure would also increase the understanding of how personal data is processed, and shared, as part of the test and trace programme.
39. At the time that the test and trace programme was announced there were significant privacy concerns reported within the media⁵ and disclosure would reassure the public that the government took appropriate measures to identify these risks.

Public interest factors in favour of maintaining the exemption

40. There is no inherent or automatic public interest in withholding information falling within this exemption; any public interest arguments should focus on protecting the policy making process and conservation of the safe-space referred to within paragraph 15.
41. The DHSC has stated it is withholding the DPIA in order to protect the safe space required to develop the test and trace programme and the associated self-isolation regulations in response to the coronavirus pandemic.
42. The Commissioner acknowledges that civil servants, subject experts, scientific advisors and ministers need to be able to speak candidly and engage within free and frank discussion if they are to develop a policy which is as effective as possible.
43. For example, the DHSC are concerned that *'if those involved in carrying out an impact assessment are concerned about the consequences of the information entering the public domain, they may limit the amount of detail they include in the DPIA.'* This could lead to risks relating to the processing of personal data for test and trace purposes going unidentified.

Balancing the public interest

44. The Commissioner considers that public authorities should be as transparent as possible when it comes to the processing of personal data. She recognises the concerns that led the complainant to make this request are likely to be shared by others.
45. However, in this instance the Commissioner has determined that the public interest lies in maintaining the exemption. The DHSC is withholding the DPIA in order to protect the policy-making process, and

⁵ [Privacy group prepares legal challenge to NHS test-and-trace scheme | NHS | The Guardian](#)

in this particular case to support public compliance with the self-isolation regulations.

46. It is not the Commissioner's role to speculate on the development of the coronavirus pandemic. However, she does recognise that the DHSC needs to be able to develop the test and trace programme in order to safeguard the health of the British public. The Commissioner assigns great weight to protecting the safe space to allow the government to do so, in the interest of the health of the public.
47. The Commissioner recognises that, at a time where the majority of restrictions have been lifted, compliance with self-isolation regulations are not as significant now as at the beginning of the pandemic. Furthermore, at any stage of the pandemic the Commissioner considers that engagement and compliance with the test and trace programme is a personal choice.
48. However, she concurs with the DHSC that disclosure of the risks identified within the DPIA may influence an individual's decision to comply with the self-isolation regulations at a time when the future necessity and importance of these regulations remains uncertain.
49. The Commissioner has compared the DPIA to information which is already in the public domain relating to the processing of personal data for contact-tracing purposes. Having reviewed the test and trace privacy notice⁶ and the aforementioned MoU, the Commissioner does not consider that the DPIA contributes sufficiently to public understanding to justify disclosure.
50. With this in mind, she has determined that the DHSC is entitled to rely upon section 35(1)(a) as a basis for refusing to disclose the DPIA in its entirety.

Section 10 – time for compliance with request

51. Section 1(1) (general right of access to information held by public authorities) states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

⁶ [Test and Trace: overarching privacy notice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612212/Test_and_Trace_overarching_privacy_notice.pdf)

52. Section 10 time (for compliance with the request) of the FOIA states that:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

53. The DHSC failed to provide a response within 20 working days and therefore breached section 10.

Right of appeal

54. 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

55. 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.
56. 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

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

Annex

The complaint included the following extract, published in Times dated 18 October 2020, in their request for information:

"Experts decry move to share Covid test and trace data with police. Government decision will deter people in England from engaging, warn public health and privacy analysts. Cabinet Office minister Michael Gove said police officers were operating in a 'very proportionate way'. Privacy experts and public health figures have reacted with alarm to the "potentially disastrous" UK government move to share with the police the contact details of those who have been instructed to self-isolate by NHS Test and Trace. Over the weekend it emerged that the police had been given powers to request data of individuals who have been told to self-isolate in England in an agreement between the Department of Health and Social Care and the National Police Chiefs' Council. The DHSC said it was a legal requirement for people who have tested positive for Covid-19 and their close contacts to self-isolate when formally notified to do so. "The Department of Health and Social Care has agreed a memorandum of understanding with the National Police Chiefs Council to enable police forces to have access on a case-by-case basis to information that enables them to know if a specific individual has been notified to self-isolate."