

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2022

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant submitted a request to HM Treasury seeking email correspondence between Adrian Masters, a senior civil servant, and representatives of McKinsey regarding the Health and Social Care Taskforce. HMT initially responded by stating that it did not hold any information. During the course of the Commissioner's investigation it located some information falling within the scope of the request. It provided the complainant with an email from McKinsey to Mr Masters, redacted on the basis of sections 35(1)(a) (formulation or development of government policy) and 40(2) (personal data) of FOIA. It also sought to withhold a slide presentation attached to the email on the basis of section 35(1)(a).
2. The Commissioner's decision is that HMT is entitled to withhold the information on the basis of sections 35(1)(a) and 40(2).
3. No steps are required.

Request and response

4. The complainant submitted a request to HMT on 10 December 2020 seeking:

“All email correspondence between Adrian Masters and representatives of McKinsey and Co between 1 June (or the date Mr Masters took up the position on the Taskforce [Health and Social Care Taskforce] if later) and 30 September 2020.”
5. HMT responded on 21 December 2020 stating that it did not hold any information falling within the scope of the request.
6. The complainant made the following further request to HMT on 5 January 2021:

“- Is Adrian Masters seconded to / employed by a government department other than the Treasury? My understanding was that he was based in the Treasury. Please advise me if this is not the case and which government department he is based in.

- Did your records' search include email accounts used by Mr Masters other than an official Treasury email account? If this is the case, I would like to request that you include in your search ANY email accounts (including non-governmental ones) being used by Adrian Masters in the context of this work. If necessary, please consider this a formal request for an internal review.”
7. HMT responded on 1 February 2021 and confirmed that Adrian Masters was seconded to HMT for his work with the Health and Social Care Taskforce. However, HMT did not hold information within the scope of the remainder of the request because he no longer worked for HMT.
8. The complainant contacted HMT on the same day and asked it to conduct an internal review of its response to her request of 10 December 2020 that it did not hold any email correspondence between Mr Masters and McKinsey.
9. HMT informed her of the outcome of the internal review on 25 May 2021. It remained of the view that it did not hold any information falling within the scope of the request.
10. However during the course of the Commissioner's investigation of this complaint HMT explained that it had, as a result of fresh searches, located some information falling within the scope of the request. As a result on 24 June 2022 HMT contacted the complainant and confirmed that it held information falling within the scope of the request but it

considered this to be exempt from disclosure on the basis of sections 35(1)(a) and 40(2) of FOIA. However, HMT explained that information produced by McKinsey had been sourced from a number of links which it provided to the complainant.

11. HMT contacted the complainant again on 17 August 2022 and explained that it was now prepared to release the content of a covering email from McKinsey. Some parts of the email were redacted on the basis of sections 35(1)(a) and 40(2) of FOIA and the attachment to the email described by McKinsey as 'a single compendium all of the work we have completed over the past few weeks in supporting the HTF' was also withheld on the basis of section 35(1)(a) of FOIA.

Scope of the case

12. The complainant initially contacted the Commissioner on 27 May 2021 in order to complain about HMT's decision that it did not hold any information falling within the scope of her request of 10 December 2020. Subsequent to HMT locating information falling within the scope of this request, the complainant confirmed to the Commissioner that she wished to challenge its application of the exemptions. This notice therefore considers whether the remaining information which HMT is still seeking to withhold, following its disclosure of 17 August 2022, is exempt from disclosure.

Reasons for decision

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

13. HMT has applied section 35(1)(a) to the vast majority of the withheld information, the only exception being the names of officials which were redacted on the basis of section 40(2). Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy"
14. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
15. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are

generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

16. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
17. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
18. 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.
19. HMT explained that the withheld information in question contained analysis by McKinsey which reviewed the progress and development of key government policies in digital, primary and elective care. HMT explained that the information in question was used at the time of the request to support live policy development in these areas. This was because at the time of the request the government was still formulating its response to the pandemic and the impact this had, and would have, on digital, primary and particularly, elective care. For example, in terms of delivering digital outpatient appointments it was necessary to assess how far the pandemic had in fact accelerated the fulfilment of digital objectives around primary care given digital solutions quickly became central to the Covid response and were used to triage pressure away from the NHS.
20. Having reviewed the withheld information, and taken into account HMT's explanation of its context, the Commissioner is satisfied that it relates to the development of the government's policies in respect of digital, primary and elective care, specifically how the pandemic had impacted and affected such policies.
21. Section 35(1)(a) is therefore engaged.

Public interest test

22. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

23. HMT acknowledged the public interest in transparency and that these policy areas are important ones to the public.

Public interest arguments in favour of maintaining the exemption

24. HMT emphasised that a lot of sources upon which McKinsey's analysis was based, over 50 in total, had now been provided to the complainant which in its view went some way to serving the public interest in disclosure.
25. Furthermore, HMT argued that in its view disclosure of the information would give a misleading and incomplete picture of the policies in question. By way of illustration, it argued that releasing the contents pages contained would provide a misleading representation to the public of the level of importance of these policies, for example the order in which they have been presented. In addition, HMT noted that as this information was produced by a third party, it does not represent the government's current prioritisation of policies. HMT explained that in its view, disclosure would be misleading to the public but also to relevant health care providers and suppliers across the healthcare market and had the potential to undermine other messaging and guidance.
26. HMT also explained that withholding the information was necessary in order to protect the importance of the safe space to develop policy. It emphasised that the time of the request the policy development to which the information related was live and ongoing. (In fact, HMT explained that at the date of its submissions to the Commissioner in July 2022 the information in scope still had a bearing in live policy development.) It argued that it is in the public interest for the government to maintain the ability to discuss and develop health policies in a safe space with stakeholders. HMT explained that such a safe space enabled the government to compare analyses, test assumptions and reach well-formed conclusions that will benefit the public. This was particularly the case during the course of the pandemic.
27. HMT also argued that release of the withheld information at the time of the request could also have had a chilling effect on policy officials. It was of the view that officials may have stopped all stakeholder engagement which would have reduced the scope to challenge and test the potential impact of the pandemic on these policies. HMT argued that

officials may have also stopped commissioning analysis that formally captured any indicative scenario planning or any analysis produced may have been subject to very strict and limited circulation even within government. HMT argued that this would have reduced the ability for the government and health system to effectively challenge and test scenario planning principles together.

28. HMT noted that as the pandemic demonstrated the ability to test and challenge principles in safe spaces with experts was essential and enabled officials to provide advice to Ministers on the policy options available in challenging circumstances. It argued that if the withheld information was disclosed at the time of the request, stakeholders may have chosen to withdraw from engaging with Government officials in the knowledge that their materials or resources would be shared publicly. HMT suggested that stakeholders may also have held back reflections or challenges in discussions or only submitted partial and incomplete information which would have impacted the quality of the policy engagement. In HMT's view release of this information could therefore have hindered the engagement to a degree that resulted in fewer Covid mitigations being proposed, resulting in less effective mitigation approaches and potentially more serious capacity problems across the health system.
29. HMT explained that in determining the balance of the public interest test it had also considered who the decision makers were. In the circumstances of this case HMT explained that the key decision makers in the development of these policies were government ministers. HMT explained that, as set above, the information in scope continues to relate to novel, high-profile and live policy making. In its view the premature release of this information would pre-empt ministerial decisions and remove the ability of ministers to scrutinise complex evidence in relation to the development of these health policies. HMT argued that this could far-reaching and detrimental consequences for wider government, the relationship between officials (given the analyses provided by McKinsey does not reflect Government policy) and the relationship between central Government and the wider health system (as this could result in the system receiving conflicting messages around approach and priorities within these policies). HMT argued that taken together this could detrimentally impact the development of these policies in the future and disrupt the implementation of these policies for the public.

Balance of the public interest arguments

30. The Commissioner accepts that significant weight should be given to safe space arguments – ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy

making process is live and the requested information relates to that policy making.

31. In the context of this request, the Commissioner accepts that the policy making process was clearly live and ongoing at the point the request was submitted. Furthermore, the Commissioner accepts that the analysis set out in the withheld information is one that would have attracted significant interest, not only from relevant stakeholders but also more widely, given the public focus on the pandemic's impact on the NHS. As a result the Commissioner accepts that disclosure of the information at the time of the request would have resulted in particular attention and comment on the analysis set out in it. The Commissioner accepts that this attention would have had a direct and detrimental impact on the policy development process. In his view the safe space arguments therefore need to be given notable weight.
32. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
33. In the context of this case the Commissioner is less persuaded by the chilling effect arguments advanced by HMT in comparison to the safe space arguments. In the Commissioner's view it is very unlikely that key stakeholders, such as McKinsey, would simply choose not to engage with government at all following the disclosure of this information, not least because there is a commercial incentive for them to do so. Nevertheless, the Commissioner does accept that disclosure of the withheld information may present some potential risk of stakeholders altering or amending the candour of submissions provided to government in such scenarios. In reaching this finding the Commissioner has taken into account the timing of the request, ie the policy making in question was ongoing and the analysis pre-dates the request by only a number of months.
34. The Commissioner is also somewhat sceptical about the extent to which disclosure would have a chilling effect on the contributions of civil servants. As HMT has reiterated in its submissions elsewhere, the withheld information is McKinsey's analysis rather than government

produced information. As a result the Commissioner does not accept that there is necessarily a direct correlation between disclosure of such information and an impact on the future advice provided by officials.

35. Nevertheless, the Commissioner again acknowledges that high profile nature of the subject matter which the information covers, the public focus on this area of policy making during the pandemic, the fact that the policy making was ongoing and the recent provenance of the information. Given these factors, the Commissioner does accept that, in theory, disclosure of external government analysis could have some impact on civil servants' contributions to ongoing policy making in this area if they were concerned that such contributions could be disclosed, because of the perceived precedent that would have been set by the disclosure of the McKinsey analysis on the same topic. However, the Commissioner is reluctant to afford this particular argument with any notable weight.
36. As a general position the Commissioner does not accept that the fact that information disclosed under FOIA could be misunderstood or misrepresented is a valid basis on which to argue that the public interest favours withholding information. This because in the Commissioner's view public authorities should be able to publish some context or explanation with the information that they release. The only circumstance in which this argument would be relevant in a section 35 cases is if a public authority is unable to provide this explanation, or if the explanation would not limit any damage caused. In the circumstances of this case, in the Commissioner's view HMT's concerns about the information being misleading could be adequately addressed if the information were to be disclosed by noting that the information was produced by McKinsey and did not represent the government's current (ie at the time of the request) prioritisation of policies.
37. Turning to the public interest arguments in favour of disclosing the information, in the Commissioner's view the government's plans for how primary and elective care would be maintained and delivered as a result of the impact of the pandemic are ones that are clearly of direct interest to the public. As a result in the Commissioner's opinion there is a significant public interest in the disclosure of information as it would aid the public's understanding of policy considerations in these areas. The Commissioner accepts that the information in question was McKinsey's analysis of issues central to these policy areas and did not represent government policy. Nevertheless, in the Commissioner's view disclosure of the information would still provide the public with sight of the analysis that the government had received and considered as part of its policy development and therefore disclosure of it would make the policy making process more transparent. In addition, disclosure of the withheld information would also arguably provide interested stakeholders with an insight into the analysis of the issues in question, at least from

McKinsey's perspective, which they could use to engage with government on.

38. Nevertheless, despite the benefits of disclosure, the Commissioner has concluded that the balance of the public interest favours maintaining the exemption. He has reached this conclusion given the significant, and ultimately compelling, weight that he considers should be given to the safe space arguments. In his view this, allied to the marginal weight that he thinks should be added to the chilling effect arguments, means that the public interest favours withholding the information.

Section 40 - personal information

39. HMT explained that it had redacted the names (and in some cases the email addresses and contact details) of eight individuals from the covering email which was disclosed to the complainant. These names consisted of three members of the Health and Social Care Task Force, four individuals from McKinsey and a member of staff from No 10 Downing Street.
40. HMT explained that it had disclosed Mr Masters' name as he was a senior civil servant at the time of the request. However, it explained that no members of the Health and Social Care Taskforce currently work in HMT and therefore out of an abundance of caution, and based on the assumption that they may be junior officials, it was withholding the details of these officials.
41. Section 40(2) of 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.
42. 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 UK General Data Protection Regulation ('UK GDPR').
43. 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 FOIA cannot apply.

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

44. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

46. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
47. 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.
48. 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.
49. The Commissioner is satisfied that the redacted information both relates to and identifies the individuals concerned. All of this information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
50. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
51. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

53. 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.
54. 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 UK GDPR

55. 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.

56. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

57. 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

58. 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

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

commercial interests as well as wider societal benefits. These interest(s) 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.

59. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about this subject. However, he is not persuaded that there is a particularly strong or compelling interest in the disclosure of names or contact details of the individuals in question.

Is disclosure necessary?

60. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
61. In the Commissioner's view it is not sustainable to argue that disclosure of the personal data HMT is seeking to withhold is necessary; disclosure of such information would not add to the public's understanding of this subject matter in any notable way.
62. Given this finding the Commissioner has concluded that disclosure of the names and contact details would not be lawful and therefore article 6(1)(f) of the UK GDPR is not met. Disclosure of such information would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

63. 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

64. 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.
65. 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

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