

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2022

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 about the process for signing off a piece of guidance on care homes. The above public authority ("DHSC") relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) in order to withhold the information.
2. The Commissioner's decision is that DHSC has correctly applied section 36 of FOIA and that the balance of the public interest favours maintaining the exemption. However, DHSC failed to confirm that it held information or issue its refusal notice within 20 working days. It therefore breached sections 10 and 17 of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 30 May 2021, the complainant wrote to DHSC and, referencing two pieces of guidance regarding the discharge of hospital patients into care homes requested information in the following terms:

"please can you specify:

- A. The job title of civil servant(s) that wrote the documents.
- B. The sign off process used with regards to these two documents to approve publication.

- C. Documents or emails which were part of the sign off process in point 2, such as between Ministers, approving this.”
5. DHSC responded on 30 September 2021. It relied on section 36 of FOIA to withhold the requested information – a position it upheld at internal review.

Reasons for decision

6. The following analysis covers why the Commissioner is satisfied that section 36 of FOIA has been correctly applied.
7. The Commissioner notes that, in this case it was necessary to issue an Information Notice to compel DHSC to provide him with the withheld information and its submissions.
8. Section 36 provides an exemption from disclosure of any information which, in the reasonable opinion of a qualified person (QP), would inhibit either the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice the effective conduct of public affairs.
9. DHSC says that due to the passage of time, ministerial changes and the sensitive subject matter it has sought a minister’s qualified opinion on two occasions. The first opinion was sought on 6 August 2021 ie prior to the response of 30 September 2021. The most recent opinion was sought from Neil O’Brien MP, the Parliamentary Under Secretary for Care in a submission dated 10 October 2022. The Commissioner is satisfied that, under sub-section 36(5)(a) of FOIA, Neil O’Brien MP is an appropriate QP.
10. DHSC has provided a copy of an email dated 18 October 2022 in which the QP confirms that section 36 should be upheld and that, in addition, the “documents specified in the annexes” should not be released. The Commissioner is therefore satisfied that the QP provided an opinion.
11. The request was submitted on 8 July 2021. As noted, DHSC had originally sought a QP opinion in August 2021. Events meant that DHSC had to seek a QP opinion a second time. On 18 October 2022, the second QP provided an opinion in response to the submission to them of 10 October 2022. Considered in the round, the Commissioner will accept that the opinion was given at an appropriate time.
12. The Commissioner has considered whether the opinion regarding section 36(2)(b)(i) and section 36(2)(b)(ii) is reasonable. It is important to note that ‘reasonableness’ is not determined by whether the Commissioner

agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion.

13. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
14. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
15. In the submission DHSC provided to the QP dated 10 October 2022, DHSC included: a background to, and copy of, the request, a brief description of the section 36(2)(b) exemptions, reasoning as to why the majority of the information should be withheld under those exemptions, discussion of the public interest test and a recommendation.
16. In the submission DHSC advised that it had identified 11 documents amongst the information in scope which it considered could be disclosed – it said these documents were listed in Annex B of the submission. DHSC's recommendation was that the majority of the information should be withheld but those 11 documents could be disclosed.
17. Of relevance to both section 36(2)(b)(i) and section 36(2)(b)(ii), DHSC explained why disclosing the information being withheld "would" prejudice the provision of advice and exchange of views. This was because the information included comments, questions and exchanges from ministers and other officials, who were directly involved in the drafting process. At the time, DHSC said, due to the fast-moving situation, decision-making sometimes took place through a combination of meetings, emails and direct messaging, as opposed to through formal submissions as would normally be the case.
18. DHSC went on to say that releasing the material would risk impacting "the quality of future policy interventions, and effective working relationships across the sector at a time when the salience of hospital discharges **is at least as high as during the pandemic**" [emphasis added]. DHSC said it was reliant on NHS and adult social care (ASC) sector partners to deliver its plans and releasing any information that adversely impacts those relationships risked impacting delivery.

19. DHSC advised that officials provide regular advice to ministers on radical options for increasing hospital flow into ASC. These involve frank and challenging conversations with sector representatives and the NHS about funding, capacity, workforce and the rights of patients and service users. While those options may not all proceed to implementation, officials and ministers need to be able to openly weigh up risks throughout the admission and discharge process, including where interventions to mitigate risk may be unpalatable. DHSC said that if officials feel unable to consider the full range of options, it risked missing options that can provide a tangible and positive impact on people's lives. This would, in turn, discourage ministers from providing such feedback on drafts in future and "would" therefore inhibit the free and frank provision of advice or exchange of views
20. In its submission to the Commissioner, DHSC confirmed that the QP's opinion in this case is in fact that the prejudice envisioned under the section 36(2) exemptions would be likely to occur if DHSC disclosed the information in scope of the case. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'. However, there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
21. The Commissioner has also noted that the submission advises that 11 documents can be disclosed but that the QP's opinion in their email of 18 October 2022 is that **all** the information, including those documents, should be withheld.
22. The Commissioner has noted that, at paragraph 19, the QP appears to be being invited to consider the situation at the time of the submission ie 10 October 2022. However, the circumstances that must be considered are those that existed at the time the request should have been responded to, ie June 2021. It appears to the Commissioner that the QP was considering the situation at the time of the request, rather than the time of the submission to them in October 2022, when they opined that all the information should be withheld.
23. As such, the Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b) exemptions to form an opinion on the matter of whether reliance on those exemptions was appropriate with regard to all the information in scope.
24. The Commissioner has reviewed the evidence and, since he is satisfied that the other relevant considerations have also been addressed, he must accept that the QP's opinion about withholding the information is

one a reasonable person might hold. He therefore finds that DHSC is entitled to rely on section 36(2)(b)(i) and section 36(2)(b)(ii) to withhold all the information.

25. The Commissioner will go on to consider the public interest test associated with those exemptions.

Public interest test

26. DHSC has considered the following arguments in its submission to the Commissioner:

- DHSC recognises that Adult Social Care is a sensitive subject, particularly at the timing of the request during the pandemic. It acknowledges and that there is a public interest in officials' decision making on this area at this time.

27. The complainant presented the following arguments for disclosure in their request for an internal review:

- Given the huge nationwide impact of the pandemic and the particularly marked effect it had on care homes and the health and mortality of vulnerable care home residents it was of the utmost importance that the public understood how key decisions were made in the formation of policy. Particularly as this particular policy had such a huge impact on the care home sector and thousands of vulnerable people.
- There was no need to withhold this information any longer because it relates to decisions that were made over a year ago and policy making has moved on significantly since this point - including a change in minister heading up the Department of Health and Social Care.

Public interest in maintaining the exemptions

28. In the submission DHSC provided to the QP, the QP was invited to consider the following arguments:

- Releasing the documents into the public domain may set a precedent of the Government releasing advice on which decisions about COVID-19 policy have been made throughout the pandemic, including clinical, financial, and operational considerations. Releasing this information would prejudice future decision making. In particular, it would inhibit the free and frank provision of advice between technical experts, policy officials and ministers. It would also hinder the ability to explore conflict and alternatives for robust and thorough decision making.

- Delivery, and implementation within the ASC sector, from workforce, local authorities, NHS, users of the service and governing bodies such as the Care Quality Commission would be negatively affected, and all rely upon robust policy and guidance to support and safeguard the sector overall.
- Hospital discharges remain a significant challenge for the NHS, DHSC and the adult social care sector, with delayed discharges remaining consistently high. Officials provide regular advice to ministers on radical options for increasing hospital flow into ASC, involving frank and challenging conversations with sector representatives and the NHS. While those options may not all proceed to implementation, officials and ministers need to be able to openly weigh up risks throughout the admission and discharge process, including where interventions to mitigate risk may be unpalatable. Releasing the material would impact the quality of future policy interventions, and effective working relationships across the sector. DHSC has considered the following arguments in its submission to the Commissioner:

29. DHSC has considered the following, related arguments in its submission to the Commissioner:

- By releasing this material, public services may be hindered from meeting their agreed policy objectives, specifically in relation to hospital discharge and delivering on agreed policy objectives.
- Officials provide regular advice to ministers on radical options for increasing hospital flow into ASC, involving frank and challenging conversations with sector representatives and the NHS about funding, capacity, workforce and the rights of patients and service users. These discussions may not always lead to implementation, but they are imperative in weighing up risks and options.
- Officials need to be able to consider the full range of risks as well as discuss interventions to manage risk, even those which may not be palatable so that options are not missed which can make a difference to people's lives. If officials feel unable to have these discussions, then Ministers would be discouraged from providing feedback on drafts and this would therefore inhibit the free and frank provision of advice or exchange of views.

Balance of the public interest

30. In its submission to the Commissioner DHSC has concluded that it is in the public interest that the Government is able to conduct business in a

manner which enables policy to be developed and delivered effectively under times of pressure as was the case in March-April 2020.

31. Some of the documents within scope of the request illustrate the pressure that both civil servants and ministers were working under. Should they be released, DHSC is concerned that these documents could be taken out of context. But it is important to acknowledge the existence of these documents as these policy decisions and discussions did indeed take place.
32. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition. The timing is key here.
33. With regard to section 36(2)(b)(i), DHSC has indicated that, at the time of the request there was greater public interest in officials feeling able to provide advice to ministers on matters associated with the care home guidance that were challenging or potentially unpalatable, without fear that that advice would be put in the public domain while the COVID-19 pandemic and the re-drafting of the care home guidance was ongoing. This was so that all the options could be discussed fully, the most appropriate solutions identified as quickly as possible, and the guidance finalised as quickly as possible.
34. Similarly with regard to section 36(2)(b)(ii), DHSC has argued that there was greater public interest in officials and ministers being able to discuss difficult, challenging, and possibly unpalatable matters freely and openly. Again, this was so that appropriate solutions and approaches could be identified as swiftly as possible to be included in the guidance.
35. The COVID-19 pandemic had been declared on 19 March 2020 and legal restrictions aimed at limiting the spread of the virus remained in place at the point the request should have been responded to (June 2021). Although the first iteration of the care home guidance had, as the complainant noted, been published on 2 April 2020, it was subject to revision almost every following month during 2020 and 2021 up to the time of the request and beyond. As such, the situation remained very much a 'live' situation. Officials and ministers were working in, and reacting to, an extremely high pressured and fast-moving set of circumstances.
36. The Commissioner notes that part A of the request sought information about the guidance's author. The withheld information confirms that numerous junior civil servants were involved in the creation of the first published version of the guidance. Given that the published version was

signed off by ministers, the Commissioner considers that the public interest in naming the individual contributors is minimal.

37. The Commissioner considers that, at the time of the request, there was greater public interest in officials and ministers feeling able to advise on, and discuss, those wider circumstances openly and to be able to focus on updating the care home guidance with minimum distraction. The QP's opinion, which the Commissioner has accepted as reasonable, is that disclosure would be likely to inhibit advising on and discussing revisions to the care home guidance. In the Commissioner's view the inhibition caused by disclosure at the time of the request would have been likely to cause severe, wide-ranging and long-term consequences, for the guidance and so, in turn, for health providers and users. He considers that the public in transparency about the Government's response to the effect of the pandemic on the ASC sector – while the pandemic was ongoing - was met to an adequate degree through the Government's press briefings and other, related published information.
38. The Commissioner will address two concerns that DHSC expressed. First, that disclosure would set a precedent. A public authority will consider the circumstances as they are at the point it receives a request; sometimes these will permit disclosure and sometimes they won't, but disclosure in this case would not have set a precedent. Similarly, the Commissioner considers any complaint to him on a case by case basis. Second, DHSC is concerned that the information, if disclosed, could have been taken out of context. It is always possible for a public authority to provide contextual information when it makes a disclosure, to mitigate the risk of the information being misunderstood.
39. On balance however, the Commissioner finds that at the time of the request the public interest favoured maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions.
40. The Commissioner has decided that DHSC correctly applied section 36(2)(b) to the withheld information and that the public interest favoured maintaining the exemptions. As such, it has not been necessary to consider DHSC's application of section 36(2)(c) to that same information.

Procedural matters

41. On the available evidence, the Commissioner finds that DHSC breached section 10 of FOIA as it failed to confirm, within 20 working days, that it held information within the scope of the request.
42. On the available evidence, the Commissioner finds that DHSC breached section 17 of FOIA as it failed to issue its refusal notice within 20 working days of receiving the request.

Other matters

43. In the Commissioner's view, the timing of the request is the crux of this case. The request was made at the time when the pandemic was still ongoing and the care home policy was still live; it was not withdrawn until April 2022.
44. More recently, a high court judgment ruled that the policy in question was 'irrational in failing to advise that where an asymptomatic patient (other than one who had tested negative) was admitted to a care home, he or she should, so far as practicable, be kept apart from other residents for 14 days¹.' Whilst the Commissioner has determined that in this case the public interest lies in maintaining the exemption, he cannot say for certain where the public interest would lie if the request was made today.

¹ <https://www.judiciary.uk/wp-content/uploads/2022/07/Gardner-Harris-v-DHSC-judgment-270422.pdf>

Right of appeal

45. 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

46. 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.
47. 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

Roger Cawthorne
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