

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 November 2022

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

**Address:** 39 Victoria Street  
London  
SW1H 0EU

### **Decision**

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1. The Commissioner's decision is that DHSC was entitled to rely on section 35(1)(a) of FOIA to withhold requested information about face coverings in relation to COVID-19, as it concerned the formulation of government policy, etc. DHSC breached section 17(1) of FOIA as it did not issue a refusal notice within the required timescale.

### **Request and response**

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2. The complainant made the following information request to DHSC on 18 January 2022:

"...My FoI request has two components:

(1) In relation to the efficacy of face coverings in stopping the spread of coronavirus in public spaces, what evidence has the SoS seen or considered in reaching his conclusion that these measures are proportionate?

(2) In relation to the negative effects of the imposition of rules mandating the use of face coverings in relevant places, what evidence has the SoS seen or considered in reaching his conclusion that these measures are proportionate?..."

3. DHSC's final position was to withhold the information under section 35(1)(a) of FOIA.

## Reasons for decision

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4. The Commissioner is satisfied that DHSC has correctly applied section 35(1)(a) of FOIA to the complainant's request as the information requested relates to the formulation of government policy.
5. In their request for an internal review, the complainant said that under section 35(2)(a), section 35(1)(a) does not apply to statistical information and that some of the information the Secretary of State considered must have been statistical information.
6. In fact, and as the complainant indicated in their complaint to the Commissioner, section 35(2)(a) says that "**Once a decision as to government policy has been taken...**" [Commissioner's emphasis] statistical information used to provide an informed background to the taking of the decision is not to be regarded as relating to the formulation of government policy.
7. In its response to the request DHSC advised that it considered that section 35 is intended to ensure that the possibility of public exposure does not deter people from fully, candidly and properly deliberating as they formulate and develop policy, including exploring all options. DHSC said that civil servants and subject experts 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. DHSC said that it was also continuing to withhold any numerical data within scope of the request along with the rest of advice given to ministers.
8. In its internal review DHSC advised that the policy in question is still developing and ongoing. It said that COVID-19 "is still around" and that although the current variant had been countered in severity by the vaccination programme, the policy was still open to change, and information being fed into the decision making processes was still live.
9. In their request for an internal review the complainant said that the decision – about face coverings – had been made at the end of November 2021. However, the majority (but not all) of legal coronavirus restrictions did not end until March 2022. At the time of the request in January 2022, the COVID-19 virus was still circulating and it remains in circulation at the date of this notice. As such, the Commissioner is satisfied that DHSC's policy response to the pandemic – including the use of face coverings - remained 'live' and subject to review and change at the time of the request. No definitive and lasting decision had been taken at that point. The Commissioner is therefore satisfied that, in the circumstances and at January 2022, DHSC was entitled to apply section 35(1)(a) of FOIA to the complainant's request, including to any numerical information within scope.

10. Regarding the public interest, the complainant argued that there is a general public interest in transparent decision-making processes and noted that measures such as face covering had an unprecedented effect on daily life in England. The complainant also considered that the Secretary of State should not claim that the face covering measure met the statutory requirement for proportionality under the Public Health (Control of Disease) Act 1984 without demonstrating that that was the case. Finally, the complainant disputed DHSC's claim that disclosure would cause a "chilling effect" and undermine the decision-making process, good working relationships and civil service neutrality.
11. DHSC accepted that the public has a genuine interest in the material within scope of the request, as this information feeds into the decision-making process that effects the lives of individuals and businesses.
12. However, DHSC argued that officials' and subject experts' candour in discussing all the evidence and policy options open to them would be affected if they considered that the content of such discussion will be disclosed. Prematurely disclosing information protected under section 35 could prejudice good working relationships and civil servants' neutrality. DHSC argued that officials and experts need to be able examine options, both popular and unpopular; they need to express their views honestly, without fear of having these views released prematurely.
13. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
14. 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.
15. At the time of the request the pandemic was not over and government policies relating to public health measures that were in place or may need to be amended would naturally be kept under review and in development.

16. The policy in question in this case remained 'live' due to emerging scientific evidence and clinical data. On the day the request was made 93,890 new COVID-19 infections and 233 deaths were recorded in the UK.
17. The Commissioner considers that given the timing of the request, the public interest rests in maintaining the exemption.

### **Procedural matters**

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18. Under section 17(1) of FOIA a public authority must issue a refusal notice in respect of any exempt information within 20 working days of the request.
19. In this case, the complainant submitted their request on 18 January 2022 and DHSC did not issue a refusal notice until 24 February 2022. DHSC did not therefore comply with section 17(1).
20. Provision of an internal review is not a requirement of FOIA but is a matter of good practice. The FOIA Code of Practice advises that an internal review should be provided within 20 working days of a request for one, in the majority of cases. In this case, the complainant requested a review on 26 February 2022 and DHSC did not provide one until 12 May 2022 which was in excess of the Code of Practice guidance.

## **Right of appeal**

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21. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

22. 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.
23. 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**

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**