

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

### **Decision notice**

**Date:** 22 April 2022

**Public Authority:** Department of Health and Social Care (DHSC)  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

#### **Decision (including any steps ordered)**

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1. The complainant has requested all correspondence between Matt Hancock and Gina Colangelo relating to government business from 1 January 2021 to the date of the request. DHSC refused to disclose the requested information under section 35(1)(a) and (d) FOIA.
2. The Commissioner's decision is that section 35(1)(a) FOIA was applied correctly to the information withheld under this exemption. However section 35(1)(d) FOIA was applied incorrectly to the information withheld under this exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information being withheld under section 35(1)(d) 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 FOIA and may be dealt with as a contempt of court'.

#### **Request and response**

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5. On 29 June 2021 the complainant submitted a request to DHSC for the following information:

"I am sending this request under the Freedom of Information Act.

Please provide all correspondence between Matt Hancock and Gina Colangelo relating to government business from 1st January 2021 to date using:

- Mr Hancock or Ms Colangelo's departmental email
  - Any private email that Mr Hancock has used for government business."
6. On 8 October 2021 DHSC responded. It withheld the requested information under section 35(1)(a) FOIA.
  7. The complainant requested an internal review on 18 October 2021. DHSC sent the outcome of its internal review on 7 February 2022. It upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled on 17 January 2022. This pre-dated the internal review response. Once DHSC provided the result of the internal review the Commissioner accepted the case for substantive investigation.
9. During the Commissioner's investigation DHSC identified two pieces of withheld information falling within the scope of the request. It confirmed it remained of the view that section 35(1)(a) was applicable to one piece of information identified however it said that section 35(1)(d) was applicable to the other piece of information identified (rather than section 35(1)(a) as originally applied).
10. The Commissioner has considered whether DHSC was correct to apply section 35(1)(a) and (d) FOIA to withhold the requested information.

### **Reasons for decision**

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#### **Section 35(1)(a)**

11. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
12. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.
14. The Commissioner's guidance on the section 35 exemption, explains that a number of factors contribute towards the establishment of a policy in formulation or being developed, including the intention to achieve a particular outcome or change where the consequences are wide ranging. The Commissioner also considers the term 'development' to include reviewing, improving and adjusting existing policy.
15. DHSC explained that the piece of information being withheld under section 35(1)(a) discusses the early development of post-pandemic public health policy and the strategy for the Office of Health Promotion (since renamed to Office for Health Improvement and Disparities).
16. DHSC said that it has not yet finished dealing with the pandemic, so it is not able to confirm when formulation and development of this policy will be complete. To give an example, it explained that there is a great deal of research going on around 'long-covid', however, that research is incomplete and will inform the 'Healthier Lives Policy' to which the withheld information relates.
17. The exemption is interpreted broadly and will capture a wide variety of information. The Commissioner understands that the withheld information relates to early development of post-pandemic public health policy, however DHSC has given the example of ongoing research relating to 'long-covid' which continues to feed in to policy development in this area. Given the significant unknowns about the long term effects of the pandemic and the research that is ongoing the Commissioner

accepts that the withheld information falls under the definition of formulation and development of government policy. Section 35(1)(a) is therefore engaged.

18. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

## **Public interest test**

### **Public interest arguments in favour of disclosure**

19. DHSC recognised that public interest exists in ensuring that all taxpayer money is spent wisely, that value for money is being sought to deliver efficient and effective solutions to government objectives and that the process is transparent.
20. Due to the extensive social and economic impact of COVID-19, the Government's response continues to attract extensive Parliamentary, media and public scrutiny

### **Public interest arguments in favour of maintaining the exemption**

21. DHSC argued that as post-pandemic policy and the strategy for the new Office for Health Improvement and Disparities are still being developed, it is in the public interest to withhold this information in order to maintain a safe space for government policy formulation.
22. Formulation and conduct of future government policy could be damaged by the disclosure of information relating to how options have been evaluated in relation to the COVID-19 pandemic response.
23. DHSC takes the view that the section 35 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 effective conduct of relations with advisors and officials depends on maintaining trust and confidence. Relationships require the free and frank exchange of information between departments to formulate policy and provide advice.
24. Civil servants and subject experts need to be able to engage in discussion of all the policy options internally, to expose their merits and their possible implications as appropriate. Their candour in doing so will be affected by their assessment of whether the content of such discussion will be disclosed. Premature disclosure of information

protected under section 35 could prejudice good working relationships and the neutrality of civil servants

### **Balance of the public interest**

25. The Commissioner considers there is a significant public interest in transparency in terms of value for money but also in terms of understanding the decision making process behind measures put in place by government to protect post-pandemic public health.
26. The Commissioner also considers that there is a strong public interest in allowing Government to develop post-pandemic health policy as efficiently and effectively as possible, particularly as research and understanding of the pandemic and its after effects are continually evolving. In particular enabling candid and open discussion of finely balanced policy decisions. In this case, whilst the withheld information relates to early post-pandemic policy development, at the time the request was made in June 2021, the withheld information was recent and arguably the beginning of the recovery despite the pandemic being far from over. The Government's post-pandemic health policy remains under continued review and development due to the fast moving pace of research and understanding of Covid-19.
27. On balance in this case, the Commissioner considers that given the timing of the request, the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

### **Section 35(1)(d)**

28. The exemption at section 35(1)(d) covers information relating to the operation of ministerial private offices.
29. The Commissioner's guidance on this exemption explains that:

"All government ministers have their own private offices comprising a small team of civil servants. They form the bridge between the minister and their department. The private office's role is to regulate and streamline the ministerial workload and allow the minister to concentrate on attending meetings, reading documents, weighing facts and advice, and making policy decisions."
30. Section 35(5) defines 'ministerial private office':

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior

Minister, or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government.”

31. The Commissioner’s guidance explains that:

“The exemption covers information which ‘relates to’ the operation of the private office. This is generally interpreted broadly: see the section on ‘relates to’ above. However, this does not mean that all information with any link to a ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.

The upshot of this is that this exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.

The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling ministerial papers or prioritising issues, travel expenses, information about staffing, the minister’s diary, and any purely internal documents or discussions which have not been circulated outside the private office.”

32. In ICO decision notice FS50165511, the Commissioner considered emails discussing the ministerial response to a parliamentary question about polygamy and benefits. He accepted that two emails engaged section 35(1)(d), as they could be classified as a routine discussion relating to procedural issues. One was a brief routine email simply confirming the minister’s view on the latest draft. The second was a routine procedural email requesting a background note on a particular topic. However, he found that the exemption was not engaged for four other emails. These contained substantive discussion of the underlying issues, rather than relating to administrative matters.
33. Upon viewing the information DHSC has withheld under section 35(1)(d) FOIA, the Commissioner does not accept that it relates to the administration of a ministerial private office. It contains substantive discussions between two of the Secretary of State’s advisors relating to Covid vaccinations.
34. Furthermore DHSC has confirmed that the information being commented upon within the information being withheld under section 35(1)(d) has long since been published under the title, “How we got here: lessons from the UK vaccine rollout”. It is clear therefore to the Commissioner

that at least some of the withheld information has been circulated outside of the ministerial private office.

35. On this basis the Commissioner does not consider that section 35(1)(d) FOIA was correctly engaged by DHSC. As the Commissioner does not consider the exemption is engaged, it is not necessary to go on to consider the public interest test. The information withheld under this exemption should therefore be disclosed.

## Right of appeal

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36. 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)

37. 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.
38. 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.....**

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**