

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

### **Decision notice**

**Date:** 2 February 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 a full copy of the internal COVID-19 test and trace business case. DHSC refused to disclose the requested information under section 35(1)(a) FOIA.
2. The Commissioner's decision is that section 35(1)(a) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 15 February 2021 the complainant submitted a request to DHSC for the following information:  
"Dear Department of Health and Social Care, I wish to see a full copy of the internal test and trace business case referred to in the article below: [https://www.huffingtonpost.co.uk/entry/test-and-trace-prevent-second-lockdown-secret-document\\_uk\\_60224ea8c5b6f38d06e6b370](https://www.huffingtonpost.co.uk/entry/test-and-trace-prevent-second-lockdown-secret-document_uk_60224ea8c5b6f38d06e6b370) "
5. DHSC responded on 15 March 2021, it refused to disclose the requested information under section 35(1)(a) FOIA.
6. The complainant requested an internal review on 16 March 2021. On 24 March 2021 DHSC provided the result of the internal review, it upheld its position.

## Scope of the case

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether DHSC was correct to apply section 35(1)(a) FOIA to withhold the requested information.

## Reasons for decision

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### Section 35(1)(a)

9. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
10. 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.
11. 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.
12. 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.
13. DHSC explained that the business case requested (dated September 2020), sought approval for the initial funding requirement of £12.1billion for NHS Test and Trace (NHS TT) covering Financial Year 2020-21. The business case was produced in accordance with HM

Treasury, The Green Book, guidance on how to appraise and evaluate policies, projects, and programmes. The business case contains details of the Strategic, Economic, Commercial, Finance and Management Case for NHS TT as a central part of UK Government's COVID-19 Recovery Strategy.

14. The exemption is interpreted broadly and will capture a wide variety of information. The Commissioner understands that the requested business case was part of the process in developing the Government's policy on NHS TT. The business case is dated September 2020 and relates to the financial year 2020/21. It could be argued that decisions surrounding the NHS TT policy had been determined for this specific financial year when this request was made in February 2021. Whilst the Commissioner is cautious of 'seamless web' submissions regarding the formulation and development of government policy, the global COVID-19 pandemic was still very much ongoing and therefore the government policy on NHS TT remained under review and continued development to meet the needs of the evolving situation. The Commissioner therefore accepts that the information that is being withheld falls under the definition of development of government policy. Section 35(1)(a) is therefore engaged.
15. 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**

16. 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.
17. 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**

18. DHSC considers that formulation and conduct of future government policy could be damaged by the disclosure of information relating to how options have been evaluated and funding allocated in relation to

the COVID-19 pandemic response. 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.

19. It went on that the effective conduct of relations with other departments also depends on maintaining trust and confidence. Relationships require the free and frank exchange of information between departments to formulate policy and provide advice. 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.
20. It argued that premature disclosure of information protected under section 35 could prejudice good working relationships and the neutrality of civil servants. The internal business case approvals process is the safe space to enable civil servants to provide impartial and objective evaluation of options and advice.
21. Accounting Officers are accountable for ensuring that funding allocated is governed in accordance with HM Treasury guidance, *Managing Public Money*, and approvals are sought within delegated authority, including through Ministers and HM Treasury. Any further policy decisions taken by Ministers in relation to COVID-19 need to be tested objectively and public communication considered if continued measures at managing the pandemic response are to succeed. A decision to release the original business case requested could undermine the future policy and investment decisions requiring Ministerial decision-making in relation to the COVID-19 response and funding requirements for continued test, trace, and isolate activity.

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

22. The Commissioner considers there is a strong public interest in transparency of NHS TT in terms of value for money but also in terms of understanding the decision making process behind measures put in place by government to tackle the COVID-19 pandemic.
23. The Commissioner also considers that there is a strong public interest

in allowing Government to develop this policy as efficiently and effectively as possible in a continually evolving pandemic. In this case, whilst policy development of NHS TT was considered in September 2020 for the financial year 2020/21, at the time the request was made in February 2021, this had only fairly recently been analysed and related to the current financial year. The Government's policy on NHS TT has remained under continued review and development due to the fast moving pace of the global pandemic and, in particular at the time the request was made in February 2021, in the context of the following financial year for 2021/22. In this regard, the September 2020 business case remains relevant in terms of previous strategic thinking and evaluation which was likely to impact ongoing policy development in this area.

24. On balance in this case, the Commissioner considers that at the point up to which DHSC could consider the public interest test in this case, that being up to the time the internal review was carried out (24 March 2021), the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

## Right of appeal

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25. 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)

26. 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.
27. 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**