

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2023

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 agendas, minutes and related materials for meetings of a variety of Boards. The Department of Health and Social Care (DHSC) disclosed some information with redactions in accordance with section 40(2) (third party personal information) of FOIA.
2. The Commissioner's decision is that DHSC was entitled to rely on section 40(2) to redact personal information within the disclosed documents. However, the Commissioner finds that DHSC breached section 10(1) and section 17(1) of FOIA, as it failed to disclose the non-exempt information within the statutory 20 working days and to cite the correct exemptions respectively.
3. The Commissioner does not require DHSC to take any further steps.

Request and response

4. On 27 February 2023, the complainant wrote to DHSC to submit five separate requests for information:

Request 1

"For the Antivirals and Therapeutics Taskforce Strategy Board meeting of 19 January 2023 please provide a

- Copy of the agenda circulated before the meeting to attendees;
- Copy of the minutes of the meeting; and
- Copy of all action logs/decision logs circulated after the meeting."

Request 2

"Please provide details of the dates of all meetings of the Prophylaxis Oversight Group from 1 June 2022 to date.

Where any meetings have taken place please provide a

- Copy of the agenda circulated before the meeting to attendees;
- Copy of the minutes of the meeting; and
- Copy of all action logs/decision logs circulated after the meeting."

Request 3

"Please provide the dates of all meetings of the Antivirals and Therapeutics Taskforce Engagement Board after 20 July 2022 to date

Where any meetings have taken place please provide a

- Copy of the agenda circulated before the meeting to attendees;
- Copy of the minutes of the meeting; and
- Copy of all action logs/decision logs circulated after the meeting."

Request 4

"Please provide the dates of all meetings of the Therapeutics Clinical Review Panel from 1 June 2022 to date.

Where any meetings have taken place please provide a

- Copy of the agenda circulated before the meeting to attendees;
- Copy of the minutes of the meeting; and
- Copy of all action logs/decision logs circulated after the meeting."

Request 5

"For the Antivirals and Therapeutics Taskforce Programme Board meeting of 2 February 2023 please provide a

- Copy of the agenda circulated before the meeting to attendees;
- Copy of the minutes of the meeting; and

- Copy of all action logs/decision logs circulated after the meeting.”
- 5. DHSC responded on 24 March 2023. It provided an amalgamated response for all five requests, and cited section 12(1) (cost of compliance exceeds the appropriate limit) of FOIA to refuse them.
- 6. Following an internal review DHSC wrote to the complainant on 13 April 2023. It maintained its reliance on section 12(1) of FOIA to refuse to comply with the requests.

Scope of the case

- 7. The complainant contacted the Commissioner on 9 May 2023 to complain about the way their request for information had been handled.
- 8. During the course of the Commissioner’s investigation DHSC revisited its handling of the five requests and found that it had incorrectly applied section 12(1) of FOIA. DHSC confirmed that it held no information for requests 2 and 3 as no meetings took place within the timeframe identified within the request.
- 9. DHSC confirmed that it held the information for the meetings identified within request 1 and request 5. It also confirmed that one meeting had taken place within the timeframe set out in request 4, on 31 January 2023, for which it also held the information. DHSC went on to disclose the information for all three meetings, albeit with redactions in accordance with section 35(1)(a) (the formulation or development of government policy) and section 40(2) (third party personal information).
- 10. The complainant accepted DHSC’s revised response to request 4, as well as accepting the redactions in accordance with section 35(1)(a) in the responses to requests 1 and 5. However, they remained dissatisfied with the redactions in accordance with section 40(2) in the responses to requests 1 and 5.
- 11. The Commissioner considers that the scope of his investigation is to determine if DHSC was entitled to rely on section 40(2) of FOIA to redact some of the third party personal information within the information disclosed in response to request 1 and request 5.

Reasons for decision

Section 40 – personal information

12. 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.
13. 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').
14. 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.
15. 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?

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

"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living individual and that the person must be identifiable.
18. 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.
19. 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.

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

20. In the circumstances of this case, the information redacted in accordance with section 40(2) of FOIA is the names of various individuals, which clearly is information that both relates to and identifies those concerned. The redacted information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. DHSC explained that it redacted the names of some officials in attendance at the meetings but not others, based on level of seniority. It further explained that it follows the current Cabinet Office guidance: officials below the grade of Deputy Director (SCS 1) should usually have their names withheld. This is the standard that DHSC has adhered to consistently for a number of years, however it considers each name on a case by case basis.
22. DHSC explained that the gap in expectation and responsibility between a Grade 6 (the grade directly below Deputy Director) and a Deputy Director is wider than between any other two adjacent grades. Typically, Deputy Directors hold responsibility for decision making and clearances. This means that the person DHSC would expect to be accountable for actions in the relevant areas would be the Deputy Director. This is because even where a more junior official attends a meeting on their behalf, any final reports, decisions and clearances would always require a Deputy Director or above's input before being followed through.
23. DHSC went on to detail that staff who are below Deputy Director level hold the expectation that their name would not typically be disclosed. It considers it reasonable that staff members who do not hold powers such as clearing and final decision making would not expect their name to be disclosed, particularly in situations where the relevant senior member of staff's name has already been made available.
24. During the Commissioner's investigation, he challenged DHSC on some of the redactions as the roles of those individuals appeared to be of a sufficient level of seniority or responsibility. Most obviously, for example, the redaction of the name of an individual deputising at a meeting for the Deputy Chief Medical Officer (DCMO). The DCMO role clearly carries a high weight and expectation of transparency and accountability, therefore the Commissioner questioned why an individual stepping in to deputise for such a senior role should not adopt the same weight and expectation. DHSC confirmed that whilst the minutes of the meeting describe the individual as 'deputising', this is not a true reflection of their function at the meeting. The individual was in attendance solely to listen and take notes back to the DCMO. They did not have the authority to make any decisions or take any actions from the meeting on behalf of the DCMO, therefore they are not held to the DCMO's level of transparency and accountability.

25. The fact that information constitutes the personal data of identifiable living individuals 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.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. 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”.

28. In the case of a 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.
29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

30. 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.

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

31. 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(s).
32. 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

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
34. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. DHSC accepts that there is a general legitimate interest in the disclosure of the names of staff members who attended and took actions from strategic and programme board meetings, for the purpose of transparency and accountability.

Is disclosure necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
37. In this case the Commissioner is satisfied that information already disclosed meets the legitimate interest – i.e. the names of officials who have the authority for decision making and clearances, and are therefore the individuals to be held accountable for such actions.

38. The Commissioner is therefore satisfied that it is not necessary to disclose the names of more junior officials where the name of a senior official who will ultimately be responsible for signing off their work has already been disclosed.
39. As disclosure is not necessary, there is no lawful basis for the disclosure of the redacted names. Disclosure would be unlawful and would therefore breach the first DP principle. The Commissioner concludes that DHSC was entitled to rely on section 40(2) of FOIA to redact the names of junior officials within the disclosed information.

Procedural matters

40. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) of FOIA promptly and in any event not later than the twentieth working day following the date of receipt.
41. DHSC did not comply with the request by disclosing the non-exempt information until it was asked to reconsider its handling of the request by the Commissioner, approximately five months after receiving the request, therefore it breached section 10(1).
42. Section 17(1) of FOIA provides that a public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
43. DHSC did not provide a valid refusal notice citing the correct exemptions for the redacted information until approximately 5 months after receiving the request, therefore it breached section 17(1).

Right of appeal

44. 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

45. 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.
46. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF