

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 May 2024

Public Authority: Department for Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to the Department of Health and Social Care's (DHSC) discharge of its responsibilities under the Equality Act 2010 pertaining to the determination of central government funding available to social services authorities, as well as information relating to the process of analysis and the process of assessment of the overall sufficiency of adult social care funding.
2. The Commissioner's decision is that DHSC was correct to rely on section 41(1) and 21 of FOIA to withhold the evidential material used in its assessment of funding and overall sufficiency.
3. The Commissioner also finds that section 35(1)(a) is engaged, however, the public interest lies in favour of disclosing the information.
4. The Commissioner requires DHSC to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information it withheld under section 35(1)(a).
5. The public authority must take these steps within 30 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 the Act and may be dealt with as a contempt of court.

Request and response

6. By way of background, the Commissioner understands that the complainant submitted a previous request to DHSC on 26 September 2022 relating to the determination of central government funding available to social services authorities. It specifically requested information provided to His Majesty's Treasury (HMT) in connection with the 2020 Spending Review (SR). In its response to the complainant, DHSC stated that it provided information to the Department for Levelling Up, Housing and Communities (DLUHC) which was then passed on to HMT. However, information provided by HMT in response to an information request suggested that equalities information was directly requested from DHSC. The complainant therefore submitted a further request which forms the basis for the current case.
7. The Commissioner is also aware that the current case relates to his previous decision notices IC-232828-R1B2 relating to the complainant's request to DLUHC and IC-185755-G3L6 relating to their request to HMT.
8. On 15 May 2023, the complainant made an information request to DHSC. The complainant's full request is contained in the Annex attached to this notice.
9. The Commissioner has noted that the complainant's request falls in two parts namely:
 - Part one which relates to the information which DHSC sent to HMT relating to the discharge of its responsibilities under the Equality Act pertaining to the impact it expected to see if the SR funding outcome was insufficient to cover the spending pressures it assessed local authorities were facing in fulfilling their existing Care Act duties.
 - Part two which relates to the process of analysis and the process of assessment of funding for adult social care described by the former Junior Minister for Equalities in her June 2022 letter to the Chairman of DLUHC.
10. DHSC responded on 8 June 2023 and provided some clarification on the equalities information falling under part one of the request. It explained that it provided HMT with information, beyond the scope of the complainant's original request and that the information it had provided to the complainant had also been shared with DLUHC. It also confirmed that it held information relating to part two of the request but refused to provide this citing section 35(1)(a) of FOIA. In relation to the evidential material used in its analysis, DHSC provided what was already in the public domain in the form of hyper-links.

11. The complainant contacted DHSC on 3 August 2023 and challenged its response to the equalities information, requesting disclosure of the information DHSC provided to HMT in relation to the 2020 SR. The complainant contended that even though the information provided to HMT was about new policy proposals or reforms, they did not consider it to fall outside the scope of their original request.
12. The complainant was of the view that, given its role as the lead policy department responsible for Adult Social Care, it seemed inconceivable that DHSC would not have provided to DLUHC or HMT its assessment of the spending pressures faced by local authorities in fulfilling their Care Act duties. For this reason, the complainant requested that DHSC provided the following:
 - 2.1 Please confirm whether information about this assessment and/or any part of its content was provided to the Treasury for the purpose of the SR 2020 and, if so, confirm the date this was provided and provide a copy.
 - 2.2 Please confirm whether information about this assessment and/or any part of its content was provided to DLUHC for the purpose of the 2020 SR and, if so, provide the date this was provided and provide a copy.
 - 2.3 Please provide a copy of the full assessment.
13. They also challenged DHSC's decision to withhold information relating to the process of analysis and the assessment of the overall sufficiency of adult social care funding on the basis of section 35(1)(a) of FOIA. The complainant requested that DHSC provide a copy of the Assessment of Sufficiency and any evidence that was taken into account in that assessment.
14. On 23 September 2023, DHSC completed an internal review. It conceded that some of the information provided to HMT should have been considered as being within the scope of the original request. However, DHSC considered the information to be exempt from disclosure under section 35(1)(a) of FOIA as it related to live policy development.
15. In relation to the questions posed at 2.1 to 2.3 above, DHSC treated it as a new request as it did not consider it to form part of the complainant's request of 15 May 2023. Although DHSC confirmed that information about the assessment was provided to HMT on 24 September 2020, it refused to disclose it by virtue of section 35(1)(a) of FOIA. The complainant disagrees with DHSC's decision to treat this as a new request. They contend that an assessment of spending pressures facing local authorities would be relevant equalities information given the impact on people with disability and older people.

16. The internal review also determined that the process of analysis undertaken by DHSC, being the overall sufficiency of adult social care funding, was exempt from disclosure on the basis of section 35(1)(a) of FOIA.
17. In relation to the evidential material that was taken into account in the "most recent analysis" undertaken in March 2023, it relied on section 41 to withhold the extracts of Skills for Care's Adult Social Care Workforce Data Set and section 21 for the Electronic Market reports, specifically, the Care Homes for Older People UK Market Report.

Scope of the case

18. The complainant contacted the Commissioner on 9 November 2023 to complain about the way their request for information had been handled.
19. It should be noted that the Commissioner's role is limited to considering the application of any exemptions (including the balance of the public interest test) to the point at which the request was submitted (or at the latest, the time for compliance with the request, i.e. 20 working days after it was submitted). Therefore, the scope of the Commissioner's investigation is to determine the circumstances as they existed at the time of the request.

Reasons for decision

Section 35(1)(a)-formulation and development of government policy

20. Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy"

21. Section 35(2) specifically deals with statistical information and states that:

'(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy'

22. Section 35 is a class-based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
23. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
24. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing, or recording the effects of existing policy.
25. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the precise context and timing of the information in question.
26. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.

Spending review 2020 equalities information

27. DHSC explained that the equalities information returned to HMT during the 2020 SR relates to prospective policies that it was seeking funding for, in what was originally intended to be a three-year SR, covering the financial years 2021-22, 2022-23, and 2023-24, some of which it says, has remained in development in the current SR. It states that the information submitted to HMT as part of the 2020 SR was eventually a one-year settlement covering the financial year 2021/2022. It says that due to the initial intention for a multi-year spending settlement some of the content relates to policies which were intended to be rolled out over a longer timeframe and are still being developed by DHSC.
28. It maintains that the equalities information in scope relates to 2023/24 financial year for which policy formulation was still ongoing at the time of the complainant's request. DHSC states that the equalities information relates to policy bids which were not funded but remained in development and could be bid for again in future SRs.

Assessment of the sufficiency of funding

29. DHSC explained that its analysis and assessments on sufficiency of funding inform live decision-making about whether additional funding should be provided to local government to meet cost pressures in adult social care and more widely. It states that Ministers make in-year decisions about funding sufficiency and funding announcements outside of SRs, based on the most up to date assessments and evidence.
30. By way of an example, DHSC explained that up to £7.5 billion was announced to support adult social care and discharged at the 2022 Autumn statement. It says that in July 2023, the government made available £570 million Market Sustainability and Improvement Workforce Fund to improve and increase adult social care provision with particular focus on workforce pay. It added that the government also made a decision in January 2024 to provide an additional £500 million to councils to help fund pressures in adult and children's social care. It argued that the decision was taken following advice and assessments provided by government departments, of the sufficiency of funding for local government.
31. DHSC says that while the complainant requested the most recent analysis and assessment of sufficiency of adult social care funding, it argued that it would always be related to live policy and current assessments will contribute to policy development over the medium term into the next SR period.
32. DHSC argued that ministers must be able to have constructive negotiation and reach a collective agreement with other departments about how to meet current adult social care pressures and pressures on local government. It maintains that there is a high risk that future decision making will become significantly less well informed if the analysis and assessment underpinning those discussions was in the public domain. DHSC contends that decisions based on the most recent assessment of the sufficiency of funding at the time of the request were still ongoing.
33. In its submissions, DHSC provided additional information together with the withheld information which the Commissioner has considered but has not reproduced in this decision notice.

The Commissioner's Position

34. The Commissioner understands that there is no dispute between the two parties over the withheld information relating to policy making about the 2020 SR. The Commissioner agrees that the information clearly relates to the formulation or development of policy making in terms of that SR. On this basis alone the Commissioner is therefore satisfied that the

withheld information falls within the scope of the exemption contained at section 35(1)(a) of FOIA.

35. However, the Commissioner appreciates that there is a fundamental disagreement between the parties as to whether the information also relates to the formulation and/or development of policy in relation to future spending decisions, namely policy making concerning spending for the financial year 2023/24.
36. In relation to this point the Commissioner has considered both parties' submissions carefully, alongside the content of the withheld information. The Commissioner has taken into consideration that the withheld information contains predicted spending data for four financial years from 2020/21 to 2023/24 along with narrative analysis that addresses matters beyond the 2020 SR. The Commissioner has also considered DHSC's position that the withheld information in scope relates to the 2023/24 financial year for which policy formulation was still ongoing at the time of the request. Therefore, the Commissioner accepts that future data for SRs beyond 2020 were submitted by DHSC to HMT. He also accepts that the information in question still relates to the formulation and development of policy relating to the financial planning for the year 2023/24.

Public interest test

37. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the information

38. In regard to the information submitted by DHSC to HMT for the 2020 SR, the complainant explained that a Spending Review makes decisions about departmental funding allocations on a financial year basis. They added that compliance with its responsibilities under the Equality Act would have required DHSC to differentiate the material in the return by financial year so that the impact of the annual allocations could be isolated and identified including the annual allocation for the 2021/22 financial year. As such the complainant argued that they do not see how an assessment of spending pressures faced by local authorities in the 2021/22 financial year would be relevant to policy making at the time of their request as they contend that the assessment would have become outdated in light of the 2021 SR, the 2022 autumn statement and the 2023 spring budget.

39. In relation to the analysis and the assessment of sufficiency the complainant argues that DHSC did not provide any explanation in its initial response or the internal review, why it claimed the information relates to live policy. However, they argued that the basis for an analysis or assessment of sufficiency is to consider the sufficiency of funding in light of a completed fiscal event, in this case, the spring budget 2023 which involves budgeting for the financial year 2023/24.
40. The complainant highlighted the Commissioner's section 35 guidance¹ noting that:

"The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request will therefore be an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008): "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public".

"Even if the policy in question is finalised, a department might argue that disclosure would affect other policy debates. The weight of these arguments will depend on the circumstances. A department might still need a safe space for other ongoing policy debates if they are so similar or related, that disclosure of one is likely to interfere with the other. Chilling effect arguments may also carry more weight if a department can point to a specific policy debate and explain why it is particularly likely to be affected. However, generic chilling effect arguments about unspecified future policy debates are unlikely to be convincing, especially if the information in question is not particularly recent."

41. In response to DHSC's argument that disclosure of the information would erode the safe space in which policy officials and ministers are able to reach policy decisions, the complainant referred to the Tribunal case of *Davies v IC and the Cabinet Office (GIA)* [2019] UKUT 185 (AAC)², 11 June 2019 in which the Upper Tribunal stated:

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#chillingeffect>

² [Davies v The Information Commissioner & Anor \(GIA\) \(Information rights - Freedom of information - qualified exemptions, Information rights - Information rights: practice and procedure\) \[2019\] UKUT 185 \(AAC\) \(11 June 2019\) \(bailii.org\)](#)

"There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution."

42. They also referred to the Commissioner's section 35 guidance where it says:

"... civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the potential for future disclosure could actually lead to better quality advice."

43. The complainant disagreed that, in the context of the inter-departmental nature of SR decision-making, that ministers would feel less able to participate in free, frank, and objective discussions. Instead, they argue that the disclosure of the information would improve the quality of the decision making process in such a context.
44. The complainant contends that in the absence of the risk of disclosure, inter-departmental decision making is more likely to descend into trade-offs which do not have proper regard to the evidence, including the impact on those who should derive protection from the Equality Act. They emphasise that the possibility of a future disclosure will act as an important counter-pressure to enhance the overall quality of equalities considerations in decision making, as ministers would be aware of their decisions and debates potentially reaching the public domain.
45. The complainant argued that DHSC had failed to take sufficient account of the public interest in transparency and accountability in budgetary decision making. They also emphasised that the vital nature of transparency in central government budgetary decision making was recognised by the OECD, of which the UK is a member. The complainant noted that in 2015 the full Council of the OECD adopted the "Recommendation of the Council on Budgetary Governance"³ and introduces its recommendation as follows:

"The budget is a central policy document of government, showing how annual and multi-annual objectives will be prioritised and achieved. Alongside other instruments of government policy – such as laws, regulation, and joint action with other actors in society – the budget aims to turn plans and aspirations into reality. More than

³ <https://www.oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf>

this, the budget is a contract between citizens and state, showing how resources are raised and allocated for the delivery of public services. The experience of recent years has underlined how good budgeting is supported by, and in turn supports, the various pillars of modern public governance: transparency, integrity, openness, participation, accountability, and a strategic approach to planning and achieving national objectives. Budgeting is thus an essential keystone in the architecture of trust between states and their citizens.”

46. In its internal review response, DHSC argued that there is a public interest in the work of government departments being transparent and open to scrutiny to increase diligence. In so doing it commissions the London School of Economics Care Policy and Evaluation Centre (CPEC) to produce long-term demand projections for adult social care and ensures these are published. The complainant argued that the release of demand projections into the public domain does not enhance transparency of decision making relating to the funding made available to adult social care. They stated that the fact that DHSC commissioned and made available some of the evidential material does not explain to the public how it reached its funding decision on adult social care.
47. The complainant further argued that given the serious growing concerns about the adequacy of funding for adult social care, transparency about how funding decisions are reached is extremely important to maintain public trust and enhance quality. The complainant emphasised that the allocation of such funding was at a time when there was a serious concern about the funding of social care and its implications for fulfilling statutory obligations. The complainant noted that there had been serious and growing concerns about the adequacy of funding for adult social care for some time with surveys conducted by the Association of Directors of Adult Social Services showing that its members increasingly lacked confidence that budgets would allow them to meet eligible needs. Consequently, in the complainant’s view the public interest in disclosure of the information was particularly strong.
48. The complainant also noted other concerns surrounding transparency and accountability which is reflected in the inquiry by the Levelling Up, Housing and Communities Select Committee which investigated the adequacy and the long-term funding of adult social care. The complainant argued that, of significance to this case is the request by the Select Committee Chair, who requested from the former Director of Local Government, information about how departments assess funding.
49. They argued that the refusal to disclose the process of assessment of overall sufficiency will further undermine public trust in government which is already a matter of serious concern. The complainant argues that this will raise serious questions in the public’s mind of why the

government will wish to withhold its assessment of sufficiency of adult social care funding if it has full confidence in that assessment. They emphasise that the refusal to disclose the information requested means that the government's assessment of sufficiency remains immune from independent evaluation which could provide reassurance to the public and improve public trust in government.

50. The complainant argued the importance of DHSC's responsibility under the Equality Act, noting that funding decisions impact on the resources available to fund the provision of care and support to meet the eligible needs of disabled adults. They emphasise that the refusal to provide the information relating to part 1 of the request prevents DHSC from meeting those obligations and fundamentally undermines accountability and public trust in its lawful performance.
51. The complainant noted that whilst the internal review acknowledges that disclosure can contribute to increasing public understanding, it fails to acknowledge that this is not simply a matter of an improvement in transparency and accountability but can also lead to an improvement of the quality of decisions made. The complainant has also argued that it is inconceivable that the information requested does not include factual information which falls within the scope of section 35(4). Section 35(4) specifically acknowledges that there is particular public interest in the disclosure of any factual information used to provide an informed background to government decisions. They argued that DHSC has not given proper weight to the public interest in the disclosure of such information as required by section 35(4). The complainant concludes that the public interest in disclosure of the information far outweighs any chilling effects that disclosure might have on future policy discussion.

Public interest in favour of maintaining the exemption

52. In support of its position, DHSC emphasised the importance of protecting the government's ability to discuss and develop policies and to reach well-informed conclusions. It noted that the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. Therefore, it argued that there is strong public interest in protecting information where disclosure would be likely to have a detrimental impact on the ongoing development of policy.
53. DHSC maintains that there is also a strong public interest in protecting against encroachment on the ability of ministers and/or officials to formulate and develop policy options freely and frankly. It argued that the information held relates to an area of live policy development and disclosure would erode the safe space in which policy officials and ministers are able to reach policy decisions away from external

interference and distraction. It says that this would be likely to prevent officials from conducting rigorous and candid assessments of the options available to them, risk closing off discussions and constrain ongoing discussions about local government funding and finance policy.

54. DHSC argued that disclosure of the requested information would also make ministers feel less able to participate in free, frank, and objective discussions regarding any information and advice put before them. DHSC added that its recent analysis and assessment of funding of sufficiency will form part of the basis for decision making about reprioritisation of funding for the current and next financial year.
55. DHSC further explained that adult social care services are funded through Local Government Finance Settlement (LGFS). It says that councils have other statutory duties which they are funded to provide as well as adult social care services. It says that a large proportion of the money they spend comes from council tax and business rates and is not ring-fenced for particular purposes. It therefore argued that the sufficiency of adult social care funding must be assessed within the broader context of local government finance and that to disclose its analysis in isolation, would undermine the ability of DLUHC, who are responsible for the assessments of local government funding, and the LGFS process to weigh up evidence from multiple sources and make decisions.
56. DHSC recognises a strong public interest in having transparent decision-making processes relating to funding and has taken steps to ensure that data publications and information such as CPEC's modelling are in the public domain. However, it maintains that a safe space is required in order for it to produce, update and share its own robust and honest internal analysis with other government departments as part of live policy discussions and decision-making about local government funding.
57. DHSC provided additional information to the Commissioner which he has considered but is not appropriate to be reproduced in this decision notice.

Balance of the PIT

58. The Commissioner accepts that significant weight should be given to safe space arguments - i.e. the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, the Commissioner accepts that policy making in relation to the DHSC budget for 2023/24 was ongoing at the time of the request. This is on the basis that although the budget had been set, decisions about its reprioritisation

and consideration in subsequent SRs remained ongoing and involved the withheld information (amongst other data and evidence).

59. Furthermore, having considered the content and context of the withheld information, the Commissioner accepts that it has the potential to encroach on the safe space of this policy making. The Commissioner accepts that it contains a direct assessment of the impact of funding decisions on equality issues.
60. The Commissioner appreciates that decisions around how DHSC funding is allocated, including the scope of any reprioritisation or consideration in subsequent SRs, is a matter of considerable interest to a significant range of stakeholders and one that involves balancing a range of competing demands. The Commissioner therefore accepts that disclosure of the information at the time of the request could have led to the government having to defend or to justify particular policy decisions regarding the budgeting for the financial year 2023/24. In turn, the Commissioner accepts that this would encroach upon the safe space that ministers and officials need for such ongoing policy making and as a result the safe space arguments deserve considerable weight.
61. With regard to attributing weight to the chilling effect arguments, as a general approach, and as referred to by the complainant, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
62. In the circumstances of this case, the Commissioner accepts that disclosure of the withheld information potentially risks the candour of such equalities assessments if officials drafting them are aware they may be disclosed in the future. Although officials are expected to be robust and impartial when giving advice, the Commissioner accepts that disclosure could nevertheless affect the tone or manner in which some information is presented. For the reasons noted above, the Commissioner accepts the policy making is still live and ongoing and usually this would add further weight to the chilling effect arguments.
63. However, the Commissioner considers the impact on both the safe space and risk of a chilling effect is arguably lessened by the fact that the live

policy making at the time of the request would relate to equalities information for the 2023/24 budgets rather than live policy making in relation to the 2020 SR itself. That is to say, disclosure at the point of the request would not have interfered with the policy making process for which the information was initially submitted.

64. In relation to the public interest arguments the Commissioner acknowledges that funding for healthcare and adult social care spending is an area of significant public interest. In the Commissioner's view disclosure of the withheld information would provide a direct insight into how DHSC took into account the impact of its spending on protected groups as part of the 2020 SR. Furthermore, given its ongoing use in the policy making process it would also provide some insight into the information being considered by ministers and officials in relation to the decisions about the reprioritisation of 2023/24 budgets. Given the significant public interest in such issues, the Commissioner considers that this factor, attracts particular and significant weight. In attributing such weight, the Commissioner has also taken into account the evidence put forward by the complainant regarding the concerns around adult social care funding.
65. In reaching this decision the Commissioner broadly shares the complainant's views about the information in the public domain which DHSC refers to. As such the Commissioner is not persuaded by DHSC's argument that publications by CPEC of the demand projections meets the public interest in transparency and accountability in relation to the requested information. Whilst some of it may provide information about the impact on equalities of the SRs 2020 and 2021, in the Commissioner's view it does not provide anywhere near the level of insight that disclosure of the withheld information would. As a result, in the Commissioner's opinion disclosure of the withheld information would add significantly to transparency and accountability around this issue.
66. The Commissioner finds merit in the complainant's argument that disclosure of the withheld information would enable the social care sector and those with care and support needs to meaningfully respond to current equalities information and suggest representations for its improvement that could improve the quality of decision making.
67. Finally, the Commissioner considers the public interest arguments to be evenly balanced. However, given the presumption in favour of disclosure, the Commissioner has found that the public interest in disclosing the information outweighs the public interest in maintaining the exemption. In reaching this conclusion the Commissioner has also taken into account the fact that, although he accepts that the policy making was still live at the point of the request, this was only in relation to the decisions regarding the 2023/24 budget, rather than the policy making in relation to the full 2020 SR.

Section 41(1)- information provided in confidence

68. Section 41(1) of FOIA states that:

‘(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.’

69. DHSC has relied on this exemption to withhold evidential material which it considered in the assessment of spending pressures and funding sufficiency.

70. For this exemption to be engaged the two criteria above have to be met.

71. DHSC has identified the third party from whom the information was obtained to be Skills for Care. It explained that Skills for Care are the strategic workforce development and planning body for adult social care in England ensuring social care has the right people, skills and support required to deliver the highest quality care and support. Therefore, the first condition is met.

72. It argued that Skills for Care ASC Workforce Data Set (ASC-WDS) has the necessary quality of confidence as the data set is a single comprehensive workforce dataset which provides in-depth information on the private, voluntary, and statutory adult social care workforce in England. It says that it is a very large, complex, and rich dataset that has a number of public access dashboards available on ASC-WDS website. It maintains that the information was communicated in circumstances importing an obligation of confidence.

73. In considering whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,
- whether an unauthorised use of the information would result in detriment to the confider.

74. DHSC argued that the information provided imports an obligation of confidence through a data sharing agreement between DHSC and Skills for Care. It says that this places a burden on DHSC to ensure that information shared under the agreement is not disclosed via FOIA due to the potential harm that may be caused to the commercial interest of individual social care providers. As such it undertook to only use the dataset for the purposes outlined within the agreement.
75. DHSC argued that the public interest in disclosure of the information does not override the competing public interest in maintaining the duty of confidence. It acknowledged the general public interest in transparency and accountability to further the public's understanding of the issues which public authorities deal with. However, it stated that the duty of confidence protects the private commercial interests of social care providers and therefore it does not consider that the public interest in transparency and accountability is sufficient to override the public interest in maintaining those interests.
76. It stated that the information may only be disclosed to third parties where disclosure is the overriding public interest. It argued that any breach of confidence would damage care providers' competitive position and their ability to compete. It maintained that the disclosure of information would assist competitors and also undermine care providers' future negotiations with Skills for Care and DHSC or negatively impact on care providers' relationship with those organisations.
77. DHSC argued that it relies on acquiring good quality information from organisations including Skills for Care. Therefore, it contends that a breach of confidence would negatively impact on its ability to procure the evidential material required to robustly model pressures on the system. It says that this would in turn have a detrimental impact on DHSC's ability to maintain an adequately funded care system, which is in the public interest. DHSC maintain that if the information is released social care providers may be discouraged from confiding information in future if they lack certainty that this will be respected.
78. The Commissioner considers that the withheld information in this instance will retain the necessary quality of confidence owed to social care providers as well as Skills for Care. The Commissioner has read a copy of the agreement between Skills for Care and DHSC and has given particular weight to the nature of information that is collected at establishment level. The Commissioner is satisfied that the information would reveal amongst other information, commercially sensitive data which is information importing an obligation of confidence.
79. With regard to the third element required to bring an action for a breach of confidence, the Commissioner also considers that there will be

detriment, not only to Skills for Care but to social care providers from whom information is collected for maintaining ASC-WDS datasets.

80. Section 41 of FOIA is an absolute exemption and is not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
81. The Commissioner is satisfied that disclosure of the requested information into the public domain would not be within the public interest. He considers there is greater public interest in the DHSC being able to maintain good relationship with Skills for Care or other social care providers and retaining trust by not revealing sensitive or confidential information.
82. The Commissioner is satisfied that the withheld evidential material meets the conditions under section 41(1) of FOIA. Therefore, DHSC was entitled to rely on this exemption to withhold the information.

Section 21- information accessible to applicant by other means

83. Section 21 of FOIA provides that information which is reasonably accessible by other means to the applicant is exempt information. This has been applied specifically to the Care Homes for Older People UK Market Report.
84. Section 21 is an absolute exemption which means that there is no requirement to carry out a public interest test if the requested information is exempt.
85. Unlike most exemptions, the circumstances of the applicant can be considered, as the information must be deemed readily accessible to the particular applicant. It is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.
86. DHSC confirmed that the information is available, albeit at a cost by application to LaingBuisson. It confirmed that the information is not available via a publication scheme, however the report can be purchased using a link provided by DHSC.
87. DHSC argued that it considered the information to be reasonably accessible to the complainant as they have been given details of the relevant organisation/website where the information can be accessed. It considered it would be reasonable to expect the complainant could obtain the information should they wish. It added that this is the usual

way to obtain a publication and should be straightforward for the applicant in their capacity of offering legal advice and support. It also confirmed that there is no legal obligation to make a copy of the requested information available to members of the public under other legislation.

88. The complainant has argued that upon accessing the hyperlink provided by DHSC, they found out that the website quotes a cost range of £1,495 to £3,695 for the report in question. They argue that this level of cost means that the information is not reasonably accessible to them.
89. The Commissioner has considered the information before him. He has used the same hyperlink provided by DHSC to access the LaingBuisson website. He notes that the minimum cost for a pdf version of the report is £1,295.00. Whilst the Commissioner has considered the cost involved in obtaining the report, he has also taken into consideration the complainant's circumstances.
90. The Commissioner notes although the complainant is acting on behalf of a charitable organisation, it receives financial support from a range of individuals and organisations. Therefore, he does not consider that the cost would be as prohibitive when incurred by the individual complainant.
91. Therefore, having considered the arguments presented it is the Commissioner's decision that DHSC was entitled to apply section 21 of FOIA to this part of the request.

Right of appeal

92. 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

93. 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.
94. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Esi Mensah
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

95. Complainant's request of 15 May 2023 to DHSC

"We are writing in respect of two matters:

1. First, we are seeking clarification of issues arising from your response to our previous request in our letter to you dated 26th September 2022 and your reply to us dated 24th October 2022 (Ref FOI-1419352), and the response to a similar request made to the Treasury. These requests concerned the discharge of responsibilities under section 149 of the Equality Act 2010 relating to the determination of central government funding available to social services authorities to use in fulfilling their responsibilities under the Care Act 2014.

2. Secondly, we are making a new request for information in connection with the process described by the then junior Minister for Equalities, the Rt Hon Kemi Badenoch MP, in her June 2022 letter to the Chairman of the Levelling Up, Housing and Communities Committee ("the Committee e"), which we set out in further detail below.

1. Equalities Information

Your letter to us of 24.10.2022 stated:

'There was no specific process, or processes, that DHSC had to follow to send information on central government funding available to social services direct to HM Treasury during Spending Review 2020. As part of Spending Review 2020, we sent equalities information to Ministry of Housing Communities and Local Government (MHCLG) to support their return on this matter to HM Treasury.'

You explained that the equalities information provided by DHSC to MHCLG was as follows, but you do not know whether this was passed on to the Treasury.

'Over half of current [adult social care] spend is on adults under 65. Better diagnostic and treatment of conditions mean that growing numbers of working age adults are requiring support from adult social care services for much longer. Our population is also aging which is increasing the demand for adult social care. One in four people in the England will be aged 65 years or over by 2050. Furthermore, the number of people aged over 85 – the group more likely to need health and care services – is projected to rise even more rapidly, more than doubling from 1.4 to 3.2 million over the

same period. The majority of social care users are over 65 and all of them have conditions which limit their ability to perform activities of daily living without support. It is therefore inevitable that inadequate funding for adult social care will impact the provision and quality of care for some of the most vulnerable adults in society such as the elderly and frail as well as adults with physical and learning disabilities.'

We attach separate although related correspondence with HM Treasury dated 11.03.2022. In response to our request for 'details of the process or processes followed by the Treasury to gather equalities information from the Department of Health and Social Care for the purpose of discharging its obligations under section 149 of the Equalities Act 2010 in relation to the 2020 spending review', the Treasury said:

'At the 2020 Spending Review, Government departments were required to comply with their legal requirement to consider equalities for all financial decisions. To support decision-making, the Department for Health and Social Care were required to set out:

a) how the current pattern of spending affects groups with any of the protected characteristics, i.e. the equalities profile of the main areas of departmental spend.

b) any significant impacts for any of the protected groups of new spending proposals, including relevant opportunities for the positive promotion of equality or for the mitigation of potential negative impacts; and

c) high level assessments of the quality of the data sources underpinning the assessments, as well as the scope to improve data quality and detail any plans to do so.'

We note that your response of 24.10.2022 suggests that no equalities information was provided by DHSC direct to the Treasury or, possibly, even indirectly if that provided to MHCLG was not passed on. Furthermore, the material that was disclosed as having been provided to MHCLG did not address the Treasury's questions (a) – (c). Please would you clarify the following:

1. Did DHSC receive a request from the Treasury to provide equalities information in relation to the 2020 Spending Review and to address the questions (a) to (c)? If so, please provide a copy of the request and a copy of the response or responses given.
2. If no response was provided to questions (a) to (c), whether or not a request from the Treasury was received, please indicate whether or not any information was available at that time which

could have been used to provide a response to question (c), including any plans to improve data quality.

Levelling Up, Housing and Communities Committee – process described to assess overall sufficiency of adult social care funding

The Minister for Equalities wrote to Clive Betts MP on 17th June 2022 in his capacity as Chair of the Committee. This letter provided supplemental information to that given by the Minister in her oral evidence to the Committee. At page 2 she wrote:

*'For adult social care, the Department for Health, and Social Care (DHSC) provide a forecast using not only CPI and average earnings, but also accounts for the impact of the National Living Wage (NLW). DHSC collate qualitative information from discussions with local authorities and adult social care providers, and commission independent projections of the long-term demand on adult social care services in England. These projections are informed by demographic drivers of demand for social care, including population size, and disability prevalence in younger and older adults. DHSC then account for cost pressures, such as inflation, by combining these projections with the latest information on CPI, the NLW, and average earnings from the OBR to project both pay (c.70% of costs) and non-pay (c.30% of costs) unit cost drivers of care. **DHSC then shares this analysis with HMT and DLUHC to inform assessments of the overall sufficiency of adult social care funding.**'* [Emphasis added.]

In the following requests we will refer to the process of analysis undertaken by DHSC to which Ms Badenoch refers as the 'Analysis', and to the process of assessment of the overall sufficiency of adult social care funding as the 'Assessment of Sufficiency of ASC Funding'. Please would you provide the following information:

1. Please confirm the date of the most recent Analysis and the date of the most recent Assessment of Sufficiency of ASC Funding. Please provide copies of:
 - a) that Analysis.
 - b) the evidential material taken into account in that Analysis, and its source.
 - c) any other evidence that was taken into account in the Assessment of Sufficiency of ASC Funding informed by that Analysis.
 - d) the Assessment of Sufficiency of ASC Funding informed by that Analysis, and the conclusion on sufficiency reached.

2. Please confirm the frequency of the Assessment of Sufficiency of ASC Funding and the next date for this process to be undertaken.
3. Please confirm what criteria were applied to determine the overall sufficiency of adult social care funding in the last use of this process.
4. Please confirm whether the Health Foundation's September 2021 estimates of the additional funding that would be needed over and above projected local authority spending power for (1) stabilisation and (2) recovery of the adult social care system in each of the years 2021/22, 2022/23 and 2023/24 were taken into account for the purpose of any Assessment of Sufficiency of ASC Funding undertaken after that date. The relevant estimates are to be found at Slide 23 PowerPoint Presentation (health.org.uk)"