

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2019

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street

Westminster

London

SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested a document from the Department of Health and Social Care (DHSC) on the analysis of the impact of Brexit on the NHS which the complainant believed was the source of a leak in April 2017. The DHSC refused to either confirm or deny if this document was held by virtue of the exclusion at section 35(3) of the FOIA as to do so would reveal information on the development of formulation of government policy (section 35(1)(a)).
2. The Commissioner's decision is that the DHSC was correct to neither confirm nor deny if this information was held and the public interest in this case supports this position. The Commissioner therefore requires no steps to be taken by the DHSC.

Request and response

3. On 31 August 2017, the complainant wrote to the Department of Health and Social Care (DHSC) and requested information in the following terms:

"I am writing to request that you provide me with a copy of the document that analyses the impact of Brexit upon the National Health Service, that was subject to a leak in April.

Please can you also tell me whether this report was commissioned by the Department of Health or the Department for Exiting the EU?"

4. The DHSC responded on 26 October 2017. It refused to confirm or deny if the information was held by virtue of the exclusion from the provision to confirm or deny at section 35(3) of the FOIA.
5. Following an internal review the DHSC wrote to the complainant on 23 March 2018 upholding its decision to neither confirm nor deny if the information was held on the basis of section 35(3).

Scope of the case

6. The complainant contacted the Commissioner on 29 May 2018 to complain about the way her request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the DHSC has correctly applied the exclusion from the duty to confirm or deny if information held at section 35(3) of the FOIA.

Reasons for decision

Section 35 – formulation or development of government policy

8. Section 35(1) provides 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,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.'

9. Section 35(3) provides that:

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'

10. A public authority's duty to confirm or deny whether it holds information requested by an applicant is imposed by section 1(1)(a) of the FOIA. A public authority may however exclude itself from complying with section 1(1)(a) on the basis of section 35(3).

11. In this case, the DHSC neither confirmed nor denied whether it held a document analysing the impact of Brexit on the NHS that was subject to a leak in April.
12. The Commissioner is satisfied that the requested information, if held, would relate to the formulation of government policy. The DHSC stated that its work on managing the impact of the UK leaving the EU was ongoing and therefore confirming or denying if the information was held would impact on the formulation of government policy.
13. The Commissioner notes that government policy can be broad in definition and will include government plans to achieve specific outcomes, from high-level objectives to detailed proposals. The purpose of the section 35 exemption is to protect the integrity of the policymaking process and to prevent disclosures which may undermine this process and result in less robust or well-considered policies.
14. The requested information, if held, would relate to the formulation of government policy in that it would be used by the DHSC to inform its Brexit planning. The request therefore falls within the scope of the exemptions at section 35(1)(a) and 35(3). The Commissioner therefore finds that the exemptions were correctly engaged.

The public interest

15. Having concluded that the exemption is engaged, it is necessary to go on to consider whether the public interest favours the maintenance of this exemption. In coming to this conclusion, the Commissioner has taken into account the factors cited by both the complainant and the public authority, as well as the general public interest in transparency.
16. As the request specifically asked the DHSC for a document that was allegedly leaked in April 2017; the position of the public authority is that confirming or denying if this information is held would act as confirmation as to whether the document leaked in the press was in fact a genuine document being used in the DHSC's Brexit planning. For the purposes of the Commissioner's analysis of the balance of the public interest, she accepts that confirmation or denial would have the result predicted by the DHSC.

Public interest arguments in favour of maintaining the duty to confirm or deny

17. The complainant has argued that Brexit impact studies should be disclosed in full rather than as summaries as not having the full detail

about assumptions behind modelling makes it impossible to scrutinise the studies properly.

18. The complainant has pointed to letters she has received which confirm that government departments have conducted analysis of over 50 sectors of the economy. However, the Secretary of State for Exiting the European Union (at the time Mr David Davis MP) stated on 7 November 2017¹ that *"there has been some misunderstanding about what this sectoral analysis actually is. It is not a series of 58 impact assessments."* It is this confusion over the evidence-base used by the government in its Brexit planning which adds to the public interest in the DHSC confirming if it holds the document requested.
19. The DHSC also acknowledges the public interest in promoting transparency and openness in the way public authorities operate through the release of information. The DHSC understands the need for transparency of discussions within government and in particular how it plans and implements its strategy for presentation of its policies.
20. Issues around the NHS and the UK's exit from the EU remain live and open to debate and scrutiny so there is a public interest in the DHSC confirming or denying if information related to this issue is held. The DHSC accepts the NHS remains at the forefront of the public consciousness and there is weight to be placed on the public interest in confirming or denying if the information is held.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

21. The DHSC argues the importance in policy making being informed by all relevant information and allowing Ministers to be able to consider all policy options. It considers that confirming if leaked material relating to a specific policy area is or is not held would not contribute materially to public understanding of the Government's policy in this area but it would impact on Minister's ability to develop policy on the potential impact of Brexit on the NHS.
22. The DHSC states it is the policy of the Government not to acknowledge that leaked information is in the public domain as this would indirectly confirm the authenticity of leaked material. If the department were to confirm that the requested information was held the authenticity of the

¹ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-11-07/HCWS231/>

leak would be confirmed. If this were the case then the individual(s) from whom the leak originated would be able to substantiate the leaked documents. This would encourage them or other individuals to undertake further breaches of departmental security.

23. Conversely, the DHSC argues that if it were to confirm the requested information was not held it would have the effect of inadvertently confirming the leaked document was not genuine. This would effectively prejudice the well-established policy with regard to alleged leaks. If the DHSC were to confirm in future instances that information was not held, it could be inferred that documents that were the subject of neither confirm nor deny responses in the future were in fact genuine.

Balance of the public interest arguments

24. There is a clear public interest in securing for the government, confidential space within which it can evaluate matters internally with candour and free from the pressures of public political debate.
25. The Commissioner notes that the Government is providing regular updates on the Brexit process² and this does somewhat diminish the public interest in knowing specifically if the leaked document is in fact the actual document being used by the DHSC as part of its planning.
26. The Commissioner stresses that, regardless of the arguments put forward, she can only consider where the balance of the public interest lies in the public authority *confirming or denying* whether it holds the leaked document. In other words, does the balance of the public interest weigh in favour of, or against confirming or denying whether the public authority holds any information within the scope of the request? The Commissioner cannot therefore consider the public interest in favour of, or against *disclosure* in this case given that the public authority has not confirmed that it holds the requested information.
27. The Brexit process is clearly a matter of great significance with huge ramifications for all parts of the UK. It is important the public is kept well informed of the progress being made and the current position of the Government. Knowing if the leaked document is the genuine document being considered by the DHSC and Government would be in the public interest as it would allow members of the public to be able to better scrutinise the analysis and impact assessments done on the effect of Brexit on the NHS. The Commissioner does not agree that the

² <https://www.gov.uk/government/brexit>

information already made available weakens the public interest in confirming whether or not the requested information is held.

28. The Commissioner agrees that the public interest arguments of transparency, openness and accountability are strong arguments in this case and she affords them considerable weight. She also accepts that confirming or denying the authenticity of the document may encourage further debate about either security within the public authority itself if the 'leaked document' were found to be genuine, or accountability of the media if it were found to be false.
29. That being said, there is a strong public interest in the government being able to have a safe space to deliberate, free from external pressure on how to use the analysis it has gathered to plan for the future.
30. The Commissioner understands the public authority's, and the Government's, policy that it does not comment on alleged leaks and whether or not they are genuine. She accepts this is a stance that needs to be maintained rigorously if it is to be effective but she is also aware that adopting a position of applying a 'blanket' exemption to the duty to neither confirm nor deny is not permissible under the FOIA.
31. However in this case, the Commissioner notes that the leak was first reported on 6 April 2017 and the article that followed disclosed some of the information from the alleged leak but the document itself was not made public. The Commissioner considers this to be significant as confirming or denying the existence of the document that provided the basis for this article would authenticate the figures and modelling and this adds to the impact that would be caused to the DHSC's safe space needed to consider all policy options on such a vital issue.
32. The timing of the request is also of importance; coming at a time when the government and its departments were still analysing their positions and needed a safe space to have discussions based on all available information to make clear plans for moving forwards.
33. If the public authority were to confirm that it holds information, thereby confirming the authenticity of the leaked document, then the person or persons who had leaked the information may be encouraged to leak further documents. The organisation which had revealed the document would be able to confirm its authenticity and may seek to encourage the same source to leak further documents. This could also encourage other members of staff to undertake similar activities if they believed that the public authority may well confirm the validity of divulged information.

34. Conversely, by denying that it holds any information the public authority would be confirming that the leaked document was in fact not genuine. Whilst this may appear to be a 'positive' result, it would have the effect of creating the assumption that 'false documents' will be confirmed by the public authority which could set a harmful precedent thereby undermining its general policy to not comment on alleged leaks.
35. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure in this case, with significant emphasis being placed on the timing of the request. Whilst she accepts that there are arguments in support of confirming or denying whether the document about which information is sought is 'genuine', she finds the public authority's position more persuasive in that, although it obviously cannot be proven, it is more probable than not that prejudice would occur. The complaint is not upheld.

Right of appeal

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@hmcts.gsi.gov.uk

Website: 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

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