

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2020

Public Authority: Department for Health and Social Care

Address: 39 Victoria Street

London

SW1H 0EU

Decision (including any steps ordered)

1. The complainant has made a two part request for information about draft regulations relating to pharmacists. The Department for Health and Social Care (DHSC) refused the information under section 35(1)(a) of the FOIA – information relating to the formulation or development of government policy. During the course of the Commissioner’s investigation the DHSC also applied section 36 – prejudice to the conduct of public affairs, to a limited amount of the information. It later withdrew its reliance on this exemption. However it also stated that other information was being withheld under section 21 – accessible to the applicant by other means and section 40(2) – personal information.
2. The Commissioner’s decision is that the DHSC was entitled to rely on section 35(1)(a) in respect of only some of the information to which it was applied. The DHSC also breached section 10 of the FOIA by failing to provide the information it tried to apply section 36 to, only to later withdraw its reliance on that exemption. However the DHSC was entitled to rely on section 21 to withhold the information to which that exemption had been applied, but by failing to inform the complainant of its application within the statutory time for doing so, the DHSC breached section 17(1). Finally the DHSC is entitled to withhold one name from one document, the agenda of the meeting of 7 April 2016. But by failing to disclose the rest of the information from the agenda it has breached section 1 – the duty to communicate information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose the information which the DHSC has withheld under section 35(1)(a) but in respect to which the Commissioner has found the exemption cannot be relied on. The Commissioner has produced a confidential annex to this notice which identifies the document/s captured by the second part of the request which can be withheld under section 35(1)(a). This confidential annex will be made available exclusively to the DHSC.
 - If it has not done so already, the DHSC is required to provide the information which at one point it applied section 36 to.
 - Disclose the information from the agenda apart from the one name that which can be withheld under section 40(2). This name is identified in the confidential annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. Following the refusal of a previous request under section 12, the complainant made a refined request to the DHSC on 18 April 2019. That request was for information of the following description:
- “ Under the Freedom of Information Act 2000, please provide me with the following information:
1. Copies of all responses to the Department of Health and Social Care’s Consultation on draft Orders under section 60 of the Health Act 1999: Pharmacy (Preparation and Dispensing Errors – Hospitals and Other Pharmacy Services) Order 2018; and Pharmacy (Responsible Pharmacists, Superintendent Pharmacists etc.) Order 2018 (“Pharmacy Legislation on Dispensing Errors and Organisational Governance”).
 2. Copies of all documents shared with the rebalancing board and its members at or in relation to its meeting on 7 April 2016.”
6. On 24 May 2019 the DHSC wrote to the complainant to explain that the requested information was exempt under section 35 and that it required additional time to consider the public interest test.
7. On 19 June 2019 the DHSC advised the complainant that it was now refusing to comply with the request under section 12 – the appropriate (cost) limit.

8. The complainant asked the DHSC to carry out an internal review on 1 July 2019 and on the 28 August 2019 the DHSC provided the outcome of that review. The DHSC now stated that it was refusing the first part of the request under section 35 – formulation and development of government policy. Its position in respect of the second part of the request was less clear. However during the course of the Commissioner's investigation the DHSC also extended the application of section 35(1)(a) to a significant amount of the information captured by the second part of the request.
9. In its submission to the Commissioner the DHSC also referred to the application of section 36 – prejudice to the conduct of public affairs to a very limited amount of the information, but later withdrew its reliance on this exemption.
10. In addition the DHSC now said that some of the information, minutes of meetings, was exempt under section 21 on the basis that it was already accessible to the complainant by other means. It provided the complainant to links to where that information could be accessed on the internet.
11. Finally the DHSC said that it would release the agenda of the meeting but that it intended to withhold some of the information from that document under section 40(2) on the basis that it was third party personal data. It did not however identify which personal data it wished to withhold or provide the Commissioner with any arguments as to why its disclosure would breach any of the data protection principles.

Scope of the case

12. The complainant contacted the Commissioner on 13 August 2019 to complain about the way his request for information had been handled. However it was only after the DHSC had completed the internal review that the Commissioner accepted the complaint as being eligible.
13. The Commissioner considers that the matter to be decided is whether the DHSC can rely on the exemption provided by section 35(1)(a) to withhold the information to which it has been applied, whether the DHSC has complied with its duty under section 1 in respect of the information to which it applied and then withdrew its reliance on section 36, whether it can rely on section 21 to exempt the information to which that exemption has been applied and finally whether any of the information contained in the agenda of the meeting which is the focus of the second part of the request is exempt under section 40(2). The Commissioner will also consider whether the DHSC has complied with the procedural provisions of the FOIA set out in section 10, time for compliance, and section 17, issuing refusal notices.

14. The Commissioner will start by looking at the DHSC's application of section 35(1)(a).

Reasons for decision

Section 35 – formulation and development of government policy

15. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.
16. For information to be exempt under section 35(1)(a) it simply has to relate to the formulation or development of government policy; there is no requirement for the disclosure of the information to be in any way prejudicial to either of those policy processes.
17. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. This means that any significant link between the information and the policy process is sufficient to engage the exemption.
18. The information captured by the first part of the request are the responses to a consultation on the two draft orders. The first of those draft orders sought to bring in defences against the criminal offence for inadvertent preparation and dispensing errors by pharmacy professionals. The second draft order concerned the organisational governance arrangement for registered pharmacies. Clearly as to the two orders were still in draft form and as the consultation process was clearly part of a process of shaping the policy which those orders would give effect to, this information does relate to the formulation or development of government policy.
19. The information captured by the second part of the request concerns the work of the Pharmacy Regulation Programme Board (RPB). The DHSC has explained that the RPB was set up to ensure that pharmacy regulation provides safety for users of pharmacy services, reduces any unnecessary legislation, allows innovation and development of pharmacy practice and advises minister on policy. Its overall aims have a very direct link to the formulation and development of government policy. The Commissioner has been provided with copies of the withheld information and is satisfied that the matters discussed at the RPB's meeting of 7 April 2016, and the papers relating to that meeting, to which section 35 has been applied, concerned matters of government policy that were still being developed.
20. In light of the above the Commissioner is satisfied that the exemption is engaged.

Public interest

21. The exemption is subject to the public interest test. This means that even though the exemption is engaged, the information can only be withheld if all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
22. The public interest test provides the opportunity to consider whether the disclosure of the information would actually cause any harm to the policy making process, and, if so, whether this harm outweighs the value in making the information available to the public. Arguments around the harm that might be caused to the policy process by disclosing information often relate to the safe space that departments need in which to have candid discussions about the pros and cons of different policy options, free from concern that such discussions will become the subject of public debate before settled lines have been adopted. Therefore it is often important to consider the stage which the policy process had reached when the request was received. Clearly it is more difficult to sustain arguments around the need for safe space where that policy has already been settled and the policy process completed than it would if the policy was still under active consideration.
23. The Commissioner will consider the public interest test in respect of the two parts of the request separately, starting with the responses to consultation exercise.

Consultation responses.

24. At the internal review stage the DHSC explained to the complainant that the responses were submitted through CitizenSpace which collates the responses in a spreadsheet. A small number of responses were submitted either as hard copy, pdf documents or via email and it is understood that these responses are not included on this spreadsheet. The complainant has agreed to focus her complaint on the information contained in the spreadsheet.
25. The DHSC has provided the Commissioner with a copy of the consultation responses contained in the spreadsheet. This does not contain the name or contact details of the respondents. However the DHSC has confirmed to the Commissioner that it does hold a master spreadsheet which does allow it to identify which respondents provided which responses. The Commissioner also notes that in a very limited number of cases the actual responses to questions posed in the consultation do identify the respondent.
26. The information provided to the Commissioner also includes a report which summarises the responses.

27. The consultation sought views on the two draft orders which have been described in more detail in paragraph 18 above. The government's policy on the accountability and governance of pharmacists must have already have reached an advanced stage in order for the orders to be have been drafted. Nevertheless that policy process had not been completed. The whole point of the consultation exercise was that the responses to it would help shape the final orders that would then be agreed with ministers and go through the parliamentary process before becoming law. The DHSC has stated that both these draft orders are still subject to agreement with the Office of Parliamentary Counsel, the new Northern Ireland government and UK ministers. Although it is apparent that the policy had not been finalised at the time of the request, the DHSC has not clarified whether it had completed its consideration of the consultation responses.
28. The complainant has drawn the Commissioner's attention to fact that the government's original intention was to publish a report on the consultation exercise within 12 weeks of the consultation period closing on 11 September 2018. The Commissioner estimates this would have meant the report was due to be published in the first week of December 2018, four months before the request was made. The complainant argues, this indicates the government would have completed its consideration of the consultation responses within that period. The complainant therefore argues that although the policy making process may not have been fully complete by the time of the request, the need for safe space to consider the consultation responses as part of the policy process had passed.
29. The Commissioner notes that no report on the consultation exercise appears to have been produced to date, certainly it does not appear that the complainant is aware of one, nor has the Commissioner been able to easily locate such a report. Therefore it cannot be said with total confidence that the government's consideration of the consultation exercise has been completed.
30. Nevertheless the Commissioner will consider what other evidence there is regarding the stage the policy making had reached. From the DHSC's submission the Commissioner is under the impression that it is at an advanced stage and is awaiting the approval of Office of Parliamentary Counsel. It would therefore appear that the policy was in its very final stages of development, awaiting ministerial approval before going through the parliamentary process. Although this means there would still have been the potential for changes to be made to the legislation, the Commissioner considers that it is most likely that the need for safe space in which to consider the consultation responses had waned by the time of the request.

31. Even if this is the case the Commissioner recognises that there would still have been some scope for there to be renewed discussions of the policy options which were based, in part, on the consultation responses. The policy process was therefore still live at the time of the request and although the need for safe space to consider the consultation responses may have waned considerably, it cannot be said that it had passed completely. The Commissioner places some, but not a significant weight, on the safe space arguments.
32. At the internal review stage the DHSC also argued that disclosing the information would have led to individuals and representative groups being less likely to provide information to the DHSC in future if they believed that it will be released into the public domain. Without such information government would not be able to debate issues as fully, which in turn would lead to poorer decision making. Such an argument is commonly referred to as the 'chilling effect'.
33. The Commissioner recognises the potential for this to happen, but does not consider that it is a foregone conclusion that respondents would behave in the way anticipated by the DHSC. It will be known to anyone who participated in the consultation exercise via the CitizenSpace portal that respondents were asked whether they agreed to their identities and/or their responses being included in the report on the consultation exercise which would be published. Although the Commissioner is not at liberty to share the details of the responses to those questions as they form part of the withheld information, she is satisfied that there is evidence that many respondents would not be concerned over their responses being made public, in addition some would be content to have their identities disclosed. Furthermore many of the respondents would be high profile organisations, major supermarkets, public authorities, representative bodies, providing their considered views on the issues raised. The Commissioner considers it would be unrealistic for such bodies to have an expectation that their responses would remain confidential. Some of them would be subject to the FOIA themselves and understand the principles of transparency and accountability.
34. Nevertheless there are a number of respondents who did not wish their identities or responses to be included in, what was intended to be, a published report. Therefore the Commissioner cannot dismiss the potential for there being some detriment to policy making process in general through stakeholders becoming less willing to participate in future consultations.
35. This chilling effect would be greatest if there was to be further consultation on the same draft orders, but the effect would be less acutely felt where the same individuals or groups were invited to participate in consultations on different issues. The effect would continue to weaken as you moved further away from the subject of the

consultation exercise to which the request relates, so that the impact on others who may be considering participating in an consultation on an unrelated issue would be negligible.

36. The Commissioner has no grounds for thinking there would be any further consultation in respect of the draft orders, but recognises that some of the respondents may well wish to participate in future exercises on issues effecting pharmacies and that reform of pharmacy practices appears to a current stream of work for the DHSC. Therefore there may be some, limited, detrimental effect to those workstreams if the responses of the consultees who had indicated they did not wish to be identified or have their responses published, were disclosed.
37. At the internal review stage the DHSC also argued that disclosure could prejudice the good working relationships and the perceptions of civil servants' neutrality. However it did not expand on this point, nor did the DHSC raise the point in its submission to the Commissioner. The Commissioner has therefore not given this argument any weight.
38. The Commissioner will now consider the public interest in favour of disclosing the consultation responses. The DHSC has identified only limited public interest arguments in favour of disclosure. It has recognised that there is a public interest in making the requested information available for the sake of greater transparency and openness in government policy making.
39. The complainant has made a number of arguments. These include the value of openness and transparency in order to increase trust in government. The complainant argues that this is all the more important when the issues relate to the safe supply and dispensing of medicines to the public.
40. The complainant also argues that disclosure would reveal the level of support that there had been for the proposals and that the disclosure would provide parliamentarians with access to the information and so inform their views on the issues when the orders are finally considered by parliament. The complainant stresses the importance of having access to this information before the proposed changes become law. The complainant has criticised the government's record in relation to changes in medicines legislation and expressed the view that it does not always facilitate proper scrutiny of legislation, citing the introduction of Serious Shortage Protocols as an example. The complainant later emphasised the importance of the draft orders being properly scrutinised as they relate to the criminal laws applicable to hospital pharmacists when they make a dispensing error and also allow pharmacists to perform their duties remotely so removing the requirement for there to be a pharmacist present in each pharmacy.

This, the complainant believes, raises significant issues around patient safety.

41. The orders in question would have been developed with advice from the RPB. The complainant considers that the government has in the past made submissions to parliamentary debate in respect of legal changes considered by the RPB which are inaccurate. In particular the complainant has referred to comments made to the effect that the proposed changes to the legislation encourages the reporting of dispensing errors without fear of prosecution. The complainant has obtained legal advice that risk of prosecution remains.
42. The Commissioner is not in a position to comment on the validity of the complainant's criticism. She notes that the fact that the complainant has been able to seek their own legal advice demonstrates that the government's position can be challenged without access to the withheld information. However she understands the broader point being made to be that, at least in some quarters, there is suspicion that the government is frustrating open and informed debate of new legislation concerning the dispensing of medicines. This argument expands the first public interest argument that increased transparency and openness is an important means of building confidence in both the policy making and democratic processes.
43. Finally the complainant makes the point that the information requested in part one of the request is simply the consultation responses. Therefore the complainant does not believe the government's deliberations would be effected by the disclosure of the information. The Commissioner acknowledges that the disclosure of the responses would be less intrusive than disclosing the internal debate that followed. However if disclosing the responses lead to a public debate and speculation as to how the government may respond to the consultation exercise, this may divert the department from the points it considered important.
44. In weighing the public interest in maintaining the exemption against the public interest in disclosure the Commissioner has taken account of the fact that it appears the policy making process was at a very advanced stage by the time the request was received. It seems most likely that consideration of the consultation responses had been completed. This very much reduces the need for safe space. However it is clear that the policy process as a whole had not been completed and so long as the orders had not passed into law, there was still scope for the issues covered by the consultation exercise to be revisited. In deed the complainant's own arguments demonstrate that the responses remained relevant to parliament's scrutiny of the draft legislation. Nevertheless the Commissioner gives the safe space argument only limited weight.

45. The chilling effect arguments are weakened by the fact that there is no evidence that the same individuals and organisations would be required to participate in another consultation on these draft orders and that many seemed prepared to have at least their responses made public. Nevertheless there were others who wished their participation to remain confidential. Having viewed the withheld information the Commissioner notes that some of the responses are critical of how the current regime operates and although it is not clear that those responses were made by those who wished to remain anonymous, she recognises that some consultees may only be prepared to provide such candid responses if they are assured confidentiality. To disclose the consultation responses in full before the policy process had been completed would make that chilling effect greater. Therefore the Commissioner finds that the value of disclosing the full responses of those who had said they were did not wish their responses to be included in any published report would outweigh the public interest in disclosure.
46. However there are less grounds for considering the public interest favours maintaining the exemption where a respondent has indicated they were content for their identities and/or responses to be included in the report on the consultation exercise that the government intended to publish. The Commissioner finds that where a respondent had said they were content for their responses to be included in such a report, the public interest in maintaining the exemption carries little weight, particularly given the advanced stage of the policy making has reached. The public interest in allowing greater scrutiny of the consultation process and enhancing the public's confidence in both the policy process and parliament's ability to properly consider the draft legislation, outweighs the limited harm caused by disclosure. Therefore in respect of those respondents who were content for both their names and their responses to be included in the report, the Commissioner finds the DHSC is required to provide their identity (apart from where this would constitute the personal data of a living individual) and their full response as contained in the spreadsheet. Similarly, where a respondent has only indicated that they are content for their responses to be disclosed, again the DHSC is required to disclose their responses as contained in the spreadsheet. The DHSC should ensure that no personal data is inadvertently disclosed in the content of any of the responses.
47. The Commissioner has also considered the summary of the consultation responses referred to in paragraph 24 above. The copy provided to the Commissioner was labelled 'Part 1 Consultation report-11-September-2018 – 14-57'. In broad terms, the consultation asked respondents whether they agreed with a particular approach and then provided the opportunity to comment on that proposal. The summary report provides details how many respondents answered each question, and of those who did, how many agreed the approach. The summary does not however include any of the comments which were provided. The

Commissioner finds that this information falls within the scope of the complainant's request for the consultation results. She also considers that this statistical information could be disclosed without there being any risk of individual respondents being identified, apart that is from the statistics relating to 'Ethnicity' from question 5. As a consequence there would be no risk of a chilling effect. Any erosion to the safe space that was still required in respect of the policy process would be so negligible as to be of no consequence. The Commissioner finds that the public interest favours the disclosure of the summary report. The DHSC is required to disclose this report, apart from the statistics on the ethnicity of respondents.

Documents shared with the rebalancing board or its members at or in relation to its meeting on 7 April 2016

48. The Commissioner has been provided with copies of the information captured by the this part of the request. As one would expect they consist of such things as minutes of previous meetings, the agenda and briefing papers relating to the items on the agenda. These briefing papers are generally updates on the progress of work streams that the RPB was contributing to. The DHSC has also included the minutes of the 7 April 2016 meeting itself. To the extent that these minutes clearly relate to the meeting and would have been circulated to the RPB at some point following the meeting, the Commissioner accepts these fall within the scope of the request.
49. At the internal review stage the DHSC's position regarding part two of the request was unclear. The request had initially been refused in its entirety under section 12 on the basis that the cost of compliance would exceed the appropriate (cost) limit. At the internal review the DHSC again refers to the cost involved, suggesting that part two of the request could be handled within the cost limit, whilst at the same time warning that this does not preclude the application of other exemptions. The Commissioner sought to clarify the DHSC's position. From the DHSC's submission the Commissioner initially understood that the DHSC was now refusing the entire request under section 35(1)(a). However in setting out its position in respect of each document captured by part two of the request, the DHSC identified a number of documents that it considered to be exempt under section 21 – information accessible to the applicant by other means and one to which it had applied section 36 – prejudice to the conduct of public affairs. In respect of the agenda for the meeting, the DHSC said it was prepared to release the information apart from some, unspecified, personal data which it intended to withhold under section 40(2) – personal information. Therefore there remains only five documents which the Commissioner understands the DHSC to be withholding under section 35(1)(a). The Commissioner will now consider the public interest in maintaining the application of section 35(1)(a) to the information in those documents.

50. The DHSC has explained that members of the RPB are drawn from regulators, professional representative bodies, industry professionals and patient representatives. It went on to state that participation in discussions is made in the knowledge that all documents and discussions are confidential. The Commissioner notes that all the documents are marked 'Not for wider circulation' and this supports an argument that there would be an expectation of confidentiality. However the Commissioner would also expect the members of the RPB to be aware of the rights of access under the FOIA and therefore that they would recognise that no absolute guarantee of confidentiality could be provided; it would depend of the sensitivity of the actual information.
51. The DHSC has advised the Commissioner that in September 2017 confidential papers from the RPB meeting held in July 2016 were leaked and this resulted in damage to work on policy issues to which those papers related. The leaked papers related to proposals on the development and consideration of policy on the supervision and skills mix in the pharmacy community. The Commissioner notes that the July 2016 meeting would have been the one after the April 2016 meeting. The DHSC has said that the leaked information was misrepresented by the trade press. Through basic internet searches the Commissioner has identified articles about the leaked proposals and notes that the Chair of the RPB felt it necessary to address the matter in interviews and that the then Secretary of State, Jeremy Hunt, is reported as having reassured pharmacists in respect of the proposal. This demonstrates very clearly the need for policy makers to have safe space in which to properly consider their options and to be able to properly manage the presentation of those policy options to the public so that they are not misinterpreted. However the need for safe space still depends on factors such as the stage which the policy development process had reached and the nature of the information itself.
52. The Commissioner also notes that in the complaint to her, the complainant refers to the press coverage of the leak and it is clear that the complainant considers the information requested in part two of the request would capture information on the same issue. Despite what may be gleaned from published minutes of the meeting the Commissioner is not prepared to go into any great detail about the nature of the information that is being withheld other than that which is set out below.
53. Two of the withheld documents simply update the RPB on the progress that had been achieved in respect of legislation which it had considered. The Commissioner accepts that both of these relate to policy that was still under development at the time of the request. It had nevertheless reached a very advance stage by the time of the request. Furthermore the Commissioner does not consider the contents of the papers reveal anything controversial and notes that a limited amount of the information is already contained in the now published minutes of the

meeting. It is also important to note that these papers do not record the internal debate around the policies being developed. Given the passage of time since the meeting of 7 April 2016 and the date of the request, some of the progress reported in the papers may be considered 'old news'.

54. The Commissioner therefore finds that disclosure of these papers would not erode any safe space which may still have been required at the time of the request in respect of these pieces of legislation. Nor, given the anodyne nature of the information, would the disclosure have a chilling effect on the willingness of the RPB to discuss related policy issues in the future.
55. Another of the documents being withheld simply briefs the Chair on the agenda and the options for managing the meeting. It does not give any insight into the debates that the agenda items might generate or reveal sensitive policy options any more than the already published minutes do. Again the Commissioner can find no reason for thinking its disclosure would have any significant impact on safe space or have any chilling effect on future, internal policy discussions.
56. The fourth document is a very inconsequential email relating to arrangements for the meeting.
57. In light of the very limited impact which the Commissioner considers the disclosure of these documents would have on the policy making process she finds that the public interest in transparency and accountability, as well as in promoting both a better understanding and confidence in the policy making process, outweighs that in maintaining the exemption. The DHSC is required to disclose the information in these documents.
58. The remaining information is that contained in a third briefing paper. The paper relates to a policy issue that was not completed at the time of the request. The contents of that paper do discuss policy options. Those policy options were at a relatively early stage of development. The paper is far more detailed than the others already considered. The issue in question is one which has attracted significant interest and controversy within the pharmacy profession. The Commissioner considers that even at the time of the request its disclosure would erode the safe space that the RPB and ministers required to fully consider the issue. Furthermore due to the controversy that has surrounded the issue, its disclosure would have a significant chilling effect on the internal policy debate. There is a strong public interest in withholding the information in order to avoid undermining the completion of the policy development in this area.
59. The issue discussed in the paper is one of importance to the pharmacy profession with implications for the responsibilities of those professionals

and, given the nature of the service those professionals provide, patient safety. This is a two edged sword; it increases the importance of not undermining the quality of the internal policy debate, but also increases the public interest in transparency and accountability of that policy making process. It can also be argued that the disclosure of the information could lead to a more informed public debate about the issue, which in turn may generate valuable feed back from members of the pharmacy community that would benefit the policy process.

60. However the Commissioner considers that the potential for the disclosure to disrupt the proper consideration of the policy outweighs the public interest in disclosure. In reaching this decision the Commissioner has had regard for the fact that paper appears to relate to a relatively early stage in the policy process and although the proposals under discussion may indicate the policy's direction of travel at that time, the paper may not properly represent the options which the DHSC decide to adopt.
61. The DHSC has explained that there is an established process for engaging with stakeholders as well as the use of formal public consultation exercises. The Commissioner understands that first the RPB tests its ideas with a limited group of stakeholders, based on the feedback received, the idea may then be put to meetings known as Pharmacy Forums in which a wider group of stakeholders are represented. In this way the RPB and DHSC have the opportunity to weed out the weaker policy options. The Commissioner is therefore satisfied that in respect of the policy which is the subject of the briefing paper, there is the opportunity for interested parties to input into the policy process.
62. In light of the above the Commissioner finds that in respect of the third briefing paper the public interest in maintaining the exemption does outweigh the public interest in disclosure. The DHSC is entitled to withhold this information. The actual paper in question will be identified in a confidential annexe supplied exclusively to the DHSC.

The remaining information captured by part two of the request

63. As explained at paragraph 49, in its submission to the Commissioner the DHSC identified a number of documents that it considered were exempt under section 21, one which it said it was prepared to release, apart from some redactions for personal data, and one document to which it had applied section 36. The Commissioner will now briefly consider the complainant's right of access to these documents.

Section 36 – prejudice to conduct of public affairs

Section 1 – duty to provide information

Section 10 – time for compliance

64. The document which the DHSC attempted to withhold under section 36 is a briefing paper in respect of one of the agenda items. Section 36 is potentially a wide ranging exemption which, so far as is relevant, allows information to be withheld if, in the opinion of the qualified person, its disclosure would inhibit the free and frank exchange of views, the free and frank provision of advice, or would otherwise prejudice the conduct of public affairs. The engagement of the exemption is dependent on the qualified person being of the opinion that the alleged harm would occur. In the case of the DHSC any government minister can act as the qualified person. It became apparent that the DHSC had not sought the opinion of a government minister and that therefore the exemption was simply not engaged. The DHSC was provided with the opportunity to clarify its position, at which point it withdrew its application of section 36. It did not seek to rely on any alternative exemption and agreed to release the information. Therefore under section 1 of the FOIA the DHSC is obliged to provide the complainant with a copy of this information. By failing to disclose this information within 20 working days of the request being received, the DHSC has breached section 10 of the FOIA. The Commissioner requires the DHSC to release this information if it has not already done so.

Section 21 information accessible by other means

65. Section 21 provides that information is exempt if it is reasonably accessible to the applicant without them having to specifically request it under the FOIA. The exemption is often used where the information has already been published on the public authority's website.
66. The DHSC identified five documents which it claimed were already reasonably accessible to the applicant by virtue of having published on the internet at the time of the request. These include the minutes of the 7 April 2016 meeting, a draft of those minutes, draft minutes of the previous meeting which were being circulated for agreement, a statement, akin to a press release, explaining very briefly what was discussed at that meeting and a draft of that RPB statement. The DHSC argues that final versions of these documents had all been published by the time of the request and that as the drafts are the same as the final versions, those drafts have effectively been published too. The Commissioner has been provided with copies of these documents and is satisfied that the drafts and final versions are the same.
67. The DHSC had not advised the complainant that these documents were available on the internet, or provided them with the addresses of the relevant pages where they could be found, by the time the complainant had raised the matter with the Commissioner. It was only when the DHSC provided its submission to the Commissioner that it became apparent that it considered this information was accessible by other means and that therefore it wished to rely on the exemption provided by

section 21. Having received its submission the Commissioner asked the DHSC to provide the information to the complainant. On 5 March 2020 the DHSC wrote to the complainant and provided links to three documents i.e. the final version of the minutes for meetings of 24 November 2015 and 7 April 2016, together with a link to the RPB statement of 7 April 2016. Given that the final versions are the same as any drafts of those documents, the Commissioner is satisfied that, in the circumstances of this case, the DHSC has now demonstrated that the information was accessible to the complainant at the time of the request and that therefore it was entitled to rely on section 21. What the DHSC failed to do however was to issue an appropriate refusal notice in accordance with section 17 of the FOIA.

Section 17 – refusal notice

68. Where a public authority is relying on one of the exemptions to refuse a request, or part of a request, it is required to serve a refusal notice identifying the exemption in question and to state why the exemption applies. Where a public authority is relying on section 21 this would involve directing the complainant to where the information was accessible from, unless this was obvious. The public authority is required to serve that refusal notice within 20 working days of the request being received.
69. Therefore the DHSC should have informed the complainant that it was relying on section 21 in respect of these documents and provided links to where that information could be accessed by 23 May 2019. It was only ten months later that the DHSC effectively complied with this requirement and the complainant was made aware that information captured by their request was available. This is clearly a breach of section 17(1) of the FOIA

Section 40(2) – personal information.

70. There is one document captured by part two of the request still to be considered. This is the agenda for the meeting of 7 April 2016. In its submission to the Commissioner the DHSC said that it would release this information apart from some information which it intended to withhold under section 40(2) of the FOIA on the basis that it was personal data. It has not made any attempt to identify the personal data it wishes to withhold and has not, to the Commissioner's knowledge, disclosed the remaining information from the agenda to the complainant.
71. Having looked at the agenda the Commissioner acknowledges that it does include the names of those who would present each of the agenda items. The Commissioner has identified that the majority of these individuals are already listed on public websites as members of the RPB and is satisfied that they hold senior positions either within the DHSC or

within the pharmacy profession. As this is the case, and in the absence of any arguments provided by the DHSC as to why the names of these individuals are exempt under section 40(2), the Commissioner is not prepared to consider its application to that information. However in respect of one individual the Commissioner has not been able to establish their seniority or membership of the RPB. The name in question is that listed against agenda item 6. As a responsible regulator of both the FOIA and the Data Protection Act, the Commissioner will therefore consider whether that name is exempt from disclosure under section 40(2).

72. So far as is relevant Section 40(2) 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) is satisfied.
73. 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 General Data Protection Regulation ('GDPR').
74. 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'). In this case the information, i.e. the name of a living individual, is clearly personal data .
75. Therefore the Commissioner will go onto consider whether the disclosure of that data would breach any of the DP principles.
76. The most relevant DP principle in this case is principle (a).
77. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
78. In the case of an 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.
79. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
80. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

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

“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”.

81. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

Legitimate interests

82. In considering any legitimate interest(s) in the disclosure of the information, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
83. There is a legitimate interest in disclosing information about the development of government policy on the reform of pharmacy practices as these impact not only pharmacy professionals but also, potentially, the safety of patients.
84. The Commissioner will therefore go on to look at whether disclosing the individual's name is necessary to satisfy that legitimate interest. 'Necessary' means more than desirable but less than indispensable or absolute necessity. In this case the Commissioner is satisfied that withholding the name of the individual would not prevent the public from understanding the policy issues being addressed by the RPB in the meeting of 7 April 2016 as set out in the agenda.
85. Therefore the Commissioner has decided in this case that disclosure is not necessary to meet the relevant legitimate interest. As a consequence she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and the disclosure would be unlawful. It therefore does not meet the requirements of principle (a).

Reference: FS50865947



86. The Commissioner has therefore decided that the DHSC is entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

87. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

88. 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.

89. 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

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