

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 27 July 2020

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020.
2. The Commissioner's decision is that Department of Health and Social Care (DHSC) has correctly applied sections 35(1)(a) and 35(1)(b) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 22 April 2020, the complainant wrote to DHSC and requested information in the following terms:

"The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 were, in part, intended "to clarify that under regulation 6(1), the prohibition applies both to leaving the place where a person is living without reasonable excuse, and also to staying outside that place without reasonable excuse". Please disclose an electronic copy of all recorded information you hold regarding this particular amendment."
5. DHSC responded on 3 June 2020 and refused to provide the requested information citing section 35(1)(a) FOIA as its basis for doing so.

6. Following an internal review DHSC wrote to the complainant on 21 August 2020 and maintained its position.

Scope of the case

7. In its submission to the Commissioner DHSC stated that it also considered section 35(1)(b) applied to part of the withheld information. The Commissioner considers the scope of this case to be to determine if DHSC correctly applied section 35(1)(a) and 35(1)(b) FOIA to the withheld information.

Reasons for decision

Section 35(1) – formulation or development of government policy

8. Section 35(1) FOIA 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"*
9. 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.
10. 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.
11. '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.
12. 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 content of the information in question and its context.
13. 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.
14. DHSC explained that the policy in question relates to the ongoing development of policy on social distancing and approaches to lockdown. It considers the formulation/development of this particular policy (or policies) to have been ongoing at the time the request.
 15. It went on to explain that we are currently in step 4 of the Government's 'COVID-19 Response: Summer 2021' publication ("the roadmap"). This means that most restrictions have now been removed, due to factors such as the successful Covid-19 vaccination programme. As set out in the roadmap, the Government may need to take measures to help manage the virus during periods of higher risk, such as winter.
 16. Therefore, the information requested remains relevant to future policy decisions, including what, if any, measures should be reintroduced in response to an unsustainable rise in cases.
 17. It is clear that the information requested meets the key indicators referred to above and there the Commissioner considers that the exemption is engaged.

Section 35(1)(b)

18. DHSC also believes the exemption at section 35(1)(b) - Ministerial Communications, which covers the proceedings of cabinet and its committees, applies to part of the withheld information. There is a strong public interest in withholding this information to preserve the effectiveness of cabinet Government.
19. DHSC provided the Commissioner with copies of all the withheld information and details of what it considered was exempt under section 35(1)(b). This encompasses agenda items of, and decisions taken at, cabinet and COBR, and items considered by a cabinet committee by correspondence. These categories clearly satisfy the section 35(5) definition. Information about the discussions at these committees are, therefore, related to ministerial communications and the Commissioner considers section 35(1)(b) is engaged.

Public interest test

20. 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) outweighs the public interest in disclosing the information.
21. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.

Public interest arguments in favour of disclosing the information

22. The complainant has argued that:

There are two factors, in particular, which strongly tip the balance of the public interest in favour of disclosure:

- *The lockdown regulations are by far the most restrictive piece of legislation ever enacted in this country, interfering with virtually every human right in the European Convention. The specific amendment about which my request is enquiring made them yet more restrictive. The importance in transparency about how decisions are reached is therefore increased.*
 - *The amendment was passed using an "urgent" procedure (albeit there is no clarity what the urgency was) without Parliamentary debate or scrutiny. Had it been debated in Parliament, the reasoning behind each provision would have been fully explained and explored. As it is, this didn't happen, so the public interest in the disclosure of the reasoning - outside Parliament - is therefore increased.*
23. DHSC acknowledged a general public interest in promoting openness in the way in which public authorities make decisions on policies.

Public interest arguments in favour of maintaining the exemption

24. DHSC stated that some of the information requested is now in the public domain, including the Explanatory Memorandum [The Health Protection \(Coronavirus, Restrictions\) \(England\) \(Amendment\) Regulations 2020 - Explanatory Memorandum \(legislation.gov.uk\)](#) and the Written Ministerial Statement [Written statements - Written questions, answers](#)

[and statements - UK Parliament](#). The rest, however, remains highly sensitive and it is not in the public's interest to reveal details that could compromise the candour of discussion, or lead to unwarranted and dangerous anticipation of the direction of travel of lockdown policy.

25. Section 35 recognises that the formulation and conduct of future government policy in this area could be badly damaged by the disclosure of information relating to these discussions.
- DHSC takes the view that the section 35 exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options.
 - The effective conduct of relations with other departments depends on maintaining trust and confidence. Relationships require the free and frank exchange of information between departments to formulate policy and provide advice.
 - Civil servants and subject experts need to be able to engage in discussion of all the policy options internally, to expose their merits and their possible implications as appropriate. Their candour in doing so will be affected by their assessment of whether the content of such discussion will be disclosed. Premature disclosure of information protected under section 35 could prejudice good working relationships and the neutrality of civil servants.
 - Disclosure of all the recorded information could make it less likely that individuals comply with government guidance to help to slow the spread of the virus and stay at home and thus threaten a further or larger peak.
26. DHSC argued that cabinet and cabinet committee meetings act as a venue for the free and frank exchange of views between ministers, either in person or by correspondence, prior to arriving at decisions about the development of policy that are binding across the rest of the Government, as per the principle of cabinet collective responsibility. As set out below, if the details of these meetings were routinely made public, including topics discussed at these meetings, or via correspondence, and their conclusions, ministers would feel less able to express their views candidly and the quality of debate, and decisions taken, at these meetings would decrease. There is a longstanding precedent that details of these meetings beyond those published on gov.uk are not routinely disclosed before they are reviewed for release to the archives, and the Government's working assumption is that information relating to the proceedings of cabinet and its committees should remain confidential, although each case should be considered on

its merits. The public interest lies in maintaining a safe space for free and frank discussion in cabinet and its committees, in order to reach a decision behind which all ministers will stand in public and better quality decision making.

27. It further considered there is also a very strong public interest in protecting the sovereignty of the deliberative process itself at this level. There is a specific public interest in preserving the confidentiality of cabinet and cabinet committee discussions in order to protect the convention of cabinet collective responsibility, which is a cornerstone of our constitution.
28. The principle underpins the accountability of governments to Parliament and is the foundation of parliamentary sovereignty. The Ministerial Code refers to the application of this convention, which reinforces its importance, in particular at part 2, section 2.1. Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions are reached. This requires that the privacy of opinions expressed in cabinet and committees should be maintained. Disclosure would be contrary to good government, which requires ministers and their officials to engage in full, frank and uninhibited consideration of policy options.
29. These considerations are particularly relevant to the material identified above, which includes topics and conclusions of discussions at cabinet, COBR and written ministerial correspondence to a cabinet committee relating to decisions on how to respond to the onset of the Covid-19 pandemic in the UK. The public interest would not be best served if in future ministers would be required to take similar decisions in the knowledge that the content and conclusions of their deliberations would be prematurely made public before they are reviewed for release to the archives. This would have a chilling effect on discussions and therefore undermine the quality of decision making in these settings.
30. DHSC concluded that while the content of the material in question appears to be removed from these concerns, making public the dates and topics of cabinet and cabinet committee meetings subjects the collective decision-making processes of Government to undue early scrutiny which damages the policy making process as it can lead to perverse incentives and ultimately a lack of free and frank exchange of ideas. Ministers could be incentivised either to meet because they wish to be seen to do so, or will be concerned about calling meetings where they would be helpful to resolve wide deliberation. Perverse incentives caused by unduly premature scrutiny of the meeting and topics considered by cabinet and its committees will therefore clearly undermine ministers' discretion in organising themselves to respond to the policy issues of the day. The purpose of section 35(1) is to protect

the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.

Balance of the public interest

31. DHSC argued that the pandemic is far from over and the number of cases are rising, but we will need to live with the virus. There is growing evidence that the vaccines significantly reduce the chance of an infection leading to hospitalisation or death.
32. Although vaccines significantly reduce the link between cases, hospitalisations, and deaths, they do not fully sever it. Opening up is not without risk, but the Government has chosen to move to step 4 as it is no longer reasonable and proportionate to impose ongoing economic and social restrictions.
33. However, even after 19 July, some restrictions remain including self-isolation and international travel restrictions.
34. As set out in 'COVID-19 Response: Summer 2021' the Government may need to take measures to help manage the virus during periods of higher risk, such as winter. Therefore, these policy decisions are arguably still ongoing.
35. The Government has committed to establishing a statutory public inquiry into the Government's response to COVID-19 - to begin in spring 2022. More details about the inquiry, including its terms of reference, will be set out in due course. At this point, however, it is likely to be harmful to the integrity of the efforts to protect the public's health if details of the decision making process become widely known, even to the point of advertising how to evade these measures.
36. The Government provided a written ministerial statement and explanatory memorandum that provided an explanation of the changes and why they are needed. As a result, the public already have access to information that justifies why the decision that was taken. For the reasons outlined above, a decision to release further information could undermine the ministerial decision-making process.

The Commissioner's decision

37. The relevant Statutory Instrument (SI) is available here:
<https://www.legislation.gov.uk/uksi/2020/447/regulation/1/made>
38. The Commissioner has reviewed all the withheld information and is satisfied that the public interest is met to a certain degree with the information already in the public domain. Furthermore The Hansard Society has published information relating to Coronavirus SIs that have come into effect¹ that explains which parliamentary scrutiny procedures apply.
39. The information requested remains relevant to future policy decisions, including what, if any, measures should be reintroduced in response to an unsustainable rise in cases.
40. Premature disclosure of the withheld information could create unwarranted and dangerous anticipation of the direction of travel of lockdown policy.
41. It is therefore the Commissioner's decision that, given the timing of the request, the stage that DHSC was at, and the relevance to future policy decisions, the public interest rests in maintaining the exemption.

¹ <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard#powers-used-by-ministers>

Right of appeal

42. 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

43. 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.
44. 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

Susan Duffy
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