

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2021

Public Authority: Public Health England
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested Public Health England (PHE) to disclose information relating to the responses to the finding of Exercise Cygnus. The PHE refused to disclose the requested information citing sections 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the PHE is entitled to refuse to disclose the requested information in accordance with section 36(2)(c) of the FOIA.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 24 May 2020, the complainant wrote to PHE and requested information in the following terms:
 - "1. Copies of any reports submitted by PHE to the Emergency Preparedness, Resilience and Response (EPRR) Oversight Group on responses to the findings of Exercise Cygnus.
 2. Copies of correspondence about the responses to Exercise Cygnus between PHE and the chair of the EPRR oversight group.
 3. Copies of any spreadsheet or 'dashboard' document that has been created in or communicated with PHE to show progress on implementing

recommendations based on the findings of Exercise Cygnus (e.g. the 'lessons identified' which are listed in Annex A of the 2017 report 'Exercise Cygnus Report Tier One Command Post Exercise Pandemic Influenza').

The time period for the information I am seeking is between October 2016 and 24th May 2020."

5. The PHE responded on 17 August 2020. It refused to disclose the requested information citing sections 36(2)(b) and (c) of the FOIA.
6. The complainant referred the matter to the Commissioner on 11 September 2020.
7. The Commissioner wrote to the complainant on 18 September 2020 and asked him to first request an internal review from the PHE, which he then did on 21 September 2020.
8. The PHE responded on 29 September 2020 and referred the complainant back to its response of 17 August 2020.

Scope of the case

9. The complainant contacted the Commissioner again on 1 October 2020 to complain about the way his request for information had been handled. He disagrees with the application of section 36(2)(b) and (c) of the FOIA and the balance of the public interest. He considers the requested information should be disclosed either on the basis that section 36(2)(b) and (c) are not engaged or on the basis that one or both are but the public interest rests in favour of disclosure.
10. The Commissioner considers the scope of her investigation to be to determine whether the PHE is entitled to rely on section 36(2)(b) and/or (c) of the FOIA for the non-disclosure of the requested information.

Reasons for decision

Section 36 – prejudice the effective conduct of public affairs

11. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –

(b) would, or would be likely to, prejudice-

- (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. The qualified person for the PHE is the Secretary of State for the Department of Health and Social Care (DHSC). Although discussions around the application of section 36 took place prior and authorisation was communicated through informal channels, the qualified person's opinion was not officially obtained until 11 March 2021. The qualified person authorised the use of section 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA.
 13. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
 14. With regards to section 36(2)(b)(i) and (ii), the PHE said that it is the qualified person's opinion that the PHE staff require the safe space where they can develop ideas, debate the full range of options and reach decisions away from external interference. Putting the requested information into the public domain would be likely to prejudice and impede officials from offering full and frank advice in the future, potentially resulting in poorer decision making and public services.
 15. More fitting to section 36(2)(c), the PHE confirmed that at the time of the request the Exercise Cygnus report was not in the public domain. The DHSC and the Cabinet Office were responsible for the final decision on when to release this report and they decided to publish it on 20 October 2020. It wrote to the complainant on 21 October 2020 to provide a link to the published document:

<https://www.gov.uk/government/publications/uk-pandemic-preparedness/annex-a-about-exercise-cygnus>
 16. Disclosure at the time of the request would have been likely to detract the PHE away from important work being carried out and to heighten public concern. It stated that the PHE has faced increased pressure to effectively respond to the COVID-19 pandemic which was in its early stages at the time of the complainant's request. The PHE advised that

the withheld information concerns follow-up actions in response to a hypothetical influenza pandemic scenario. It is the qualified person's opinion that disclosure of the withheld information in the middle of a real-life pandemic would be likely to lead to information being taken out of context. The withheld information are follow-up documents to Exercise Cygnus, rather than the report itself. Disclosure at the time of the request would not have presented a full picture of the situation without the report itself and knowledge of other discussions that had taken place between the agencies.

17. It stated that the COVID-19 pandemic is unique, as it is unlike other hypothetical influenza pandemics, and therefore necessitates a unique response. It is the qualified person's opinion that the PHE's attention must be focused on these real-life needs. The PHE also commented that confidence in the COVID-19 response was already marred at the time of the complainant's request and since then it has been announced that the PHE will close and a National Institute for Health Protection will be created to bring together expertise of several agencies. It is the qualified person's opinion that this demonstrates the importance of a co-ordinated response to public health messaging which better serves the public interest. Disclosure at the time of the request would have been likely to erode the organisations' ability to work together, especially if one contravenes another's approach to public messaging.
18. It is the qualified person's opinion that detracting the PHE from its important work would take the form of increased follow-up communications, public responses and media attention for the PHE and other agencies involved in both Exercise Cygnus simulations and the COVID-19 response. The likely increase in work arising from disclosure would demand unreasonable effort and divert important resources away from focusing on the COVID-19 pandemic and other PHE work.
19. The PHE also referred to the effect on its relationships with other agencies if the withheld information was disclosed. It said that it is the qualified person's opinion that disclosure at the time of the request was incompatible with the disclosure position of the DHSC. While the PHE is a public authority in its own right and is obliged to respond to FOIA requests separately, it must consider the context in which the information was produced, the other bodies involved and its working relationship with them.
20. The Commissioner first considered PHE's application of section 36(2)(c). She is satisfied that section 36(2)(c) is engaged and that it is a reasonable opinion that disclosure would be likely to otherwise prejudice the effective conduct of public affairs due to the circumstances at the time of the request. The Commissioner notes that at the time of the request the PHE and all aspects of government were dealing with a real

life pandemic. It is a reasonable opinion to hold that disclosure of the withheld information at the time of the request would have been likely to detract the PHE away from pressing matters and work of significant public importance. PHE staff would have been diverted away from these matters to dealing with enquiries relating to the disclosure of the withheld information and the media interest it would have attracted. This would then have been likely to prejudice the PHE's ability to effectively conduct its public affairs.

21. The Commissioner also notes that the PHE was working with other government departments on Exercise Cygnus and it is a reasonable opinion to hold that a uniform approach to public disclosure was required between the different departments. PHE is a public authority in its own right and it is correct to state that it needs to consider information requests made to it itself. However, it is a reasonable opinion to hold that it should take into account the views of other government departments it is working with and, if it was to take an approach that has not been agreed with those other departments in terms of disclosure, this would be likely to prejudice its ability to work effectively with these departments on the matter at hand, and more widely in the context of this case, the actual COVID-19 pandemic.
22. As the Commissioner is satisfied that section 36(2)(c) of the FOIA is engaged, she will now go on to consider the public interest test.

Public interest test

23. The PHE did not provide further public interest arguments in its submissions to the Commissioner. The following is therefore taken from its refusal notice to the complainant dated 17 August 2020.
24. The PHE stated that it recognised the public interest in transparency and the commitment to being open and transparent. It accepted that disclosing information to present a full picture enables wider public scrutiny of decision making of organisations responsible for the implementation of recommendations within the report.
25. However, it considers the public interest rests in maintaining the exemption. It confirmed that it was the PHE's responsibility to produce the report and other bodies' responsibility to consider and implement the recommendations. It argued that premature disclosure would detract the PHE away from its important work to promote public health and reduce health inequalities. In addition the PHE confirmed that the report was and is accessible to a wide range of organisations who are involved in emergency response activities within the UK. Disclosure may precipitate unnecessary heightened public concerns at an already difficult time for the UK population. Information provided out of context

is a significant risk to promoting clear accessible public messaging to ensure the wide ranging and rapidly changing guidance reaches the widest possible audience.

26. The PHE also commented that disclosure of the withheld information is incompatible with the disclosure position of the DHSC for requests regarding this report.
27. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
28. The Commissioner acknowledges the general public interest in openness, transparency and accountability and how access to public information enables members of the public to understand more clearly how decisions are reached by public authorities. Disclosure aids public debate and in this case would highlight what recommendations were put forward as a result of this exercise and how these were being implemented.
29. Given the real life pandemic the UK is currently facing the Commissioner notes and fully appreciates the heightened public interest in disclosure. She accepts that the public interest in transparency around issues concerning the pandemic is very significant and that the information would be very useful in understanding how prepared the UK was for such a situation.
30. However the Commissioner has to consider the circumstances at the time of the request. At the time the request was made the final report had not been published and the UK was (and still is) dealing with a real life pandemic situation. She accepts that disclosure would have been likely to detract the PHE and other public authorities involved away from dealing with the pandemic and other important work and tasks entrusted to them. It would have attracted significant media interest too and the PHE and other public authorities would have been likely to have been diverted away from the urgent matters that required attention to dealing with that and the additional work and challenges that resulted. She considers these effects would have been fairly severe and extensive at the time of the request and this would not have been in the public interest.
31. Should this request have been made at a later date this is likely to have impacted on the Commissioner's consideration of the public interest and potentially her decision. This is because there is a much stronger argument in favour of the public interest in disclosure after the Operation Cygnus Report itself has been disclosed and once the country starts to move out of the pandemic.

32. However despite the Commissioner recognising the strong argument for transparency she is obliged to consider the circumstances that existed at the time of the request. In summary at that point the report itself had not been disclosed and the country was in the grip of the pandemic. In view of this the Commissioner has decided that the public interest rests in maintaining the exemption, despite the significant public interest in disclosure. As the Commissioner has concluded that the information is exempt by virtue of section 36(2)(c) she has not gone on to consider sections 36(2)(b)(i) and (ii).
33. In reaching her decision she welcomes the fact the report has now been disclosed and recognises the bearing this may have on the outcome of future requests connected to the Report.

Right of appeal

34. 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

35. 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.
36. 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

Mr Gerrard Tracey
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