

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 April 2022

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1 0EU

Decision (including any steps ordered)

1. The complainant has requested information about a contract associated with a report into adult social care reform that was awarded to Public First Limited. The Department for Health and Social Care (DHSC) withheld the information under section 22(1) of FOIA (information intended for future publication) and section 35(1)(a) (formulation or development of government policy). DHSC subsequently published the information to which it had applied section 22 and is now relying on section 21(1) to withhold it (information accessible to applicant by other means). The complainant is dissatisfied with DHSC's reliance on section 35(1)(a) of FOIA to withhold the remaining information they have requested.
2. The Commissioner's decision is as follows:
 - The information to which DHSC applied section 35(1)(a) of FOIA engages that exemption and, at the time of the request, the public interest favoured maintaining this exemption.
3. The Commissioner does not require DHSC to take any corrective steps.

Request and response

4. On 19 February 2021 the complainant wrote to DHSC and requested information in the following terms:

"Subject: Freedom of Information request - Public First Limited
This is a request for information under the Freedom of Information Act. According to Contracts Finder, a contract was awarded to Public First Limited:

<https://www.contractsfinder.service.gov.uk/notice/9dec78f8-da9d-4e9f-b3e7-f15c7c670b38?origin=SearchResults&p=1>

The project is described as "How can we lock in the lessons of the COVID-19 crisis to build a more robust, sustainable, joined-up system of health and social care?" In light of this, please provide all materials - including key deliverables - that have been produced by Public First for the Department for this contract."

5. DHSC responded on 19 March 2021. It refused the request under section 22(1) and section 35(1)(a) of FOIA.
6. The complainant requested an internal review on 26 March 2021; querying DHSC's application of section 22 and providing section 35(1)(a) public interest arguments for the information's disclosure.
7. DHSC provided an internal review on 19 April 2021 – it upheld its response.

Scope of the case

8. The complainant contacted the Commissioner on 30 June 2021 to complain about the way their request for information had been handled.
9. On 23 February 2022 DHSC provided a further response to the complainant. In the period since they had submitted their complaint to the Commissioner DHSC had published the information to which it had originally applied section 22(1). DHSC is now withholding that information under section 21(1) of FOIA as it considers that it is now accessible to the complainant by other means. It continues to rely on section 35(1)(a) with regards to the remaining relevant information.
10. The Commissioner advised the complainant that, in the circumstances, the information to which DHSC has now applied section 21(1) of FOIA should be removed from the scope of this investigation and the complainant did not confirm to the contrary.
11. The Commissioner's investigation has therefore focused on whether DHSC is entitled to rely on section 35(1)(a) of FOIA to withhold the remaining information the complainant has requested, and the balance of the public interest.

Reasons for decision

12. Section 35(1)(a) of FOIA says that information held by a government department is exempt information if it relates to the formulation or development of government policy.
13. DHSC has provided the Commissioner with a copy of the information it is withholding under this exemption. It described the withheld information as comprising draft policy proposals and progress reports on Baroness Cavendish's final report on social care reform. The report concerns how to embed the lessons of the COVID-19 pandemic in order to improve social care. The final report is the key deliverable from this contract and was published on 21 February 2022¹.
14. In its submission to the Commissioner DHSC has said that it announced its programme for adult social care system reform in its white paper – 'People at the Heart of Care'² - on 1 December 2021. At the time the request in this case was submitted in February 2021, these reform policies were still under development and the department was considering recommendations.

The Commissioner's conclusion

15. 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.
16. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. It is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of

¹ <https://www.gov.uk/government/publications/social-care-reform-an-independent-review-by-baroness-cavendish>

² <https://www.gov.uk/government/publications/people-at-the-heart-of-care-adult-social-care-reform-white-paper>

government policy. Classes can be interpreted broadly and will catch a wide range of information.

17. With regard to the criteria at paragraph 15, first, Baroness Cavendish's report notes that the aim of her report was to review and make recommendations for social care reform in the wake of the COVID-19 pandemic, to inform the government's plans for reform. As such the Commissioner is satisfied that the final decisions on any social care reform, which the report is intended to inform, will be made by the relevant government Minister. The Commissioner is also satisfied that the government intends to achieve a particular change or outcome in the real world – improvement in how adult health and social care is delivered – and that, clearly, the consequences of those policy decisions will be wide-ranging.
18. The Commissioner is therefore satisfied that the information being withheld relates to the formulation or development of government policy – specifically, government policy on adult social health and care reform. He finds that the section 35(1)(a) exemption was therefore engaged at the time of the request and internal review in February and April 2021. The Commissioner has gone on to consider the public interest test.

Public interest test

19. Section 35 is a qualified exemption and so the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1) outweighed the public interest in disclosing the information.
20. 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. As such, the exact timing of a request will be very important.
21. There is often likely to be significant public interest in disclosure of policy information, as it is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.

Public interest arguments in favour of disclosing the information

22. In their request for an internal review the complainant argued that the COVID-19 pandemic had been devastating, and with the project referred to in the request and entitled "How can we lock in the lessons of the COVID-19 crisis to build a more robust, sustainable, joined-up system of health and social care?", it was urgent that the lessons of the COVID-19 crisis were communicated to the public as soon as possible.
23. The complainant added that any reforms to the health and social care sector in light of the pandemic must also be communicated to the public and that there must be transparency as to what the government intended to do next.
24. Finally, the complainant noted that there had been a lot of controversy over the supplier 'Public First Limited'. There had been much press coverage about the company having been awarded contracts by the government without competition.
25. In their submission to the Commissioner, the complainant said that in March 2021 it had been found that Michael Gove (then Minister of the Cabinet Office) had broken the law when the government "handed" a £560,000 COVID contract to Public First Ltd, a business Mr Gove had "personal connections" with, the High Court had ruled. The complainant argued that the public was therefore entitled to scrutinise the work done by Public First Ltd, as well as scrutinise its connections with the UK government.
26. In its submission to the Commissioner, DHSC has not provided any public interest arguments that support disclosing the information. However in its response to the request had noted the general public interest in promoting openness and transparency in government.

Public interest arguments in favour of maintaining the exemption

27. DHSC has argued that, since the policy recommendations made in the report were still under consideration, it could have caused significant damage to the policy development process if contents of the report were disclosed. Disclosure could have led the public to assume that they reflected firm or likely policy choices.
28. DHSC considers that if the requested information been released into the public domain out of context, it would have been difficult to manage the public's expectation of future policy decisions. It would also have been difficult to mitigate the risk of misinterpretation, particularly since social care reform is a high-profile policy area.

29. DHSC goes on to say that it 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 exploring all options.
30. Ministers need to be able to receive advice freely that covers a broad range of different policy options - including options that may on balance be more unlikely. The withheld material includes information on a range of policy proposals which DHSC has not taken forward.
31. DHSC notes that Baroness Cavendish engaged with a range of people when conducting her review and she outlines the conversations that she had with many of those individuals in her draft progress reports and proposals. DHSC argues that those who engaged with Baroness Cavendish did so with the expectation that these conversations would only be used for internal purposes. Releasing this information could, in DHSC's view, have deterred those with the relevant expertise and experience from engaging in independent reviews in the future.
32. DHSC considers that subject experts need to be able to discuss 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. Prematurely disclosing information protected under section 35 would, according to DHSC, have prejudiced good working relationships and the neutrality of independent experts.
33. DHSC has confirmed that it considers the public interest test supports the decision to maintain the exemption applied and not to disclose the information requested. Releasing this information "now", it argues, could damage future government policy making - deterring independent experts from engaging in future independent reviews or making full and frank assessments when advising ministers.
34. Finally, DHSC has noted that the key deliverable from the contract - the report - has now been published and is available for the public to view.

Balance of the public interest

35. With regard to section 35(1)(a) of FOIA, public interest arguments should focus on protecting the policymaking process. There is no inherent or automatic public interest in withholding all information falling within this exemption. 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.

36. For the same reason, arguments that 'routine' disclosure of a particular type of information would not be in the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one particular case, this does not mean that similar information must be disclosed in future. Arguments must focus on the effect of disclosing the particular information in question at the particular time of the request, rather than the effect of routine disclosure of that type of information.
37. The key public interest argument for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future.
38. The exact timing of a request will be very important. If the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.
39. However, even if the policy process is still live, there may be significant landmarks after which the sensitivity of information starts to wane.
40. In the Commissioner's view, the timing of the request is a key factor in this case because the policy process was still live at the time of the request. As the requested information relates to that policy making, he considers that the need for a 'safe space' to debate policy and reach decisions without external comment is a valid argument. It has been generally accepted by both the Commissioner and First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated.
41. The complainant has raised the circumstances of the awarding of the contract to Public First Limited as having significant public interest. They have said that in "March 2021" Michael Gove was found to have broken the law when this contract was awarded. The Commissioner notes that the High Court's judgement on that matter is dated 9 June 2021³. However, whether it was March 2021 or June 2021, both dates are after the date on which the complainant submitted their request. It was known that Public First Limited had been awarded a contract

³ <https://www.judiciary.uk/wp-content/uploads/2021/06/Good-Law-Project-v-Cabinet-Office-judgment.pdf>

without competition but, at the time of the request and internal review, the specifics of the circumstances of how and why the contract was awarded to that company – later considered by the High Court - were not formally in the public domain. The Commissioner considers that this fact lessens the weight of that particular public interest argument which the complainant put forward. (He has not taken account of it in his deliberations, but the Commissioner has noted that the Court of Appeal subsequently overturned the High Court's decision.)

42. In addition, disclosing the disputed information would not shed a great deal of light on the circumstances in which the contract was awarded to Public First Limited. The disputed information concerns discussion of particular policy options associated with adult social care.
43. The Commissioner is not entirely convinced by DHSC's argument that disclosing the requested information would deter experienced and knowledgeable senior individuals from discussing policy options freely – at the time or in the future. However, he does accept that disclosing the information at the time of the request would have been likely to have had a negative impact. Fielding questions and providing explanations would frustrate the safe space needed to deliberate the issues. The public interest in the government being able to develop its social care policy, without significant disruption is the overwhelming factor in the circumstances of this case.
44. Having weighed the public interest factors for and against disclosure, although finely balanced, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.

45. **Right of appeal**

46. 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

47. 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.
48. 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

Cressida Woodall
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