



Department of Health & Social Care

Freedom of Information Team
Department of Health and Social Care
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Ms Hilary Aked
request-585169-
974aa6ef@whatdotheyknow.com

6 March 2020

Annex A: DHSC's response to initial request dated 22 January 2020
Annex B: Request for internal review dated 19 February 2020

Dear Ms Aked,

FREEDOM OF INFORMATION ACT (FOIA): INTERNAL REVIEW CASE REFERENCE IR 1195121

You most recently wrote to the Department of Health and Social Care (DHSC) on 16 September regarding the Rt Hon Ben Bradshaw MP's opinion of overseas visitor charging. We responded to you on 22 January (our ref: FOI-1195121), withholding the requested information under sections 36(2)(b)(i) and (ii) of the FOIA. A copy of our response, including the full text of your request, is at Annex A.

You subsequently emailed DHSC on 19 February, requesting an internal review into the handling of your original request. A copy of your email is at Annex B.

The purpose of an internal review is to assess how your FOI request was handled in the first instance and to determine whether the decision given to you was correct. This is an independent review as I was not involved in the original decision.

I have undertaken discussions with the team that has responsibility for your request, and we have taken the opportunity to consider it again.

Conclusion

After careful consideration of the subject matter and the public interest arguments put forward by the Department, I have concluded that the response you received was compliant with the requirements of the FOIA and I uphold DHSC's decision to withhold the requested information under sections 36(2)(b)(i) and (ii) of the FOIA.

The review is now complete.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner (ICO) for a decision. The ICO can be contacted at:

The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

<https://ico.org.uk/concerns>

Yours sincerely,

Charlene Carter
Casework Manager
Freedom of Information Team
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Annex A: DHSC's response to initial request

Ms Hilary Aked
request-585169-974aa6ef@whatdotheyknow.com

22 January 2020

Dear Ms Aked,

Freedom of Information Request Reference FOI-1195121

I refer to your requests dated 26 June, 11 July, 20 August and 16 September 2019 to the Department of Health and Social Care (DHSC) (our refs: FOI 1181312, FOI 1182897, FOI 1187641, and FOI 1190511 respectively).

Your original request of 26 June 2019 (FOI 1181312) was as follows:

"Subject: Freedom of Information request - Scoping of NHS visitor charging under Labour government

At a hearing of the Health Social Care Committee yesterday (25 July 2019), Ben Bradshaw MP made reference to advice received by the ministry during his tenure as Minister of State in the Department of Health which suggested that healthcare charging for migrants/overseas visitors would lead to harm and therefore led him not to adopt a policy similar to the current NHS Overseas Visitor Charging Regulation.

He said: When I was in the ministry we had the same policy put before us and all the advice we had said it would lead to exactly the harm we're hearing about now. (Link here:

<https://www.parliamentlive.tv/Event/Index/f2708123-1556-4b12-aa64-6a04f1ff7049>)

My understanding is that Mr Bradshaw's term in office was 28 June 2007 – 5 June 2009.

Therefore, using this time period as the range, I would like to request a copy of all materials (including documents, powerpoint presentations, and emails) held by the department from this period related to the proposal, consideration, and assessment and rejection of such a policy. Please note, if this proves too large a request within the time/cost limit, I'd like to narrow the scope to one year only, specifically June 2008 - May 2009 inclusive."

Following your subsequent requests and our responses (FOI 1182897, FOI 1187641, FOI 1190511, and an Internal Review of FOI 1190511) the scope of your request was narrowed to searches of files relating to the overseas visitor charging regulations during the period that Mr Bradshaw was a minister at DHSC using the keyword "harm" only (this narrowed request being processed under our reference number FOI 1195121).

This narrowed request (FOI 1195121) has been handled under the Freedom of Information Act (FOIA).

I can confirm that we hold information relevant to your request.

However, we consider that this information is exempt from release under Section 36 (2)(b)(i) and (ii) of the FOIA, which states that information is exempt if, in the opinion of a 'qualified person', in this case a Minister of the Crown, its disclosure would prejudice the free and frank provision of advice or exchange of views for the purposes of deliberation; or would otherwise prejudice the effective conduct of public affairs. We have sought the view of the qualified person, who is of the reasonable opinion that section 36(2)(b)(i) and (ii) is indeed engaged.

Section 36 is a qualified exemption and requires consideration of the public interest test. There is public interest in openness as well as understanding how the government plans and implements its strategy for selection of its policies.

Against this, there is a stronger public interest in maintaining the existing constitutional convention of Ministerial accountability. The integrity of the system underlying the convention must be preserved. The advice ministers receive must be detailed, frank and candid for it to be of value and Ministers must be satisfied that advisers are free of any inhibitions that might interfere with their ability to give full, and occasionally unwelcome, advice. These extraneous concerns necessarily include the apprehension that the advice will be exposed prematurely to public scrutiny or comment. It would not be in the public interest for officials to be made publicly accountable for the advice they gave in this formal manner. This could in effect limit the advice they could give, and we therefore consider that the public interest balance lies in favour of withholding this information.

If you are not satisfied with the handling of your request, you have the right to appeal by asking for an internal review. This should be submitted within two months of the date of this letter and sent to FreedomOfInformation@dhsc.gov.uk, or to the address at the top of this letter.

Please remember to quote the reference number above in any future communication.

If you are not content with the outcome of your internal review, you may complain directly to the Information Commissioner's Office (ICO). Generally, the ICO cannot make a decision unless you have already appealed our original response and received our internal review decision. You should raise your concerns with the ICO within three months of your last meaningful contact with us.

The ICO can be contacted at:

The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

<https://ico.org.uk/concerns/>

Annex B: Request for internal review

Dear Department of Health and Social Care,

Thank you for your email containing the Department's response.

I would like to request an internal review on the following grounds.

1. No specific evidence demonstrating likelihood of prejudice

- a) The exemption to the FOIA set out in Section 36 is prejudice-based and the public authority must be able to demonstrate precisely how the particular kinds of specified prejudice would or would be likely to arise.
- b) DHSC has not provided any specific evidence to demonstrate that prejudice to the conduct of public affairs would likely arise from disclosure of the information.
- c) Absent further specific detail about the reasoning of the qualified person as to why the information requested could have the alleged effect, and how their view was reached, it is not clear to me that their view constitutes a "reasonable opinion".

2. Insufficient consideration given to public interest arguments favouring disclosure.

- a) Even if the qualified person's belief that disclosure would, or would be likely to, prejudice the conduct of public affairs, is indeed "reasonable", this potential harm does not automatically outweigh, in a public interest test (PIT), the good that would come from disclosure.
- b) The response from DHSC suggests that it has not given sufficient consideration to the arguments in favour of disclosure. It gives only a one sentence account of the public interest arguments for disclosure, saying: "There is public interest in openness as well as understanding how the government plans and implements its strategy for selection of its policies."
- c) However, there are several other important public interest arguments favouring disclosure which it appears DHSC has failed to take into account.
- d) Beyond the general democratic and public interest in the principle of transparent government, the public needs to be confident about whether policy decisions are taken based on the best evidence available i. If they are, then such openness can increase public trust in government.
 - ii. If they are not, this is a problem which the public deserves to know about as it might expose government wrongdoing and/or allow the government to be held accountable.
- e) There is a particularly pronounced public interest in disclosure of this specific information to increase public knowledge and inform public debate because the issue to which it relates has already generated public concern.
 - i. A recent academic study from Oxford University researchers found concerning evidence indicating that the policy may be harmful, including potentially contributing to the deaths of three pregnant women [1].
 - ii. The Health and Social Care Committee last summer requested information on the Government's review of NHS overseas visitor charging and subsequently called then Secretary of State for Health to appear before it to explain his refusal to provide it [2].
 - iii. A number of civil society bodies including the British Medical Association have called for upfront migrant charging to be scrapped [3].
 - iv. A coalition of academics and health professionals, in a letter to the British Medical Journal last, called for greater transparency on the policy [4].
- f) Furthermore, a general point is that by ensuring that all evidence is known and being taken into account, disclosure could actually improve policy making, which is clearly in the public interest.
- g) Finally, there is a public interest in knowing that ministers are adhering to the Code which regulates their conduct.

3. Argument stressing "ministerial accountability" in fact favours disclosure

a) DHSC states that “[th]ere is a stronger public interest in maintaining the existing constitutional convention of Ministerial accountability. The integrity of the system underlying the convention must be preserved.”

b) However, this is by no means obviously an argument in favour of non-disclosure.

c) As outlined above, the public need to be able to assess whether government ministers have made wise policy decisions based on the best evidence available and to this end the relevant evidence needs to be transparent.

4. Argument concerning protecting advisers from public scrutiny not relevant

a) DHSC states that advisers need to be “free of any inhibitions in providing Ministers with detailed, frank and candid advice” and adds that “It would not be in the public interest for officials to be made publicly accountable for the advice they gave in this formal manner.”

b) While this is a generic point, I do not disagree with it. However, I do not believe it is relevant given that the names and job titles of any advisers, and any other personal details such as contact information, can easily be redacted.

c) The same applies for any external parties who have proffered advice.

5. “Premature” exposure of advice argument not relevant a) DHSC states that the quality of advice could be inhibited by “the apprehension that the advice will be exposed prematurely to public scrutiny or comment.”

b) The information requested constitutes advice given at least 11 years ago, under a different government and quite possibly by different civil servants. The MoJ’s advice [5] on Section 36 states: “In many cases, information will become less sensitive as time goes by. A time span of two administrations (that is, governments of different political parties) is often a good rule of thumb about whether information held by central government is likely still to be sufficiently sensitive that its disclosure would have the effects referred to in section 36(2).”

c) The policy to which it relates is already in place and is not under review. The ICO’s advice [6] is clear: “Once the public authority has made a decision, a safe space for deliberation will no longer be required.” (61).

d) Furthermore, the nature of the information requested is certainly not of the type that could be considered to warrant application of the thirty-year-rule (since amended to 20 years).

e) As such disclosure of the information could not be considered premature. In addition, taking account of the timing of this request, I would argue that any potential prejudice to the conduct of public affairs “would not be severe or widespread”, echoing the ICO’s view in its decision notice FS50264783 [7].

Conclusion

It seems DHSC has not given sufficient consideration to the arguments in favour of disclosure in weighing up the public interest. On the other hand, undue weight has been given to arguments favouring non-disclosure, some of which are not relevant such as the suggestion that disclosure would be premature.

As a result, I believe the conclusion - that the balance of the public interest lies with non-disclosure - to be erroneous and I would appreciate it if you could reconsider disclosing the information requested.

Yours faithfully,

Hilary Aked

FOOTNOTES

[1] See: Shaun Lintern, "Pregnant women died after fears Tory crackdown on 'health tourism' would bankrupt them, report delayed until after election reveals", The Independent, 13 December 2019, <https://www.independent.co.uk/news/health/nhs-report-delayed-until-after-election-reveals-pregnant-women-died-because-of-mistaken-fears-they-a9245966.html> and Marian Knight et. al., (2018) Saving Lives, Improving Mothers' Care, MBRRACE: iv, <https://www.npeu.ox.ac.uk/downloads/files/mbrance-uk/reports/MBRRACE-UK%20Maternal%20Report%202018%20-%20Web%20Version.pdf>.

[2] <https://www.parliament.uk/business/committees/committees-a-z/commons-select/health-and-social-care-committee/news/nhs-overseas-visitor-charging-17-19/>

[3] <https://www.theguardian.com/society/2019/jun/25/scrap-upfront-nhs-charges-for-migrants-says-bma>

[4] <https://blogs.bmj.com/bmj/2019/05/13/creating-a-hostile-environment-for-migrants-transparency-is-needed-on-nhs-charges-and-data-sharing-agreements-in-nhs-england/>

[5] <https://web.archive.org/web/20110201165207/http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/foi-exemption-s36.pdf>

[6] https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

[7] https://ico.org.uk/media/action-weve-taken/decision-notice/2011/579502/fs_50264783.pdf