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Your Ref: IC-83706-P2P2
Our Ref: TGY/CXO/00242584/2
Date: 23 March 2021

Information Commissioner's Office
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Sent by email only: icocasework@ico.org.uk
CC: freedomofinformation@dhsc.gov.uk

Dear Mr Cawthorne,

Submissions to the ICO regarding case ref. IC-83706-P2P2

1. We write on behalf of Dr Moosa Qureshi with respect to his complaint regarding the recent decision of the Department of Health and Social Care (the **DHSC**) to refuse a request he submitted under the Freedom of Information Act 2000 (**FOIA**). By this letter, Dr Qureshi wishes to make preliminary submissions to the ICO regarding the proper resolution of his complaint under section 50 FOIA, which we understand you have responsibility for investigating. He reserves the right to make further submissions upon the receipt of further information or documentation relating to this request.

2. These submissions are accompanied by a bundle of enclosures, references to which are in the page **[Enc/page number]**.

The FOIA Request

3. On 21 December 2020, Dr Qureshi requested copies of two reports from the DHSC under FOIA (**[Enc/1]**):

    3.1. A report entitled "*Pandemic Influenza Briefing paper – NHS Surge and Triage"* completed in or around December 2017; and

    3.2. A report entitled "*Pandemic Influenza Briefing paper – Adult social care and community healthcare"* (date unknown). (together, the **Reports**).

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4. The existence of the Reports is public knowledge, as is the fact that the Reports were submitted by NHS England to the then Chief Medical Officer (Dame Sally Davies) shortly after completion of a 3-day simulation exercise conducted by NHS England in 2016 which was designed to evaluate the preparedness of the UK health system to deal with a viral pandemic (**Exercise Cygnus**). It gave rise to a number of key lessons or recommendations to be implemented by the Government which were summarised in a report (the **Cygnus Report –** see **[Enc/37]**).

5. The existence of the Reports is known because of another document disclosed by NHS England which sought to identify the steps that had been taken to implement the key lessons learned from Exercise Cygnus. See **[Enc/13**]. As to what this document tells us about the information contained in the Reports:

    5.1. Key lesson number 5 was the need for further work to be done to "*inform consideration of the issues related to the possible use of population-based triage during a reasonable worst case scenario"* **(p.16)***.* Key lesson number 6 was the need for further work "*to consider surge arrangements for a Reasonable Worst Case Scenario pandemic"* which work was to be led by NHS England with oversight from "*DH*" (presumably the Department of Health) **(p.17)**. Both key lessons are marked as "*Complete"*.

    5.2. The accompanying notes and comments to these key lessons refer to the former and current Chief Medical Officers and the Chief Nursing Officer having given "*approval"* to an NHS England "*policy paper"* covering "*how systems will be flexed to cope with the expected surge in demand during a pandemic and the possible application of "population triage""*. Likewise, the notes accompanying key lesson 18 states that a "*policy paper on social care surge has been completed and reviewed by the previous CMO"*.

    5.3. The two Reports are then identified. The first ("*NHS Surge and Triage"*) is said to be about population triage in hospitals. The second ("*Adult social care and community healthcare"*) is said to be about social and community care and was jointly prepared with the DHSC. The Reports are said to have "*modelled the impact of service closures and triage systems and developed supporting plans for community treatment".*

5.4. The notes then state that "*following approval*" of the Reports, further steps were being taken – in particular "*finalising the strategy to be published and developing the service facing guidance*".

DHSC's Refusal Decision

6. On 22 January 2021, the DHSC responded to Dr Qureshi's FOIA request (**[Enc/2]**). By this letter, the DHSC confirmed that it is in possession of the Reports but refused to disclose them, invoking the qualified exemptions under "*sections 36(2)(b)(i)(ii) and (c)*" of FOIA (the **Refusal Decision**).

7. The DHSC's letter otherwise provides no substantive reasoning at all as to why those exemptions are properly applicable, nor why the public interest is considered better served by maintaining the exemption. It did nothing more than assert that "*[w]e have sought the view of the qualified person, who is of the reasonable opinion that section 36(2)(b)(i)(ii) and (c) is indeed engaged*" and, as to public interest balancing, that "*we believe that disclosure of these documents is likely to inhibit the provision of advice or the exchange of views for the purpose of deliberation, or would otherwise prejudice the effective conduct of public affairs, and we therefore consider that the public interest balance lies in favour of withholding this information*" (underline added). No reasoning is given as to why either or both are engaged. This raises questions about whether the DHSC has simply engaged in a knee-jerk reaction of referring to all possible bases for the section 36 exemption.

8. The reasoning on public interest balancing also displays a fundamental misconception as to how that balancing exercise must be carried out. The DHSC simply states the basis on which the qualified section 36 exemption is *prima facie* engaged (i.e. that disclosure is likely to prejudice the effective conduct of public affairs) and moves from that proposition to the conclusion that "*therefore*" public interest is best served by non-disclosure. By that logic, all qualified exemptions are automatically transformed into absolute exemptions. As the ICO is aware, section 36 requires a two stage approach. The DHSC failed to recognise this and failed to properly apply the public interest balancing test.

9. It is also striking that the DHSC has declined to provide any part of the information contained in the Reports. The proposition that the public interest is best served by the

wholesale withholding of both Reports, as opposed to the proper and proportionate use of redactions (if properly necessary), requires justification. The Reports will presumably contain a wide range of information, each part of which falls to be considered against the exemptions. See, for example, the approach in *HMRC v Information Commissioner* (EA/2008/0067) concerning a request for a copy of a report prepared following an investigation into allegations about a proposed amnesty for United Kingdom tobacco producers. The Commissioner considered that different types of information within the report fell to be considered differently (see §17 **[Enc/284-285]**). Information relating to the involvement of third parties need not be disclosed. However, information relating to an HMRC employee could be disclosed, as the same concern about non-cooperation with future investigations did not bear the same force for employees. Whilst the First-tier Tribunal ultimately disagreed with the Commissioner's conclusions as to the public interest test, it did not depart from the approach of differentiating distinct kinds of information.

Internal review

10. On 18 February 2021, the DHSC wrote again to Dr Qureshi with the outcome of its internal review of its Refusal Decision **[Enc/6]**. The internal review upheld the Refusal Decision. Beyond identifying the "*qualified person"* as Parliamentary Under Secretary of State, Jo Churchill MP, this letter contained no further information or reasoning.

Legal principles governing the application of the section 36 FOIA exemption

11. Section 36 provides for a qualified exemption from disclosure (save for information held by the Houses of Parliament) if, in the "*reasonable opinion"* of a "*qualified person"*, disclosure would or would be likely to "*inhibit the free and frank provision of advice"* (section 36(2)(b)(i)), "*inhibit the free and frank exchange of views for the purposes of deliberation"* (section 36(2)(b)(ii)) or "*otherwise prejudice the effective conduct of public affairs"* (section 36(2)(c)).

12. A qualified person means, in relation to information held by a government department in the charge of a Minister of the Crown, any Minister of the Crown (section 36(5)(a)).

13. Whether prejudice is likely depends on whether there is "*a significant and weighty chance of prejudice to the identified public interest"* so that there "*may very well"* be prejudice,

even if the risk falls short of being more probable than not (see *Downs v The Information Commissioner (EA/2015/0137)* at §35, finding that this test was not satisfied on the facts as the arguments made by the authority were unrealistic and speculative).

14. A qualified person's opinion as to actual or likely prejudice must be substantively reasonable. See *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and British Broadcasting Corporation (EA/2006/0011 and EA/2006/0013)* at §§54-64 **[Enc/218]**, discussed in *Information Commissioner v Edward Malnick and another (GIA/447/2017)* ("***Malnick***") at §52 **[Enc/171]**. The opinion must be "*objectively reasonable*" (*Guardian Newspapers and Brooke v Information Commissioner & BBC (EA/2006/011 and EA/2006/0013)* at §60).

15. Where the qualified person holds such a reasonable opinion, the public authority must proceed to apply the public interest test. This is a separate and distinct stage of analysis. If the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed. If the scales are level, the information must therefore be disclosed (*Department of Health v Information Commissioner* [2017] 1 WLR 3330 at §46 **[Enc/199]**).

16. In scrutinising a public authority's approach to the public interest test, the Information Commissioner is not simply asking whether the authority's view is reasonable – the question is whether the public interest has then been weighed correctly. See *Malnick* at §32 **[Enc/165]**.

Likelihood of prejudice to the conduct of public affairs

17. The Reports are "*policy papers"* which "*modelled the impact of service closures and triage systems"* and "*developed…plans"* for "*how systems will be flexed to cope with the expected surge in demand during a pandemic"*. These plans included "*population triage"*. The Reports were requested by and provided to the Chief Medical Officer, who reviewed them and gave them "*approval"*. Steps to implement whatever is in these Reports were taken. See §5 above.

18. It is very difficult indeed to understand how Jo Churchill MP reached the view that publication of policy papers, which were approved by the Chief Medical Officer and formed the basis for further action, could prejudice the conduct of public affairs. The

common appeal to the need for a 'safe space' in which to discuss policy options would not apply where the relevant decisions have already been made. In this regard, we note the ICO's own guidance on the section 36 exemption[1] which states that the need for a safe space will generally no longer be necessary when the public authority has made the decision in question.

19. Likewise, it is difficult to understand how disclosure of the Reports might inhibit civil servants and medical professionals in NHS England from giving frank assessments of the existing surge capacity of health and social care services in the future. They are not politicians. Their job is to inform politicians as to the facts. No explanation is provided as to how either limb of s.36(2)(b) is engaged.

20. These Reports appear to contain approved policy which was, or is in the process of being, implemented. The proper conduct of public affairs calls for the disclosure of these Reports. The public should be able to understand and debate the degree to which systems were expected to cope (or not to cope) in 2017 in the wake of Exercise Cygnus and the steps being put in place to deal with that.

<u>Strong public interest in disclosure of the Reports</u>

21. Further and in any event, the public interest strongly weighs in favour of disclosing the Reports.

22. Firstly, there is widespread public and political interest in the degree to which the Government took action following Exercise Cygnus to prepare for a viral pandemic, and the degree of preparedness for the ongoing COVID-19 pandemic. There is, in particular, widespread interest in any plans for, and discussions of, the use of population triage should healthcare resources become overwhelmed. See, by way of example:

    22.1. Reporting from The Telegraph on the anger expressed by front-line NHS doctors at the absence of transparency in this regard: **[Enc/94]**;

    22.2. Calls from the Nuffield Council of Bioethics for national guidance on population triage and resources allocation in the pandemic: **[Enc/101]**;

    22.3. Discussion of the possible parameters for a population triage policy by Professor Tim Cook and his NHS colleagues in the Journal of Medical Ethics: **[Enc/105]**; and

[1] ICO, *"Prejudice to the effective conduct of public affairs (section 36)"*, March 2015 at §61 **[Enc/136]**.

22.4. The discussion of the difficult decisions faced by healthcare providers in the absence of any national policy as to triage and the legal and ethical implications by legal academics from Cambridge University's Faculty of Law: **[Enc/113]**.

23. Disclosure of the Reports will go towards increasing the public understanding of the fact of and development of any policy on this issue – or indeed the absence of any such policy – and would allow a more informed debate.

24. Secondly, there is a reasonable expectation that NHS England and the DHSC will discuss issues and formulate policy relating to public health, including the possible need for and/or basis of using population triage, in a free and frank manner with the public. These are matters on which there should be informed public debate. See, by analogy, the comments of the Information Commissioner in its decisions requiring the disclosure of Committee minutes relating to the MMR vaccine at §95 (Decision Notice 22 December 2008, Ref FS50149375) **[Enc/247]**.

25. Thirdly, the Reports appear to date to 2017. The DHSC cannot pray in aid of a 'safe space' indefinitely and the public interest in maintaining the exemption will naturally diminish over time. The case of *Matthew Hill v Information Commissioner (EA/2091/0136)* is an instructive example. Mr Hill sought disclosure of a report produced by the Royal College of Obstetricians and Gynaecologists following its visit to a local NHS Trust maternity unit in the wake of longstanding safety concerns, which report contained recommendations for the improvement. The Information Commissioner had upheld the Trust's refusal to disclose the report on the basis of the section 36 exemption, reasoning that the Trust needed to "*consider the pros and cons of various options without the risk of premature disclosure".* The First-tier Tribunal disagreed. It noted that there was already information in the public domain to the effect that concerns existed for some time and were not being addressed (§17) **[Enc/152]**. In this context it concluded (§§19-20) **[Enc/153]**:

> "The difficulty is that the Trust has had a safe space for a number of years. The issues were identified in a RCOG review in 2013, by the CQC in 2014 and 2015 and yet when the RCOG conducted a further review in 2017 the situation was not materially different. The Trust had had ample opportunity to move forward within the protection of the safe space. It had failed to do so. Perhaps on this occasion the safe space has not served to facilitate clear thinking, but to enable an unsatisfactory state of affairs to continue.
>
> The public interest in understanding the difficulties of this unit is substantial. The difficulties had gone on for too long and the public interest in disclosure of the report

at the start of 2018 outweighed any likely good that protecting the safe space could achieve."

26. It is also notable that the DHSC has not purported to rely upon the section 35 exemption covering information relating to the formulation and development of government policy which may be indicative of the fact that the contents of the Reports have not informed central government policy-making, further diminishing the force of any 'safe space' argument.

27. Fourthly, the degree of information which is already in the public domain militates in favour of the disclosure of the Reports. The Cygnus Report has been published. That Report outlines a number of key lessons which needed to be learned and recommendations that the Government needed to implement to ensure it was prepared for a viral pandemic. We know that the Reports exist and formed part of the steps taken in response to those lessons learned. They are the natural successors to the Cygnus Report. Disclosure will plainly serve the public interest in understanding what, if anything, was done in response to it.

Need for close scrutiny by ICO

28. The Refusal Decision here challenged is the latest in what has been a persistent pattern on the part of the DHSC of closing ranks and refusing to disclose documentation relevant to the public's understanding of the nation's preparation for and action in response to the ongoing COVID-19 pandemic.

29. You may be aware that Dr Qureshi was one of the leading forces behind the calls on Government to publish the reports containing the findings and recommendations of Exercise Cygnus (the **Cygnus Report**). In April 2020, he requested publication of the Cygnus Report under FOIA. He was not alone in doing so. Many others had made FOIA requests for the Cygnus Report, and had been refused on the basis *inter alia* of the very same section 36 exemption that the DHSC is now praying in aid of. In response to Dr Qureshi's request, the DHSC engaged in a strategy of evasion and delay. Rather than refuse Dr Qureshi's FOIA request, as it had done so with those requests which came before him, the DHSC kept on requesting extensions of time so as to complete the public interest balancing exercise. We refer you to Dr Qureshi's earlier complaint regarding this conduct at **[Enc/25]**.

30. Dr Qureshi commenced a judicial review, seeking publication of all of the reports prepared as part of and following Exercise Cygnus, included those reports provided to or filed by participants. Faced with the growing pressure for transparency, the Government finally published the Cygnus Report containing a summary of the key lessons learned.

31. In these circumstances, it is incumbent upon the Information Commissioner to submit the DHSC's purported justifications for non-disclosure in this case to the strictest scrutiny. At the very least, we invite the Commissioner to request sight of:

    31.1. Copies of any submissions made to the qualified person before she made her decision at the applicability of either limb of section 36(2) in this case;

    31.2. Copies of any documents detailing the reasons for the qualified person's opinion and the factors taken into account by her and the weight attached to them;

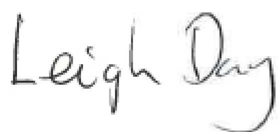
    31.3. Copies of any submission made to the person who made a decision on the public interest balancing test (if different to the qualified person) and documents detailing the reasons for their opinion, the factors taken into account and the weight attached to them;

    31.4. Any other documents which were considered or produced as part of the DHSC's Internal Review;

    31.5. Reasons why the continued withholding of the Reports can be justified, in circumstances in which the Cygnus Report and the document detailing the steps undertaken to implement the key lessons outlined in the Cygnus Report (see §5 above) have been disclosed and are in the public domain.

We await your decision. Please do not hesitate to contact Tessa Gregory or Carolin Ott using the details provided above, if we can be of further assistance.

Yours faithfully,



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