

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2018

Public Authority: Department of Health Northern Ireland

Address: lynne.curran@health-ni.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Health (DoH) Northern Ireland in relation to the Hay review of senior executive pay in Health and Social Care (HSC).
2. The Commissioner's decision is that the DoH has correctly applied section 35(1)(a) of the FOIA to the requested information, therefore the Commissioner requires no steps to be taken.

Request and response

3. On 25 January 2017, the complainant wrote to the DoH and requested information in the following terms:

"You will recall we spoke some weeks ago about senior executive pay in the HSC. You indicated that the Department of Health have carried out a review of the Hay scheme and that this would be presented to the Permanent Secretary for consideration.

I would be grateful if you could provide me with a copy of the review report and let me know its current status, i.e. has it been considered and if so, what recommendations or decisions been made?"

4. The Department of Health responded on 21 February 2017. It stated that it did hold information in relation to the Hay review, however it was exempt from disclosure under section 35(1)(a) of the FOIA. The

complainant requested an internal review of that decision on 7 March 2017.

5. Following an internal review the Department of Health wrote to the complainant on 22 March 2017. It stated that the reviewer was upholding the original decision.

Scope of the case

6. The complainant contacted the Commissioner on 11 May 2017 to complain about the way his request for information had been handled.
7. The Commissioner has considered the DoH's application of section 35(1)(a) of the FOIA to the requested information.

Reasons for decision

8. Section 35(1)(a) of the FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands these terms to refer to the design of new policy, and the process of reviewing or improving existing policy. However, the exemption will not cover information relating purely to the application or implementation of established policy.
9. The Commissioner recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making 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.

Does the withheld information relate to the formulation or development of government policy?

10. The withheld information in this case consists of a draft submission to the Permanent Secretary of the DoH and a submission to the Minister. The Commissioner's approach to defining government policy is set out in her guidance. That guidance clearly indicates that policy can be developed in many ways and in a wide range of circumstances.
11. The DoH states that the current HSC Senior Executive Pay and Grading Scheme was first introduced in October 2001 following criticism by the Assembly's Public Accounts Committee (PAC) that the previous arrangements were too lax and had led to overly generous and uncontrolled senior pay in some (then) HPSS bodies. The Scheme is based on a system of overlapping pay ranges with a wide range between minima and maxima and no fixed points between these minima and maxima. The Department has used an evaluation system devised by the Hay Group to assess the job weight of all Senior Executive posts in the HSC and to assign them to the appropriate level within the grading structure. The Hay system of job evaluation identifies factors for a group of jobs and scores them against each factor, using a fixed weighting for the factors. This system offers a clear framework for assessing jobs of all types and levels.
12. In September 2016 a submission was presented to the Permanent Secretary of the DoH regarding the proposals to reform health and social care senior executive pay. This submission outlined the background to the current arrangements for senior executive pay; highlighted the anomalies; and sought the Permanent Secretary's view on a number of options for a new arrangement for senior executive pay. It was stipulated that, subject to the Permanent Secretary's agreement in principle, details for the new arrangements would be brought forward for consideration and Ministerial approval. At a meeting on 8 September 2016 the Permanent Secretary did not agree that this submission could be submitted to the Minister but instead gave a verbal direction to draft an introductory submission to the Minister regarding this issue with particular focus on the anomalies.

13. On 13 December 2016 a submission was presented to the then Minister of Health introducing her to the issue of senior executive pay and grading. The Minister was advised that the timescale for the submission was routine but that there were increasing calls for consideration of senior executive pay. She was also advised that the submission was not disclosable as its contents were policy in development. She was asked to note the briefing and indicate that she was content for officials to progress a review of the existing senior executive pay and grading scheme. It was anticipated that a further options paper would be submitted to her to establish if there was an appetite for reform.
14. Between December 2016 and the dissolution of the Northern Ireland Assembly on 26 January 2017 the Minister did not make a decision on this issue. Since 26 January 2017 to date no further work has been undertaken in relation to the HSC Pay and Grading Review as a Ministerial direction is required.
15. The development of this matter is therefore considered to be at a very early stage and cannot be further progressed without a Ministerial decision or direction.
16. The complainant has not disputed that the exemption is engaged, his arguments are that the public interest favours disclosure. The Commissioner accepts that a submission to a Minister regarding an issue proposed to be reviewed does relate to the formulation and development of government policy.
17. As it is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in favour of maintaining the exemption and those in favour of disclosure.

Public interest arguments in favour of disclosure

18. The DoH accepts that there is a strong public interest in transparency, accountability and allowing public scrutiny of the DoH's decision-making processes and particularly in promoting openness and public understanding around the development of the policy.
19. The DoH also considers that there is a strong public interest in demonstrating compliance with the spirit of Freedom of Information legislation and promoting positive behavior in relation to sharing information, also in reassuring Senior Executives who are unhappy with their remuneration that the DoH has been working to identify potential improvements to their pay structure.

Public interest arguments in favour of maintaining the exemption

20. The DoH has informed the Commissioner that the policy review relates to high profile positions within the HSC and consequently there is a need to preserve confidentiality due to the sensitivity of information which impacts on identifiable individuals. Release of the information at this stage could cause unnecessary and undue anxiety.
21. The DoH also considers that release of information at this stage would have a negative impact on the ongoing discussions about this policy and could compromise its development and formulation. This is the early stage of a live formulation process of a policy and therefore releasing the information would reveal details of live policy options while the policy review process is still ongoing.
22. There is a continuing need to maintain thinking space away from public scrutiny as a policy decision has not yet been taken. Information from other sources on this issue will be sought and will need to be scoped in order to make informed policy decisions. The protection of the policy-making process, and preserving the ability of officials to engage in free and candid discussion of policy options without apprehension that potential courses of action may be held up to scrutiny before they have been fully developed or evaluated.

Balance of the public interest

23. In determining where the balance of the public interest lies the Commissioner first notes that the exemption is a class-based exemption, meaning that it is not necessary for it to be demonstrated that any prejudice, inhibition or harm would result from disclosure in order for the exemption to be engaged. There is, therefore, no inbuilt weight in favour of maintaining the exemption which automatically transfers across to the public interest weighting. In view of this, the Commissioner considers that the specific nature of the information, its content and sensitivity, and its context are key influences on the outcome of the public interest test, as is the timing of the complainant's request.
24. Having reviewed the requested information, and in view of the DoH's explanations regarding the issue of pay and grading, the Commissioner is satisfied that the policy in this area was, both at the time of the request and currently, in a process of formulation and development.
25. The Commissioner accepts that the exemption is designed to protect the policy making process and that, where disclosure might result in this process being impaired, there is an arguable public interest in decision-making undertaken on behalf of the public being effective.

26. The Commissioner has examined the arguments in favour of disclosing the requested information, and in maintaining the exemption, and agrees that disclosure would increase the DoH's transparency and accountability to the public in decision-making.
27. The DoH refers to requiring a thinking space in which to debate live issues and make informed policy decisions. The Commissioner accepts that a safe space argument is relevant in this case, as the issues are live and ongoing, and space away from public scrutiny is necessary to debate and finalise issues with a view to the formulation and development of this particular policy.
28. The DoH also argues that disclosure of the requested information might affect the ability of officials to engage in free, frank and candid discussions regarding policy decisions, i.e. the 'chilling effect' argument. The Commissioner's guidance on this issue states that:-

"When discussions are purely internal then civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice."
29. It is the Commissioner's view that chilling effect arguments operate at various levels. If the policy in question is still live, arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
30. The Commissioner considers that, in this case, the DoH is making the 'chilling effect' argument about the issue at hand, which is part of a live and ongoing policy decision-making process. Therefore, the Commissioner considers that the argument that discussions regarding the pay review may be less free, frank and candid, would carry significant weight in this instance.
31. Having considered all of the public interest arguments, both in favour of maintaining the exemption and of disclosure, the Commissioner considers that, in this case, the public interest is in favour of maintaining the exemption at section 35(1)(a) of the FOIA.

Right of appeal

32. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.

34. 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

Deirdre Collins
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