

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2013

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

Decision (including any steps ordered)

1. The complainant has requested communications between senior staff at Monitor with representatives of McKinsey and Co. and the Department of Health in relation to Regulations under section 75 of the Health and Social Care Act. Monitor confirmed that some of the requested information was held, amounting to 4 documents, all of which were being withheld on the basis of section 36(2) and, in one case, section 41 of the FOIA.
2. The Commissioner's decision is that Monitor has correctly withheld the correspondence it received from the DoH under section 36(2)(b)(i), (ii) and (c) but the public interest in disclosure outweighs that in maintaining the exemptions in relation to the three "sector reports".
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the three sector reports dated 15 January 2013, 15 February 2013 and 20 March 2013, with appropriate redactions for personal data under section 40(2) of the FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 March 2013, the complainant wrote to Monitor and requested information in the following terms:

From January 1st 2013 to March 26th 2013 all communications, electronic or otherwise, including minutes of meetings and correspondence pertaining to Regulations under Section 75 of the Health and Social Care Act between:

- 1) David Bennett, Chief Executive, Monitor and any employee or representative of McKinsey and Co.
 - 2) Adrian Masters, Director of Strategy, Monitor and any employee or representative of McKinsey and Co.
 - 3) Stephen Hay, Chief Operating Officer, Monitor and any employee or representative of McKinsey and Co.
 - 4) Any of the above named employees of Monitor and any representative of the Department of Health, including Ministers.
6. Monitor responded on 25 April 2013. It stated that it did not hold information within the scope of parts 1) to 3) of the request. Monitor confirmed it did hold information within the scope of part 4) of the request but it was being withheld on the basis of section 36(2) and section 41 of the FOIA.
7. Following an internal review Monitor wrote to the complainant on 22 May 2013. It stated that it upheld its decision to withhold the information identified as being within the scope of part 4) of the request.

Scope of the case

8. The complainant contacted the Commissioner on 29 May 2013 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine if Monitor has correctly applied the section 36(2) and section 41 exemptions to the information within the scope of part 4) of the request and if so, where the balance of the public interest lies.

Background

10. The Health and Social Care Act 2012 made changes to the way health care services are regulated and gave Monitor, the body responsible for regulation of the health care sector, additional responsibilities.
11. One of these new duties was to enforce the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013 (No. 2)¹, referred to in this Notice as the section 75 regulations as they were made under sections 75 to 77 of the Health and Social Care Act.
12. These new regulations replaced the existing rules governing the procurement of NHS-funded services as set out in the Principles and Rules for Cooperation and Competition and the Procurement Guide for Commissioners of NHS-funded Services.

Reasons for decision

Section 36(2)

13. Section 36(2) of the FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –

(b) would, or would be likely to, inhibit –

(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."

14. The exemptions listed in section 36(2) are qualified exemptions so are subject to public interest tests. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
-

¹ http://www.legislation.gov.uk/ukxi/2013/500/pdfs/ukxi_20130500_en.pdf

15. For any of the exemptions listed at section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for Monitor is the Chief Executive, David Bennett. Monitor has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the Chief Executive was a reasonable one.
16. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: "*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason: not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*"²
17. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
 - whether the prejudice claimed relates to the specific subsection of section 36(2) that Monitor is relying on;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
18. Monitor has identified four documents within the scope of part 4) of the request: 3 Sector Regulation Monthly Status Reports and one email from a Department of Health (DoH) official to Monitor's Chief Executive with an attached note. The status reports are sent to various public authorities involved in regulation of the health care sector including the DoH and the Care Quality Commission (CQC). These reports provide updates on developments on regulation in the sector and an assessment of risk associated with these developments.
19. Monitor has argued that these reports must be frank and open so they are of use to the recipients and disclosure of the reports would inhibit the candour with which they are prepared. Monitor has considered the 'chilling effect' on the exchange of views between the public authorities

² Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

on the subject of the risks associated with the developments, with the likely inhibition on the free and frank exchange of views for the purposes of deliberation.

20. On a more general note, Monitor considered the disclosure of these reports could interfere with the openness with which the DoH and other public authorities communicate with each other and the candour with which they share information.
21. Monitor also considered the chilling effect in relation to the correspondence with the DoH and considered that publishing this information would have a real risk of hindering the frankness with which Monitor and the DoH communicate. With regard to this email and its specific content on potential ways to address concerns with the section 75 regulations; Monitor was also of the view that a 'safe space' was required for the DoH to consider how to do this and to share its views with Monitor without being exposed to public scrutiny.
22. With each of the types of withheld information Monitor has argued that the likely inhibition of the free and frank exchange of views would also inhibit the exploration of policy options and the quality of decisions about the revision of legislation.
23. Similarly in terms of the likely inhibition on the free and frank provision of advice the withheld information provides updates on the status of projects within the context of on-going discussions about the evolution of the legislation. This process requires advice from and to the DoH and other regulatory bodies on how best to achieve policy objectives and deliver successful programmes. Disclosure of this information would be likely to inhibit the free and frank provision of advice if stakeholders and contributors felt that advice given with no expectation of disclosure could be made public. This could then lead to less candid input and more tailored opinions being provided with public consumption in mind.
24. With regard to the likely prejudice to the effective conduct of public affairs; Monitor considers all of the withheld information is important to the progress and achievement of policy objectives and to discussions surrounding amendments to legislation which have not yet been made. Monitor argues that were information relating to the discussions and advice surrounding these matters to be disclosed this would have a chilling effect on the candour and frankness with which these issues are addressed between regulatory bodies thus having a detrimental impact on the effective conduct of public affairs.
25. Monitor has provided sufficient evidence to illustrate that the Chief Executive was provided with information explaining that he was required to form a reasonable opinion in relation to the application of section

36(2) of the FOIA to the information withheld by Monitor in this case. It is clear having reviewed this information the qualified person formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and exchange of views and the effective conduct of public affairs.

26. Having considered the points outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. In places the Commissioner finds that there is some overlap in the arguments underpinning the opinion between sections 36(2)(b) and (c), however the Commissioner accepts that the opinion does provide enough evidence to support the reasonableness under (b) and (c). Therefore, he considers that sections 36(2)(b)(i), (b)(ii) and (c) are engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

27. Monitor acknowledged the public interest in disclosure of information in relation to the section 75 regulations. These regulations attracted media attention and scrutiny and any disclosure would be likely to aid the public understanding of the decisions being made about amendments to the legislation and the associated risks and management of the decisions.
28. There is an acknowledged public interest in the disclosure of information which ensures transparency in the way in which government and regulatory bodies operate and in the increased transparency and accountability of public officials, leading to increased trust in public bodies to carry out important policy functions and processes.
29. The complainant has argued that as the original section 75 regulations were withdrawn due to concerns about their content and intent and were then redrafted quickly there is a very strong public interest in any information relating to this process being made public to assist the public's understanding and to address the concerns about the changes in the NHS.

Public interest arguments in favour of maintaining the exemption

30. When making a judgement about the weight of the public authority's arguments under section 36(2), the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
31. Monitor argues that the reports and correspondence, both of which are shared with or come from the DoH and other regulatory bodies, as well

as the timing of the request at a time when amendments were still being finalised in relation to the section 75 regulations, all contribute to the likely inhibition to the free and frank exchange of views and provision of advice and the prejudice to the effective conduct of public affairs.

32. As a counter to the public interest in disclosure to increase transparency, it can be argued this is a very high level, general argument which does not take account of the need to maintain a 'safe space' for decision-making and the ability to make robust decisions based on frank advice.
33. Monitor has also argued that there is already a substantial amount of information available in the public domain on the section 75 regulations³. The debate in the House of Lords on the section 75 regulations that were laid before Parliament on 13 February and which occurred on 5 March 2013 is available to be viewed⁴. Similarly the debate in the House of Lords on the motion to annul the revised regulations that were laid before Parliament on 11 March which occurred on 24 April 2013 is a matter of public record⁵.

Balance of the public interest arguments

34. In considering the balance of the public interest arguments the Commissioner has been mindful of previous decisions of the Information Tribunal. Particularly the case of the *Department of Health v ICO and Healey and Cecil*⁶ in which a request to the DoH for risk registers relating to the NHS modernisation programme resulted in a decision by the Tribunal that the transition risk register should be disclosed whilst the strategic risk register should be withheld on the basis of section 35(1)(a). Similarly, the Commissioner determined that risk registers should be disclosed relating to the Department for Work and Pension's Universal Credit Programme⁷.

³ <https://www.gov.uk/government/publications/nhs-procurement-patient-choice-and-competition-regulations-2013-department-of-health-response-to-legal-opinions>

<http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/SI-500-NHS-Procurement-2-Written-Submissions.pdf>

⁴ Hansard Vol.743, No.120

⁵ Hansard Vol. 744, No. 137

⁶ Case EA/2011/0286 and 0287

⁷ FS50460988

35. The Commissioner is also mindful of previous decisions such as the DoH and DWP cases noted above, where the disclosure was ordered of the transition register but not the strategic register. He is also aware that risk registers have been disclosed by other public authorities in the past such as the one related to the expansion of Heathrow airport and others in the NHS. However, the Commissioner must consider the individual circumstances of this case when making a decision on where the balance of the public interest lies. The Commissioner must also be mindful that the information in this case amounts to three status reports which contain risk assessments and could be viewed as risk registers but also includes correspondence from the DoH discussing options for amendment to the legislation.
36. Monitor mentioned the need to maintain a 'safe space' in its submissions to the Commissioner and he generally accepts that these arguments are applicable where there is a need to debate issues and make decisions away from public scrutiny. At the time of the request decisions on amendments to the section 75 regulations were still being finalised. As such the Commissioner does accept that there is some likelihood that disclosure would impact on Monitor's ability to deliver the policy programme (particularly when considering that the withheld information constitutes discussions with the DoH) as it would have increased scrutiny and potentially required the diversion of resources from the programme. He is less minded to accept this argument in relation to the sector reports which appear to provide updates on current progress and risks and do not contain proposals for amendments and the reasons for this which the correspondence does. It is this 'correspondence' information which the Commissioner considers would be more likely to attract public scrutiny and carry a greater weight of public interest in maintaining the exemption.
37. The Commissioner also notes that there is no specific evidence to suggest that in previous cases where risk logs and other information have been disclosed there has been any impact on the ability to deliver on stated aims or programmes.
38. With regards to the 'chilling effect' argued by Monitor, the Commissioner would generally give some weight to the argument that disclosing information that is being used to influence decisions, whether on the formulation and development of policy, or in this case, on the delivery of a programme, could affect the frankness and candour with which relevant parties would continue to contribute to discussions on how to mitigate risks and keep the programme moving on time. The weight that can be given is stronger when the public authority can demonstrate that the information clearly relates to a matter which is still effectively "live".

39. In this case the request was made at a time when a motion to annul the section 75 regulations had been made and the DoH and Monitor, as well as other regulatory bodies, were in the process of considering the options available to the Government for revising the regulations. The Commissioner recognises the likelihood of the chilling effect occurring is much higher for the correspondence from the DoH, which dealt with the options for redrafting the regulations, than for the majority of the status reports which contain updates on the regulations and risks in relation to the NHS transition programme.
40. Three of the status reports contained updates on the regulations from when they were initially laid before Parliament on 13 February 2013. One of the status reports dated from 20 March 2013 so contained updates on the revised regulations which had been laid before Parliament on 11 March 2013. As such the Commissioner finds the chilling effect argument more likely to apply in relation to the status report which contained information on the revised regulations as the revised regulations had not come into force at the time of the request so the issue was still "live".
41. The Commissioner is mindful of decisions of the Information Tribunal⁸ where broad arguments that disclosure would affect the frankness and candour with which officials would contribute were rejected. However the Commissioner also accepts the need to consider the specific impacts of disclosure in each case. As such the Commissioner does consider that there is some validity to the 'chilling effect' arguments in this case in relation to the correspondence from the DoH as it is a record of high-level discussions between relevant parties setting out views on how to proceed with the draft legislation and potential amendments that could be made.
42. However, despite the Commissioner accepting there is weight to the 'chilling effect' argument in respect of the correspondence from the DoH he does not consider this to be the case with the status reports. The correspondence from the DoH contains reasonably detailed information intended for candid and frank discussions and planning.
43. The sector reports contain limited information and are based on current issues with the NHS transition programme, including the drafting of the section 75 regulations. The information is not particularly detailed and the Commissioner is not clear on how a significant chilling effect would

⁸ Office of Government Commerce v Information Commissioner [EA/2006/0068 & EA/2006/80]

be likely to result from disclosing this information and Monitor have not specifically explained this. Whilst the Commissioner can accept there may be some validity to the argument that disclosure of the status reports may have an impact on the level of detail included in future reports he does not accept that there would be any inhibition to the process of producing the reports and he does not therefore accept there would be any chilling effect should the reports be disclosed.

44. Balanced against all of this, the Commissioner does find there is a strong public interest in disclosure of the information given the significant changes to the NHS that came into force on 1 April 2013. The information in this case pre-dates the transition but relates to the management of aspects of the NHS transition and, in particular, the controversial section 75 regulations. These regulations fundamentally changed the ways in which services are procured within the NHS and were intended to increase competition.
45. After the first draft regulations were laid before Parliament on 13 February 2013 concerns were raised over tendering and when contracts could be awarded without competition. The second set of regulations was then laid before Parliament on 11 March 2013 with these concerns in mind. The changes will impact on all Clinical Commissioning Groups and have been criticised as a step towards privatisation⁹ of the NHS.
46. The drafting and redrafting of the regulations are an important public interest matter for a number of reasons:
 - The regulations represent a significant change to how NHS-funded services are procured;
 - At a time of transition for the NHS changes to the procurement of services may impact on the provision of services in the short-term;
 - Competition for all services may also create extra costs and increase the chances of legal challenge, impacting on the NHS' ability to deliver its services in an efficient and effective way.
47. There has been widespread discussion amongst the public and campaign groups and industry bodies, as well as media commentary, about the

⁹ <http://www.opendemocracy.net/ournhs/caroline-molloy/after-section-75-where-next-for-nhs-campaigners>

impact of the regulations¹⁰. Disclosure of any information, particularly that which shows that risks had been identified and mitigated against, would significantly aid public understanding of risks related to the programme and the redrafting of the section 75 regulations.

48. In the case of the sector reports, as the Commissioner does not accept the chilling effect arguments carry much weight he has concluded the public interest in maintaining the section 36(2)(b) exemptions does not outweigh that in disclosure.
49. The Commissioner therefore requires Monitor to disclose the three sector reports, with appropriate redactions under section 40(2) for personal data.
50. The Commissioner recognises that the decision regarding the correspondence from the DoH is finely balanced but as he has accepted the validity to the chilling effect and safe space arguments in relation to this, these arguments do slightly outweigh the public interest in disclosure. The Commissioner therefore finds that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure. The Commissioner has also reached the same conclusion under section 36(2)(c) for the correspondence from the DoH.
51. In conclusion the Commissioner requires Monitor to disclose the sector reports but not the correspondence from the DoH (the email and attached note) which has been correctly withheld.

¹⁰ <http://www.theguardian.com/healthcare-network/2013/apr/30/nhs-section-75-regulations-where-next>

<http://bma.org.uk/working-for-change/the-changing-nhs/competition-and-choice/choice-and-competition/section-75-briefing>

Right of appeal

52. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

53. 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.
54. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF