

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 November 2016

**Public Authority:** Department of Health

**Address:** 79 Whitehall

London

SW1A 2NS

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information on how the transition costs for junior doctors' contracts were being funded. The Department of Health (DH) refused to provide the information under section 35(1)(a) on the basis that it related to the formulation or development of government policy.
2. The Commissioner's decision is that the DH is entitled to rely on section 35 to withhold the information.
3. The Commissioner does not require the public authority to take any further action in this matter.

#### **Request and response**

---

4. On 26 March 2016 the complainant requested information of the following description:

"Ben Gummer stated in the House of Commons on 24th March 2016 that "not only is this contract cost neutral, but transition payment is being funded from outside the pay envelope."

Please provide a full description (making reference to any relevant documents that it is possible to make reference to within FoI limits) of the transition payment costs referred to by the minister to include:

- a) The current best estimate of the costs involved (per year for the next 5 years if available)
  - b) How the costs were estimated
  - c) Whether the costs will be funded by central government or by individual NHS trusts (or other source)
  - d) Details of any assessment made as to the impact of these costs on NHS trusts and the subsequent impact upon patients (if not funded by new money from central government)"
5. On 11 April 2016 the DH responded. It confirmed the DH held information relevant to the request but withheld it under the exemption provided by section 35(1)(a) – formulation or development of government policy.
  6. The complainant requested an internal review on the same day, 11 April 2016. The DH sent him the outcome of the internal review on 29 April 2016. The DH upheld its original position.

### **Scope of the case**

---

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled on 4 May 2016, but it was only after he submitted all the relevant documentation on 3 June 2016 that his complaint was considered eligible for investigation.
8. The complainant explained that senior NHS managers had expressed concern over the cost of introducing the new contract for junior doctors and about its impact on patient care. He also argued that as senior politicians had signalled that the Government's policy on the contract had been finalised the policy making process no longer required protecting.
9. The Commissioner considers that the matter to be decided is whether the DH is entitled to withhold the requested information under section 35(1)(a).

## Reasons for decision

---

### **Section 35(1)(a) – formulation and development of government policy**

10. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy.
11. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice would arise from disclosing the requested information. So long as it falls within the class of information described in the exemption the exemption will be engaged. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can potentially capture a broad range of information given that the information only has to 'relate' to the formulation and development of government policy.
12. However, as will be discussed later, section 35 is subject to the public interest test which means that information can only be withheld under the exemption if the harm that would be caused to the policy making process outweighs the value in disclosing it.
13. The information that has been requested is on the transitional costs associated with the introduction of the new contract for junior doctors ie the short term costs that would be incurred as a result of introducing the new contract over and above those that would be incurred if the current pay structure and contract remained in place. It includes spreadsheets containing the most current calculations or modelling of the transitional costs which existed at the time of the request. There is one very detailed document. Also included in the withheld information is a relatively short presentation which explains the methodology adopted when calculating the transition costs, this predates the spreadsheets by some months but was the most recent explanation available.
14. The modelling of these costs is necessary in order to facilitate the effective implementation of the overall policy on the new contract. The Commissioner is satisfied that it forms part of the process for formulating the policy.
15. The introduction of a new contract for junior doctors is part of the Government's wider policy objective of creating, what is often referred to as, a seven day national health service. It is a major piece of Government policy.
16. When seeking an internal review the complainant argued that at the time of his request the Government's policy on junior doctors' contracts

had been finalised and pointed to a number of statements by ministers which made clear the Government's commitment to introducing a new contract. In its submission to the Commissioner the DH has argued that although the Secretary of State had announced in the House of Commons that the new junior doctors' contract will be implemented, this had not been planned to be made effective until August 2016. As such, the policy was still under development at the time of the initial request.

17. The Commissioner is satisfied that although the Government had very clearly signalled its intention to implement the new contract for junior doctors by the time the request was made, the actual process of refining the terms of the contract so that the policy could be implemented was still ongoing. This includes the modelling of the transitional costs.
18. In light of the above the Commissioner is satisfied that the information relates to the formulation of the policy on junior doctors' contracts and finds that the exemption provided by section 35(1)(a) is engaged. However before deciding whether the information can be withheld it is necessary to conduct the public interest test.

#### **Public interest test**

19. The public interest test provides that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In broad terms this involves considering the extent to which both the policy process and the policy itself would be harmed and then weighing those factors against the value in making the information available to the public.
20. The DH has recognised a general public interest in promoting openness in the way in which public authorities manage major current events. The Commissioner considers this underestimates the value in disclosing the information. The proposed reforms to the health service have proved very controversial. The introduction of the new junior doctors' contract has been resisted with doctors voting to take industrial action. Only a couple of weeks prior to the request the junior doctors had staged a two day strike and further industrial action had been planned for April. It is clear that at the time of the request there was real public debate on the reforms and the future of the health service. The requested information relates only to one element of the wider policy debate. Nevertheless the cost implications of the reforms were part of that debate and the Commissioner has no reason to challenge the complainant's position that there were concerns over the cost of implementing the new contract including concerns raised by senior NHS staff. At a time when all public spending is under pressure, including the budget for the NHS, there is clearly a public interest in people understanding the costs

involved in implementing the new junior doctors' contract and having confidence that Government statements on this issue are supported by sound financial modelling.

21. Although the plans to introduce the new contract were at an advanced stage by the time of the request, they were still being finalised. Therefore it could be argued that there was a value in disclosing information that would allow informed challenges to that policy before it was set in stone.
22. The Commissioner therefore finds there is a public interest in disclosing the requested information. However the ongoing controversy that surrounded the policy at the time of the request also has a bearing on the public interest in maintaining the exemption.
23. The DH has emphasised that it would not be in the public interest to disclose the requested information whilst industrial action was taking place and the actual policy which was the subject of that industrial action was still under development.
24. The purpose of section 35 is to protect the deliberative process required for the formulation of policy. Ministers and officials require safe space in which to discuss policy options and the implications of policies in a full and candid manner. The DH is concerned that to disclose the requested information whilst the dispute over the junior doctors' contract is still ongoing would erode that safe space and make it more difficult to have the sort of conversations that are needed to develop robust policy. Although the information itself does not record policy discussions it does set out the basis on which the policy decisions around the costs of introducing the new contract are based. Furthermore it is clear that the modelling process was an ongoing one with calculations being reworked in light of new data and the negotiations with the doctor's representatives, the British Medical Association (BMA). The Commissioner accepts that being able to set out the intricate details of the policy for internal scrutiny is an important part of the policy process. It is plausible that to disclose this information at a sensitive time in the policy's development would exacerbate the dispute making it more difficult to effectively deliver the policy.
25. The Commissioner understands that the presentation which is included in the withheld information was produced in order to assist the employers' side in the dispute to explain to the BMA how the contract would work and methodology for modelling its impact. It was produced jointly by the DH and NHS Employers and was part of the attempts in late 2015 to resolve the dispute following the matter's referral to the Advisory, Conciliation and Arbitration Service (ACAS). The Commissioner therefore assumes the presentation has been shared with the BMA. On

the face of it this would undermine the argument that the presentation should be withheld to protect safe space.

26. However in this case there is an ongoing dispute and relationships between the two sides of that dispute need to be sensitively managed. In these circumstances there is an argument that the DH also needs safe space in which to conduct negotiations with the doctors' representatives in order to give the policy the best chance of being successfully introduced. It may therefore not be appropriate to disclose information produced to facilitate such discussions to the world at large, which a disclosure under FOIA is regarded as being.
27. The Commissioner is therefore satisfied that disclosing the information would have a detrimental impact on the ongoing policy process and on the chances of the policy being effectively implemented.
28. Although not an issue raised by the DH, the Commissioner has also considered whether disclosing the information would have any chilling effect on the candour of internal policy discussions. The 'chilling effect' is a term used to describe the impact that disclosing one piece of information at a given time could have on future internal debates. If disclosing the withheld information in the circumstances that existed at the time of the request meant that officials and ministers felt unable to discuss other policy matters as openly in the future this would work against the public interest. The Commissioner is normally sceptical of chilling effect arguments. However each case needs to be considered on its own merits. In this case the request was received while the final details of the policy on the junior doctors' contract were being formulated and there was the threat of industrial action. The Commissioner has already concluded that to disclose the information in these circumstances could be prejudicial. It follows that if it was disclosed officials might speculate that other, similar, information which they previously thought exempt from disclosure could be released. This would make them more reluctant to discuss such matters as freely and frankly as they had before.
29. The impact would be greatest on the formulation or development of policies associated with the introduction of the new contract for doctors. Given the breadth of the proposed health service reforms and their high profile, it is possible that the chilling effect would be felt in a number of related policy areas.
30. In weighing the public interest in favour of disclosure against the public interest in favour of maintaining the exemption the Commissioner has had regard for the genuine public debate around the reforms to the health service and the new contract for junior doctors in particular. However the Commissioner is satisfied that disclosing the information in

the circumstances that existed at the time of the request would have been detrimental to the final stages of the policy making process and would have made the effective introduction of that policy more difficult. There is also the potential for the disclosure to have some chilling effect on the quality of other policy debates on health reforms. On balance the Commissioner finds that the public interest in maintaining the exemption is greater than the public interest in disclosure.

31. The DH is entitled to withhold the information under section 35(1)(a). It is not required to take any further action in this matter.

## 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

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