

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2016

Public Authority: Department of Health (DoH)
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested email correspondence between particular individuals for a particular period. The DoH refused to disclose the requested information under section 35(1)(a) FOIA.
2. The Commissioner's decision is that section 35(1)(a) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 9 March 2016 the complainant requested information of the following description:

"Please can you provide all emails sent or received (or cc:d in) by Department of Health's Mark Svenson in correspondence with the following individuals at NHS England:

Simon Bennett
David Halsall
Deborah Williams
Cathy Hassell
Bruce Keogh
Roger Davidson

This is to include the whole month of July and August 2015.

Please specifically state which emails are sent/received/cc:d in with Sir Bruce Keogh - as NHS Director he does not get section 40 protection under the FOIA."

5. On 8 April 2016 the DoH responded. It provided the complainant with information in response to the request with redactions made under section 40(2) FOIA. It also confirmed that it was withholding some information in full under section 35(1)(a) FOIA. It subsequently confirmed that 4 emails had been withheld under section 35(1)(a) FOIA.
6. The complainant requested an internal review on 19 April 2016 as he was dissatisfied with the DoH's application of section 35(1)(a) FOIA. The DoH sent the outcome of its internal review on 16 May 2016. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 20 May 2016 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DoH was correct to apply section 35(1)(a) FOIA to the withheld information.

Reasons for decision

Section 35(1)(a)

9. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
10. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
11. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described

in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.

12. The DoH considers that the withheld information relates to the Government policy on a seven day NHS. The policy in formulation relates to the roll-out of seven day services within the NHS and links directly to the work being undertaken on health professionals' work contracts. It said that the Government is committed to seven day services in NHS hospitals being fully implemented by 2020.
13. The information therefore relates to the Government's policy in development work being formulated regarding the junior doctors' contract (pay and terms and conditions of service). The request was made on 9 March 2016 after the Review Body on Doctors' and Dentists' Remuneration (DDRB) report on contract reform¹ was published. The withheld information dates from July-August 2015 at the time this report was published. However, the Commissioner has previously acknowledged that the publication of the report was not the end of the development of the policy. The report itself states that

"the recommendations and observations in this report provide a roadmap of what could and should be achievable in the interests of everyone with a stake in the NHS. It now depends on the parties to resume negotiations... with a commitment to long-term as well as short-term objectives."

14. The Commissioner is satisfied that this demonstrates the publication of this report was not designed to be the end of the process, but a starting point for further negotiations.
15. The exemption is interpreted broadly and will capture a wide variety of information. The information contained within the emails clearly relates to the evidence base for seven day services within the NHS and therefore feeds directly into ongoing contract reform at that time.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445742/50576_DDRB_report_2015_WEB_book.pdf

16. In light of this the Commissioner accepts that the information that is being withheld is likely to have fed into ongoing negotiations and can therefore be said to be related to the formulation and development of government policy, therefore section 35(1)(a) is engaged.
17. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

18. The DoH acknowledged that there is a general public interest in disclosure of information and the DoH recognises that openness in Government may increase public trust in and engagement with the Government. It recognises that there may be a public interest in information related to the evidence base for seven day services in hospitals.

Public interest arguments in favour of maintaining the exemption

19. The DoH argued that there is a strong public interest in officials being able to provide timely advice and have open and frank discussions without concern about possible reactions from stakeholders and others.
20. There is a strong public interest to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options.
21. It argued that civil servants and subject experts need to be able to engage in the free and frank discussion of all the policy options internally, to expose their merits and demerits and their possible implications as appropriate. Their candour in doing so will be affected by their assessment of whether the content of such discussion will be disclosed in the near future. Premature disclosure of information could prejudice good working relationships, the neutrality of civil servants and, ultimately, the quality of government.
22. It acknowledged that the public interest test needs to be considered on a case by case basis; however it argued that there is a very strong public interest in ensuring that there is a safe space within which senior officials are able to discuss a wide range of issues, freely and frankly.

In this case the request was for emails between the DoH and NHS England in the months of July and August 2015, this was the time leading up to, and following the speech announcing the government's ambition to deliver a seven day NHS service. Putting these discussions into the public domain at this early stage in the policy development cycle would mean that officials and stakeholders would be impeded from offering full and frank advice in the future potentially resulting in poorer decision making and public services.

23. It considers that disclosure of the withheld information would have the effect of compromising:

- The introduction of the junior doctors' contract planned from August 2016 and the current contract negotiations for consultants make this an extremely sensitive and controversial issue. Any release is more than likely going to have a negative effect upon the NHS to implement the new contract. There is also a great risk of negative impact to the Government to conclude successful negotiations with the BMA on consultants contracts and for any future negotiations with the Trade Unions representing those staff employed under the Agenda for Change pay system, which covers over one million NHS staff. This, in turn, will affect the implementation of the policy; and
- Future discussions between officials and subject experts. The Government's intention is to introduce its seven day NHS Service over the life time of the current parliament. Therefore releasing the information requested would affect further formulation of the wider policy area that may be required and its disclosure would increase the risk of the chilling effect which would impact ongoing policy work. The reform of the NHS to move to 7 Day Services is a major policy objective of the Government and therefore represents a significant proportion of the DoH's work. This increases the public interest in maintaining the exemption. There is scope for further policy formulation and the DoH need to have a safe space in which officials and subject experts can debate issues free from external interference and distraction.

Balance of the public interest

24. In considering the public interest arguments the Commissioner has firstly looked at the information in question and whether the information contains details of negotiating positions.

25. The withheld information contains emails between the DoH and NHS England in the months of July and August 2015, this was the time

- leading up to, and following the speech announcing the government's ambition to deliver a seven day NHS service. The request was then made in March 2016. The DoH has said that implementation of the junior doctors contracts was planned for August 2016 whilst negotiations for consultant's contracts are still ongoing.
26. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry some weight in that disclosure would provide transparency and accountability and allow the public to further understand the evidence base behind the reforms.
 27. The Commissioner has also looked at the fact that the reform of doctors' contracts is a matter of significant public interest. The reforms formalise the arrangements for, seven day working by consultants together with the training and working practices of junior doctors. All of which is intended to deliver improved health care for the public.
 28. This increases the public interest in the disclosure of information on the discussions between the DoH and NHS England relating to the evidence base behind the reforms. It is also important to be transparent about the issues discussed within government behind the negotiations to show that the decision-making process was based on sound discussions and advice.
 29. The Commissioner believes it important to emphasise the significance of the media interest in this issue, with wide spread concern from doctors over the Government's proposals. Bodies representing doctors were arguing that the proposals were a threat to the health service and put patient safety at risk and the press reported on the division between the doctors and government over the changes to the contracts for junior doctors.
 30. The Commissioner is therefore satisfied that the withheld information sheds light on the evidence base behind the reforms and altogether would increase transparency on matters which could impact on all inhabitants of the UK. The proposed changes would have a long term effect and there is clearly an ongoing public debate of the issues which is not confined purely to the media.
 31. It is likely disclosure would add to the information already available and would inform the public debate but the extent to which it would has to be balanced against the harm, at the time of the request, to the ongoing negotiations relating to consultant contracts and the need for a safe space to discuss how to proceed with the proposed reforms.

32. Turning now to the DoH's case for withholding the information, the arguments for maintaining the exemption essentially focus on the concept of a "safe space". The idea behind the safe space argument, accepted by the Commissioner, is that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
33. The need for a safe space will be strongest when an issue is still live. In this case the DoH has confirmed that the policy process was live at the time of the request and remains ongoing. At the time of the request, the DDRBs recommendations had been published but a safe space was still required to conduct negotiations based on these recommendations. The Commissioner accepts that to disclose information which recorded frank views on key issues could have impacted these negotiations.
34. The Commissioner notes that the withheld emails discuss some aspects of the evidence base behind the reforms which may have had an impact upon negotiations. It does contain details of views and evidence of the Government's negotiating position. As the Commissioner is satisfied the policy development was ongoing at the time of the request, he recognises there was a considerable public interest in allowing the government a safe space to continue the policy development process without the fear that information would be made public that might damage that process.
35. In the Commissioner's view disclosure of the information in these documents would have been likely, at the time of the request, to lead to greater speculation and the policy development being hindered by external comment, media attention or pressure from other interested parties. This would have distracted from the ongoing sensitive negotiations surrounding contract reform and would not have been in the public interest.
36. The Commissioner has weighed these arguments and acknowledges there is a strong public interest in disclosure of information which would demonstrate that this sensitive issue has been properly managed and that there is a sound evidence to support the Government's position. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case.
37. Balanced against that the Commissioner has to accept there is significant weight to the safe space arguments given the timing of the request, 5/6 months prior to the planned August 2016 implementation for junior doctors and because negotiations relating to consultants are still ongoing.

38. The Commissioner therefore considers that the balance of the public interest in disclosure is outweighed by the public interest in maintaining the section 35(1)(a) exemption as these documents contain frank views and opinions and the Government's evidence base for the initial contract reform proposals which, at the time of the request, would have impacted on negotiations and development of the Government's policy. The exemption was therefore correctly engaged.

Right of appeal

39. 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

40. 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.
41. 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

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