

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 December 2016

**Public Authority:** Health Education England (HEE)  
**Address:** Blenheim House  
Duncombe Street  
Leeds  
LS1 4PL

#### Decision (including any steps ordered)

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1. The complainant has requested correspondence relating to the junior doctor contract negotiations. HEE provided the complainant with some of the requested information but refused to provide some of the requested information under section 36(2)(b)(ii) and section 36(2)(c) FOIA.
2. The Commissioner's decision is that HEE correctly applied section 36(2)(b)(ii) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

#### Request and response

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4. On 14 March 2016 the complainant requested information of the following description:  
  
"I would like to see any correspondence between Ian Cumming and any officials from the Department of Health or NHS England from September 2015 til the present day relating to the junior doctor contract?"
5. On 18 March 2016 the complainant requested information of the following description:  
  
"A letter dated 15th February sent from Professor Cummings Chief

Exec of HEE inferred training posts would be removed from trusts which decided not to implement the controversial new junior doctors contract. The letter also referred to prior communication from Jim Mackey CEO of NHS Improvement.

I would like to see all correspondence including emails which HEE holds relating to the production of this letter. This includes any draft copies of the letter and who had input into this.

As HEE is an independent body it cannot use the argument of a need for 'safe space' in the production of this letter - if the letter was produced subject to an influence from other bodies"

6. On 13 April 2016, Health Education England responded to both requests. It refused to provide the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.
7. The complainant requested an internal review on 13 April 2016. Health Education England sent the outcome of its internal review on 11 May 2016. It provided the complainant with some information in relation to the request made on 18 March 2016. It withdrew the application of section 36(2)(b)(i) and (ii) but upheld the application of section 36(2)(c) FOIA to the information requested on 14 March 2016 and the remaining withheld information requested on 18 March 2016.

## Scope of the case

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8. The complainant contacted the Commissioner on 23 May 2016 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation HEE reinstated the application of section 36(2)(b)(ii) FOIA.
10. The Commissioner has considered whether HEE was correct to apply section 36(2)(b)(ii) or section 36(2)(c) FOIA to the withheld information.

## Reasons for decision

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### Section 36

11. Section 36 FOIA provides that,

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

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. The Trust has applied section 36(2)(b)(ii) and section 36(2)(c) FOIA to the withheld information. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance.
13. In determining whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
14. The Trust explained that the qualified person is the Chief Executive. The qualified person's opinion was provided on 7 October 2016 and 14 November 2016. The qualified person's opinion was that section 36(2)(b)(ii) was applicable in this case as disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person and the qualified person's opinion was provided to the Commissioner.
15. The HEE explained that the qualified person's opinion was provided by the Chief Executive late in this case because at the time of the request the Deputy Chief Executive had originally provided this. This was to eradicate any bias from the decision in order to avoid accusations of conflict of interest as the withheld emails were written by the Chief

- Executive or by his instruction. However the Commissioner's Guidance<sup>1</sup> is clear that the role of the qualified person for the purposes of section 36 cannot be delegated and therefore this was required directly from the Chief Executive. The Commissioner is satisfied that the qualified person made his decision in relation to the application of section 36(2)(b)(ii) based upon the circumstances at the time of the request.
16. HEE's qualified person considers that the withheld information reflects the views of senior individuals within HEE and external organisations in relation to the junior doctor contract negotiations. The qualified person believes that disclosing this information would be likely to restrict open and robust discussions in the future and would likely be prejudicial to the work of HEE. Additionally, disclosing the information would be likely to prejudice the relationships between all parties involved in the dispute, resulting in them being less willing to share free and frank views in the future. In forming this opinion HEE and its qualified person had regard to the fact that the work to implement the junior doctor contract is ongoing, and any disclosure could prejudice the implementation process and ultimately its end product.
  17. The Commissioner considers that the withheld information does contain candid discussion between senior individuals within HEE and external organisations in relation to the junior doctor contract negotiations. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore the exemption was correctly engaged.
  18. As the Commissioner has decided that the exemption is engaged, she has gone 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 disclosing the requested information**

19. HEE acknowledged that the complainant has argued that the junior doctor contract negotiations and discussions represent a key matter of public interest and any influence on these proceedings from

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

government should be publicly transparent. HEE recognises the inherent public interest in operating in an open and transparent way and being held to account for decisions made.

20. It went on that the contract reform to doctors ways of working, these ongoing discussions and the role doctors fulfil within the NHS and therefore how they are trained to perform and are remunerated for that role, is an issue that will affect the entire population. The concerns expressed over the proposed reforms forms part of a very real ongoing public debate. The requested information would fuel that debate and perhaps, out of context, provide the opportunity for some to make "informed" challenges to the proposals being developed.

### **Public interest arguments in favour of maintaining the exemption**

21. HEE considers that it is in the public interest that members of its senior management team have an internal arena in which to discuss draft materials candidly before settling on a course of action especially around the sensitive issues relating to the junior doctor contract negotiations.
22. The information captured by the request consists of email correspondence including updates and draft versions of the later published letters as well as sensitive emails relating to other matters regarding the negotiations and discussions. HEE had contacted (via telephone) two of the main parties involved in the discussions to seek their views on disclosure. One was adamant that the information should not be disclosed, arguing that to do so would substantially inhibit the free and frank exchange of views. The other party's concerns focussed on the release of such correspondence heightening the tension between the parties involved in the dispute.
23. It said that the fact that the main parties to some of the meetings voiced serious concerns over disclosing the information supports HEE's position that to do so would alter the nature of the relationship between parties and could dampen the candour of their ongoing and future discussions. In turn, this could prevent those tasked with implementing the recommendations or discussion around the junior doctors' contract, from exploring all possible options as robustly as is necessary.
24. It said that the discussions and negotiations around the junior doctors' contract were ongoing at the time the requests were made and this issue is being debated currently. Undoubtedly, HEE and other parties who participated in the meetings to which the request relates will continue to be involved in discussions and debates over its

implementation for the foreseeable future. Any inhibition caused by disclosing this information could impact and continue to impact on this important policy area as discussions continue.

### **Balance of the public interest arguments**

25. The withheld information contains the views of senior individuals within HEE and external organisations in relation to the junior doctor contract negotiations dated from September 2015 to March 2016, this is the time following the speech announcing the Government's ambition to deliver a seven day NHS service. The Commissioner is aware 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 reasoning behind the reforms.
27. The Commissioner has also looked at the fact that the reform of junior doctors' contract 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. 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.
29. The Commissioner is satisfied that the withheld information sheds light on reasoning and thought processes 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.
30. 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 implementation of junior doctor's contract.

31. Turning now to the case for withholding the information, the arguments for maintaining the exemption essentially focus on the 'chilling affect' argument, that officials would be likely to be less candid in the free and frank exchange of views for the purpose of deliberation.
32. The chilling affect argument will be strongest when an issue is still live. In this case, at the time of the requests, implementation of the junior doctor's contract was planned for August 2016 and therefore negotiations surrounding implementation were very much live. The Commissioner accepts that to disclose information which recorded frank views on key issues could have impacted these negotiations.
33. In the Commissioner's view disclosure of the information in these documents, which contained the views of senior individuals within HEE and external organisations in relation to the junior doctor contract negotiations would have been likely, at the time of the request, to lead to greater speculation, external comment, media attention or pressure from other interested parties. This would have been likely to inhibit the free and frank exchange of views for the purpose of deliberating implementation of the junior doctor's contract reforms planned for August 2016 and would not have been in the public interest.
34. 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 discussed and deliberated. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case.
35. Balanced against that the Commissioner has to accept there is significant weight to the chilling affect arguments given the timing of the requests, 5/6 months prior to the planned August 2016 implementation for junior doctor's contract and because negotiations relating to consultants are still ongoing.
36. The Commissioner therefore considers that the balance of the public interest in disclosure is outweighed by the public interest in maintaining the section 36(2)(b)(ii) exemption as these documents contain frank views and opinions relating to the contract reforms, which, at the time of the request, would have impacted on negotiations and implementation of the junior doctor contracts. Therefore, the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.

37. As the Commissioner considers that section 36(2)(b)(ii) was correctly applied, she has not gone on to consider the application of section 36(2)(c) any further.



## Right of appeal

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38. 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)

39. 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.
40. 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** .....

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**