

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **23 October 2023**

Public Authority: **Cabinet Office**
Address: **70 Whitehall**
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested the Infrastructure and Projects Authority's reviews of the government's New Hospital Programme.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 33(2) to withhold the requested information from the complainant.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The New Hospital Programme was set up in 2020 to build 40 new hospitals in England by 2030. It has £3.7 billion in capital funding for this for up to March 2025, with more to be provided for the following five years. The Programme is also intended to transform how NHS

healthcare infrastructure is built, including by standardising hospital design¹.

5. Infrastructure and Projects Authority (IPA) conducted two reviews of the Programme that were published in August and December 2021:
 - Stage Gate Assessment – Gate 0 ('Gate 0 Review' - 11 August 2021)
 - Assurance of Action Plan ('AAP' - 2 December 2021)

Request and response

6. On 18 November 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I am seeking further information on the Infrastructure and Projects Authority's review of the New Hospital Programme. An article in the Health Service Journal today reported that ' According to sources, the New Hospitals Programme – which was created to deliver the key manifesto pledge – has been downgraded to a "red" rating by the Infrastructure and Projects Authority following a review of the programme and its leadership.' The article went on to note that 'HSJ understands that the IPA has carried out two reviews of NHP in the last six months.'

I would like to request the results of both of these reviews into the New Hospital Programme. I would expect that these reviews resulted in some form of final report, outlining the project scope, current progress and assessment of risks, but if no final report were produced, we can discuss what other information the authority holds would satisfy the terms of this request."

7. On 7 December 2021, the Cabinet Office responded, it refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - Section 33 – prejudice to audit functions
 - Section 35, the formulation or development of government policy

¹ [New Hospital Programme - Committees - UK Parliament](#)

- Section 41 – confidentiality
 - and
 - Section 43 – prejudice to commercial interests
8. The complainant requested an internal review. The Cabinet Office sent him the outcome of its internal review on 17 March 2022. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner 29 March 2023 to complain about the way his request for information had been handled.

Reasons for decision

10. Section 33(1)(b) and 33(2) of FOIA states:

“(1)This section applies to any public authority which has functions in relation to—

... (b)the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2)Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1).”

11. The Commissioner notes that a stated responsibility of the Cabinet Office is the promoting efficiency and reform across government through innovation, better procurement and project management, and by transforming the delivery of services.
12. The Commissioner is therefore satisfied that the Cabinet Office is a public authority that has “functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions” and is an applicable public authority for the purposes of section 33.
13. The Cabinet Office has submitted that reports must be prompt and based on candid interviews and full and frank disclosure from project teams. Fear of immediate publication could hamper this disclosure and

have a negative impact on the effectiveness of future IPA reviews, weakening the peer review process which would not be in the public interest.

14. The complainant has submitted that "considering the authority has not sufficiently demonstrated the causal link between disclosure of the information and the prejudice it claims the exemption does not apply. The only factor in favour of this prejudice is the supposition that disclosure of the report would undermine full and frank discussions, but this does not appear to be more than speculation".
15. He also opines that the Information Commissioner's guidance on Section 36, under the heading 'Chilling Effect Arguments' notes: Civil servants and other public officials 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.
16. The Commissioner is satisfied that if the withheld information were disclosed it would be likely to prejudice the exercise of the Cabinet Office's functions in the context of this complaint. In that disclosure would be likely to prejudice the exercise of its functions by hampering or styming the IPA process as described above. Therefore the Commissioner finds that the exemption is engaged. He next went on to consider the application of the public interest test as required by section 2 of the FOIA.

The Cabinet Office's submissions

17. In favour of disclosure it noted that there is a considerable public interest in understanding government projects and programmes and also in ensuring their success. The Cabinet Office also noted the general public interest in transparency and accountability so that there can be public scrutiny of whether the assurance process is effective.
18. The Cabinet Office believes, there is a stronger public interest in maintaining the integrity of the Assurance process as an effective and prompt peer review process that produces reports based on candid interviews for the benefit of programme's Senior Responsible Owners and Accounting Officers.' The Cabinet Office notes that effective reviews have a demonstrable value for money to the taxpayer and support the successful delivery of project outcomes. Reports must be prompt and based on candid interviews and full and frank disclosure from project teams. Fear of immediate publication could hamper this disclosure and have a negative impact on the effectiveness of future IPA reviews, weakening the peer review process which would not be in the public interest.

Complainant's Submissions

19. The Cabinet Office has significantly underestimated the public interest in disclosure.

- The hospital building programme was a key manifesto pledge, so there is an especially strong public interest in showing to what extent the government is meeting these election promises.

- Progress on the hospital building programme appears to be going backwards. In July 2021, the IPA rated the Hospital Building programme as Amber/Red 'Successful delivery of the project is in doubt'. By November 2021, the project was downgraded to Red 'Unachievable'.

- The Department of Health and Social Care appears to want to mislead the public with regards to the scope and progress of the project. A leaked 'communications playbook' for the new hospital programme tells trusts that major refurbishments and new wings/units which are part of the scheme 'must always be referred to as a new hospital'. In the 'background lines -if needed' section, the document adds: "The government has committed to the delivery of all 48 hospitals by 2030 — and these plans remain on track." This is clearly a stark contrast to the IPA's Red rating for the project as a whole.

- Furthermore, the Department also appears to be quietly downgrading the project, asking NHS Trusts in July to re-submit cheaper plans.

- The national hospital building programme sits in the context of long-term under-investment in healthcare infrastructure. The National Audit Office reports that between 2016 and 2019, NHS providers as a whole needed £1.1bn each year more than the capital spending limit that had been imposed upon them. Moreover, in the same period, the DHSC has transferred £4.3bn earmarked for capital spending to the revenue budget, reducing further the budget for long-term investment in NHS infrastructure.

- This sustained lack of investment is one reason the NHS has fewer beds per population (including ICU beds) than most of its OECD counterparts. In 2000 the UK was ranked 25th in the OECD, with 4.1 beds per 1,000 people. By 2019 it had dropped to 35th place with 2.5 beds per 1000 people. During the pandemic it has become acutely obvious why investment in healthcare infrastructure is so important.

Combined, this paints a picture of an election pledge gone badly awry, with deadly effects. While there may indeed be sensitivities to the report, there is an obvious and overwhelming public interest in disclosure which has been underestimated by the Cabinet Office.

There is a clear need for further transparency and accountability over the hospital building programme itself, and a further need to demonstrate that the IPA's review process has been effective in driving improvements. The concerns about disclosure raised so far are entirely generalised and speculative, without reference to any specific and substantiated prejudice and so should be far outweighed by the public interest in disclosure.

Commissioner's Reasonings

20. The Commissioner has read the withheld information and considered both parties submissions. The Commissioner (for the reasons given below) concurs with the public authority that the public interest in maintaining the exemption outweighs the public interest in disclosure.
21. In essence the deciding factor was the "public interest in maintaining the integrity of the Assurance process". The purpose of the Assurance process is to ensure or facilitate the security of the government spending in excess of 3 billion up to the year 2025. In order to do this as effectively as possible the programme needs the frank opinions of (amongst others) administrators and staff working in the sector. Additionally, the authors of such report should be able to produce them without the concern or fear that a confidential document (produced on that basis) will be prematurely disclosed to the public. The reports were not more than 6 months old at the time of the request and so could be considered to retain significant sensitivity. It is not difficult to foresee that contributors and authors with such concerns may detrimentally temper their contributions and reports accordingly and thereby reduce the effectiveness of the reports as an analytical and planning tool.
22. The complainant in his submissions has helpfully highlighted the complexity and cost of the hospital programme. However it is these very factors that mean the integrity of the Assurance programme should be maintained and protected by withholding the requested information.
23. Having found that the public interest favours maintaining the exemption the Commissioner therefore concludes that the public authority were entitled to rely on section 33(2) to withhold the requested information. Having made such a determination the Commissioner did not go on to consider the other exemptions relied on by the public authority.

Right of appeal

24. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
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