

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 02 November 2011

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant made a freedom of information request to the Department of Health for a copy of risk registers or risk assessments related to government plans regarding the modernisation of the NHS and the Health and Social Care Bill. The Department of Health refused the request under section 35(1)(a) of the Act (formulation of government policy). The Commissioner has now investigated the complaint and found that section 35(1)(a) is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner requires the public authority to disclose this information. The Commissioner also found that in its handling of the request the public authority breached section 17(1) of the Act (Refusal of a request).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 29 November 2010 the complainant wrote to the public authority to request a copy of the public authority's risk register related to its reforms on the modernisation of the NHS. The request read as follows:

"...I am formally asking you, under the Freedom of Information Act, to let me have the full details and copies of any Departmental risk assessment or risk register which officials or advisers in the Department of Health have created or are maintaining which contains assessments of the risk associated with the implementation of the GP Commissioning Consortia or the White Paper or measures to be contained in the forthcoming Health Bill."

3. The public authority responded to the complainant on 20 December 2010 and confirmed that it held information falling within the scope of his request. However it now explained that the information was exempt from disclosure under section 36(2)(b)(i) which provides that information is exempt if, in the opinion of the qualified person, disclosure would or would be likely to inhibit the free and frank provision of advice. The public authority recognised that section 36 was a qualified exemption but said that it had decided that the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. On 7 January 2011 the complainant asked the public authority to carry out an internal review of its handling of his request. In particular, the complainant challenged the public authority's decision that the public interest favoured maintaining the exemption and set out why he considered it important that the information was released.
5. The public authority presented the findings of its internal review on 2 March 2011. First of all, it said that having reconsidered its initial response it was now withdrawing its reliance on the section 36(2)(b)(i) exemption. Instead it said that it was applying the section 35(1)(a) exemption because the requested information is concerned with the formulation and development of government policy and therefore was manifestly within the scope of section 35(1)(a). It went on to say that it was still of the view that the public interest favoured withholding the requested information and set out the factors it had taken into account when balancing the public interest in disclosure against the public interest in maintaining the exemption.
6. The public authority also took the opportunity to clarify exactly what information it held. It said that it had concluded that the request "should have been understood as being specifically about the register of transition risks associated with the Health and Care reforms" which it explained were maintained by the Integrated Programme Office (IPO), and not another separate risk register it held which it said concerned the wider department and which in any case contained the most high profile and major risks from the IPO risk register.

7. The public authority also said it was now applying the section 21 (Information accessible by other means) and section 22 exemptions (Information intended for future publication) to some of the information falling within the scope of the request. This was because, it said, some relevant information was now in the public domain and it referred the complainant to the following documents:
 - The command paper (Liberating the NHS: legislative framework and next steps)
 - Sir David Nicholson's letter to the NHS
 - The NHS Operating framework
 - Impact Assessment (Health and Social Care Bill 2011: coordinating document for the Impact Assessments and Equality Impact Assessments).
8. The public authority explained that section 21 applied because the information was now in the public domain and section 22 applied because whilst the information had not been published at the time of the request, the information was in a category that was routinely published and therefore it could be said that the information was intended for future publication. The public authority said that in particular the impact assessment contained material on risks associated with the plans.

The Investigation

Scope of the case

9. On 11 May 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose the information he requested.

Chronology

10. On 4 June 2011 the Commissioner contacted the public authority with details of the complaint. The Commissioner asked for a copy of the withheld information and further reasons as to why any exemptions were being applied.
11. There followed further discussions between the Commissioner and the public authority in which the Commissioner asked for further details on the policy to which the withheld information relates and for further information on the stage at which the policy process had reached at the time the complainant's request was received.

12. The public authority responded to the Commissioner on 7 July 2011 and provided a copy of the withheld information which it described as the Transition risk register from November 2010 related to the government's Health and Care reforms on the modernisation of the NHS. The public authority also provided further reasons as to why section 35(1)(a) was believed to apply and why it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
13. On 26 July 2011 the public authority provided the Commissioner with further information on the government's policies regarding the NHS modernisation and the stage at which the policy process had reached at the time the complainant submitted his request.

Findings of fact

14. On 12 July 2010 the Government published its White Paper *Equity and Excellence: Liberating the NHS* setting out its long-term vision for the future of the NHS. The White paper set out how the government would:
 - put patients at the heart of everything the NHS does;
 - focus on continuously improving those things that really matter to patients - the outcome of their healthcare; and
 - empower and liberate clinicians to innovate, with the freedom to focus on improving healthcare services
15. The White Paper is available on the public authority's website:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353
16. The White Paper was opened to consultation which closed on 11 October 2010. The proposed reforms were also subject to a separate public consultation which opened on 18 October 2010.
17. On 15 December 2010 the government published *Liberating the NHS: Legislative framework and next steps* which sets out how it intended to legislate for and implement the proposed forms, taking into account the responses received during the consultation period.
18. The Health and Social Bill was introduced into Parliament on 19 January 2011 but its progress was halted following the government's

announcement on 6 April 2011 that it would engage in a listening exercise intended to address the concerns that have been raised regarding the scale and pace of the reforms.

Analysis

19. A full text of the relevant provisions of the statutes referred to in this section is contained within the legal annex.

Scope of the request

20. In its internal review the public authority clarified to the complainant that it was interpreting his request as a request for the Transition risk register rather than the risk register for the wider department. For the avoidance of doubt, the Commissioner wishes to state that he considers this to be a reasonable interpretation of the request. In any event, the complainant did not challenge this interpretation of his request either to the public authority or in his complaint to the Commissioner. Therefore the Commissioner is content to proceed on the basis that it is the public authority's 'Transition Risk Register' which is the subject of the complainant's request.

Exemptions

Section 35(1)(a) – Formulation and development of government policy

21. The public authority has explained that it is the Transition risk register associated with the Health and Care reforms which the public authority has identified as being within the scope of the request and is being withheld under section 35(1)(a). Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy. Section 35(1)(a) is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
22. The Commissioner considers that the term 'relates to' can safely be given a broad interpretation. This is because the exemption is qualified and a public authority would be obliged to disclose information where there is no significant harm to the public interest. 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.

23. In this case the public authority has explained that the risk register is maintained by its "Transition Programme Integrated Programme Office (IPO)" and contains transition risks associated with the Health and Care reforms, part of the government's plans for the modernisation of the NHS. This risk register is used to manage risks associated with the transition and modernisation of the NHS and on reviewing the information it is very clear that it relates to the public authority's policies on NHS modernisation. Indeed the Commissioner considers that at the time of the request this information would have related to the development of the policy as it was used as a management tool to guide the policy work being carried out and in particular the passage of the forthcoming Health and Social Care Bill. The Commissioner is satisfied that the information relates to the formulation and development of government policy and therefore is exempt from disclosure under section 35(1)(a) of the Act.

The public interest test

24. Section 2(2)(b) provides that where a qualified exemption applies information shall only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

25. The complainant has argued that there is public interest in disclosure to allow for greater scrutiny of the government's plans which he says involves £80 billion of government expenditure and for providing reassurance to NHS staff that proposals that will affect them are being properly risk managed.
26. The complainant has also argued that the government's proposals for modernising the NHS have provoked widespread concern and that the government had "given the impression of not listening, ignoring these warnings from across the NHS". On this point the Commissioner agrees that the public interest would be served by disclosure as this would provide greater transparency on the government's proposals. In the Commissioner's view disclosure would also serve the public interest by aiding public understanding of the government's reforms and the associated risks. This would have allowed the public to better contribute to the public debate surrounding the reforms. The

Commissioner notes that he must consider the public interest in disclosure at the time the request was made, which was before the listening exercise was announced on 6 April 2011.

27. The complainant has also referred the Commissioner to a previous decision where he ordered the disclosure of a risk register related to the expansion of Heathrow airport. The complainant suggests that there is a similarity between the two cases and a precedent has been set for the disclosure of risk registers. Disclosure would also provide reassurance that the public authority appropriately manages risks associated with proposed policies.

Public interest arguments in favour of maintaining the exemption

28. The public authority has argued that the public interest favours maintaining the exemption because releasing the risk register at the time of the request would have jeopardised the success of the policy.
29. In its submission to the Commissioner the public authority has said that the modernisation of the NHS is a high profile, sensitive and complex project and that in its view officials must be afforded the freedom to use management reporting tools such as the strategic risk register without fear or concern that the information will then be placed in the public domain in an unmanaged way whilst the policy continues to be developed. This would, it suggests, hinder its ability to ensure correct and proper governance and robust management of such a policy.
30. In addition, the public authority said that the public interest favoured maintaining the protection offered by section 35(1)(a) so as to ensure that that the possibility of disclosure would not deter from full, candid and proper deliberation of policy formulation and development, "including the exploration of all options, the keeping of detailed records and the taking of difficult decisions". It argued that officials needed to be able to engage in free and frank discussion of all policy options and that releasing the information prematurely would prevent them from conducting their business "unfettered and free from unwarranted scrutiny" which it suggests would severely compromise the successful delivery of the policy.

Balance of the public interest arguments

31. The Commissioner finds that there is a very strong public interest in disclosure of the information, given the significant change to the structure of the health service the government's policies on the modernisation will bring. There has also been widespread debate public

debate amongst the general public, commentators, experts and those who work in the NHS. The debate has covered the scale and pace of the changes being proposed. The Commissioner notes that opposition to the reforms has been expressed by groups including the British Medical Association and the Royal College of Nursing. Disclosure would significantly aid public understanding of the risks related to the proposed reforms and it would also inform participation in the debate about the reforms. The Commissioner must consider the public interest at the time the request was made.

32. The public authority has suggested that the public interest in disclosure is met to a large extent by the information already in the public domain, which the public authority referred to in its response to the complainant, as well as the published reporting of the Parliamentary process of the passage of the Health and Social Care Bill. However, he does not accept this argument and considers that disclosure would go somewhat further in helping the public to better understand the risks associated with the modernisation of the NHS than any information that has previously been published. For instance the risk registers as well as identifying potential risks also contain information on the likelihood of each risk occurring, the impact of the risks and the public authority's plans to mitigate these risks. For these reasons the Commissioner has given the public interest in greater transparency and accountability particular weight in this case.
33. Whilst the Commissioner finds that the public interest in disclosure is strong, he must also take into account the significant public interest arguments in favour of maintaining the exemption. The public authority is essentially relying on the "safe space" and "chilling effect" arguments which are well understood and have been considered in a number of cases before the Information Tribunal.
34. The safe space argument concerns the importance of government having the freedom to debate policy and make decisions without being hindered by external comment. In *Department for Education and Skills v the information Commissioner and The Evening Standard* the Tribunal recognised the importance of this argument stating:

*"Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."*¹

¹ Department for Education and Skills v The Information Commissioner and the Evening Standard [EA/2006/0006], para. 75, point iv.

35. The Commissioner accepts that generally speaking there is a public interest in a safe space as disclosure acts as a distraction whilst the policy process is ongoing. The weight that will be attributed to this factor largely depends on the timing of the request. Where a policy is still live the public interest in maintaining a safe space will be stronger because greater protection is required whilst the policy is still in the formulation and development stages. In this particular case the public authority has demonstrated that at the time the request was received the policy was at a sensitive point and was still under active consideration.
36. The public authority explained that the policy development was at an early stage and to illustrate this point it provided the Commissioner with a copy of a project report on the Health Care reforms dated 17 November 2010. This report outlines the status and progress that had been made in respect of the reforms as well as next steps and future milestones in the development of the policy. This information shows that when the request was received policy around the NHS reforms was still very much under discussion. Policy instructions were still being developed and the Government response to the White Paper was still being drafted. Moreover, the Bill had not yet been introduced into Parliament. The public authority also explained that at this stage financial impact assessments of the reforms had not been prepared and were not issued until 19 January 2011.
37. In considering the importance of the safe space the Commissioner has also taken into account the nature of the information contained in the risk register. The Commissioner accepts that disclosure at the time the request was made could have distracted the policy work being undertaken at this time. In light of this the Commissioner has found that at the time of the request a safe space around the policy was still required and that there was a significant public interest in maintaining this safe space.
38. As regards the 'chilling effect' the Commissioner would generally give some weight to arguments that disclosing information relating to a particular policy whilst that policy is still being formulated/developed, could effect the frankness and candour with which relevant parties would continue to contribute to that particular policy making process. Again, given that the policy was still being developed at the time of the request and in view of the fact that the risk register is under constant revision the Commissioner is prepared to accept that disclosure could have some affect on the frankness of future policy discussions on the modernisation of the NHS. However, he does not consider that disclosure would affect the detail and frankness of future

risk registers of this nature. The expectation that risk registers must be completed with full frankness would clearly remain a core governance requirement. He also notes that the content of the register does not reveal detail of the policy discussions in the same way as other policy information, for example – reports, emails and draft papers. In reaching this view the Commissioner is mindful of the findings of the Information Tribunal in *Office of Government Commerce v Information Commissioner*. The Commissioner sees a parallel with this case where the Tribunal rejected arguments that disclosure would affect the frankness and candour with which officials would contribute to government gateway reviews.²

39. The Commissioner finds that the factors are finely balanced in this case but the considerable public interest in disclosure means that the information should be disclosed. Consequently the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the section 35(1)(a) exemption does not outweigh the public interest in disclosure.

Other exemptions

40. At the internal review stage the public authority cited the section 21 (Information accessible by other means) and the section 22 (Information intended for future publication) exemptions in respect of some relevant information which it said was in the public domain. However, the public authority did not refer to these exemptions in its submissions to the Commissioner. Furthermore, the information to which the public authority applied these exemptions would appear to be information which relates to the government's plans for the modernisation of the NHS but which would not actually fall within the scope of the request which explicitly asked for risk assessments and risk registers. Therefore the Commissioner has not made a decision on the application of these exemptions as he does not think they were applied to the information requested by the complainant.
41. The public authority had indicated that the section 40(2) exemption for personal information would apply to the names of any junior officials featured in the risk register. However, it also acknowledged that there is a legitimate interest in knowing the names of senior officials and said that accountability for high profile projects and policies is in the Senior Civil Service grades. The Commissioner has reviewed the withheld information he has been passed by the public authority and he has

² *Office of Government Commerce v Information Commissioner* [EA/2006/0068 & EA/2006/80]

concluded that all of the individuals concerned would be members of the Senior Civil Service or senior NHS officials. He has reached this view because he would expect risks associated with such a high profile and important policy as this to be the responsibility of the department's more senior officials. He is also aware that many of the names featured in the risk register are readily identifiable as the most senior officials within the public authority. Therefore it is the Commissioner's view that section 40(2) has not been applied to this information and therefore there is no barrier to the names featured in the risk register being released.

Procedural Requirements

42. The public authority initially refused the request under the exemption under section 36(2)(b)(i) of the Act. It was only at the internal review stage that it informed that complainant that it was no longer seeking to rely on this exemption and that it was applying section 35(1)(a) instead. Section 17(1) of the Act provides that where a public authority refuses a request on the basis that information is exempt, it must provide the complainant with a refusal notice, within the time for complying with section 1(1)(a), which states that fact, specifies the exemption in question and states why the exemption applies. Therefore by failing to inform the complainant that it was relying on section 35(1)(a) within 20 working days of receiving the request the public authority breached section 17(1) of the Act.

The Decision

43. The Commissioner's decision is that the following elements of the request were not dealt with in accordance with the Act.
- The public authority breached section 1(1)(b) of the Act by refusing to disclose the information requested by the complainant.
 - The public authority breached section 17(1) by failing to inform the complainant that it was relying on the section 35(1)(a) exemption within 20 working days of receiving the request.

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- The public authority shall disclose the requested information to the complainant.
45. 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 2nd day of November 2011

Signed

**Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (a) specifies the exemption in question, and
- (b) states (if that would not otherwise be apparent) why the exemption applies."

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (c) the formulation or development of government policy,
- (d) Ministerial communications,
- (e) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (f) the operation of any Ministerial private office."