

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2016

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

Decision (including any steps ordered)

1. The complainant has requested information on any meetings between the Chair of a Pay Review Body and politicians/civil servants to discuss the document on doctors and dentists contract reform. The Department of Health identified a number of documents including briefings, minutes and information provided to oral evidence sessions which it considered exempt on the basis of section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the DoH has correctly applied the section 35(1)(a) exemption and balanced the public interest appropriately to withhold the majority of this information. However, he finds the public interest favours disclosure in relation to the information contained in two documents.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation. Disclose the information contained in the following two documents:
 - (2) PSH brief for meetings with Chair of the Pay Review Bodies – Sept 2014
 - (1) PSP brief for meetings with DDRB – July 2015
4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 July 2015, the complainant wrote to the Department of Health (DoH) and requested information in the following terms:

"I would like to enquire if Professor Paul Curran of the DDRB has met any politicians/civil servants to discuss the document "Review Body on Doctors' and Dentists' Remuneration" which was published in July 2015.

If so, I would like to know who was involved in the meetings and I would like to see the documentation of the meetings.

I would be grateful if you could search the appropriate Department records for this information and not fob me off with your normal stonewalling tactics."

6. The DoH responded on 12 August 2015. It stated that it did hold some information within the scope of the request but this was being withheld on the basis of section 35(1)(a) of the FOIA.
7. Following an internal review the DoH wrote to the complainant on 6 October 2015. It stated that it maintained its position that any information within the scope of the request was exempt from disclosure on the basis of section 35(1)(a) of the FOIA.

Background

8. In October 2014 the DDRB (Review Body on Doctors' and Dentists' Remuneration, a pay review body whose role is to provide independent advice and recommendations to government about pay and reward) was asked by the UK Government, the Welsh Government and the Northern Ireland Executive to make recommendations on changes to contractual arrangements for junior doctors, including a new system of pay progression. It was also asked to make observations on pay proposals for reforming consultants' contracts. In order to fulfil these remits the DDRB asked for written evidence from interested parties from both the employers' and employees' side. It then invited some of those parties to provide oral evidence separately.
9. Such arrangements provide an opportunity for a Pay Review Body to clarify points in their written evidence and for the Pay Review Body to test hypothetical recommendations. It also gives the parties involved the chance to signal what their priorities would be if resources were limited and might therefore need to be targeted towards particular groups and

places. The written evidence is shared with all parties, but the oral evidence is not.

10. The DDRB published its report in July 2015. The recommendations and observations contained within it informed and contributed to the negotiations between the employers and employees that followed. The report's recommendations are just that, recommendations, they do not prescribe the terms of contract. They simply set out the DDRB's views on what the parameters of the subsequent negotiations should be.

Scope of the case

11. The complainant contacted the Commissioner on 9 October 2015 to complain about the way his request for information had been handled.
12. In order to establish the information within the scope of the request the DoH provided some background and timeline. The DoH explained that the (at the time) Parliamentary Under Secretary of State for Health, Dr Dan Poulter, met with Professor Curran in September 2014 to discuss the possible remit for the DDRB. This meeting was also attended by Deputy Director Tim Sands and a Private Secretary from Dr Poulter's office.
13. Dr Poulter then attended an oral evidence session in March 2015 with DDRB to present the Government's evidence. These sessions were held in confidence and the DoH explained it did not keep a record of these sessions.
14. Professor Curran met with the Parliamentary Under Secretary of State for NHS Productivity, Lord Prior of Brampton, in July 2015 after the finalised report was submitted to the Government. This meeting was an informal, introductory meeting between the minister with responsibility for pay and the Chairman of the DDRB and in this meeting the report was discussed.
15. Department officials did prepare briefing notes for Dr Poulter and Lord Prior in advance of the meetings and some informal minutes of the Lord Prior meeting were taken. It is these documents which the DoH considers engage section 35 of the FOIA and are exempt from disclosure.
16. The Commissioner established with the DoH the specific information that was being withheld and the documents that contained this information. The DoH identified 7 documents containing information it considered relevant to the request. The Commissioner has reviewed these and has referred back to the wording of the request when determining what

information falls within the scope of the request. The complainant specifically requested information in which Paul Curran of the DDRB met civil servants and politicians to discuss the document "Review Body on Doctors' and Dentists' Remuneration".

17. The DoH identified one document which it considered contained relevant information which it numbered (7) which the Commissioner does not accept contains information within the scope of the request. Document (7) is a note of a meeting between Lord Prior and the BMA in which the upcoming report is discussed but Paul Curran does not appear to have been in attendance at this meeting. As such this is not within the scope of the request.
18. The information that is therefore being withheld is contained within six documents: a briefing for a meeting in which the potential remit of the DDRB was discussed; three documents which contain briefings, preparation and evidence for the oral evidence session; and two documents which are the briefing and subsequent note from a meeting between Paul Curran and the Parliamentary Secretary on the day of the publication of the report.
19. The Commissioner therefore considers the scope of his investigation to be to determine if the DoH has correctly withhold this information on the basis of section 35(1)(a) of the FOIA.

Reasons for decision

Section 35(1)(a) – formulation & development of government policy

20. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
21. 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
22. 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.

23. In this case the DoH has said that the withheld information is related to the policy in development work regarding junior doctor's contracts. The request was made on 17 July 2015; the day after the DDRB report on contract reform¹ was published. However, this 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."*
24. 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. Added to that is the fact that at the time of the request the report had only just been published and the impact of and potential work needed from it would not have been determined. The Commissioner is therefore satisfied that the information in question here, which all fed in to the development of this report, relates to the formulation and development of government policy.
25. The exemption is interpreted broadly and will capture a wide variety of information. The information contained within the report clearly relates to the issue of contract reform within the NHS and how this might be improved. It is clear that the document itself would also be used by the government to help formulate and develop policies in this area through negotiations.
26. In light of this the Commissioner accepts that the information that is being withheld (the briefing notes for meetings with the DDRB, the documents relating to the oral evidence sessions and the meeting notes) which may have fed into the production of the report can be said to relate to the formulation and development of government policy and therefore section 35(1)(a) is engaged.
27. 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.

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

Public interest arguments in favour of disclosure

28. In favour of disclosure, the DoH acknowledged there is a general public interest in transparency and openness.
29. The complainant considers that as the DDRB is an independent body producing an independent report on matter relating to issues of significant interest, the full political context and influence upon the report should be transparent. He also believes that disclosing the withheld information and opening it up to public scrutiny would lead to more accountability and better policy for the taxpayer.

Public interest arguments in favour of maintaining the exemption

30. With regard to the public interest in maintaining the exemption, the DoH stressed the work on doctors' contract reform is still in 'development' and is the subject of on-going negotiations. The DoH therefore considered disclosure of information which informed the DDRB report and showed the discussions that had taken place would inhibit and interfere with these sensitive negotiations and policy delivery.
31. The DoH has also argued that disclosure of information at this stage would prejudice the negotiations, mislead the wider public and media about the government's position and negotiating strategy to the detriment of the taxpayer.

Balance of the public interest arguments

32. 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. In doing so, he notes that the document identified as (2) by the DoH is a briefing note that pre-dates the DDRB being appointed and discusses the possible remit of any future report. Documents (3), (4) and (5) are the briefings for the Minister and the DoHs evidence for the oral evidence session. Document (1) is the brief for a meeting with the DDRB on the date of publication of the report and document (6) is the note of this meeting. These documents cover the life span of the report, from inception to publication, and the Commissioner has gone on to discuss the public interest arguments and the weight these should be given in relation to each of these documents and the information they contain.
33. 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 understand the context of the report and the discussions between the government and the DDRB and the evidence the government presented to inform the DDRB report.

34. The Commissioner has also looked at the fact that the reform of doctors' contracts is a matter of significant public interest. The reforms considered by the DDRB represent a key element of public policy, which introduces, or at least formalises 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.
35. This increases the public interest in the disclosure of information on the discussions ministers and civil servants had with the DDRB to discuss the report and to provide evidence to feed into it. It is important for transparency around this process to show that the DDRB, as an independent body, produced an independent report based on evidence from different sources without undue influence from government.
36. The DoH has pointed out that no meetings took place between ministers and Paul Curran of the DDRB between the point where the DDRB were appointed and the report was finalised, with the exception of the oral evidence session. Therefore the withheld information in this case represents the entirety of the contact between Paul Curran and ministers/civil servants during the process and disclosure would provide transparency.
37. 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.
38. The Commissioner is therefore satisfied that, in particular, the oral evidence relates to important matters that could impact on all inhabitants of the UK. The briefing and meetings to discuss the remit of the DDRB and the publication of the report also contain information which sheds light on the process and altogether would increase transparency. 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.
39. There is a clear public interest in disclosure of information and evidence which shows how the government reached the point of making its proposals; this would include information on the DDRBs role and the evidence given to the DDRB to make its recommendations. All of this could potentially increase understanding of the positions taken during subsequent negotiations which would be in the public interest.

40. The Commissioner is satisfied that there was a genuine public interest in, what at the time of the request, were the proposed reforms to doctors' contracts. The DDRB report had been published and did summarise some of the evidence provided at the oral evidence sessions on the Government's arguments for change and the counter arguments from other parties.
41. There was therefore already a great amount of information available to facilitate an informed public debate on the issue. In the case of the oral evidence and the briefing and notes it is likely disclosure would add to the information already available and the public debate but the extent to which it would have to be balanced against the harm, at the time of the request, to the ongoing negotiations and the need for a safe space to discuss how to proceed with the proposed reforms
42. 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.
43. 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.
44. In saying that, the Commissioner notes that two of the documents containing information – (2) briefing to minister from September 2014 on various issues including potential DDRB remit and (1) briefing to minister before meeting with Paul Curran on date of publication of recommendations – do not contain any details of frank views and contain only headline notes for the minister in advance of meetings. The Commissioner consider it unlikely the disclosure of the information in either of these two documents would have impacted on negotiations as the information does not reveal anything significant about the Government's views that was not already known or published in the report at the time of the request.
45. For those documents which do contain details of views and evidence of the Government's negotiating position (documents (3), (4), (5) and (6)) the Commissioner is satisfied the policy development was ongoing at the time of the request and as such 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.

46. 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.
47. 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.
48. Balanced against that the Commissioner has to accept there is significant weight to the safe space arguments given the timing of the request, coming the day after the publication of the DDRBs recommendations. Disclosing any information which revealed frank views and would hinder upcoming negotiations and discussions to develop on these recommendations would not have been in the public interest.
49. The Commissioner therefore considers that for the documents which contain the details of the information for the oral evidence sessions (documents (3), (4) and (5)) and the note of the meeting with Paul Curran on the date of publication of the DDRBs recommendations (document (6)) 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.
50. For the remaining two documents ((1) and (2)) the Commissioner does not accept that the information contained within them would impact on the development of the Government's policy or would have hindered negotiations. These documents are briefings in advance of meetings and contain key facts and points for the minister, many of which are very high level and reveal little about the Government's position which was not already known at the time of the request or included in the DDRBs recommendations. It is more difficult to see how this information would have had an impact if it were disclosed at the time of the request and therefore, as there are strong arguments for disclosure for any

information on the contract reform issue, the Commissioner considers the public interest arguments for maintaining the exemption are outweighed by those in favour of disclosure for these documents.

Right of appeal

51. 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

52. 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.
53. 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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