

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2016

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

Decision (including any steps ordered)

1. The complainant has requested minutes of any meetings held between July and August 2015 between specific Ministers and officials at the Department of Health (DoH) and representatives of NHS employers and/or the BMA. The DoH identified information within the scope of the request but considered it exempt on the basis of section 35(1)(a).
2. The Commissioner's decision is that the section 35(1)(a) exemption is engaged and the public interest favours maintaining the exemption. She does not require the DoH to take any steps.

Request and response

3. On 11 February 2016, the complainant wrote to the Department of Health (DoH) and requested information in the following terms:

"I would like to request electronic copies of the minutes of any meetings held during July and August 2015 between:

1. Lord Prior and Danny Mortimer and/or other representatives of NHS employers
2. Lord Prior and the BMA specifically the meeting held on the 23rd of July with representatives of NHSE present."

As the junior doctors contract is now going to be imposed, this information should not be exempt under section 35 of the FOIA Act,

because the information in question relates to the Government's policy on junior doctor contract, which has now concluded, and decisions have been made."

4. The DoH responded on 10 March 2016. It stated that it held information within the scope of the request but considered it exempt from disclosure on the basis of section 35(1)(a) of the FOIA.
5. Following an internal review the DoH wrote to the complainant on 8 April 2016. It stated that it upheld its position that the information within the scope of the request should be withheld under section 35(1)(a) as the Government's policy on junior doctors contracts was still under development.

Scope of the case

6. The complainant contacted the Commissioner on 11 April 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine if the DoH has correctly withheld the requested information on the basis of the section 35(1)(a) exemption.

Reasons for decision

Section 35(1)(a)

8. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
9. 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.
10. 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.

11. The DoH considers 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' (specifically junior doctors) work contracts.
12. 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 services). The request was made in February 2016, after the Review Body on Doctors' and Dentists' Remuneration (DDRB) report on contract reform¹ was published. The withheld information dates from between July and August 2015 – a period of time which covered the publication of the report. In several cases the Commissioner has considered whether the publication of the DDRB report was the end of the development of the policy and has found that it is not². The DDRB 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."

13. 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.
14. The DoH has further explained that the implementation of the new contracts was not intended to become effective until August 2016, after the date of the request. As such the DoH argues that the policy was still under development not just during the time period the request

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

² FS50603751, FS50630409

covers but also at the time of the request and up until the implementation.

15. The DoH has further explained although an announcement was made in February 2016 that the new junior doctor contract would be implemented, the policy process did not end with this single announcement. Releasing information which shows detail of the modelling behind the February offer would inhibit the free and frank exchange of information between Government departments, their stakeholders and advisors. Exchanges of information such as this need to take place in private so as not to undermine any further policy development on contracts or on other 'live' negotiations such as those for consultant contracts.
16. The exemption is interpreted broadly and will capture a wide variety of information. The information contained within the meeting note that has been identified clearly relates to the evidence base for seven day services within the NHS and the issues that are likely to arise with implementation and therefore feeds directly into ongoing contract reform at that time. 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 arguments in favour of disclosure

18. The DoH acknowledged there is a general public interest in promoting openness in the way in which public authorities manage major current events and therefore in increasing public trust in and engagement with the Government. It also recognises that disclosing the information will allow more informed debate and thereby increase the trust in the quality of the decision-making process.

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. There is a strong public interest in ensuring 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.

20. It argued that Ministers and officials 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.
21. The DoH argues there is a very strong public interest in ensuring there is a safe space within which senior officials can discuss a wide range of issues, freely and frankly. In this case, the information requested was notes of meetings between July and August 2015 between Lord Prior and Danny Mortimer and the BMA and other representatives of NHS employers. This was the time leading up to and following the speech announcing the Government's ambition to deliver a seven day NHS service. Putting details of meetings and 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.
22. The DoH raised concerns that disclosure of the withheld information at the time of the request would still impede on the policy development and the free and frank exchange of views to continue the policy development as it came at a time when junior doctors had not accepted the formal recommendation of their representative body and a series of industrial action was planned. The DoH therefore argues that making modelling information from earlier in the process publicly available would have risked undermining attempts to negotiate with the BMA on its planned industrial action and would continue to impact on negotiations even now.
23. The DoH has also argued that disclosure at the time of the request would have compromised the introduction of the junior doctors' contract planned for August 2016 and the ongoing contract negotiations for consultants. Any disclosure, the DoH argues, would have a negative impact on the NHS in implementing the new contract. There would also be a 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.

24. 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 seven 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

25. 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.
26. The withheld information consists of a note of a meeting involving Lord Prior and representatives of the BMA and other NHS employers. It discusses options and the impacts of various measures. It dates from a time period when the government announced its ambition to deliver the seven day service. The request was then made in February 2016 and the DoH has clarified that the implementation of the junior doctors contracts was planned for August 2016 whilst negotiations for the consultant's contract are still ongoing.
27. 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.
28. 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.
29. This increases the public interest in the disclosure of information on the discussions between the DoH and the BMA and NHS representatives relating to the modelling behind the reforms and the impacts of implementation. 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.

30. 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.
31. The Commissioner is therefore satisfied that the withheld information sheds light on the decisions behind the reforms and the debates and discussions that took place to consider the various options 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.
32. 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.
33. 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.
34. 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.
35. The Commissioner notes that the withheld information mostly focuses on the impact of various measures and how to proceed with negotiations. 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.

36. In the Commissioner's view disclosure of this information 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 was at a time when industrial action was a very real possibility and the Commissioner believes releasing this information at the time of the request would have undermined negotiations aimed at finding a resolution and minimising the likelihood of disruption. This would have distracted from the ongoing sensitive negotiations surrounding contract reform and would not have been in the public interest.
37. 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.
38. Balanced against that the Commissioner has to accept there is significant weight to the safe space arguments given the timing of the request, several months prior to the planned August 2016 implementation for junior doctors and because negotiations relating to consultants are still ongoing.
39. 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 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

40. 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
41. 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.
42. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF