

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2017

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department of Health (DoH) for information related to meetings with Ian Cumming, the Chief Executive of Health Education England. The DoH disclosed some information falling within the scope of the request but withheld some information under the section 35(1)(a) (policy formulation and development), section 35(1)(d) (operation of ministerial private office) and section 40(2) (personal information) exemptions. During the course of the investigation it disclosed some further information to the complainant and confirmed that rather than section 35, it was now seeking to rely on the section 36 (prejudice to effective conduct of public affairs etc) exemption to withhold the remaining undisclosed information.
2. The Commissioner has decided that the remaining withheld information is exempt under section 36(2)(b)(i) and (ii) and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also found that section 40(2) applies to the name and contact details of one individual named in the withheld information. The Commissioner requires no steps to be taken.

Request and response

3. On 19 October 2016 the complainant made a freedom of information request to the DoH which read as follows:

"1. as regards Ben Gummer's meeting with Ian Cumming on 10th Feb 2016 - may I please see any emails/minutes/diary entries relating to this meeting?"

2. as regards 8 February 2016 – Secretary of State Transformation meeting to discuss GP targets with Ian Cumming - may I see any emails/minutes/diary entries which relate to this meeting and relate to the letter sent to NHS Trusts by HEE threatening the removal of training posts on the 15th February."

4. The DoH responded on 18 October 2016 when it confirmed that it held information falling within the scope of the request. However it said that the information was exempt under 35(1)(a) (formulation and development of government policy) and it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
5. The complainant subsequently asked the DoH to carry out an internal review and it presented its findings on 15 November 2016. The review found that a redacted version of a document entitled "PS(CQ)'s meeting with Ian Cumming 10/2" could now be released but that it was upholding the application of section 35(1)(a) to any further information falling within the scope of the request. It also found that in addition, the section 35(1)(d) (operation of ministerial private office) and section 40(2) (personal information) exemptions also applied to the withheld information.

Scope of the case

6. On 17 November 2016 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation the DoH said that rather than the exemptions in section 35 of FOIA, it considered that the correct exemption which ought to apply was section 36(2)(b)(i) and (ii). The DoH also disclosed some further information to the complainant after reconsidering its handling of the request.

8. Following discussions with the complainant the Commissioner considers the scope of her investigation to be to consider whether any of the exemptions relied on by the DoH apply to the withheld information.

Reasons for decision

Section 36(2)(b) – free and frank advice / exchange of views

9. The DoH has confirmed that the only information which continues to be withheld are redacted portions of an email entitled "*PS(CQ)'s meeting with Ian Cumming 10/2*". Parts of this email were disclosed to the complainant at the internal review stage and during the course of the Commissioner's investigation.
10. Section 36(2)(b)(i) and (ii) provide that information is exempt if in the opinion of a public authority's qualified person, disclosure would or would be likely to prejudice:
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation
11. For the exemption to be engaged the proper qualified person for the public authority must have given his or her opinion on the application of the exemption. The qualified person may apply the exemption on the basis that inhibition either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
12. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur. The choice between the two limbs will affect the balance of the public interest test.
13. In this case the DoH provided the Commissioner with evidence to show that the proper qualified person, the Minister of State for Health Phillip Dunne MP, gave his opinion that disclosure *would* prejudice the free and frank provision of advice, and the free and frank exchange of views on 21 July 2017.

14. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the DoH is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.

15. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

16. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
17. The Commissioner has considered the information placed before the qualified person and is satisfied that it included the relevant arguments. The qualified person was provided with a detailed submission outlining the reasons for applying the exemption as well as the counter arguments in favour of disclosure. The qualified person also had access to the withheld information and the Commissioner is satisfied that the qualified person was sufficiently well informed to allow them to form a reasonable opinion on whether or not the information should be disclosed.
18. The Commissioner has reviewed a full un-redacted version of the withheld information and is satisfied that the qualified person's opinion that disclosure would inhibit the free and frank exchange of views and the frank provision of advice was reasonable. The email records a free and frank discussion about live issues and was recorded at a sensitive period given the dispute over junior doctors' contracts. In light of this the Commissioner considers that it was at least reasonable for the qualified person to conclude that disclosure would affect the candour with which its officials and stakeholders contribute to future discussions

and discourage external organisations from sharing their free and frank views.

19. The Commissioner has decided that the section 36(2)(b)(i) and (ii) exemptions are engaged and she has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

The Public interest test

Public interest arguments in favour of disclosure

20. The complainant has argued that there is a public interest in knowing the extent to which the DoH influenced Health Education England in relation to the junior doctors contract dispute and in particular the letter it sent on 15 February 2016 which he says threatened to remove funding for NHS Trusts which failed to impose the Government's new contract for junior doctors.
21. The complainant provided the Commissioner with evidence which he said demonstrated that the government's reforms to the NHS including changes to junior doctors' contracts and "7 day reforms" were a failure. The complainant appears to suggest that disclosure of the requested information would shed light on the reasons for this. He also suggested that disclosure would lead to a better informed general public and would encourage better policy development.
22. For its part the DoH said that it recognised that there is a public interest in promoting transparency and openness in the way public authorities operate. It acknowledged that there is a general public interest in transparency of discussions within government and in particular how it plans and implements its strategy for presentation of its policies. It said that NHS workforce issues remain live and open to debate and scrutiny and that therefore it recognised the public interest in disclosure. In addition to this, it said that it recognised the strong public interest in making information readily available on how public services such as the NHS are run and the importance of openness and transparency in government. It said that NHS workforce is a strong, emotive subject which it described as being "at the forefront of the public mind, as demonstrated by the unrivalled national media coverage the NHS receives on a daily basis". In light of this it said that it recognised the weight this places on the public interest in disclosure.

Public interest arguments in favour of maintaining the exemption

23. The DoH's reasons for maintaining the exemption focused on the 'chilling effect' and 'safe space' arguments. It explained that in its view there is a strong public interest in ensuring a safe space for officials to discuss issues freely and frankly in the knowledge that the contents of those discussions will remain private. If this information was released, it would, it said, create a future 'chilling effect' where officials felt unable to provide frank advice and views over concerns that those communications could be made public in the future. It argued that this would be a highly undesirable position, especially in respect of periods where unexpected issues regularly arise and frank discussions are essential in order to make difficult decisions as quickly and effectively as possible.
24. In addition, the DoH said that it considered the 'chilling effect' adds further weight to the public interest in withholding the information because it relates to live issues. It explained that the issues under discussion at the meeting which are recorded in the email are closely linked to wider medical education reforms and include details which Ministers may wish to explore with officials as part of policy development. It said that this was particularly sensitive information which meant there was a risk that should this information be released into the public domain it could significantly limit the scope of future Ministerial decisions.
25. The DoH said that it also considered that officials need to be afforded a safe space in order to have such discussions about live issues openly and candidly, which it said again adds further weight to withholding the requested information. It argued that disclosing the information could result in poorer decision making thereby impacting adversely on value for money for taxpayers and which could in turn impact on the quality of services for patients.
26. Finally, the DoH referred to the timing of the request which it said was a key consideration because issues such as medical education and recruitment are live and high profile matters. It argued that the need for a safe space will be strongest when an issue is still live.

Balance of the public interest arguments

27. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent

and frequency of that inhibition in assessing whether the public interest test dictates disclosure.

28. The Commissioner has first considered the arguments for disclosure and acknowledges that the NHS is a matter of great public interest. Therefore she would accept that there is a public interest in transparency and accountability around the Government's plans to reform the medical profession. However, having reviewed the relatively small amount of information that continues to be withheld the Commissioner considers that the public interest in disclosure is limited because the information would actually add very little to public understanding about the issues surrounding junior doctors' contracts. Neither would disclosure shed any light on the extent of the DoH's involvement in HEE's letter of 15 February 2016 which the complainant's arguments for disclosure had focused on.
29. Any public interest in disclosure also has to be balanced against the harm that would be caused to the government's reforms of the medical profession. The DoH's arguments focus on the 'chilling effect' of disclosure whereby officials would be likely to be less candid in the free and frank exchange of views or when providing advice. It also referred to the 'Safe space' argument which is about the need for a "safe space" to formulate policy and debate 'live' issues" without being hindered by external comment and/or media involvement
30. The Commissioner has reviewed the withheld information and it is clear that the issues discussed were sensitive and still live at the time the complainant made his request. The information records a free and frank discussion and in the Commissioner's view disclosure at this point would have been likely to have a chilling effect on the ability of officials to contribute to future discussions about these issues. The Commissioner would also accept that there is a public interest in allowing the government a safe space to discuss issues and make decisions free from outside interference and the distraction that would be caused by disclosure in circumstances where the issues are still live and no final decisions have been made. The Commissioner is also mindful that the information was still relatively recent (around 10 months old) at the time of the request and so any chilling effect is likely to be greater. On balance the Commissioner finds that there is a strong public interest in maintaining the exemption as disclosure would ultimately lead to poorer quality decision making and hinder the DoH's ability to discuss and formulate policy on these issues in future.
31. In balancing the public interest the Commissioner has also given due weight to the opinion of the qualified person. As noted above the qualified person's opinion is that disclosure would, rather than would be

likely to, have the effects in section 36(2)(b)(i) and (ii), and this carries through greater weight into the public interest test.

32. In conclusion, the Commissioner has found that the withheld information relates to live issues which are still being discussed within government and therefore there is a strong public interest in maintaining the exemption. At the same time, the public interest in disclosure is limited and therefore the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.

Section 40(2) – personal information

33. Section 40(2) has been applied to redact the name and contact details of a junior civil servant who was named within the email falling within the scope of the request. So far as is relevant here, section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In this case the DoH has said that in its view disclosure would contravene the first principle which requires that personal data shall be processed fairly and lawfully and in particular shall not be processed unless at least one of the conditions listed in Schedule 2 of the DPA can be satisfied.
34. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

"personal data" means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

35. The information withheld under this exemption is simply the name and contact details of junior civil servant within the DoH. The Commissioner is satisfied that this information is personal data as the information clearly identifies the individuals concerned.

36. The next thing to consider is whether disclosure of the requested information would contravene the first data protection principle. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
37. In this case the DoH argued that disclosure would be unfair because the individual concerned would not have had any expectation that their personal data would be placed into the public domain, whereas officials graded at Senior Civil Service (SCS) level would as they are responsible for their respective policy areas. The Commissioner notes that the individual concerned is a relatively junior official and does not appear to be in a public facing role. The information also relates to a private meeting and therefore the Commissioner would accept that they would have a reasonable expectation that the information would not be disclosed. In these circumstances the Commissioner is satisfied that disclosure would be unfair.
38. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the rights and freedom of the data subject. In this case the Commissioner's view is that disclosure of the name of a junior official would not aid public understanding of the issues under discussion or otherwise serve the public interest in any meaningful way. The Commissioner is mindful that the names of the senior officials who were in attendance at the meeting described in the email are in the public domain. In the Commissioner's view this provides sufficient transparency and accountability and disclosure of the data subject's personal data would be unwarranted in the circumstances.
39. The Commissioner has decided that disclosure of the name and contact details of the junior official would be unfair and that consequently the section 40(2) exemption is engaged in respect of this information.

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

**Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**