

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2017

Public Authority: Health Education England
Address: 1st Floor
Blenheim House
Duncombe Street
Leeds
LS1 4PL

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Health Education England (HEE) for information related to a letter sent by HEE's Chief Executive regarding changes to junior doctors' contracts. HEE disclosed some information falling within the scope of the request but also withheld some information under the section 36 exemption.
2. The Commissioner's decision is that HEE has correctly applied section 36 to the withheld information and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 26 September 2016 the complainant submitted a freedom of information request to HEE which read as follows:

"On 15th February 2016, HEE sent a letter to NHS trusts inferring that HEE would remove training posts from trusts that did not use the new junior doctor contract. This was written by Ian Cumming.

Under the FOIA (2000), I request:

1) Please state if any external parties (including but not limited to the Department of Health) were involved in the decision to create the letter, or amending any drafts of the letter. If any external parties were, please provide:

- full email/mail correspondence and/or dates/times/minutes of any meetings with any input from external parties.*
- The institutions of those involved outside HEE (eg. Department of Health).*
- The names of those involved, outside HEE (if not exempt under S40 if they are senior enough, they should not be exempt)*

2) Please provide all drafts of the letter before it was sent. Please provide any notes/comments made on these drafts. Please provide any emails sent/received, and/or dates/times/minutes of any meetings, commenting on the drafting process (including the choice to start drafting) of the letter. If the letter (or drafts of it) were sent to anyone else before it was sent to NHS trusts on (or around) 15th February 2016, please provide the copies of correspondence sending the letter, along with any reply received.

Please provide any attachments with emails. If any information is removed under any exemptions, please state how much is removed or any number of complete emails removed. Please do not just hold back whole emails under exemptions, and consider providing redacted versions instead. If an exemption applies to parts of this request (eg part 2) do not apply it to the whole request (eg also part 1). Please remember the FOIA limit of £450 is for finding and retrieving relevant information only, not for deciding if any of it falls under an exemption, nor for the time taken in redacting it."

4. HEE responded to the request on 25 October 2016. It disclosed some information but withheld information for part 2 of the request under the exemption in section 36 (prejudice to effective conduct of public affairs).
5. The complainant subsequently asked HEE to carry out an internal review and it presented its findings on 24 November 2016. The review upheld the application of section 36 to the withheld information but also indicated that section 40(2) might apply to the names of individuals featured in the withheld information.

Scope of the case

6. On 2 December 2016 the complainant contacted the Commissioner to complain about HEE's decision to refuse to disclose some of the information falling within the scope of his request.
7. The Commissioner considers the scope of her investigation to be to consider whether HEE correctly applied the section 36 and/or section 40(2) exemptions to the withheld information.

Background

8. In 2012, Ministers drew up plans to change Junior Doctors contracts to allow more flexible working and shape the Government's commitment to a '7 day NHS'. Talks broke down between the Department of Health (DH) and the British Medical Association (BMA) in 2014 but were reintroduced in autumn 2015. An agreement could still not be reached and in February 2016 Secretary of State for Health, Rt Hon Jeremy Hunt, made the announcement that he would be imposing the new contract from summer 2016. HEE explained that it remained neutral throughout.
9. On 15 February 2016, Professor Ian Cumming, Chief Executive of HEE, sent a letter to all Chief Executives of NHS Trusts. A separate letter was sent from Jim Mackey, Chief Executive of NHS Improvement, again to Chief Executives of NHS Trusts. Both letters outlined support for the contract and invited recipients to consider the advantages to the contracts and promote them within their localities. Both letters are published online and are publically available and it is these letters that are the subject of the complainant's request.
10. In May 2016 a contract was agreed by the BMA and DH. This was then subject to a vote by junior doctors and it was subsequently announced that junior doctors had rejected the proposed contract.
11. A five day strike was called by the junior doctors and BMA to take place between 08:00 and 17:00 from Monday 12 to Friday 16 September 2016. This was later called off following patient safety concerns. Further five day strikes were confirmed for October, November and December 2016; which were subsequently cancelled on 24 September 2016.
12. The implementation of the junior doctors contract is ongoing and continues to be a contentious issue across the NHS.

13. The Commissioner has already issued two decisions in cases involving the same information as this case. In both cases (FS50630599 and FS50636468) the Commissioner concluded that the information was exempt under section 36 and the public interest in maintaining the exemption outweighed the public interest in disclosure.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs etc

14. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-
- (b) would, or would be likely to inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. For the exemption to be engaged the proper qualified person for the public authority must have given his opinion on the application of the exemption. In this case the HEE has provided the Commissioner with a copy of a submission that was sent to the qualified person, its Chief Executive Professor Ian Cumming OBE, which shows that he gave his opinion that section 36(2)(b) and section 36(2)(c) were engaged on 24 October 2016. It explained that the qualified person had agreed that the withheld information reflects the views of senior individuals within HEE and external organisations in relation to the Junior Doctors' Contracts Negotiations (JDCN). The qualified person believed that disclosing this information would likely restrict open and robust discussions in the future and would likely be prejudicial to the work of HEE. In addition the qualified person found that disclosing the information would be likely to prejudice the relationships between all parties involved in the dispute, resulting in them being less willing to share free and frank views in the future. In forming this opinion it said that both HEE and its qualified person had regard for the fact that the work to implement the junior doctor contract is ongoing, and any disclosure could prejudice the implementation process and ultimately its end product.

16. The Commissioner is satisfied that HEE has obtained the opinion of the proper qualified person and so this element of the exemption is met.
17. 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 HEE 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.
18. 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."
19. 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.
20. Having reviewed all of the information placed before the qualified person the Commissioner is satisfied that the information included the relevant arguments. The qualified person was provided with a detailed submission outlining the possible consequences of disclosure as well as the counter arguments in favour of disclosure. The qualified person had access to the correspondence with the complainant and the withheld information. Indeed the qualified person wrote the letter which was the focus of the complainant's request and so was well placed to understand the sensitivities regarding disclosure of material related to its production. In the Commissioner's view the qualified person was provided with sufficient information to allow him to form a reasonable opinion on the application of the exemption. The Commissioner also notes that the HEE additionally sought the opinion of its Deputy Chief Executive who also gave their opinion that the withheld information should not be disclosed. This was to avoid any bias or conflict of interest given that Professor Cummings, as the author of the letter, was the focus of the request.

21. The qualified person has given his opinion that disclosing this information would likely restrict open and robust discussions in the future and would likely be prejudicial to the work of HEE. Additionally, they found that disclosing the information would be likely to prejudice the relationships between all parties involved in the dispute, resulting in them being less willing to share free and frank views in the future. In forming this opinion HEE said it and its qualified person had regard for the fact that the work to implement the junior doctor contract is ongoing, and any disclosure could prejudice the implementation process and ultimately its end product.
22. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to inhibit the free and frank provision of advice. The Commissioner has found that the emails surrounding the production of the Professor Cummings letter were informal and drafted in a free and frank manner. The information also relates to what is a very controversial and sensitive issue. In light of this, the Commissioner finds that it was reasonable for the qualified person to conclude that disclosure would affect the candour with which it contributes to future policy discussions and discourage external organisations from sharing their free and frank views.
23. Given that the HEE's arguments focus on the harm that would be done to its ability to contribute freely and frankly to further discussions around the issue of changes to junior doctors contracts, the Commissioner considers that section 36(2)(b)(i) and (ii), rather than section 36(2)(c) are the correct exemptions to apply. The Commissioner is satisfied that these exemptions are engaged and has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosure

24. The complainant suggested that the Secretary of State Jeremy Hunt may have had some input into the production of Professor Cumming's letter and that the public interest favoured disclosure to show the extent of the Secretary of State's involvement or whether the HEE was acting independently.
25. For its part, HEE said that it recognises the inherent public interest in operating in an open and transparent way and being held to account for decisions made.

Public interest arguments in favour of maintaining the exemption

26. As regards the public interest in maintaining the exemption, HEE said that it considers that it is in the public interest that members of its senior management team have an internal arena in which to discuss draft materials candidly before settling on a course of action especially around the sensitive issues relating to the JDCN.
27. It explained that the information captured by the request consists of email correspondence including updates and draft versions of the published letters as well as sensitive emails relating to other matters regarding the negotiations and discussions. HEE said that it had contacted (via telephone) two of the main parties involved in the discussions to seek their views on disclosure. One was adamant that the information should not be disclosed, arguing that to do so would substantially inhibit the free and frank exchange of views. The other party's concerns focussed on the release of such correspondence heightening the tension between the parties involved in the dispute.
28. HEE argued that the fact that the main parties to some of the meetings voiced serious concerns over disclosing the information supports its position that to do so would alter the nature of the relationship between parties and could dampen the candour of their ongoing and future discussions. In turn, this could, it said, prevent those tasked with implementing the recommendations or discussion around the junior doctors' contract from exploring all possible options as robustly as is necessary.
29. It said that the discussions and negotiations around the junior doctors contract were ongoing at the time of the request and that some of these issues continue to be debated over the implementation phase. It added that both HEE and other parties who participated in the meetings to which the request relates will continue to be involved in discussions and debates over the contracts implementation for the foreseeable future. It argued that any inhibition caused by disclosing this information could impact and continue to impact on this important policy area.

Balance of public interest arguments

30. The withheld information comprises emails from senior officials within HEE and other external organisations relating to the production of the letter from Professor Cumming as well as the related letter from Jim Mackey, Chief Executive of NHS Improvement.

31. The Commissioner has first considered the arguments for disclosure and accepts that there is a public interest in transparency surrounding the reforms and in particular the role of HEE and the involvement of the Secretary of State in the production of the letters, if any. However, the Commissioner also finds that having reviewed the withheld information the public interest in disclosure is limited. Whilst the information does in part record the views of senior officials on the JDCN, the focus is on the actual drafting of the letter which is of course in the public domain. The information includes drafts of the letter as well as officials' comments on the various drafts and suggested amendments. The Commissioner considers that much of this information has limited value in terms of increasing public understanding about the reforms or promoting debate, beyond the information which has already been placed in the public domain.
32. However, the Commissioner does accept that the reforms to junior doctors' contract are a matter of great controversy and a cause for concern to those affected. 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. The reforms are a major public policy issue and so there remains a public interest in promoting transparency and accountability.
33. Any public interest in disclosure also has to be balanced against the harm that would be caused to the ongoing negotiations surrounding the implementation of junior doctors' contracts. The Commissioner accepts HEE's arguments that to release the information would be at the cost of allowing HEE, with its specific responsibilities for implementing the contract recommendations, to fully contribute to that implementation process.
34. HEE's arguments for engaging the section 36 exemptions essentially focus on the 'chilling effect' that officials would be likely to be less candid in the free and frank exchange of views for the purpose of deliberation or advice which in turn leads to poorer quality advice and less well formulated policy and decisions.
35. Chilling effect arguments will be strongest when an issue is still live. In this case HEE has confirmed that at the time of the request discussions around junior doctors' contracts were ongoing and remain ongoing still. The Commissioner is aware that a decision had been taken to implement the contracts in August 2016 and that the complainant made his request in October. However, the Commissioner is satisfied that this was still a live issue. Following the decision to implement the contracts strikes were announced by the BMA for the end of 2016 although these were

subsequently cancelled. HEE has confirmed that implementation of the contract remains ongoing and that as a result of the negotiations it and its partners are carrying out work to enhance junior doctors working lives. It explained that this work is intended to address a number of issues raised by junior doctors during the negotiations concerning their training and working environment. In the Commissioner's view, disclosure at this point would have made it harder for the HEE to contribute to these discussions and this would not have been in the public interest. The Commissioner is also concerned that given the highly charged atmosphere surrounding the government's decision to implement the contract disclosure may be likely to reopen the dispute and make it harder for HEE to carry out its role effectively.

36. In balancing the public interest arguments the Commissioner has also considered the content of the withheld information and has given due weight to the qualified person's opinion. The Commissioner has concluded that since the information relates to a live issue the chilling effect arguments carry significant weight and disclosure would prejudice its ability to contribute to future discussions around the JCDN and its implementation.
37. As noted above the Commissioner has already found in two previous cases that the withheld information is exempt and the public interest favours maintaining the exemption. The Commissioner sees no reason to deviate from that position in this case. Whilst the request in this case was made some time after the request was made in the two previous cases the Commissioner is satisfied that the issues surrounding the JDCN were still live and so the passage of time makes no significant difference to the public interest balance.
38. The Commissioner has concluded that the public interest in maintaining the section 36(2)(b)(i) and (i) exemptions outweighs the public interest in disclosure.

Right of appeal

39. 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

40. 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.
41. 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
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