

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 March 2009

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

Summary

The complainant asked the Department of Health ('the Department') for a copy of the Gateway 4 review report for the Department's Electronic Recruitment project. The Department provided the complainant with certain elements of the review report, but withheld some information citing the exemption contained in section 36(2)(b)(ii) of the Act. The Commissioner has decided that section 36(2)(b)(ii) is engaged in relation to the information in the report, but he concluded that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information sought. He directed the Department to provide the complainant with that information. The Commissioner has also concluded that, in failing to make available to the complainant information to which he is entitled, the Department has breached sections 1(1)(b) and 10(1) of the Act.

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 2 January 2005 the complainant requested the following information from the Department in accordance with section 1 of the Act:

"a copy of the Gateway 4 review for the Department of Health's Electronic Recruitment (e -Rec) project."

He said that he believed that the review had been undertaken during the first half of 2004 and that the project to which it referred had resulted in the establishment of the www.jobs.nhs.uk website.

3. On 31 January 2005 the Department replied, confirming that it held the information requested by the complainant and saying that the exemption in section 36 of the Act (relating to the prejudice to the effective conduct of public affairs) applied. The Department said that, because of the need to consider the balance of public interest in relation to the information request, it would not be able to respond in full for a further 15 days.
4. The Department replied substantively on 25 February 2005, saying that an important general consideration was the clear public interest in maintaining the integrity of the Gateway Process as an effective and prompt peer review process producing reports based on candid interviews for the benefit of Senior Responsible Owners, which had led to demonstrable value for money gains across central government. Having applied the public interest test, it decided to release to the complainant the elements of the Gateway 4 report relating to the background to the e-Recruitment project and the purpose of the Gateway 4 review, but withheld the Conclusion and Summary of Findings, the Findings and Recommendations, the Status, the List of Interviewees and the Summary of Recommendations, citing section 36(2)(b)(ii) of the Act . The Department said that the basis for its decision was that the prospect of disclosure had the potential to prejudice the Gateway process in relation to the examination of the efficiency and effectiveness with which public authorities discharge their function.
5. On 2 March 2005 the complainant sought a review of the Department's decision, disputing its assertion that disclosure of the report would prejudice the Gateway process, and saying that he believed that the Department was using a blanket exemption that was being applied to all requests for Gateway reports. He said that the electronic recruitment project was having a profound impact on the way in which some aspects of recruitment were being undertaken within English NHS Trusts, and that these changes had the potential to either save or cost Trusts considerable sums of money over the next few years. He said that he believed the report in question to be an important document and that employers using the Electronic Recruitment system, and those suppliers who might be put out of business by its adoption, should have access to its full contents in order to be reassured that the assessments made were accurate, and could face up to independent scrutiny. He expressed the opinion that "if the document was not able to stand up to that type of scrutiny it was of little value to either the Office of Government Commerce" (which carried out the Gateway reviews) "or to the Senior Responsible Owner and it was not appropriate for it to be withheld". The complainant disputed the Department's assessment of where the balance of the public interest lay, and contended that the prospect of disclosure and independent scrutiny would improve the quality of the reports being supplied to the Department.
6. The Department replied on 12 May 2005 saying that, as regards the complainant's comments that the changes brought about by the electronic recruitment project had the potential to save or cost Trusts considerable sums of money, the value for money gain of the Gateway Review process was indicated in a press release of

December 2004 which ascribed over £700m savings to the use of the Gateway Review based on a methodology approved by the National Audit Office. The Department maintained its decision that the withheld information should not be released.

The Investigation

Scope of the case

7. On 17 May 2005 the complainant contacted the Commissioner to complain about the Department's refusal to provide him with the complete version of the report of the Gateway 4 review, for the reasons given in his review request, namely that the Department had adopted a blanket approach to all Gateway cases rather than consider the individual circumstances of the information request, and that it had incorrectly assessed where the balance of the public interest lay and thus had incorrectly applied section 36(2)(b)(ii) of the Act. These issues form the focus of the Commissioner's investigation.

Chronology

8. On 23 March 2006 the Commissioner began his investigation by writing to the Department to request a copy of the information sought and any other relevant papers or background information the Department considered necessary to put the matter in context.
9. The Department responded on 5 May 2006. It set out the background to the Gateway process, and explained that all acquisition programmes and procurement projects in central government are subject to Office of Government Commerce Gateway reviews. The Department said that the Gateway process examined a programme or project at critical stages in its lifecycle to provide assurance that it could progress successfully to the next phase. There were five key stages or Gates. At each stage Gateway reviewers reviewed relevant documents and interviewed and probed individuals involved in the procurement project or programme. The reports were then prepared for the Senior Responsible Owner of the programme or project. The Department said that interviewees, who attended voluntarily, were encouraged by the reviewers to be candid and frank about the progress of the project or programme. It said that Gateway reports were prepared very quickly, usually in a matter of days, and that such promptness was possible only because the reviewers were writing for a narrow audience.
10. The Department said that the complainant had requested a copy of the report of the fourth stage review, Gateway 4 'Readiness for service'. It said that the main objective of the project was to improve the efficiency of the NHS recruitment processes and reduce advertising by providing a national NHS jobs website, thus releasing more money for patient care. It said that the project started in January 2003 and was closed at the end of June 2005 when the national service was handed over to NHS Employers to manage. The Gateway 4 review took place in March 2004, following the pilot and immediately prior to the Project Board decision

to commence national roll out in April 2004. The Department said that the recommendations of the Gateway team were accepted and the issues raised had been addressed.

11. Action on this case was deferred pending the outcome of two cases in which similar public interest arguments had been advanced which were awaiting determination by the Information Tribunal. Those cases (*Office of Government Commerce v Information Commissioner (Tribunal references: EA/2006/0068 and 0080)*) were decided, appealed to the High Court, remitted to the Information Tribunal (Tribunal No. 2) and have now been re-determined in Tribunal No. 2's decision of 19 February 2009. This Decision Notice takes account of Tribunal No. 2's conclusions on this matter.

Analysis

Procedural matters

General right of access

12. Section 1(1) of the Act provides that any person making a request for information to a public authority is entitled to (a) be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.
13. For the reasons which follow, the Commissioner considers that the information the Department withheld from the complainant should be released to him. Therefore, the Department has breached section 1(1)(b) of the Act in failing to communicate this information to the complainant in response to his request.

Time for compliance

14. Under section 10(1), a public authority must inform a person making a request for information whether it holds the information requested, and communicate that information to the applicant, no later than the twentieth working day following the date of receipt.
15. By failing to provide the complainant with information to which he is entitled within twenty working days of the date of receipt of the complainant's request, the Department has breached section 10(1) of the Act.

Exemption

Section 36

16. The Department said that it had withheld the information requested under the exemption in section 36 of the Act, the relevant extracts of which are set out in the legal annex to this decision notice. Section 36(2)(b)(ii) exempts from the right of access information which, in the reasonable opinion of a qualified person, if

disclosed would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. In the Information Tribunal's decision in *Guardian & Brooke v BBC (EA/2006/0011)* the Tribunal found that 'reasonable opinion' for the purposes of section 36 is one which is both objectively reasonable and reasonably arrived at.

17. The 'qualified person' in the case of government departments is a Minister of the Crown. On questioning by the Commissioner, the Department confirmed that the qualified person in this case was Lord Warner, Parliamentary Under Secretary of State at the Department. His opinion was sought on 25 January 2005, and given on 31 January 2005. He took advice about the likely effect of disclosure and took the view that:
 - to be effective, the Gateway process requires open and candid contributions from those taking part;
 - the success of that process depends to a large extent on the speed with which the report is delivered to the Senior Responsible Owner to act upon the recommendations;
 - releasing all of the information contained within the Gateway review report sought by the complainant would inhibit contributions to future gateway reviews by making it less likely that interviewees would be as candid to the reviewers;
 - it would also result in a delay to the drafting of Gateway reports as a result of reviewers having to give more detailed consideration to the drafting of the reports in the light of the wider circulation, including consultation with third parties.
18. The Commissioner accepts that the Gateway process needs the benefit of a full and frank exchange of views for the scheme to be effective, and that releasing all the information from Gateway review reports as a matter of course would be likely to generate a risk of prejudice to the efficient operation of the scheme. He is certainly not of the view that Gateway Reviews should always be released, and considers that each case should be considered on its own merits.
19. In the case of *Guardian & Brooke v BBC (EA/2006/0011)*, the Information Tribunal noted that in considering the public interest although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (para 88). In the Tribunal's view, the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, "*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*" (para 91). So whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of that prejudice to the matter in hand. In the context of the present review the Commissioner believes that disclosure would be likely to have some adverse effects on the operation of the process and he has considered this when assessing the public interest (below).

20. The Commissioner is, therefore, of the view that the opinion of the qualified person was objectively reasonable and reasonably arrived at, and that section 36(2)(b)(ii) is engaged in relation to the information in the Gateway 4 report sought by the complainant. However, section 36 is a qualified exemption and, to decide if the Department has dealt with the complainant's request for information in accordance with the requirements of Part 1 of the Act, the Commissioner must go on to assess whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public Interest Test

21. The Department asserts that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The complainant argues that the Department has misapplied the test.

Public interest in maintaining the exemption

22. In support of its position, the Department said that it had considered "the general public interest in transparency to allow public scrutiny of whether government projects are being managed effectively and are responding properly to information contained in Gate reports as well as public interest in greater knowledge and understanding of the Gateway process. However this was balanced against the public interest in maintaining the integrity of the Gateway process".
23. In summary, the Department has argued that there is a public interest in withholding information where disclosure of certain information in Gateway reports:
- would (or would be likely to) inhibit candour amongst future interviewees on that or other projects; in particular there is a very strong public interest in ensuring that interviewees are able to be candid about matters which could lead to serious recommendations being made to the Senior Responsible Owner of a project (those interviewed as part of a Gateway review assume that what they say will be treated in confidence);
 - would lead to them becoming (or being seen to become) less reliable documents for Senior Responsible Owners;
 - may result in future Gateway reports being written for wider disclosure than for the sole benefit of the Senior Responsible Owner and so becoming less prompt, less robust or more narrow in scope. In particular, there is a very strong public interest in Gateway reports not becoming anodyne;
 - may call into doubt the integrity and confidentiality of the Gateway Review process so that departments and the wider public sector would be likely to be less willing to make full and appropriate use of the Gateway Process: for example Senior Responsible Owners of projects which are likely to attract adverse recommendations not requesting Gateway Reviews – so that the public interest is harmed because the projects in greatest need of support are least likely to receive it.

24. As to the Department's view that the release of all of the information in the report would make future prospective interviewees less willing to participate in the Gateway process, in this particular case the Commissioner is not entirely persuaded by this argument. In the Commissioner's opinion, the report does not contain any information which would cause participants to be less willing to contribute openly and fully in future Gateway Reviews. Those contributing information do so in a professional capacity and it is part of their official responsibilities to participate fully and frankly, and to express themselves in robust terms where the situation warrants it. The Commissioner does not accept that the release of the requested information in the Gateway 4 report in question would necessarily result in public sector employees failing to provide information or in their providing incomplete, inaccurate or anodyne information in the future. Gateway reports do not attribute comments to any particular person, although the Commissioner recognises that in some cases the nature of the information is such that it may be possible to attribute content to a particular individual. The Department has not suggested that this is the case here. However, even if it were possible to do this, the Commissioner is still not convinced that disclosure of the requested information would be likely to lead to contributors being less candid in future reports. Should there be evidence of this, the organisations involved should take the necessary measures to ensure that their staff continue to deliver the quality of advice that they are expected to provide as part of their official duties.
25. The Department has said that the success of the Gateway process depends to a large extent on the speed with which the report is delivered. It has highlighted its concerns that disclosure of future Gateway reports would lead to delays in their production because of the need to draft with a wider readership than the Senior Responsible Owner in mind. The Commissioner recognises the need for reports to be produced promptly. However, the Department has not provided any compelling evidence to substantiate its view that disclosure of the requested information would slow down the Gateway Review process in the future. The Commissioner considers that even if disclosure were to lead to some delay in the drafting of future reports, this is likely to be outweighed by improving public understanding of the subject of these reports. In any event, in the Commissioner's opinion, keeping the report process on track is essentially a management issue.
26. The Department contends that, if the information requested were to be released, the Gateway process would be devalued and departments and the wider public sector would as a consequence be less willing to make use of the Gateway Process. However the Commissioner's view is that since all acquisition programmes and procurement projects in central government are subject to Gateway reviews, reference for such reviews is not voluntary, and it would again be a management issue for the Department if officials failed to make the necessary references.
27. The Department said that the greater public interest was in maintaining the integrity of the Gateway Process as an effective and prompt peer review process producing reports for the benefit of Senior Responsible Owners, as this process had led to demonstrable value for money gains (shown in a press release of December 2004 as being over £700m – paragraph 6 above). If the Gateway review process is responsible for such significant savings, the Commissioner does not consider it

likely that Senior Responsible Officers would be deterred from bringing projects forward for review out of concern that the completed review may be publicly available. He therefore considers that this public interest factor holds less weight.

28. In summary the Commissioner believes that disclosure in the present case would be likely to have some adverse effects on the operation of the process but that these would be unlikely to be substantial. He has therefore only given them limited weight when considering the public interest.

Public interest in disclosure

29. The Commissioner is aware of the importance that the Government attaches to the Gateway process. He recognises that there is a balance to be drawn between the competing objectives of public accountability and transparency and the importance of maintaining public confidence in the effectiveness of the Gateway process. The Commissioner has taken these competing objectives into account in reaching his decision and has taken full account of the approach adopted by Tribunal No.2 in *Office of Government Commerce v Information Commissioner (EA/2006/0068 and 0080)*. He has also had regard to the decision of the Information Tribunal in the *Secretary of State for Work and Pensions v the Information Commissioner (EA/2006/0040)*, in which the Tribunal highlighted the presumption in favour of disclosure, saying:

“there is an assumption built into [the Act], that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities”.

30. The subject of the report, i.e the introduction of an electronic recruitment service, impacts on the NHS workforce as a whole and, as the complainant has pointed out, on existing suppliers, some of whom might be put out of business by its adoption. The Commissioner considers that disclosure of the Gateway 4 review will inform these factors and presents a strong argument in favour of disclosure.
31. The Commissioner has noted (see paragraph 10) that the e-Recruitment project started in January 2003 and was closed at the end of June 2005 when the national service was handed over to NHS Employers to manage. The Gateway 4 review took place in March 2004 following the pilot and immediately prior to the Project Board decision to commence national roll out in April 2004. As such the Gateway 4 report contains information that is essentially historical, which again militates against withholding the information on public interest grounds.
32. In paragraph 162 of its decision, in *Office of Government Commerce v the Information Commissioner (EA/2006/0068 and 0080)*, Tribunal No. 2 said :

“... there is a public interest in assessing the value of the Gateway Review Process itself. Without in any way disparaging the fears expressedthat the entire Gateway Process would be at risk were disclosure ordered, in the Tribunal’s view there can be no doubt that there is a public interest in seeing that the Gateway Review Process itself in fact works. The point was made

that.....reviewers would have a greater incentive to be candid and complete in the carrying out of their functions in the knowledge that their actions might at some stage be subject to public scrutiny. The Tribunal regards this as a very telling consideration.”

33. While the Department has argued strongly against the disclosure of information from Gateway review reports in general, it has not explained in any detail why it considers the public interest in maintaining the exemption in relation to the withheld information in the specific Gateway 4 report at issue in this case outweighs the public interest in its release. It should be noted here that, in Tribunal No. 2's decision in *Office of Government Commerce v Information Commissioner (EA/2006/0068 and 0080)*, the Tribunal drew attention to the fact that the general Working Assumptions as regards Gateway reviews, that the conclusion and summary of findings, the findings and recommendations, the Red/Amber/Green status, the list of interviewees and the summary of recommendations should be withheld, did not apply to Gateway 4 and 5 reports, and they should be disclosed.
34. In the light of the foregoing, the Commissioner concludes that, in all the circumstances of the case, the public interest in maintaining the exemption in section 36(2)(b)(ii) does not outweigh the public interest in disclosing the information sought by the complainant, and the Gateway 4 review report should be released to him.
35. However, in *Office of Government Commerce v the Information Commissioner (EA/2006/0068 and 0080)* Tribunal No. 2 also discussed whether the names of Reviewers and Interviewees mentioned in the Gateway reviews in question should be released. The Tribunal maintained (paragraph 187) that “*names should be redacted but not the individual parties' grades and/or functions*”. In the present case, the names of the Reviewers have already been released to the complainant, but the names of the Interviewees, which appear in the Appendix to the Gateway 4 review, have not. In accordance with the Tribunal's decision, the Commissioner, therefore, finds that the Department should withhold the list of Interviewees, but should provide the complainant with details of the grades and/or functions of persons interviewed.

The Decision

36. The Commissioner's decision is that the public authority did not deal with the following elements of the request for information in accordance with the requirements of the Act:
 - it breached section 1(1)(b) of the Act by virtue of the incorrect application of section 36(2)(b)(ii), thus breaching; and
 - it breached section 10(1) of the Act by failing to provide the requested information within twenty working days of the date of receipt of the request.

Steps Required

37. The Commissioner requires the Department to take the following steps to ensure compliance with the Act:

to disclose to the complainant the information he requested on 2 January 2005, namely the full Gateway 4 review report relating to the NHS e-Recruitment Project.

However, in line with Tribunal No. 2's decision mentioned above, the Department is entitled to withhold the names of Interviewees but should provide the complainant with details of the grades and/or functions of persons interviewed.

38. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

39. Failure to comply with the steps described above 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

40. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 23 day of March 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Prejudice to effective conduct of public affairs.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the executive committee of the National Assembly for Wales,

(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.