Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2009

Public Authority: Department of Health
Address: 334B Skipton House
80 London Road
London
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Summary

The complainant made a request for documents containing discussions in respect of the modernising medical careers initiative with emphasis on information held in relation to proposed variations to the Consultant contract. The public authority disclosed some information but specifically withheld submissions made to Ministers by civil servants in respect of the Consultant contract by virtue of the exemption contained in section 35(1)(a) of the Act. It also withheld the names of specific civil servants by virtue of the exemptions contained in section 40(3)(a)(i). The Commissioner finds that section 35(1)(a) was correctly engaged. However he has decided that in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He also finds that section 40(3)(a)(i) was correctly engaged, and that the public authority breached sections 1, 10, and 17 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. The complainant wrote to the public authority on 04 January 2007 requesting the following:

'*……details/documentation of meetings where Lord Warner has discussed the motives behind the MMC* (Modernising Medical Careers) *and specifically the 'subconsultant grade*'

'*…..documentation of meetings where Lord Warner has discussed suppressing the truth behind the MMC and where Lord Warner has discussed how to implement MMC with a minimum of fuss from the unions.*'

'*……information as to why MMC has been implemented so quickly and the motives of Lord Warner behind this…*'

3. The public authority responded on 12 January 2007. It explained that the development of a sub-consultant grade was not part of the MMC initiative. It however disclosed '*papers and notes from meetings that cover discussion and agreement of the MMC structure and further exploratory discussions around the shape of the medical workforce in future.*'

4. The public authority then went on to inform the complainant that it '*does also hold correspondence in relation to consultations between Government Ministers and interested parties, including expert advice in the development of policy in this area.*' This information was however withheld under '*section 35* ' of the Act.

5. On 14 January 2007, the complainant asked the public authority to review the decision to withhold the correspondence it had referred to under section 35 of the Act.

6. On 26 March 2007, the public authority informed the complainant that it had completed its review and decided to uphold its original decision because '*section 35 covers the formulation or development of government policy.* ' The public interest favoured maintaining the exemption as officials need to be able to provide frank advice to Ministers, and also conduct rigorous and candid assessments of policies and programmes.

The Investigation

Scope of the case

7. On 26 March 2007, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to;

- Review the public authority's application of section 35, and
- Address the public authority's delay in completing its internal review.

8. In light of the clarification provided by the public authority which is outlined below, the Commissioner's investigation covered documents held in relation to discussions on the future role of Consultants within the framework of the medical workforce.

Chronology

9. The Commissioner wrote to the complainant on 28 May 2008 outlining the scope of the investigation and inviting the complainant to comment if he disagreed with the scope and/or wanted additional factors taken into account.

10. Specifically in relation to the scope of the investigation, the Commissioner explained that the investigation would review the application of section 35 to the withheld correspondence in relation to '*consultations between Government Ministers and interested parties, including expert advice in the development of policy…*(for the MMC initiative)'

11. The complainant did not question the scope of the investigation.

12. On 05 June 2008, the Commissioner wrote to the public authority. He asked the public authority to provide him with the withheld information adding that unless a contrary explanation was provided by the public authority, he expected the withheld information included documents in relation to the 'sub-consultant' grade.

13. The Commissioner also asked the public authority to clarify the exact exemption it had relied on under section 35, as well as provide a full and detailed explanation as to the reasoning behind its application. In addition, the Commissioner asked the public authority to provide him with the public interest factors it had taken into account before concluding that the exemption should be maintained.

14. The public authority provided a response on 21 July 2008, and also responded to further queries from the Commissioner in letters dated 13 August 2008, 18 September 2008, 26 September 2008, and 07 November 2008.

15. The public authority provided the Commissioner with copies of the information it had already disclosed to the complainant in relation to the subject of his request of 04 January 2007 (i.e. MMC initiative and 'sub-consultant grade'). It also clarified that most of the withheld correspondence was in relation to discussions on the future role of Consultants within the framework of the medical workforce.

16. A list of the documents disclosed is available in Annex A at the end of this Notice.

17. According to the public authority, the grading structure introduced as part of the MMC initiative covers training grades up to the level of the Certificate of Completion of Training (CCT). The Consultant grade is post-CCT, and therefore discussions on varying the Consultant grade (i.e. introducing a 'sub-consultant' grade) would generate a search for post-CCT information. However, discussions on the future shape of the medical workforce would necessarily cover both the training grades as well as post-CCT grades.

18. The public authority clarified that it had relied on section 35(1)(a) and identified the following as the additional information withheld:

- A copy of a letter to Lord Warner from NHS Employers dated 19 December 2006.

- A copy of a draft reply from Lord Hunt to NHS Employers dated 29 January 2007.
- A copy of a Ministerial submission titled; Modernising Careers: update on the future of the medical workforce events dated 03 March 2006.
- A copy of an email dated 02 March 2006 presenting the above submission.
- A copy of a Ministerial submission dated 13 March 2006.
- A copy of an email dated13 March 2006 presenting the above submission.

19. During the course of the investigation, the public authority agreed to disclose the following:

- The letter to Lord Warner from NHS Employers
- The draft reply from Lord Hunt to NHS Employers (*ex gratia* as it was not captured by the request by virtue of the time it was produced).
- Annex 1 of the submission of 03 March 2006 titled; 'background information on pay'.

20. The public authority went on to explain that;

- The contents of the email of 02 March 2006 could be disclosed apart from the names of junior officials which it withheld by virtue of the exemption contained in section 40(3)(a)(i),
- The names of junior officials included in the email of 13 March 2006 was withheld by virtue of section 40(3)(a)(i), and the majority of the information therein by virtue of section 35(1)(a),
- The title, three paragraphs, and names of senior officials contained in the submission of 03 March 2006 could be disclosed. However, the rest of the information was withheld by virtue of section 35(1)(1)(a), and,
- All of the information contained in the submission of 13 March 2006 apart from a senior official's name was withheld by virtue of section 35(1)(a).

Analysis

Procedural matters

21. A public authority is required by virtue of section 17(1)(b) of the Act to specify the exemption it is relying on when issuing a refusal notice under section 17(1).

22. A full text of section 17 is available in the Legal Annex at the end of this Notice.

23. The Commissioner finds the public authority in breach of section 17(1)(b) for failing to specify in its letter of 26 March 2007 that it was relying on section 35(1)(a) of the Act, and for also not specifying that it was relying on section 40(2) by virtue of 40(3)(a)(i).

24. The Commissioner also finds the public authority in breach of section 1(1)(b) and section 10 for the disclosing the following information outlined in paragraph 19 above:

- The letter to Lord Warner from NHS Employers
- Annex 1 of the submission of 03 March 2006 titled; 'background information on pay'.

25. By virtue of the provisions of sections 1(1)(b) and 10 of the Act, a public authority is required to disclose information upon request within 20 working days if it is not relying on an exemption under the Act.

26. A full text of sections 1 and 10 are available in the Legal Annex at the end of this Notice.

27. The Commissioner has addressed the public authority's delay in completing its internal review and other issues of concern regarding its handling of the case in the 'Other Matters' section of this Notice.

Exemptions

Section 35(1)(a)

28. Information held by a government department is exempt by virtue of section 35(1)(a) if it relates to the formulation or development of government policy.

29. According to the public authority, the withheld information relates to the development of government policy. The public authority explained that the withheld information summarises stakeholder attitudes to then current and proposed future policies on post-CCT hospital doctor employment, presents the Minister with options for the ongoing development and negotiation of the proposed 'sub-consultant' grade, examines these options, advises about likely stakeholder attitudes, and makes recommendations.

30. It is important to note from the outset that in examining the withheld information, the Commissioner was guided by the Information Tribunal's (Tribunal) interpretation of 'relates to' and 'formulation or development of government policy' in DfES v Information Commissioner & The Evening Standard (EA/2006/0006).

31. According to the Tribunal, 'relates to' can safely be given a reasonably broad interpretation as section 35 is a classed based exemption which is subject to a public interest test. (See paragraphs 50 – 59). In particular, it stated that; '*if the meeting or discussion of a particular topic within it, was, as a whole, concerned with section 35(1)(a) activities, then everything done is covered. Minute*

dissection of each sentence for signs of deviation from its main purpose is not required nor desirable.' (See paragraph 58)

32. In considering the application of the exemption, the Commissioner first considered the nature of information which could be described as relating to the *development of government policy*.

33. In the Commissioner's view, development is suggestive of a stage beyond formulation which would include a process of improving or altering existing policy by analysing, reviewing, or recording the effects of the existing policy.

34. The Commissioner notes that most of the withheld information is focussed on the on the affordability of future consultants within the general framework of the medical workforce. Broadly speaking therefore, the submissions essentially contain a summarised review of the current structure of the medical workforce, as well as detailed options and recommendations to Ministers on how to maintain the future affordability of the consultant workforce. The emails though not entirely focussed on the policy discussions were not produced in isolation, and are incidental to the discussions on the future of the medical workforce.

35. The withheld information therefore relate to the development of government policy by virtue of the fact that they contain a review of the Consultant contract in particular, and by extension the shape of the medical workforce. The review was conducted with the purpose of informing a possible change in policy.

36. The Commissioner is therefore satisfied that all of the withheld information was correctly withheld by virtue of the exemption contained in section 35(1)(a) of the Act.

Public Interest Test

37. As noted above, section 35 is a qualified exemption and subject to a public interest test. Therefore, the Commissioner must determine whether in all the circumstances of the case, the public interest favoured maintaining the exemption.

Public Authority's arguments

38. The public authority recognised the public interest in accessing information which would facilitate informed participation and demonstrate adequate deliberative rigour in developing government policy. It however concluded this was outweighed by the public interest in maintaining the exemption. The public authority's arguments are outlined in the paragraphs below.

39. Maintaining the quality of government policy making by facilitating free and frank exchanges between officials and Ministers, including the thorough consideration of all policy options, however extreme, without either inducing the need to defend those options or inhibiting the consideration and debate of a full range of policy options in future. According to the public authority, it is important to ensure that the medical profession's position on pay and conditions is aligned with the public

interest in a reasonable and cost-effective remuneration that guarantees the highest quality specialist medical provision.

40. It explained '*that there is already scope for Trusts to employ doctors in non-consultant posts.*' Therefore, policy makers, Ministers and professional representatives should be able to consider such an option amongst a range of others at a national level as policy around the future structure of the medical workforce is formulated. In its view, disclosure would not only inhibit the breadth of debating possibilities in future but also curtail stakeholder engagement in relation to the discussions on the future of the workforce as well as other pay-related discussions.

41. Disclosure would not promote meaningful and constructive public debate, but rather distract health professionals and the public authority from future deliberations on the subject. On this point, the public authority also noted that the information already disclosed to the complainant on discussions and agreement of the MMC structure as well as further exploratory discussions around the future shape of the medical workforce satisfy the public interest in the public's participation in policy debates.

42. Disclosure could impinge on the morale of health professionals thus provoking unnecessary concern and discontent about past proposals and inhibit discussions of future options as the '*submissions talk specifically about the affordability of the consultant workforce.*' (The paragraphs further below explain why notwithstanding the public authority's concern, the Commissioner has not redacted any reference to the affordability of the consultant workforce throughout this Notice).

43. The public authority explained the development of policy in relation to consultant grades was at the time of the request '*dormant*' not 'concluded' and could be reconsidered in the future should it consider this to be in the best interests of the NHS and the public. In support of this assertion, the public authority referred the Commissioner to a copy of the 'draft reply from Lord Hunt to NHS Employers (29 January 2007)'.

Commissioner's Assessment

Public interest factors in favour of disclosure

44. According to the Tribunal in Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC (EA/2006/0011 and EA/2006/0013);

'*While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.*' (Paragraph 87).

45. In addition to the above public interest factors, the Commissioner is of the view that good governance could also be promoted by being able to assess the quality of advice given to Ministers and the subsequent decision(s) taken based on the advice provided.

46. In respect of the withheld information, the Commissioner considers there is a significant public interest in assessing the quality of advice Ministers were provided with in relation to proposals which could affect the structure of the medical workforce and consequently have an impact (positive or negative) on the services provided by the NHS. This would also have the added effect of enhancing the transparency of the process so that the public (including relevant stakeholders) are in no doubt about the government's intentions.

47. There is also a significant public interest in ensuring that the public are well informed about options being considered by the government so that they can fully understand the government's reasoning behind the need to review the Consultant role. The withheld information would allow the public to engage in a constructive debate as to whether the reasons for the review as well as the options being considered have been properly weighed alongside the potential impact on health care services. This would also enhance the public's understanding of any decisions taken thereof. The Commissioner also notes that the policy issues in question formed a significant part of a major reform of health service pay and conditions and therefore the work of thousands of clinicians. The reforms would also have a potentially significant impact of the distribution of funding across the NHS. The issue itself is one of significant public interest.

48. On the points made about made by the public authority about the unconstructive debate that may result the Commissioner notes the comments of the Information Tribunal in Derry City Council v Information Commissioner (EA/2006/014):

'*In the course of discussing with both the advocates and the witnesses the balancing exercise that these provisions require us to undertake, one or two wider issues crept into the debate. Given that part of the argument we heard concerned whether or not the disclosure of the information in question was or was not necessary to enable a fully informed public debate to take place it was perhaps inevitable that the issues which that debate might cover were commented on. However, we are not concerned with the detail of the debate which may result if we order disclosure of the Ryanair Financial Information. Still less are we concerned with any question as to what issues ought to be covered by it. The only legitimate concern (on this point) is the balance to be struck between the public interest in disclosing information that may illuminate that debate, on the one hand, and the public interest in maintaining the relevant exemption, on the other.'*

49. In light of this guidance from the Tribunal, the Commissioner, reiterates his analysis above, that in his opinion the information would illuminate public debate on this important issue. He does not consider it a relevant consideration that the disclosure may result in a debate looking backwards rather forwards, as a large percentage of requests under the Act will always relate to information that illuminate decisions that have been already taken and to do so would undermine

the purpose of the Act and the assumption in favour of disclosure. The Commissioner has therefore accorded significant weight to the public interest arguments in favour of disclosure; this is on the basis of the content of the information and the relevance of the policy decision in question to a large part of the public.

Public interest factors in favour of maintaining the exemption

50. In considering the public authority's arguments against disclosure, the Commissioner took into account the information already disclosed to the complainant in relation to the subject of his request and prior to his complaint to the Commissioner.

51. As noted above, the public authority considers that disclosing the fact that the submissions specifically talk about the affordability of the consultant workforce would provoke unnecessary concern and therefore inhibit discussions of future options. The Commissioner however notes that at least one document (which contains a summary of discussions from meetings or engagements in relation to the future of the medical workforce) already disclosed to the complainant specifically refers to the '*affordability of the consultant led service*' and further disclosed documents reveal that NHS Trusts also recognised it would be '*unaffordable to employ large numbers of highly paid consultants.*' (See document listed as; 'Future of the Medical Workforce: Recommendations -28 February 2006). He also notes that paragraph 5 of the submission of 03 March 2006 which the public authority has no objection to being disclosed again refers specifically to the affordability of the consultant-delivered service as an issue of contention at meetings on the future of the medical workforce involving stakeholders.

52. The public authority is therefore undermining its argument for withholding documents which specifically refer to the affordability of the consultant workforce by simultaneously making disclosures of similar information. The Commissioner is therefore satisfied that the submissions would not necessarily exacerbate any existing concerns in that they mirror what is already regarded as the public authority's view on this specific point.

53. The public authority also argued that the development of policies in relation to consultant grades was simply dormant and not off the agenda. The Tribunal in DfES v The Information Commissioner and the Evening Standard EA/2006/006 stated that when the formulation or development of a particular policy is complete is a question of fact, and rejected the notion that the development of policy is a continuous process or a "seamless web" (paragraphs 40 and 75(v)). Though the Commissioner accepts that in some cases it may be possible for a public authority to provide evidence to illustrate a clear link between information on formulation and development on a completed project with an identified, related policy where policy formulation and development is ongoing. This will be established on a case by case basis.

54. In the Commissioner's view, the 'draft letter from Lord Hunt to NHS Employers' which the public authority provided in support of the above argument suggests that at least as at January 2007, the government was no longer considering any

changes to the consultant grade, although it considered the flexibilities offered by the consultant contract combined with the freedoms that Trusts have to develop their own terms and conditions '*should provide them with enough options to meet their needs.*'

55. The Commissioner therefore considers that the most plausible interpretation of the position in January 2007 is that the government was no longer considering specific policy alterations in relation to the nature of the consultant role, and suggesting that there was only a pause in the development cycle would in the Commissioner's view introduce the 'seamless web' argument rejected by the Tribunal in the DfES case. He is therefore satisfied that for the purposes of the Act, policy deliberations in respect of the consultant role was completed in January 2007. In DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072), the Tribunal commented that;

'*This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public*.' (Paragraph 114)

56. This was reinforced in Scotland Office v Information Commissioner (EA/2007/0070). According to the Tribunal;

'*Where the Ministerial communication is in relation to an issue that was "live" when the request was made, the public interest in preserving a "safe space" for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality, have been contentious policy issue, may weigh the balance in favour of maintaining the exemption. However, that does not detract from the need to assess each case on its own circumstances.*' (Paragraph 88).

57. The Commissioner accepts that an argument in respect of 'safe space' could be made in this case as the complainant's request was made on 04 January 2007, and the 'draft letter' is dated 29 January 2007. The 'draft letter' was attached to a covering note which was not considered as part of the request as it was also dated 29 January 2007 although as noted above, the public authority did disclose the 'draft letter'. However, the Commissioner considers it reasonable to draw a conclusion from the contents of both the 'draft letter' and the covering note to the effect that the government was no longer considering any changes to the Consultant contract or grade possibly at the end of 2006 or at least in January 2007. The Commissioner accepts that the need protect the safe space does not fall away completely after the decision about the policy is made but he notes the finding of the High Court in Office of Government Commerce v the Information Commissioner. Stanley Burnton J commented: '*I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished*'. The Commissioner has therefore only given the safe space argument very limited weight in this case. The public authority's general assertion that the policy was dormant should not

add extra weight to arguments in respect of the need for 'safe space' to conduct policy deliberations.

58. In respect of the public interest in maintaining free and frank exchanges between officials and Ministers, the Commissioner notes that the submissions of 03 and 13 March 2006 contain detailed proposals from senior civil servants in respect of the possibility of changes to the consultant contract. They also include analysis of the likely effects of options under consideration and the anticipated response from stakeholders. The Commissioner also notes that paragraphs 1- 6 of the submission of 03 March is a summary of the discussions which took place at an engagement event on the future of the medical workforce as part of a series of events on modernising medical careers. This event included representatives from the British Medical Association and NHS Employers.

59. The argument in this respect is centred on the likely wider effect that disclosure could have on the frankness and candour with which civil servants contribute to future policy debates including those on the future shape of the medical workforce. In Foreign and Commonwealth Office v Information Commissioner, the Tribunal commented on the weight to be given to arguments in this respect. According to the Tribunal;

'*we adopt two points of general principle which were expressed in the decision in Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential……Secondly, the Tribunal could place some reliance in the courage of Civil Servants, especially senior ones continuing to give robust and independent advice even in the face of a risk of publicity.*' (Paragraph 26).

60. The High Court in Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department also commented on the weight to be given to the above argument. According to Mr Justice Mitting, frankness and candour should not be regarded as ulterior considerations;

'*they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case……I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.*' (Paragraph 38)

61. The Commissioner accepts that the practicalities of modern government support the need to consider arguments in respect of frankness and candour. However, in each case, the content of the withheld information, the particular facts, and circumstances under consideration would determine how much weight he attributes to such arguments.

62. As noted above, the submissions include options and analysis from senior civil servants in respect of the possibility of making changes to the consultant role. These options as well as analysis were not only based on factual representations but also included opinions based on the expert knowledge of the person(s) providing them. However, at the time the request was made, these options were no longer being seriously considered as possible policy changes to be made in respect of the consultant role. The public authority however considers the submissions as part of an ongoing (although currently dormant) policy development in respect of the future shape of the medical workforce. It should also be noted that the disclosed document listed in Annex A as; 'Future of the Medical Workforce – Recommendations – 28 February 2006 include a summary of the options which were under consideration at the time.

63. The NHS and the way it operates is like most public sector bodies under constant review, although the Commissioner accepts that there have been, and most likely still are, concerns about the structure and operation of the NHS. There are also different aspects to these concerns which include the quality of healthcare provided, sustainability in its current form, and it is inevitable therefore that attempts to strengthen the NHS may from time to time include a review of the medical workforce.

64. The advent of the Freedom of Information Act signalled a presumption in favour of disclosure. Therefore, accepting that the disclosure of these submissions would result in a significant loss of frankness and candour in future unspecified discussions and advice on the shape of the medical workforce (including pay related issues) and/or policies in relation to healthcare in effect suggest that such deliberations and consequent recommendations should remain confidential. There is, as noted above, an expectation that civil servants should always provide robust and independent advice even at the constant risk of publicity. Equally, the Commissioner does not accept that external stakeholders would be less likely to engage in these policy discussions, noting his finding on the timing of the request related to the decision and the fact it will always be in the interests of such stakeholders to lobby for their position to be taken into account. Admittedly, more weight would have to be given to frankness and candour if such a request was made in relation to a 'live' issue.

65. The Commissioner's view therefore is that the withheld information, especially the submissions in question would shed more light on the options under consideration as well as on the intentions of the public authority at the time in relation to the consultant contract. In his opinion, in light of the timing of the request, disclosure was unlikely to pose a significant threat to the candour of officials in future deliberations, he has therefore only given a very limited amount of weight to the 'chilling effect' arguments.

66. He therefore finds that in all the circumstances of the case, the public interest in favour of disclosure outweigh the public interest in maintaining the exemption at section 35(1)(a).

Section 40(3)(a)(i)

67. As noted above, the public authority is of the opinion that names of junior officials included in the withheld information should be withheld by virtue of the above exemption.

68. Information is exempt from disclosure by virtue of sections 40(2) and 40(3)(a)(i) if it constitutes the personal data of person(s) other than the applicant, and its disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 (DPA).

69. A full text of section 40 is available in the Legal Annex at the end of this Notice.

Information Constituting Personal Data

70. The definition of personal data under section 1 of the DPA includes data which relates to a living individual who can be identified from those data.

71. A full text of section 1 of the DPA is available in the Legal Annex at the end of this Notice.

72. The names of the officials clearly constitute their personal data as defined by section 1 of the DPA. The Commissioner has produced guidance to assist public authorities in determining what information could constitute personal data.[1] The names of the individuals in conjunction with their job titles could be used to identify and distinguish them from a group. Therefore, this information could be accurately described as their personal data.

Would disclosure contravene any of the data protection principles?

73. The data protection principles are contained in schedule 1 of the DPA. The Commissioner considers the first data protection principle as the relevant principle for the purposes of the Act.

First Data Protection Principle

74. The first data protection principle provides in part;

'*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met….*'

75. The Commissioner considers the sixth condition as the most applicable principle. The sixth condition provides;

'*The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party to whom the data are disclosed, except where the*

[1] See 'Data Protection Technical Guidance.' Available online: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_V1_with_preface001.pdf

processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

76. Therefore, in considering whether or not disclosing the names of the junior officials would contravene the first data protection principle, the Commissioner took into account their reasonable expectations, rights and freedoms, as well as the legitimate interests of the public.

77. The public authority explained that, generally, there is no legitimate interest in disclosing the names of junior officials as they are not responsible for projects and policies of sufficiently high profile to merit a public interest in knowing their identities. Senior officials are held accountable for such projects and policies in accordance with their level of involvement.

78. It further argued that even if there was a legitimate interest in ensuring the accountability of junior officials, such processing would be unwarranted by reason of prejudice to their rights and freedoms or legitimate interests. According to the public authority, there is a reasonable expectation of anonymity that extends to all junior officials. As part of the constitutional necessity of an independent and politically neutral civil service, such employees are neither entitled to publicly defend their actions, nor comment on the policies that they are obliged to implement. Therefore, it would be unfair to release their names into the public domain and expose them to potential criticism that they are in no position to counter without breaching the terms of their employment.

79. In support of the above arguments, the public provided the Commissioner with a list containing the names of the officials, job titles, level and nature of contribution to discussions on the MMC initiative and Consultant role in 2006. It however explained that only seven individuals were included on the list because three others had left the public authority, and '*it was impossible…….to confirm their job titles or degree of contact with MMC in 2006.*'

80. The Commissioner produced awareness guidance 1 to assist public authorities in the application of section 40. In the Commissioner's view, information about a person's private life would deserve more protection than information about them acting in an official capacity, and the more senior a person is, the less likely that information about them acting in an official capacity would deserve protection.

81. From the list provided by the public authority, the Commissioner notes that not all of the individuals are junior officials but none of them had direct input in the options under consideration apart from being privy to deliberations as private secretaries or team managers with specific factual knowledge needed to inform the deliberations.

82. The Commissioner therefore considers they would have had a reasonable expectation that their names would not be disclosed in relation to the options considered, as their input was mostly minimal. He is therefore persuaded that it would have been unfair for their names to be disclosed in this regard since they are not accountable for the policies which were being considered at time..

Schedule 2 – Sixth Condition

83. The Commissioner also considered whether processing the data in question would satisfy the sixth condition in schedule 2 of the DPA.

84. The Commissioner was guided in his assessment by the approach adopted by the Tribunal in House of Commons v Information Commissioner & Leapman, Brooke, Thomas (EA/2007/0060). According to the Tribunal, to process personal data in accordance in with the sixth condition, a three part test must be satisfied.

85. There must be legitimate interests in disclosing the information, the disclosure must be necessary for a legitimate interest of the public, and even where disclosure is necessary, it must not cause unwarranted interference or prejudice to the rights, freedoms, and legitimate interest of the data subject(s).

86. In the Commissioner's view, there could be a legitimate interest in disclosing the names of individuals notwithstanding their rank (i.e. senior or junior) who had significant input in policy formulation or development. However, as already noted above, these specific officials had a minimal input in the policy deliberations and are not accountable for options considered or subsequent decisions made.

87. In light of their lack of input into the options under consideration, and consequent deliberations, the Commissioner does not consider the public has a legitimate interest in the disclosure of the withheld names.

88. He therefore finds that the names were correctly withheld under section 40(2) by virtue of section 40(3)(a)(i) because disclosure would contravene the fairness element of the first data protection principle, and would not satisfy the sixth condition in schedule 2.

The Decision

89. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly withheld the names listed in its letter to the Commissioner of 03 December 2008.

90. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

91. The public authority breached sections 1 and 10 for failing to disclose the information outlined in paragraph 24 above at the time of the complainant's request.

92. The public authority breached section 17(1)(b) for failing to specify which part of section 35 it was relying on and also failing to specify that it was also relying on section 40(2) by virtue of 40(3)(a)(i) in its letter of 26 March 2007.

93. It incorrectly concluded that the public interest in maintaining the exemption at section 35(1)(a) outweighed the public interest in disclosing the information outlined in paragraph 76 below.

94. He therefore finds the public authority breached section 1(1)(b) for failing to disclose the information outlined in paragraph 76 below,

95. The public authority breached section 10(1) for failing to disclose the information outlined in paragraph 76 below within 20 working days.

Steps Required

96. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose the email of 02 March 2006 with any of the names listed in its letter of 03 December 2008 redacted,
- disclose the email of 13 March 2006 with any of the names listed in its letter of 03 December 2008 redacted,
- disclose the submission of 03 March 2006,
- disclose the submission of 13 March 2006.

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

Other matters

98. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

99. The Commissioner's position as explained in the 'Freedom of Information Good Practice Guidance No. 5' is that internal reviews should take no longer than 20 working days, and in exceptional circumstances which have been clearly explained to the complainant, the total time taken should not exceed 40 working days. This guidance was published in February 2007. The Commissioner therefore took into account the fact that the guidance had not been published at the time the complainant requested an internal review. He would however like to record that he does not consider the public authority had any exceptional reasons for delaying the internal review. Although the delay does not constitute a breach of the Act, the Commissioner would like to make it clear that this does not accord with good practice. He therefore expects the public authority to be aware of his

position as provided in the published guidance as his office will monitor the public authority's compliance or otherwise via future complaints made against it.

100. The Commissioner will also like to express his concern at the length of time it took the public authority to respond to some of his queries as well as its general handling of the case. He is particularly concerned that during the course of the investigation, the public authority was unsure about the information it had actually withheld as well as the exemptions it relied on.

Failure to comply

101. 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

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102. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 30th day of March 2009

Signed ……

Steve Wood
Assistant Commissioner

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

Annex A

List of Documents Disclosed to Complainant

1) Future of medical workforce: issues and options: 15 February 2006

2) Future of the medical workforce: Doctors of tomorrow: 19 January 2006

3) Future of the medical workforce: Recommendations: 28 February 2006

4) Modernising medical careers: clinical workforce solutions group

5) Clinical workforce solutions group – options for the senior medical workforce

6) Costing MMC

7) Decision required: agreement on the future of specialist training

8) Modernising medical careers: overview for UK strategy group

9) Letter from Department of Health to all members of clinical workforce solutions group

10) Note of the meeting of the MMC UK strategy group: 16 November 2005

11) Note of meeting of the MMC UK strategy group: 7 September 2005

12) Summary note and action points of modernising medical career advisory board meeting of 9 September 2005

13) Summary note and action points of modernising career advisory board meeting of MMC: 7 November 2005

14) Clinical workforce solutions group. Summary note of meeting: 9 May 2006

15) Clinical workforce solutions group. Summary of meeting: 2 – 18 April 2006.

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 1(2) provides that -
"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –
"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –
"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –
"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –
"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

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."

Section 10(2) provides that –
"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –
"If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Section 10(4) provides that –
"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

Section 10(5) provides that –
"Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and
(b) confer a discretion on the Commissioner."

Section 10(6) provides that –
"In this section –
"the date of receipt" means –

(a) the day on which the public authority receives the request for information, or
(b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Refusal of Request

Section 17(1) provides that -
"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant t the request, or
  (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50."

Formulation of Government Policy

Section 35(1) provides that –
"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy,
(b) Ministerial communications,
(c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
(d) the operation of any Ministerial private office.

Section 35(2) provides that –
"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
(b) for the purposes of subsection (1)(b), as relating to Ministerial communications."

Section 35(3) provides that –
"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

Section 35(4) provides that –
"In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking."

Section 35(5) provides that –
"In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-
(a) between Ministers of the Crown,
(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
(c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern

Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."