

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2012

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the review carried out by the Doctors' and Dentists' Remuneration Body (DDRB) of the clinical excellence awards for consultants. The Department of Health (DoH) confirmed that the information was held but claimed that it was exempt from disclosure under sections 22 (future publication), 28 (relations within the United Kingdom) and 35 (formulation of government policy). The Commissioner's decision is that the DoH was entitled to rely on section 22 as grounds for refusing the request. He does not therefore require the DoH to take any steps as a result of this notice.

Request and response

2. On 4 April 2012 the complainant wrote to the DoH and requested information in the following terms:

"I would like to see the Doctors' and Dentists' Remuneration Body's review of consultants' Clinical Excellence Awards, submitted to you by the DDRB on 7th July 2011."

3. The DoH responded on 12 April 2012. It confirmed that the requested information was held but refused to disclose this on the basis of the exemptions provided by sections 22 and 35 of FOIA.
4. The complainant wrote to the DoH again on 29 April 2012 challenging its refusal. The DoH subsequently carried out an internal review, the outcome of which was sent to the complainant on 25 May 2012. This

upheld the original position taken by the DoH but also introduced a reliance on section 28 of FOIA as an additional ground for not complying with the request.

Scope of the case

5. The complainant contacted the Commissioner to complain about the DoH's decision to withhold the information he had requested.
6. The Commissioner has therefore had to consider whether the DoH's decision was in accordance with FOIA.

Reasons for decision

Background

7. According to the website of the Office of Manpower Economics¹, the Review Body on Doctors' and Dentists' Remuneration (DDRDB) is independent.
8. Its role is to make recommendations to the Prime Minister, the Secretary of State for Health, the First Minister and the Cabinet Secretary for Health and Wellbeing of the Scottish Parliament, the First Minister and the Minister for Health and Social Services in the Welsh Assembly Government and the First Minister, Deputy First Minister and Minister for Health, Social Services and Public Safety of the Northern Ireland Executive on the remuneration of doctors and dentists taking any part in the National Health Service (NHS).
9. At the request of the four UK health departments, the DDRDB carried out an independent review looking at compensation levels and incentive systems and the various Clinical Excellence and Distinction Award Schemes for NHS consultants at both national and local level in England, Wales, Scotland and Northern Ireland.²

¹http://www.ome.uk.com/example/Review_Body_on_Doctors_and_Dentists_Remuneration.aspx

² http://www.ome.uk.com/DDRDB_CEA_review.aspx

10. An extract of the terms of reference for the review follows (the full terms are available on the website of the Office of Manpower Economics):

- To consider the need for compensation levels above the basic pay scales for NHS consultant doctors and dentists including clinical academics with honorary NHS contracts, in order to recruit, retain and motivate the necessary supply of consultants in the context of the international medical job market and maintain a comprehensive and universal provision of consultants across the NHS. The review will consider total compensation levels for consultants and may make observations (rather than recommendations) on basic pay scales
- To consider the need for incentives to encourage and reward excellent quality of care, innovation, leadership, health research, productivity and contributions to the wider NHS – including those beyond the immediate workplace, and over and above contractual expectations. The review should specifically reassess the structure of and purpose for the Clinical Excellence and Distinction Awards Schemes and provide assurance that any system for the future includes a process which is fair, equitable and provides value for money.

11. The DDRB submitted its report to ministers on 7 July 2011.

Section 22 – information intended for future publication

12. Section 22(1) of FOIA states that –

“Information is exempt information if –

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

13. Section 22(1) is a qualified exemption. This means that if it is engaged, a public authority is still required to demonstrate that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. The Commissioner will first consider whether the exemption is engaged.
14. The DoH has explained that there has always been an intention, in line with customary practice with all DDRB reports, to publish the requested information. It did not have a specific date when the publication was due to take place, although it considered that by the date of the request it was clear that the report would be placed in the public domain at some point in 2012. The publication itself was dependent on the readiness of the UK governments to make their response to the recommendations in the report.
15. Section 22(1) of FOIA will only apply to the specific information that is intended to be published. This point will have particular importance where a public authority was only ever proposing to release part of the requested information. Similarly, if during the course of the preparation of information for publication some components are rejected, the exemption will no longer cover the rejected material.
16. The Commissioner appreciates that the requested report is the final, and thus fully realised, version of a document prepared by the DDRB for the consideration of the UK governments. As such, there is no question that the report will be amended prior to its publication. Furthermore, the DoH has confirmed that the report will be published in its entirety, rather than only specific elements of the information. In terms of the format by which the report would be made available, the DoH has stated that it planned to publish the complete report as a command paper (possibly on its own website) and issue the Governments' response as a written ministerial statement to the House of Commons.
17. In light of the DoH's explanation, the Commissioner is satisfied that at the time of the request the report was held by the DoH with a view to its later publication. This finding is reinforced, in the Commissioner's opinion, by his awareness that the pages of the report are headed and footed by the statement "protect until publication"; giving credence to the claim that the report was meant to be published at some point. The Commissioner has therefore gone on to consider the next test for the engagement of the exemption, namely whether it was reasonable in all the circumstances to withhold the disputed information until the planned publication.
18. When considering this test, the Commissioner has found it helpful to assess whether the decision to withhold the requested information was sensible and fair to all concerned.

19. The DoH has argued that the commitment to making the review process transparent is evidenced by the fact that the requested information was always due to be published. Bearing this in mind, the DoH considers that it is reasonable for the publication to coincide with the point at which the response from the UK governments has been agreed. Further, the DoH believes that it would in fact be irresponsible to publish a far reaching report before an agreement had been reached, in what it considers would be a contextual vacuum.
20. The DoH has explained that any decision relating to the implementation of recommendations advanced by the DDRB will potentially require detailed negotiations between key stakeholders including NHS Employers and the British Medical Association (BMA). It is the view of the DoH that the publication of the report needs to take place against a clear background of the governments' decisions regarding the recommendations, including consultation of the key stakeholders to seek their views.
21. The Commissioner accepts that the arguments of the DoH do carry some weight. Using the logic of the arguments the Commissioner can also see that disclosing the report at the time of the request would have likely led to increased media attention on the issue. This, in turn, would have increased the pressure on the UK governments to agree their response before the recommendations had been fully considered. While the Commissioner is conscious that a number of parties would prefer to have access to the report as soon as possible, this is not the same as saying that it is unfair to have to wait for publication.
22. The Commissioner has therefore decided that in the circumstances it was reasonable for the DoH to continue to withhold the requested information. In forming this view, the Commissioner considers it is realistic to assume that the UK governments will take a significant length of time in agreeing a response to a far reaching review. The nature and complexity of a review will ultimately determine the promptness in which a response can be given. This also means that, in the absence of a prescribed limit, it is difficult for the Commissioner to impose a standard timeframe in which a review and the corresponding response should be published.
23. On this basis, the Commissioner has been unable to find that the amount of time taken to consider the report in this report is necessarily disproportionate or unwarranted.

Public interest test

Public interest arguments in favour of disclosure

24. The DoH recognises there is a strong public interest in disclosure which goes beyond the weight attached to the general principle of transparency. This is because of the particular value the information will have for the medical and dental professions given the contribution the findings of the review will potentially have in shaping decisions that could profoundly affect them.
25. It should also be factored in that the report was submitted to ministers in July 2011. Therefore, at the time of the request, a considerable length of time had already passed since the report had been submitted for consideration. The Commissioner understands that a number of concerns have been raised about the decision to hold off the publication of the report. These have led to claims that the delay is politically motivated.
26. The importance of the information can also be demonstrated by the action of delegates at a BMA consultants conference, who passed a motion calling on the DoH to publish the DDRB review. This was due to their belief that the continuing uncertainty has disrupted the clinical excellence awards application process.

Public interest arguments in favour of maintaining the exemption

27. The DoH has reiterated the arguments it advanced for finding that the decision for withholding the requested information was reasonable.
28. In summary, the DoH has claimed that disclosure ultimately makes more sense when the UK governments have had an opportunity to prepare their response to the recommendations to the report. To release the report before this point would, in the opinion of the DoH, seriously impair and damage the coordinated approach that has already been agreed.

The balance of the public interest

29. The Commissioner has some sympathy with, and to an extent shares, the complainant's concerns about the length of time the DoH planned to withhold the requested information. By the date of the request over 9 months had passed since the report had been submitted to ministers in order to consider the recommendations. This, when combined with the important nature of the report itself, presents a strong case for disclosure.

30. However, the Commissioner also recognises that the motivation behind including the exemption in FOIA is to avoid the premature disclosure of information. Even where information is due to be placed in the public domain, there will be occasions when to disclose it before the publication date will cause more harm than good.
31. The Commissioner understands there is an inherent value in governments being able to freely discuss and engage with recommendations made by an independent body. It is vital to the interests of good governance, and therefore to the public interest, that the deliberations of the governments are allowed to proceed without undue external pressure or interference.
32. In essence, the Commissioner accepts that there is a strong public interest in ensuring that the publication of information is managed in a coherent way. The effective management of the information should, in principle, be in the interests of all the parties concerned; facilitating a full and reasoned debate based on all the relevant supporting information attendant to the issue. Furthermore, the Commissioner has not seen any cause to believe that the timing of the publication is being driven by a political agenda which has the aim of delaying disclosure for political advantage.
33. For these reasons the Commissioner has found that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption. In light of the Commissioner's determination that the DoH was correct to withhold the requested information under section 22 he has not gone on to consider the DoH's application of sections 28 and 35 of FOIA to the same information.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Rachael Cragg
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