

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2013

Public Authority: The Department of Health
Address: Room 317
Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested from the Department of Health (DoH) copies of papers put before the NHS Operations Executive (the "Executive"). The Commissioner considers that disclosure of the requested information engages section 36(2)(b) but that, in all the circumstances, the public interest in maintaining the exemption is outweighed by the public interest in disclosure. He finds that section 36(2)(c) is not engaged.
2. The Commissioner requires the DoH to take the following steps to ensure compliance with the legislation.
 - Disclose NHS OE 01
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant has requested on 22 November 2011 –
"...copies of the agenda, papers and minutes of the last three meetings of the NHS Operations Executive (<http://www.dh.gov.uk/health/the-nhs-opex/>) please...

Please also send the list of meeting dates for the remainder of 2011 and 2012."

5. The DoH responded on 20 January 2012. It clarified that the Executive had only met on two occasions since its formation in October 2011, providing the agendas for both meetings and enclosing the dates set aside for meetings in the future. In relation to the remaining records covered by the scope of the request, the DoH claimed that elements of the requested information were exempt information under section 35 (formulation of government policy, etc), with other parts exempt under section 36(2)(b) and (c) (prejudice to effective conduct of public affairs) of FOIA. As qualified exemptions, the DoH considered the public interest test but found that it favoured withholding the information.
6. On 20 December 2011 the complainant wrote to the DoH asking it to review its decision to withhold the papers entitled NHS OE 01 under section 36 of FOIA.
7. The DoH sent the complainant the outcome of its internal review on 20 January 2012. This upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the decision of the DoH to refuse the disclosure of NHS OE 01 (the "disputed information").

Reasons for decision

9. Sections 36(2)(b) and (c) of FOIA states –

"(2) 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 –

...

(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.

10. Breaking down the individual components of the exemption, the successful application of section 36(2)(b) and (c) is dependent on an ability to demonstrate –
 - who was the qualified person;
 - when an opinion was given by the qualified person and what this opinion consisted of; and
 - that the opinion of the qualified person was objectively reasonable in substance.
11. Where these conditions are found to be met for any part of section 36(2)(b) or (c), it is then necessary to assess the public interest arguments attendant to the disclosure of the information.

The qualified person

12. The DoH has informed the Commissioner that Simon Burns MP, the Minister of State for Health, was the designated qualified person at the time of the request. The Commissioner is satisfied that this accords with section 36(5)(a) of FOIA, which stipulates who is meant by a qualified person in respect of information held by a government department in the charge of a Minister of the Crown.

The qualified person's opinion

13. The Commissioner has been provided with a copy of an email, dated 19 December 2011, which confirmed that the qualified person was prepared to sign-off the application of section 36. In reaching this decision, the Commissioner understands that earlier the same day the qualified person had been supplied with a copy of the disputed information alongside the recommendations of officials at the DoH.
14. The submissions presented to the qualified person conclude that the recommendation is to apply section 36(2)(b). The text of the submission also suggests that section 36(2)(c) may apply, as an alternative. The DoH cited both (b) and (c) to the complainant. The response of the qualified person is unclear – simply supporting the use of “section 36”. It is therefore unclear whether the qualified person expressed an opinion on section 36(2)(c). Having considered the conclusion of the submission the Commissioner concludes the opinion did not cover (c).

15. Additionally it is also important to note paragraph 49 of the Commissioner's section 36 guidance¹:

"... if section 36(2)(c) is used in conjunction with any another exemption in Part II of the Act, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)."

16. The Commissioner therefore finds that section 36(2)(c) is not engaged but he has gone on to consider the reasonableness of the opinion under section 36(2)(b).

The reasonableness of the qualified person's opinion

17. As described by the guidance published by the Commissioner on section 36, the test of whether an opinion is 'reasonable' is based on the plain meaning of the word. In short, an opinion will be considered reasonable if it is an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion and not necessarily the *most reasonable* opinion.
18. In this case the DoH has not specified whether the prejudice or inhibition of those factors described by section 36 either 'would' occur or 'would be likely' to occur. It is the view of the Commissioner that, where the level of prejudice has not been clarified, the lower threshold of 'would be likely' should be applied. He has therefore considered the qualified person's opinion in the context of whether it was reasonable to argue that the prejudice would be likely to arise.
19. Reflecting the observations made on his decision involving the Foreign and Commonwealth Office (FS50421724)², the Commissioner notes that the exemptions provided by 36(2)(b)(i) and (ii) are about the processes that may be inhibited, rather than what is necessarily in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views.

¹http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

² http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50421724.ashx

20. The Executive is the forum that, broadly speaking, has the task for providing oversight and assurance of day-to-day operational delivery of the NHS. The Executive itself is a sub-committee of the NHS Transitional Executive Forum and has responsibility for:
- providing an oversight and assurance on the day-to-day operational delivery of the NHS against a backdrop of reform,
 - leading on responding to urgent or emergency events,
 - leading on the planning for the NHS Operating Framework for 2012/13,
 - leading on delivery of QIPP [Quality, Innovation, Productivity and Prevention],
 - taking a collective view of risk across the NHS and ensure action is taken to mitigate risks.³
21. The disputed information covers 'Key issues on performance' and 'Financial performance' relating to different areas of NHS activity, which was produced for the meetings of the Executive held in October and November 2011. The data is based on the indicators set out in the NHS Operating Framework⁴ but is not in a format that is made public because, as the DoH has explained, it contains commentary that will inform the debate on performance and the relevant action that is required to be taken.
22. The reasons for withholding the information are summarised in the submissions put before the qualified person –
- "[It] is to give members of these boards and committees the space and freedom to hold open discussions with 'no holds barred', and to reassure officials they can submit information that is honest in its assessments and considers all options for action."*
23. The Commissioner acknowledges that the purpose of the disputed information is to focus the attention of senior management, by way of the meetings of the Executive, on possible areas of concern. The dashboard information includes performance data of, say, trusts or

³ <http://www.dh.gov.uk/health/the-nhs-opex/>

⁴ http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_131428.pdf

clusters, which is graded Red, Amber or Green (RAG rated) to demonstrate poor, average or good performance respectively.

The DoH has explained that while data is used to inform papers such as NHS OE 01, it is an official's views of the data, which will often include speculations on the reasons behind changes in performance and the different options available. Furthermore, the officials drafting the papers for the Executive do not routinely attend the meetings, so it is claimed that a clear and candid assessment of the data must be presented for review.

24. Bearing in mind the purpose for which the information is created, the Commissioner is prepared to accept as reasonable the opinion which says that disclosure would be likely to have an inhibitory effect; in that it could increase the pressure on officials to present the information in a more 'media-friendly' fashion. Consequently, it is likely there would be a 'chilling effect' on the frankness and candour with which views are exchanged and advice given in respect of the performance data produced for future meetings of the Executive. The opinion in respect of section 36(2)(b)(i) and (ii) is therefore reasonable
25. As the Commissioner has decided that the section 36(2)(b) exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosure.
26. In doing so, the Commissioner has reminded himself that the opinion of the qualified person must be given weight as an important piece of evidence. Yet, he will form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.

The public interest arguments in favour of maintaining the exemption

27. The arguments of the DoH for withholding the disputed information stem primarily from the way in which the data contained in the papers are presented. It has stated that the information does not, and is not meant to, portray a balanced picture of performance. Instead, the data is heavily skewed to focus on potentially problematic areas, to which the attention of the Executive – as the appropriate forum – should be drawn rather than the public or frontline staff.
28. For this reason, the overall impression given in the papers will, almost inevitably, be one of depressed performance. Few areas are likely to be rated green, for example, because this would imply little focus was needed in that area – a scenario that can easily be imagined to be unlikely even in connection with particularly well-run organisations.

29. The disclosure of these papers could, according to the DoH, lead to changes in behaviour in both the officials who produce the information for the Executive and by NHS organisations.
30. Regarding the behaviour of officials, the Commissioner has accepted the likelihood that disclosure would lead to a greater emphasis on data being produced in such a way so as to make it more balanced, thereby 'obscuring' the pertinent issues that the Executive is intended to address.
31. In respect of NHS organisations, the DoH has informed the Commissioner that it normally seeks to avoid publishing information in 'league tables'. This is because past experience has shown that organisations wary of negative publicity may try to 'game', or manipulate, the statistics provided to the department, particularly where there is not an opportunity for an organisation to give a contextual background to performance data. Such manipulation would weaken the credibility and usefulness of any conclusions drawn from this information.
32. This, the DoH asserts, can be contrasted with the validated performance data which is already made publicly available through various sources. For example, 'The Quarter'⁵ publishes performance statistics which are based on the validated versions of data contained in the papers provided for the Executive but also includes narrative context and links between different indicators. The fundamental difference being that the publications of the data are set within context in order to aid the understanding of the data by both frontline staff and the public.
33. To disclose performance data without this contextualisation would, in the DoH's view, lead to an unwarranted undermining of public confidence in the performance of the NHS, as well as serving to discourage NHS staff who are working to improve services.

The public interest arguments in favour of disclosure

34. In principle, the weight of the public interest in any disclosure is often significantly impacted by the number of people affected by the issue the information in question relates to and the nature of this effect.

⁵http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_087335

The Commissioner recognises that, by its very nature, information relating to the performance of the NHS will carry significant weight. This is because the work of the NHS very much forms part of the fabric of society, with any issues or concerns relating to its performance having a direct effect on the population which it serves.

35. This weight is further augmented in this case, however, because the disputed information is used to guide a forum from which significant decisions on the day-to-day running of the NHS are considered. In the Commissioner's view, disclosure would serve the public interest by allowing it to understand why particular decisions have been made or why changes are being suggested.
36. The request was also made during a time of considerable importance for the NHS in terms of reform and financial pressure. It therefore follows then that the public interest in understanding the information related to decision making at this time was particularly significant.

Additional arguments made by the complainant

37. The complainant has expanded on the arguments for the disclosure of the disputed information by raising two further points. The first relates to the unavailability of the disputed information. While he is aware that performance data is contained in publications such as 'The Quarter', he notes that this is not the same as the data contained in the disputed information. Consequently, he considers that the public interest in disclosure is not offset by these other publications.
38. The second point concerns the robustness of officials employed to provide advice on, and debate, issues relating to performance. The complainant considers that both the officials who produce the papers for the Executive, and the members of the Executive themselves, should be expected to be strong enough to withstand public scrutiny. He argues that the public is mature enough to understand that the Executive has a particular role to play, which will include the consideration of a number of choices based on worse-case scenarios. Indeed, the transparency of information feeding into discussions around policy could help the public reassure themselves that any decisions made are based on reasonable grounds.

The balance of the public interest arguments

39. A key theme of the arguments of the DoH essentially relates to the "chilling effect" that disclosure would be likely to bring about. Chilling effect arguments are concerned with the loss of frankness which would lead to poorer quality advice and less formulated decisions.
40. The Commissioner finds that there is a strong public interest in allowing the DoH a protected mechanism by which performance data can be

assessed and potentially difficult decisions made as a result of this assessment. He understands that the provision of the performance dashboards for the Executive will likely be required on a regular basis and, as such, will form a seamless stream of information – the performance data carrying on from where the previous meeting of the Executive had left off. As such, it cannot be said that the information had necessarily lost all of its sensitivity at the time of the request. Moreover, the Commissioner accepts that the Executive will operate in a sphere in which full frankness is expected and required.

41. However, the Commissioner does not share with the DoH the level of importance it has placed on the fact that the data is skewed towards a negative impression of performance. He has greater faith that the public and frontline staff will understand that the Executive, which is after all concerned with risks across the NHS, will require information that demonstrates and highlights possible areas of concern.
42. Building on this point, the Commissioner is not persuaded that the consequences of disclosure would be as severe as those stated by the DoH. The dashboards are, as might be expected, mostly made up of statistical information with room for comments on general trends of performance, and some wording on other areas arising from the performance data. This includes forecasts, updates and brief explanations relating to the data. In essence, this information gives a picture of where the NHS is rather than offering, in the main, any specific guidance on how the Executive should act on the information. On this basis, the Commissioner is unable to reconcile the idea that disclosure would significantly alter the way that officials present information in the future with his own observations of the disputed information itself.
43. The Commissioner has therefore turned to the argument that the release of the disputed information could lead to the attempts of organisations to 'game' their figures in order to avoid any negative publicity.
44. The Commissioner acknowledges that there will always be significant pressures on an organisation to justify its performance in competition with others. However, the Commissioner also appreciates that other publications, such as 'The Quarter', already produce headline information showing the best and worst performers in areas such as 'referral to treatment waits' and 'diagnostic waits'. This knowledge should help soften any concerns about how an organisation might react to the disclosure in this case, given that a precedent already exists.
45. In any event, simply acting on the fear that the release of comparative statistics could lead to the manipulation of the raw data leads us, in the Commissioner's view, to the unwelcome conclusion that any

comparative data that reflects poorly on an organisation or organisations should not be released.

46. The Commissioner observes that the public interest factors are finely balanced. However, he is conscious of the considerable public interest in the performance of the NHS which means that the information should be disclosed. He considers that considerable weight is attached to the public knowing how and why decisions are reached by senior management. The information would complement the other information about performance that is in the public domain and which is already significantly debated. There is also a significant public interest in the public seeing the full picture. He also accords additional weight to disclosure when considering the circumstances of the NHS at the time of the request, as mentioned at paragraph 38 above.
47. Consequently, the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the section 36(2)(b)(i) and (ii) exemption does not outweigh the public interest in disclosure.

Right of appeal

48. 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

49. 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.
50. 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

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