

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2013

Public Authority: Department of Health, Social Services & Public Safety

Address: Castle Buildings
Stormont
Belfast

Decision (including any steps ordered)

The complainant has requested a copy of the advice received by the Minister for Health, Social Services and Public Safety from the Attorney General for Northern Ireland in respect of the lifetime ban on men who have sex with men from donating blood in Northern Ireland. This was withheld by the DHSSPS. The Commissioner's decision is that the exemptions applied by the DHSSPS (sections 42(1) and 35(1)(a) of FOIA) are engaged in relation to the withheld information, however the public interest in disclosure of the withheld information outweighs that in maintaining the exemption in all the circumstances of the case.

1. The Commissioner requires the DHSSPS to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant
2. The DHSSPS 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.

Background

3. Blood donation in the UK is regulated by the Blood Safety and Quality Regulations 2005 as amended by the Blood Safety and Quality (Amendment) Regulations 2006 into which have been transposed several EC directives regarding blood quality and safety. Detailed guidelines in relation to blood donation are prepared by the Joint UK Blood Transfusion Services and National Institute of Biological Standards

and Control Professional Advisory Committee (JPAC). These guidelines are followed by the United Kingdom Blood Transfusion Service (UKBTS).

4. In Northern Ireland, blood donation falls under the remit of health, which is a transferred matter. This means that it is a matter for which the Northern Ireland Assembly's ministers are responsible, rather than Westminster. In respect of blood donation, Northern Ireland is not obligated to follow the UK position and the JPAC guidelines, however it has, up until now, been accepted practice that it does so.
5. Since the 1980s, in the UK, there had been a lifelong ban on blood donation from men who have sex with men (MSM). In 2011 a review carried out by the advisory committee for the Safety of Blood, Tissue and Organs (SaBTO), the independent review body answerable to government for the safety of blood products, revealed advances in the testing and processing of blood and other progress in scientific knowledge regarding blood borne infections. These findings allowed SaBTO to re-assess the restrictions on blood donation based on sexual behaviour.
6. SaBTO recommended changing the lifetime ban to a one year deferral period. This would allow MSM who have been celibate for a period of one year prior to the donation to donate blood. This recommendation was accepted and implemented by England, Scotland and Wales and came into force on 7 November 2011, however the Minister for Health for Northern Ireland has not followed it and has so far maintained the original position of a lifetime ban. This position is currently the subject of a legal challenge in the High Court in Northern Ireland by way of judicial review proceedings.

Request and response

7. On 8 February 2012, the complainant wrote to the DHSSPS and requested information in the following terms:

"Under the right of access provided in the Freedom of Information Act 2000 I should be grateful if you could a) forward a copy of the advice received by the Minister for Health, Social Services and Public Safety from the Attorney General for Northern Ireland in respect to the lifetime ban on men who have sex with men from donating blood in Northern Ireland and b) the cost of importing blood to Northern Ireland from i) England in November 2011, (ii) Scotland in December 2011 and (iii) Scotland in January 2012.
8. The DHSSPS responded on 27 February 2012. It stated that it did not hold information in relation to part b) of the complainant's request and referred him to the Northern Ireland Blood Transfusion Service. In

relation to part a) of the complainant's request it stated that it held information relevant to this ("the withheld information") but that it was exempt from disclosure under sections 35(1)(a) and 42(1) of FOIA.

9. Following an internal review the DHSSPS wrote to the complainant on 26 March 2012. It stated that it was upholding the original decision not to disclose the withheld information, citing the above exemptions as a basis for non-disclosure.

Scope of the case

10. The complainant contacted the Commissioner on 5 April 2012 to complain about the way his request for information had been handled, specifically about the application of the above exemptions to the information in part a) of his request. He has not complained about part b) of the request, so the Commissioner has only considered the DHSSPS' handling of part a).
11. The Commissioner has considered whether the DHSSPS has correctly applied the above exemptions to the withheld information.

Reasons for decision

Section 42

12. Section 42 of FOIA states that information is exempt from disclosure if it is protected by Legal Professional Privilege ('LPP'). The principle of LPP is based on the need to ensure that communications between a client and his or her legal adviser will be treated in confidence and not revealed without the client's consent. It is considered to be a fundamental requirement of the legal system that a client can speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice based on full knowledge of all the relevant circumstances of the case.
13. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege may apply where no litigation is in progress or being contemplated. In order for information to be covered by LPP, the communications must be:
 - confidential,

- made between a client and professional legal adviser acting in their professional capacity and;
- made for the sole or dominant purpose of obtaining legal advice.

Communications made between adviser and client in a relevant legal context will therefore attract privilege.

14. Having viewed the withheld information in this case the Commissioner accepts that all of that information is subject to legal advice privilege. The DHSSPS has argued that the information is also subject to litigation privilege as there are live and ongoing judicial review proceedings. However, in order for litigation privilege to apply, at the time of the creation of the information, there must have been a real prospect or likelihood of litigation occurring, rather than just a fear or possibility. Since the withheld information is dated October 2011, and leave for judicial review was not sought until 5 December 2011, it is the Commissioner's view that, at the time the information was created, litigation was nothing more than a possibility. Therefore, litigation privilege does not apply to the withheld information.
15. Information will only be privileged so long as it is held confidentially and not disclosed. As far as the Commissioner is aware, the legal advice remained confidential at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner accepts that the withheld information is legally privileged and the exemption is engaged. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the withheld information

16. The DHSSPS acknowledges there is a public interest in individuals being able to exercise their rights under FOIA to enhance their understanding of the reasons for decisions or actions taken by a public body. The Commissioner agrees that this is the case.
17. The DHSSPS also accepts there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of decision making. In this case, disclosure of the withheld information would assist the public in understanding any legal issues associated with the stance by the Minister for Health of so far maintaining the lifetime ban as described in the background to this notice and the issue of blood donation and blood safety generally. The Commissioner considers that this is an extremely significant public interest argument as these are issues of great public importance which could potentially affect any and all members of the public.

18. The remaining public interest arguments in favour of disclosing the withheld information are set out in a confidential annex to this Notice.

Public interest arguments in favour of maintaining the exemption

19. It is in the public interest that decisions are taken in a fully informed legal context. The DHSSPS and other government departments require high quality, comprehensive legal advice for effective conduct of its affairs and decision-making process. Without such advice, the quality of its decision-making would be considerably reduced as it would not be able to make fully-informed decisions on the basis of the best advice available, and with a full appreciation of relevant facts.
20. The DHSSPS argues that it is important to maintain confidentiality regarding legal advice as it is important to safeguard the DHSSPS' access to fully informed, frank and realistic legal advice. It is the Commissioner's view that it is of vital importance for a legal adviser to present the full picture to his or her client, which includes arguments in support of any final conclusions as well as counter-arguments. The nature of legal advice often sets out possible arguments for and against a particular view and weighs up their relative merits. This means that legal advice obtained will often set out the perceived weaknesses of the client's position, as well as the strengths.
21. The DHSSPS has also argued that maintaining the exemption is particularly important in this case due to the highly controversial nature of the issue. There are ongoing judicial review proceedings, meaning that the issues are live and sensitive, therefore it would be in the public interest to keep the information confidential until the legal proceedings have been concluded. The Commissioner agrees that it would not be in the public interest to undermine legal proceedings by premature disclosure of information. However, in this case the withheld information consists of legal advice in relation to the position on blood donation by MSM in Northern Ireland, which was provided just after the decision was taken to lift the ban in the rest of the UK. The legal advice was not provided during the course of the judicial review proceedings and the Commissioner, having viewed the withheld information, does not consider that its disclosure would undermine those proceedings.

Balance of the public interest arguments

22. In considering the balance of the public interest, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. However, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.

23. In order to determine where the public interest lies in this case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant number of people, the timing of the request and the status of the advice.
24. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in the decision-making processes of government departments such as the DHSSPS. In this particular case, disclosure of the legal advice would provide a greater degree of transparency in relation to the fact that the position in relation to blood donation by MSM has been maintained in Northern Ireland, despite it having been changed in the rest of the UK.
25. The Commissioner notes that, at the time of the request, no definitive decision had been taken by the Minister for Health about whether or not to maintain the position of a lifetime ban on blood donation in Northern Ireland by MSM. It is still the case that there has been no such decision to date. As such, the legal advice was still very much "live" at the time of the request and cannot be considered to be no longer of great relevance or to have served its purpose. The Commissioner believes this adds weight to the arguments in favour of maintaining the exemption. However, the Commissioner considers that the fact that the lifetime ban was still being maintained in Northern Ireland at the time of the request, despite the SaBTO review and the change in position in the rest of the UK, is also a factor which increases the public interest in disclosure. It could be argued that disclosure would have informed public debate and may have allowed the public to participate or contribute to the decision making process. The Commissioner notes that blood donation is itself a significant issue of public interest which can potentially affect any member of the public.
26. The Commissioner accepts there is a very strong public interest in the DHSSPS being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and might even have a limited impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the DHSSPS which would not be in the public interest. However the Commissioner does not accept that disclosure would undermine the current live legal proceedings in relation to the issue.
27. The Commissioner has considered the withheld information, the potential harm which might arise from disclosure and the wider context that informs the public interest in transparency and accountability. For

the reasons set out above, and detailed in the confidential annex, whilst this is a finely balanced judgement, the Commissioner considers that in all the circumstances of the case, the public interest in maintaining the LPP exemption does not outweigh the public interest in disclosure.

Section 35(1)(a) – Formulation and development of government policy

28. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy. Section 35(1)(a) is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
29. The Commissioner considers that the term 'relates to' can safely be given a broad interpretation. This is because the exemption is qualified and a public authority would be obliged to disclose information where there is no significant harm to the public interest. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process-where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
30. In this case the Commissioner has considered whether the overall purpose and nature of the withheld information can be characterised as relating to formulation or development of government policy.
31. The DHSSPS has informed the Commissioner that no definitive decision has been made in respect of any change to the current policy relating to blood donation. The DHSSPS is currently considering whether the current blood donation policy should remain or whether it should change as has recently been the case in other parts of the UK.
32. The Commissioner accepts that the policy process is in its early stages and the issues and risks need to be fully considered. The DHSSPS is scoping information from other sources in relation to the subject in order to make a fully informed policy decision. Full consideration of current and pending information will inform the future blood donation policy.

33. The Commissioner accepts that the withheld information consists of advice given to the DHSSPS regarding the potential change in the blood donation policy which is currently being considered. He therefore accepts that the policy is in the development stage and that the withheld information relates to that development. Therefore, he is satisfied that section 35(1)(a) of FOIA is engaged in relation to the withheld information and has gone on to consider the public interest arguments both in favour of maintaining the exemption and disclosure of the withheld information.

Public interest arguments in favour of disclosing the withheld information

34. The DHSSPS accepts that there should be accountability and transparency of administrators and scrutiny of the decision making process. This would enable the public to see the policy-making process in operation and better understand the process specifically in relation to blood supply and blood safety, which is clearly an issue of highly significant public interest.
35. The Commissioner acknowledges the right of the public to have access to information and to be better informed on current thinking in relation to a policy decision about future blood supply and blood safety. This would allow the public to be better informed of the DHSSPS' role in developing policy in relation to blood supply, including blood donor deferrals and blood safety.
36. Although there is already a large amount of information available to the public about blood safety and blood donation, having viewed the withheld information, the Commissioner considers that disclosure would significantly add to the available information about the thinking behind this particular policy. Disclosure would assist the public in forming an opinion on the specific questions and issues raised.

Public interest arguments in favour of maintaining the exemption

37. The DHSSPS is still considering the SaBTO report and no policy decision has yet been made. The DHSSPS is concerned that release of information at this stage could compromise the development of formulation of government policy.
38. The DHSSPS considers that it is necessary to maintain the exemption because a policy decision has not yet been taken therefore information is being withheld at this stage to protect the policy-making process. There is a strong public interest in preserving the ability of officials to engage in free and candid discussion on policy options without apprehension that potential courses of action may be held up to scrutiny before they have been fully developed or evaluated.

39. The development of policy decisions on increasing blood supplies needs to be balanced against the need to maintain blood safety and thereby public confidence in the supply of blood. The DHSSPS has informed the Commissioner that it is scoping information from other sources on this issue to make an informed decision and needs time to scope this relevant evidence. It argues that releasing this information before the scoping is concluded could lead to a policy being developed before full consideration is given to all current and pending evidence being gathered, analysed, and evaluated.

Balance of the public interest arguments

40. The Commissioner must consider the public interest at the time the request was made. He finds that there is a very strong public interest in disclosure of the information, given the change in policy which has come into force in the rest of the UK. There has also been widespread public debate, with arguments and points of view being expressed by the general public and more varied and specific interested parties, such as commentators, experts, members of groups focusing on the issues of discrimination and equal rights, and those who have had occasion to receive donated blood. Disclosure would significantly add to public understanding of risks related to any proposed reforms and it would also inform participation in the debate about such reforms.
41. The donation of blood is vital for the delivery of health care, and in saving and enhancing lives. People benefit from donated blood through emergency surgery, for routine operations, in the treatment of cancer or childbirth, amongst other things. According to a news release by the NHSBT in January 2011, only 4% of the eligible population of the UK as a whole were actively donating blood. The abolition of the lifetime ban on blood donation by MSM and the introduction of the 12 month deferral period, which came into force later on that year, would have increased the percentage of the population who were eligible to donate blood, thereby providing the potential to increase the percentage of active blood donors.
42. According to a speech by the Minister for Health on 13 June 2011 at the Northern Ireland Blood Transfusion Service (NIBTS), in Northern Ireland, around 500 patients need life-saving blood each week. To ensure an adequate supply to our hospitals, we need 300 people to give blood every day. At that date, only 6% of the eligible population in Northern Ireland were actively donating blood. The Minister urged people to give blood as their contribution would save lives. Therefore, at that time, the percentage of the eligible population who were actively donating blood was almost as low as that in the UK as a whole, yet at the end of that year, Northern Ireland was still maintaining the position of a lifetime ban on blood donation by MSM, despite the rest of the UK having abolished this ban and potentially increasing its

percentage of those who were eligible to donate blood. Since that position was maintained despite the changes in the rest of the UK, and despite the Minister's urgent appeal for blood donors earlier in the year, the Commissioner considers that the principles of transparency and accountability should be afforded very significant weight in this case, as it would help the public to understand the thinking behind the government in Northern Ireland maintaining its position.

43. Whilst the Commissioner finds that the public interest in disclosure is strong, he also recognises the significant public interest arguments in favour of maintaining the exemption. The DHSSPS is essentially relying on the "safe space" and "chilling effect" arguments which are well understood and have been considered in a number of cases before the Information Tribunal.
44. The safe space argument concerns the importance of government having the freedom to debate policy and make decisions without being hindered by external comment. In *Department for Education and Skills v the Information Commissioner and The Evening Standard*¹ the Tribunal recognised the importance of this argument stating: *"Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."*
45. The Commissioner accepts that generally speaking there is a public interest in a safe space as disclosure acts as a distraction whilst the policy process is ongoing. The weight that will be attributed to this factor largely depends on the timing of the request. Where a policy is still live the public interest in maintaining a safe space will be stronger because greater protection is required whilst the policy is still in the formulation and development stages. In this particular case the DHSSPS has demonstrated that at the time the request was received, the policy formulation was at a sensitive point and was still under active consideration. Indeed that remains the position.
46. In considering the importance of the safe space the Commissioner has also taken into account the nature of the withheld information. The Commissioner accepts that disclosure at the time the request was made could have distracted the policy work in the area being

¹ EA/2006/0006

undertaken at this time. In light of this the Commissioner finds that at the time of the request a safe space around the policy was still required and that there was a significant public interest in maintaining that safe space.

47. As regards the 'chilling effect' the Commissioner does give some weight to arguments that disclosing information relating to a particular policy, whilst that policy is still being formulated/developed, could affect the frankness and candour with which relevant parties would continue to contribute to that particular policy making process. Again, given that the policy was still being developed at the time of the request and that no final decision has currently been made the Commissioner accepts that disclosure could have some effect on the frankness of future policy discussions within the DHSSPS and other government departments. However, he does not consider that disclosure would have a significant adverse effect on the detail, frankness and candour of future discussions as not all policy formulation will generate as much public debate, discussion and interest as it has the subject matter of the current case has.
48. The Commissioner finds that the public interest factors in this case are finely balanced. The subject-matter of the withheld information means that there is a very considerable public interest in disclosure competing with that in maintaining the necessary "safe space" and in avoiding the potential "chilling effect". The Commissioner has decided that, on balance, in all the circumstances of the case the public interest in maintaining the section 35(1)(a) exemption does not outweigh the public interest in disclosure. The withheld information should therefore be disclosed.

Right of appeal

50. 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

51. 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.
52. 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

Graham Smith
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