

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2013

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested copies of any email correspondence between the health adviser to the Prime Minister and the director of the NHS Partners Network. The Cabinet Office refused the request, citing the exemption at section 36(2)(c) of the FOIA. The Information Commissioner's decision is that although the exemption is engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information it has identified as falling within the scope of his request.
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.

Background

4. The NHS Partners Network (NHSPN) is a trade association which represents independent sector providers of NHS services, ranging through acute, diagnostic, primary and community care. It describes its aim as being to help independent sector providers become a fully accepted part of a mixed economy NHS by influencing policy and developing solutions that will allow independent providers to play a full role in healthcare delivery.
5. Its objectives include:
 - championing the benefits of a fully engaged independent sector to the media, government and local stakeholders;
 - securing system reform in the NHS that allows the independent sector to play a full part in delivering patient care;
 - pushing for the development of a framework that facilitates fair competition and proper recognition of commercial and investor requirements;
 - continued engagement with the Department of Health; and
 - broadening its membership so it can achieve its goal of representing the independent sector in the NHS at every level of care.¹
6. The Information Commissioner considers that the aims and objectives outlined above would generally be recognised as constituting lobbying on behalf of members' interests.

Request and response

7. On 15 September 2012, the complainant wrote to the Cabinet Office and made the following request for information.

"I would like the emails communicated between Paul Bate the Health advisor to Number 10 and David Worskett the director of NHS Partners Network."

¹ NHSPN Annual Review 2009/2010 - "About Us"
http://www.nhsconfed.org/Publications/Documents/NHSPN_annual_review_09_10.pdf

8. The Cabinet Office responded on 15 October 2012. It confirmed that it held information which was relevant to the request, but stated that it was exempt from disclosure under section 36(2)(c) (prejudice to the effective conduct of public affairs). The Cabinet Office explained that section 36 is subject to a public interest test and confirmed that, in this case, it considered the public interest in maintaining the exemption to be stronger than that in disclosing the information.
9. Following an internal review, the Cabinet Office wrote to the complainant on 17 December 2012. It upheld its decision to refuse the request under section 36(2)(c).

Scope of the case

10. The complainant contacted the Commissioner on 16 January 2013 to complain about the way his request for information had been handled. He argued that the NHSPN had been actively lobbying to influence the outcome of NHS reforms in its members' interests, and that the public interest favoured scrutiny of such actions.
11. The Commissioner has considered whether the Cabinet Office correctly applied section 36(2)(c) to withhold the information the complainant requested.

Reasons for decision

Section 36 – effective conduct of public affairs

12. The Cabinet Office argued that the withheld information was exempt from disclosure on the basis of section 36(2)(c) of the FOIA.
13. Section 36(2)(c) provides that information is exempt if its disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs, otherwise than as set out under sections 36(2)(a) and (b).
14. Section 36(2)(c) may only be cited where it is the reasonable opinion of a specified 'qualified person' that the prejudice envisaged would or would be likely to occur, and that the exemption is therefore engaged.
15. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.

16. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The Shorter Oxford English Dictionary defines "reasonable" as, "...in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd (in short, if it is an opinion that a reasonable person could hold) then it is reasonable.
17. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.
18. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC*² (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

"does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".
19. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, he is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
20. The Cabinet Office has explained that the qualified person in this case is Francis Maude, Minister for the Cabinet Office. The Commissioner is satisfied that this is in accordance with the requirements of section 36(5).
21. The opinion was requested on 12 October 2012 and obtained on 15 October 2013. The Cabinet Office provided the Commissioner with a copy of the submission to the qualified person and his confirmation that he agreed the engagement of section 36. The Commissioner notes that the level of prejudice claimed was the lower threshold of "would be

² Appeal numbers EA/2006/0011 & EA/2006/0013

likely". The submission contained representations in relation to the application of section 36(2)(c) in the context of this particular request, and a copy of the withheld information was included.

22. The submission to the qualified person argued that disclosure of communications between junior civil servants (below Permanent Secretary level) and outside interest groups such as the NHSPN would be likely to prejudice the effective conduct of public affairs. Concern that information about communications might be disclosed would be likely to deter outside interest groups from seeking to engage with government and to inhibit any discussions which nevertheless did occur. This would interfere with the way in which public policy is devised and implemented.
23. With regard to the reasonableness of the opinion in relation to section 36(2)(c), the Commissioner is not entirely convinced as to the directness of the link between disclosure of the withheld information and the suggestion that this will inhibit outside interest groups from engaging with government. Nevertheless, the Commissioner accepts that it is not irrational or absurd to suggest that the possibility of future disclosure might reduce the extent and quality of such contact. Therefore, the Commissioner accepts that the qualified person's opinion with regard to section 36(2)(c) is a reasonable one and that this exemption is engaged.

Public Interest Test

24. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

25. The Cabinet Office explained that there is a very strong public interest in preserving the confidentiality of discussions between relatively junior officials and outside interest groups such as the NHSPN.
26. Ministers and Permanent Secretaries are senior decision makers and it is therefore important that the public should know who they are meeting. For this reason, the government proactively releases details of such meetings.
27. However, civil servants such as Mr Bate are not responsible for making decisions about government policy and they perform largely advisory roles. They should be able to undertake a dialogue with a wide range of external stakeholders, at the time of their choosing to help them in that role without fear that the timing or substance of these discussions will

be prematurely disclosed. The value of these interactions depends on the willingness of the participants on both sides to be frank.

28. The Cabinet Office has explained that Mr Bate's role involved him building trust-based relationships with a wide range of interest groups across public, voluntary and private sectors. These enable him to gather accurate views from across the sector on an ongoing basis from which to give informed advice to the Prime Minister and Deputy Prime Minister. Stakeholders would be more guarded and less frank with him if they find their confidential correspondence in the public domain, with the result that the advice he is able to give would be of lower quality. This would not be in the public interest.
29. Secondly, the information in this case relates to a sensitive policy issue, which was live at the time of the request and remains so. The Commissioner cannot be more specific as to what that issue is without disclosing some of the withheld information, but it is discussed in detail in the confidential annex which accompanies this decision notice. The Cabinet Office says that Mr Bate has had extensive discussions about the subject with stakeholders from public, voluntary and private sectors, and that disclosure of information about such discussions would be premature and particularly damaging, and not in the public interest.

Public interest arguments in favour of disclosure

30. The complainant says that the NHSPN, of which Mr Worskett is a director, is a lobbying group which represents the interests of independent healthcare providers, and that it has been actively lobbying for the wider involvement of private sector companies in the delivery of NHS services. He is particularly interested in its lobbying activities during the period when the government was actively considering significant reforms to the delivery of NHS services.
31. He considers that there is compelling public interest in the disclosure of the requested information in order to enhance public debate about and scrutiny of the influence of lobbyists on government decisions regarding NHS reforms. He rejects the Cabinet Office's argument that civil servants such as Mr Bate are not key decision makers and that the requirement for transparency with regard to their meetings is not so great, and considers instead that such advisers occupy positions of considerable influence.
32. The complainant cites a meeting referred to in the NHSPN's 2007/2008 annual report, between the NHSPN and Andrew Lansley (then Shadow Secretary of State for Health), about the Conservative Party's draft Health and Social Care Bill, as evidence of the NHSPN's involvement in shaping NHS reform. After much media coverage and significant public

debate about the impact of its proposals, the Bill received Royal Assent in March 2012.

33. The complainant argues that it is in the public interest to know if this legislation, which has the effect of opening up the NHS to greater private sector involvement, thereby creating financial opportunities for private sector healthcare providers, has been unduly shaped by behind-the-scenes lobbying by private sector interests.
34. In support of his position, the complainant has referred to a speech made by David Cameron in February 2010, about transparency in government, in which he stated "*I believe it's time we shone the light of transparency on lobbying in our country and forced our politics to come clean about who is buying power and influence*".³
35. He has also cited the Public Administration Select Committee's conclusion in *Lobbying: Access and Influence in Whitehall*, which was that "*Lobbying enhances democracy; but can also subvert it*"; and that "*The key, in this area as in others, is transparency. There is a public interest in knowing who is lobbying whom about what*".⁴
36. For its part, the Cabinet Office has acknowledged that there is a general public interest in openness of government and recognises that transparency might contribute to greater public understanding of and participation in public affairs. It also accepts there is a public interest in understanding how governments develop policies, including on health issues to which this information relates.

Balance of the public interest

37. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in the public interest test. This means that while the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest favours the maintenance of the exemption or the disclosure of the information.

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http://www.conservatives.com/News/Speeches/2010/02/David_Cameron_Rebuilding_trust_in_politics.aspx

⁴ <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/36/36i.pdf>

38. When questioned by the Commissioner as to why the exemption at section 36(2)(c) should be maintained, the Cabinet Office stated that it was in the public interest for civil servants such as Mr Bate, who are not responsible for making high level policy decisions, to have access to and interact with a wide range of independent stakeholders without the inhibiting effect of external scrutiny, as this would improve the quality of the information and advice he was subsequently able to give to government.
39. While the Cabinet Office refers to the NHSPN as "a stakeholder" and "an outside interest group", as explained in paragraph 6 of this decision notice, the Commissioner understands its activities to constitute lobbying.
40. The Commissioner accepts that there is public interest in policy making being informed by lobbyists. A well informed government that has benefited from the input of a wide range of stakeholders is in a stronger position to develop sound, workable policies. Civil servants are not business people, and benefit from an insight into business' concerns and an indication of whether a proposed measure would have the desired effect.
41. What needs to be considered against this, however, is whether the quality of this contribution will be diminished and whether lobbyists will be reluctant to engage with government as a consequence of disclosure.
42. The Commissioner considers that the severity, extent and frequency of prejudice to the process, envisaged by the Cabinet Office as likely to occur if the withheld information were to be disclosed, would be very limited. The overriding aim of lobbyists is to exert influence and so they will not easily be deterred from seeking to engage with government and offering free and frank views in pursuit of this aim.
43. As such, in the Commissioner's view, the suggestion that the disclosure of the withheld information would deter private sector stakeholders from participating in the debate around public policy making is highly speculative.
44. Furthermore, the Commissioner's published guidance on the public interest arguments for and against disclosing information about lobbyists⁵ states that dialogue with lobbyists does not warrant the same

⁵ <http://www.ico.org.uk/foikb/FOIPolicyLobbyists-publicinterestinfavourofmaintaininganexemptionforwithholdinginformat.htm>

safe space as purely internal policy thinking; there is a public interest in making the contribution of lobbyists public at the time when the policy debate is still ongoing (that is, before policy decisions have been finalised), to allow counterbalancing views to be presented.

45. Consequently, the Commissioner considers that in this case, only limited weight should be given to the Cabinet Office's first argument.
46. The Cabinet Office's second argument in support of maintaining the exemption was that the withheld information relates to a live issue, surrounding a sensitive area of ongoing policy development. The Commissioner is unable to set out his consideration of this point without disclosing some information which the Cabinet Office maintains is exempt. His consideration of the argument is, therefore, contained in a confidential annex to this decision notice.
47. The Commissioner has considered how disclosure would otherwise prejudice the conduct of public affairs and whilst he accepts that he must give due recognition to the opinion of the qualified person, he does not accept that the severity of the inhibitory effects of disclosure would have been as strong as the Cabinet Office contends.
48. The Commissioner finds that considerable weight should be given to the public interest in understanding the relationship between government and lobbyists. The Commissioner's published guidance outlines the public interest in disclosing information about lobbyists:

There is a public interest in:

1) Understanding the role of lobbyists and their relationship with government, this includes both:

(a) Understanding the mechanics of lobbying and,

(b) Understanding the relationship between government and a particular lobbyist and the influence they exert

2) Scrutinising the probity of public officials

3) Providing the opportunity for others to present opposing view during the policy development process⁶.

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<http://www.ico.org.uk/foikb/FOIPolicyPublicinterestindisclosinginformationaboutlobbyists.htm>

49. The Commissioner notes the considerable public debate about the role of lobbyists that existed at the time of the request and this further strengthens the case for disclosure. He also notes significant debate about the role of commercial companies in the NHS and that this information would inform that debate.
50. The Commissioner also finds that there is a strong public interest in understanding the role of Mr Bate and level of influence he had, in general terms and on this specific issue. He rejects the Cabinet Office arguments focused on the fact that Mr Bate did not have decision making responsibility and that this diminishes the public interest in disclosure.
51. There is a public interest in policy making being informed by groups such as the NHSPN, which is an argument for not disclosing the information. However, in view of the reduced weight given to the Cabinet Office's chilling effect and safe space arguments, and the very significant public interest in transparency with regard to relationships between lobbyists and government during periods of legislative change or policy development, the Commissioner finds that the public interest arguments in favour of maintaining the exemption do not outweigh the public interest arguments in favour of disclosure.

Right of appeal

52. 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

53. 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.
54. 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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