

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2015

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

Decision (including any steps ordered)

1. The complainant has requested information provided to Ministers on the impact of the withdrawal of Minimum Practice Income Guarantee Payments. The Department of Health considered the information was exempt from disclosure on the basis of section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the exemption is engaged and the balance of the public interest lies in maintaining the exemption. He requires no steps to be taken.

Request and response

3. On 5 February 2015, the complainant wrote to the Department of Health ("DoH") and requested information in the following terms:
"Please provide all analysis and evidence provided to DH ministers and officials between January 2012 and April 2013 which suggested GP practices could be forced to close by the withdrawal of Minimum Practice Income Guarantee (MPIG) payments. Where possible, show where the source of this analysis or evidence is derived from."
4. The DoH responded on 5 March 2015. It stated that it did hold information within the scope of the request but it considered this to be exempt on the basis of section 36.
5. Following an internal review the DoH wrote to the complainant on 9 April 2015. It stated that it had reviewed its response and now considered the section 28(1) and 35(1)(a) and (b) exemptions to be engaged and it

was no longer seeking to rely on the section 36 exemption. The DoH did provide the complainant with some information within the scope of the request with redactions made under the section 28 and 35 exemptions.

Scope of the case

6. The complainant contacted the Commissioner on 10 April 2015 to complain about the way his request for information had been handled.
7. The Commissioner has clarified with the DoH that it is also not seeking to rely on section 35(1)(b) of the FOIA to withhold any of the relevant information. The Commissioner therefore considers the scope of his investigation to be to determine if the section 35(1)(a) exemption is engaged in relation to the withheld information and, if so, where the balance of the public interest lies.

Reasons for decision

Section 35 – the formulation or development of government policy

8. Section 35(1)(a) of the FOIA provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test.
9. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.
10. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process where options are generated, risks are identified and consultation occurs. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.
11. The Commissioner, following the approach of the Tribunal, has looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy.
12. The request in this case was for information which suggested GP practices could be forced to close due to the withdrawal of the Minimum Practice Income Guarantee (MPIG) payments. The DoH has explained that the MPIG was introduced in 2004 as a top-up payment for General

Medical Services (GMS) practices that would lose funding under the terms of the new GP contract. The payments ensure that practices received the same level of funding they received before the new contract was introduced.

13. However, the Government and NHS England determined the payments were inequitable and as part of the changes to the 2012-13 GP contract it was decided they should be withdrawn but to allow practices time to adjust the withdrawal was phased over seven years, commencing in April 2014.
14. For this reason the DoH argues that the information within the scope of this request relates to the development of the government policy on withdrawing MPIG payments. The information within the scope of the request relates to the negotiation of the 2013-14 GP contract and refers to the withdrawal of MPIG but mostly consists of the government's negotiating position for the 2013-14 contract.
15. The Commissioner is satisfied that the information that has been withheld does relate to the withdrawal of MPIG payments as this is a part of the GP contract negotiations. He has next gone on to consider if this can be considered a 'live' government policy that engages the section 35(1)(a) exemption.
16. To support its position the DoH has argued that since 2004 the GP contract has been subject to annual renegotiation between NHS employers on behalf of the DoH and representatives of the British Medical Association (BMA). However, the DoH has explained that the negotiations for the 2013-14 contract were the beginnings of the new government policy to withdraw MPIG payments. In 2014, NHS England authorised payments to the practices likely to suffer the biggest losses of income and continues to work with these practices that will lose money over the first two years and see if these reductions in MPIG payments continue over the next seven years. As such the DoH considers the policy of withdrawing MPIG payments is still live and ongoing and will not be completed until 2020.
17. The Commissioner accepts that the withdrawal of MPIG payments is a government policy and it appears to be at an early stage of the process as the withdrawal only commenced in April 2014. As such the negotiations for the 2013-14 GP contract would have constituted some of the earliest discussions which factored in the impact of the MPIG payment withdrawal. At the time of the request, 5 February 2015, negotiations for the 2014-15 contract would have taken place ready for implementation in April 2015 and would have been likely to have been influenced by the lessons learned from the 2013-14 negotiations.

18. The timing of the process is important when determining whether the information relates to the development of formulation of the government policy in question. As the Commissioner has already noted the policy on the withdrawal of MPIG payments was at an early stage at the time of these discussions as this was prior to the commencement of the first withdrawals. The request was made during the 2013-14 contract period and before the commencement of the 2014-15 contract in April. The Commissioner considers it reasonable to assume that in these early stages experience of the process and the negotiations would feed into the continued development of how to withdraw MPIG payments in subsequent years up to the final stage in 2020.
19. The Commissioner's view is that whilst the policy is still in the early stages and is being shaped by discussions and improved through experiences then the policy development is still ongoing. Therefore he considers that the withheld information relates to the formulation or development of government policy and the exemption is engaged.
20. This exemption is subject to a public interest test. As such the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has gone on to consider these arguments.

Public interest arguments in favour of disclosure

21. The complainant has argued that the consequences of this policy have threatened the future of hundreds of GP practices, provoked public concern and protest and political debate. As such the complainant considers disclosure would enhance the quality of future advice in this area.
22. The complainant has also argued that disclosure would enhance the public debate on this issue as well as providing transparency in the decision making process and restore trust and engagement in that process, giving confidence the decision was taken on the basis of the best possible advice.
23. The DoH recognises the general public interest argument that disclosure of information relating to government policy making will help to inform the public debate and promote transparency of governance.

Public interest arguments in favour of maintaining the exemption

24. The DoH has submitted a number of arguments to support the public interest in maintaining the exemption. It has also pointed out the public interest inherent in the exemption – that premature disclosure of information which engages the section 35 exemption could prejudice good working relationships, the neutrality of civil servants and the quality of Government.
25. The negotiation of contracts is an annual process and the DoH therefore argues that disclosure of the information within the scope of this request into the public domain would be likely to inhibit the advice that officials provide to Ministers as part of this process in the future. This would not be in the public interest as it would impact on the quality of future decisions.
26. Additionally, it may impact on relations between the DoH and BMAs General Practitioner's Committee who are the main representative body for a key health profession. The DoH has stated that GPs are central to delivering the government's priorities on health and relations between the government and GPs are particularly sensitive at this time particularly with regard to workload and funding pressures on the profession. The DOH argues therefore that revealing its negotiating position would damage the public and taxpayer interest by undermining future negotiations with the BMA.

Balance of the public interest arguments

27. The Commissioner considers that the withdrawal of MPIG is an area of some public debate. This policy represents a significant change for some GP surgeries and the funding they receive. The DoH has noted that the withdrawal of MPIG has been controversial and some GP practices believe they will no longer be viable without the payments. In addition to this there have been public protests against the policy, particularly in East London and the Lake District, which have received national and health sector media coverage. There have also been parliamentary debates and a significant amount of official correspondence on the subject from practices and their patients.
28. The Commissioner therefore considers that there is a public interest in increasing the transparency of the policy decisions and enabling the public to debate the issues around the withdrawal of MPIG. However, he notes that this should be balanced against the fact that much of the withheld information relates to the discussions around the 2013-14 GP contracts and not to the initial policy decision to withdraw the payments which is the decision which caused much of the protests. As such the disclosure of this information will not add any significant insight into the

decision to introduce the policy but will allow for increased understanding of how the policy is being developed and implemented and how this is affecting the negotiations between the BMA and the DoH.

29. Both the DoH and the complainant have highlighted there is a public interest in openness, transparency and accountability, and in understanding how decisions which could affect people's lives are taken. The Commissioner accepts there are strong arguments about the importance of public oversight of funding for GPs surgeries and how any changes will affect the provision of services. The disclosure of the requested information would enable the public to take part in this process and debate the extent of the impact of the withdrawal of the MPIG payments on the funding of GP practices.
30. However, the Commissioner has taken into account the level of detail in the withheld information as it deals with detailed negotiations. He considers that high level information which provides an insight into the impact of the MPIG withdrawal would assist in the public debate. The significant level of detail contained in the withheld information does require the Commissioner to further consider the DoH's argument that disclosure may have an inhibitory effect on the advice that officials provide to Ministers as part of the process in the future.
31. "Chilling effect" arguments are well-established arguments that can be relevant to the consideration of the public interest test in relation to section 35 but in order to determine how much weight should be given to these arguments the Commissioner must consider the timing of the request with regard to the point at which the policy process was at when the request was made to determine how real the risk of a potential chilling effect would be on the future provision of advice.
32. In this case a public announcement of the decision to withdraw MPIG payments had been made which can often mark the end of the formulation stage of the policy process. However, discussions between the DoH and the BMA were ongoing and negotiations for the GP contract in the first year were likely to set a precedent for future years and as such the Commissioner considers this to be part of the formulation and development stage of the policy process.
33. The Commissioner would therefore accept that chilling effect arguments can carry weight in this case. The DoH has argued that the quality of future advice may be compromised by disclosure of the withheld information which in turn may affect the quality of decision making and the ability of the DoH and the BMA to negotiate future GP contracts while the MPIG payments are being phased out. Although the DoH has not expanded on this any further the Commissioner cannot dismiss this

argument entirely as he acknowledges the withheld information relates to discussions at an important part of the policy process containing options for compromises and changes that could be considered by Ministers before finalising the GP contracts.

34. Disclosure of this information, given that it contains advice and discussions and requires input from Ministers, may have an impact on the future provision of advice in subsequent years as MPIG withdrawals continue as it may affect the depth of advice provided by officials if they consider this information may be disclosed and lead to undue levels of public scrutiny. The Commissioner therefore accepts this argument carries weight in favour of withholding the information.
35. The DoH has raised particular concerns that disclosure of the withheld information will impact on the relationship between the DoH and the BMA at a time when there is a great deal of sensitivity between the government and GPs about funding. The DoH's main argument in this regard is that disclosure of information which relates to its negotiating position would be likely to undermine its future negotiating position with the BMA.
36. The Commissioner recognises that disclosure of information which discusses the options available to the DoH may impact on its future negotiating position in the next few years as the MPIG withdrawal continues, particularly in the first few years which the DoH has stated are the most crucial. If the BMA were to become aware of the options that were debated and discussed by officials and Ministers then it is reasonable to assume this would influence in some way, future negotiations for GP contracts. This in turn will impact on the implementation of the MPIG payment withdrawal policy.
37. In balancing the public interest arguments the Commissioner is mindful of the detailed nature of the information which has been withheld in this case and considers that the negative impacts of disclosure, as argued by the DoH, carry more weight than if the information was less detailed and of a higher level.
38. He also considers there is weight to the chilling effect arguments and the argument that disclosure may negatively impact on future negotiations with the BMA, potentially damaging relations between the government and GPs who are central to delivering the government's priorities on health.
39. The Commissioner has given significant weight to these arguments due to the nature of the withheld information and the important stage of the policy development process that it relates to. The Commissioner accepts that disclosure of the requested information could potentially lead to

increased attention in the process and a level of scrutiny which would not otherwise normally be faced when negotiating contracts and discussing policy options. This in turn may hinder the process and the policy aim of withdrawing MPIG payments by 2020 which would not be in the public interest.

40. The Commissioner also acknowledges the public interest factors in favour of disclosure are strong in this case. The withheld information relates to negotiations for the GP contract which includes the MPIG payment withdrawals and the expenditure of public money. It has been noted by the DoH that the policy decision to withdraw these payments has been controversial and has led to much debate and discussion and the Commissioner accepts that the disclosure of information which would demonstrate the basis for decisions taken would increase transparency and help public understanding.
41. That being said, the detailed and specific nature of the information in this case if disclosed would be likely to impact on future negotiations and the policy aim of withdrawing MPIG payments by revealing the DoHs negotiating position. This detailed information is not necessarily going to provide any further insight into the policy decision to withdraw MPIG payments but disclosure may impact on the DoHs ability to continue to develop the policy and the Commissioner considers this risk is not outweighed by the public interest in disclosing the information.
42. The Commissioner therefore has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information and the DoH has correctly withheld the information within the scope of the request.

Right of appeal

43. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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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