

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2016

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

Decision (including any steps ordered)

1. The complainant made a request to the Department of Health (DoH) for information relating to financial figures on the role of technology in driving efficiency savings in the NHS, as discussed at the National Information Board meeting on June 17, 2015. The DoH refused to provide the information it held within the scope of the request under section 35(1)(a) FOIA.
2. The Commissioner's decision is that the DoH has correctly applied section 35(1)(a) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 30 June 2015 the complainant requested information of the following description:

"I write to make a Freedom of Information request concerning financial figures on the role of technology in driving efficiency savings in the NHS, as discussed at the National Information Board meeting on June 17, 2015.

During this meeting Tim Kelsey, NIB chair, made reference to studies that showed the NHS could make between £8.3 billion to £13.7 billion of savings through improved use of digital technology. My FOI request is to see those reports on which the NIB has based these figures as this

information was not shared at the meeting and is not in any notes I can find online."

5. On 22 July 2015 the DoH responded. The DoH refused to disclose the requested information under section 35 FOIA.
6. The complainant requested an internal review on 23 July 2015. The DoH sent the outcome of its internal review on 4 September 2015. It upheld its original position confirming that section 35(1)(a) FOIA was applicable to the withheld information. It also said that section 22 FOIA was applicable as the withheld information was intended for future publication.

Scope of the case

7. The complainant contacted the Commissioner on 8 September 2015 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the DoH withdrew its application of section 22 FOIA.
9. The Commissioner has considered whether the DoH correctly applied section 35(1)(a) FOIA in this case.

Reasons for decision

Section 35 – the formulation or development of government policy

9. 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.
10. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.
11. 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.
12. 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.

13. The request in this case was for reports on which the National Information Board (NIB) based the savings figures set out in the request above. The DoH has explained that the figures already available publically referred to by the complainant are headline figures only which in no way reflect the full extent of the withheld information. It confirmed that no final policy decisions can be taken until the DoH completes its assessment of what work is affordable in light of the recently agreed overall Spending Review (SR) settlement. Once this assessment work has been concluded, it will be at that stage that policy proposals are put to Ministers for a final decision.
14. For this reason the DoH argued that the information within the scope of this request relates to the development of the government policy on financial savings through the improved use of digital technology. The withheld report provides further detail and evidence on which the publically available head-line figures are based.
15. The DoH has confirmed that the process within the DoH is ongoing in fully assessing what work will be affordable in light of the overall SR settlement and this should conclude in the near future (early 2016). It said that once a final policy decision is taken by Ministers, a report containing the vast majority of the withheld information will be published in early 2016.
16. The Commissioner's view is that whilst the policy is still being shaped by discussions, 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.
17. 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

18. The complainant has argued that the chair of the NIB, has shared the top line results of this information in several public forums, including the NIB meeting in June, and many stakeholders in healthcare who are not involved in the policy process are already in the middle of projects that have been put in place as a direct response to the potential efficiency benefits the reports indicate. The complainant considers that there is great public interest in disclosing this information in order that these stakeholders know there is evidence to back up the work they are doing.

19. The DoH recognised the general public interest in making this information available for the sake of greater transparency and openness.

Public interest arguments in favour of maintaining the exemption

20. The DoH considers that the public interest lies in protecting the policy-making process and preserving the ability of officials in the DoH to engage in free and open discussion of policy options. It said that releasing the information being withheld in this instance into the public domain at this time would undermine Ministers' and official's space for consideration and debate and would inhibit policy development and delivery. In particular, it said that the fact that a report containing the information has been agreed to be published in early 2016 is also a factor taken into consideration in not releasing the information at this stage.
21. The DoH also said that it also reconsidered whether the public interest in applying the exemption is greater than the public interest in providing the information (taking into account the applicants views at Internal Review stage on the benefit of releasing the information to stakeholders involved in associated project work). The DoH does not consider it is in the wider public interest to release the information at this time, because the policy work is on-going in that the NIB proposals are still "live" and in development and will be considered by Ministers in due course.
22. It went on that during the policy development phase, it is recognised that Ministers and officials should be afforded a safe space to discuss and debate the merits of statistical information without that information also being made public in parallel. It said that release of the information at this specific time would compromise this important policy development process, which is scheduled to conclude imminently. The key points that the final policy decision will ultimately be based upon, the implementation of the policy leading to a particular outcome/change in the real world (i.e. changes to the NHS which could lead to financial savings) and its consequences likely to be wide-ranging (potential effects to the NHS and Government spending) have been further factors considered in coming to the DoH's conclusion to withhold the information.

Balance of the public interest arguments

23. The Commissioner considers that financial savings within the NHS is an area of considerable public debate and there is a strong public interest in disclosure of information which will further inform the public.

24. The complainant has argued that there is a public interest in stakeholders, who are in the middle of projects that have been put in place as a direct response to the potential efficiency benefits, having sight of the withheld information.
25. The Commissioner considers that there is a public interest in disclosure of information relating to potential financial savings within the NHS. However, whilst the complainant has provided arguments as to why stakeholders, who have already begun projects in this area, would have an interest in disclosure of the withheld information, he has not explained why he considers that this would be in the wider public interest.
26. The Commissioner accepts that there is a strong public interest, during the policy development phase, in Ministers and officials being afforded a safe space to discuss and debate evidence and ideas which inform decision making, without that information also being made publicly available.
27. The Commissioner has taken into account the level of detail in the withheld information. This therefore requires 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.
28. "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.
29. In this case a decision has not yet been taken by Ministers as any decision that is ultimately taken is dependent on the recently agreed SR. Discussions are therefore ongoing and 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. Although the DoH has not expanded on this any further the Commissioner cannot dismiss this argument entirely as he acknowledges the withheld information will inform and feed into forthcoming policy discussions.
30. 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 (higher level information has already been disclosed into the public domain).

31. 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

32. 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

33. 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.
34. 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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF