

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2016

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

Decision (including any steps ordered)

1. The complainant has requested information relating to any meetings between the former Parliamentary Under Secretary of State for Health and Jeremy Hunt or senior civil servants about the report on doctors pay. The Department of Health identified a number of diary entries, narrative information and three notes of meetings which were relevant to the request but considered this information exempt on the basis of section 35(1)(a), 35(1)(d) and 40(2) where the information was the names of junior staff.
2. The Commissioner's decision is that the DoH has correctly applied section 35(1)(a) to withhold the three notes of meetings but that the public interest in the narrative of the meetings and the diary entries of the meetings favours disclosure. He also finds that the public interest in section 35(1)(d) favours disclosure in relation to this information. The Commissioner finds that section 40(2) does provide a basis for withholding some of the names from the narrative information and the diary entries.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the narrative and diary entries from 2, 10 and 23 February 2015 and 2 and 9 March 2015 with the names of more junior members of staff (as identified to the Commissioner) redacted under section 40(2).
4. 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

5. On 17 August 2015, the complainant wrote to the Department of Health (DoH) and requested information in the following terms:

"I would like to know if Dan Poulter has met to discuss the DDRB report on doctors pay with Jeremy Hunt/senior civil servants within the DH/representatives from No10 over the course of 2014 and 15 at any point?

If so may I please know when, who was involved and see any documentation of such meetings"

6. The DoH responded on 28 August 2015 and stated it may hold information within the scope of the request but considered this would relate to the management of the Parliamentary Undersecretary of State's diary and was therefore exempt under section 35 of the FOIA. Specifically, the DoH cited section 35(1)(d) which relates to the administration of a ministerial private office.
7. Following an internal review the DoH wrote to the complainant on 23 October 2015. The DoH maintained its position but also added that the information would also engage section 35(1)(a).

Scope of the case

8. The complainant contacted the Commissioner on 3 November 2015 to complain about the way his request for information had been handled.
9. In this case the Commissioner has established that the information which is actually being withheld consists of a narrative of events drawn from diary entries (this is information collated by the DoH which lists the dates of meetings, attendees and the reason for the meeting) as well as the diary entries from several dates and a list of the attendees at the meetings within the scope of the request. The DoH stated no minutes of the meetings were held but following further searches did identify three documents containing information relevant to the request as they contain notes/summaries from the meetings.
10. During the course of the Commissioner's investigation the DoH also sought to apply section 35(1)(d) to this information and section 40(2) in relation to the names of attendees.

11. The Commissioner therefore considers the scope of his investigation to be to determine if the narrative information has been correctly withheld under either section 35(1)(a) or 35(1)(d) and if section 40(2) provides a basis for withholding the names of junior staff identified by the DoH.

Background

12. In October 2014 the DDRB (Review Body on Doctors' and Dentists' Remuneration, a pay review body whose role is to provide independent advice and recommendations to government about pay and reward) was asked by the UK Government, the Welsh Government and the Northern Ireland Executive to make recommendations on changes to contractual arrangements for junior doctors, including a new system of pay progression. It was also asked to make observations on pay proposals for reforming consultants' contracts. In order to fulfil these remits the DDRB asked for written evidence from interested parties from both the employers' and employees' side. It then invited some of those parties to provide oral evidence separately.
13. Such arrangements provide an opportunity for a Pay Review Body to clarify points in their written evidence and for the Pay Review Body to test hypothetical recommendations. It also gives the parties involved the chance to signal what their priorities would be if resources were limited and might therefore need to be targeted towards particular groups and places. The written evidence is shared with all parties, but the oral evidence is not.
14. The DDRB published its report in July 2015. The recommendations and observations contained within it informed and contributed to the negotiations between the employers and employees that followed. The report's recommendations are just that, recommendations, they do not prescribe the terms of contract. They simply set out the DDRB's views on what the parameters of the subsequent negotiations should be.

Reasons for decision

Section 35(1)(a) – formulation & development of government policy

15. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
16. 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.

17. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.
18. In this case the DoH has said the information relates to the Government's policy in development work being formulated regarding the junior doctors' contract (pay and terms and conditions of service). The request was made on 17 August 2015 after the DDRB report on contract reform¹ was published. However, this was not the end of the development of the policy. The report itself states that *"the recommendations and observations in this report provide a roadmap of what could and should be achievable in the interests of everyone with a stake in the NHS. It now depends on the parties to resume negotiations ... with a commitment to long-term as well as short-term objectives."*
19. The Commissioner is satisfied that this demonstrates the publication of this report was not designed to be the end of the process, but a starting point for further negotiations. Added to that is the fact that at the time of the request the report had only just been published and the impact of and potential work needed from it would not have been determined. The Commissioner is therefore satisfied that the information in question here, most of which pre-dated the appointment of the DDRB to make recommendations but all of which related to the government's work on junior doctors contracts, would relate to the formulation and development of government policy.
20. The exemption is interpreted broadly and will capture a wide variety of information. The information contained within the report clearly relates to the issue of contract reform within the NHS and how this might be improved. It is clear that discussion about this report prior to its

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445742/50576_DDRB_report_2015_WEB_book.pdf

publication would also be used by the government to help formulate and develop policies in this area through negotiations.

21. In light of this the Commissioner accepts that the information that is being withheld (notes from meetings discussing contract reform, the narrative of events and the diary entries) may have fed into setting the remit of the DDRB and the scope of the report and can be said to be related to the formulation and development of government policy, therefore section 35(1)(a) is engaged.
22. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of disclosure

23. In favour of disclosure, the DoH acknowledged there is a general public interest in transparency and openness.
24. The complainant considers that as the DDRB is an independent body producing an independent report on matters relating to issues of significant interest, the full political context and influence upon the report should be transparent. He also believes that disclosing the withheld information and opening it up to public scrutiny would lead to more accountability and better policy for the taxpayer.

Public interest arguments in favour of maintaining the exemption

25. With regard to the public interest in maintaining the exemption, the DoH stressed the work on doctors' contract reform is still in 'development' and is the subject of on-going negotiations. The DoH therefore considered disclosure of information which related to discussions on the DDRB report and remit of the DDRB in this situation and showed the discussions that had taken place would inhibit and interfere with these sensitive negotiations and policy delivery.
26. The DoH has also argued that disclosure of information at this stage would prejudice the negotiations, mislead the wider public and media about the government's position and negotiating strategy to the detriment of the taxpayer.

Balance of the public interest arguments

27. In considering the public interest arguments the Commissioner has firstly looked at the information in question and whether the information contains details of negotiating positions.

28. In doing so, he notes that the three documents which contain details of discussions all pre-date the appointment of the DDRB to make recommendations on changes to contractual arrangements, a new pay progression system and proposals for reforming consultants' contracts.
29. What these discussions have in common is that they detail the negotiating position of the DoH prior to the DDRB being asked for its recommendations and in some case discuss the potential of the DDRB becoming involved and the scope of this involvement. The narrative information, gathered from ministerial diary entries, and the diary entries from February and March 2015, which is also being withheld, provides an overview of the meetings that took place before and after the DDRB were appointed.
30. The Commissioner has gone on to consider the public interest arguments and the weight these should be given in relation to each of these documents and the information they contain.
31. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry some weight in that disclosure would provide transparency and accountability and allow the public to understand the context of the report and the discussions within government on the issue of contract reform.
32. The Commissioner has also looked at the fact that the reform of doctors' contracts is a matter of significant public interest. The reforms considered by the DDRB represent a key element of public policy, which introduces, or at least formalises the arrangements for, seven day working by consultants together with the training and working practices of junior doctors. All of which is intended to deliver improved health care for the public.
33. This increases the public interest in the disclosure of information on the discussions ministers and civil servants had with the DDRB to discuss the report and about the DDRB and their role in the reform process. It is important for transparency around this process to show that the DDRB, as an independent body, produced an independent report based on evidence from different sources without undue influence from government. It is also important to be transparent about the issues discussed within government on the negotiations to show that the decision-making process was based on sound discussions and advice.
34. The Commissioner believes it important to emphasise the significance of the media interest in this issue, with wide spread concern from doctors over the Government's proposals. Bodies representing doctors were arguing that the proposals were a threat to the health service and put patient safety at risk and the press reported on the division between the

doctors and government over the changes to the contracts for junior doctors.

35. The Commissioner is therefore satisfied that the notes of the meetings contain information which sheds light on the process and discussions and altogether would increase transparency on matters which could impact on all inhabitants of the UK. The proposed changes would have a long term effect and there is clearly an ongoing public debate of the issues which is not confined purely to the media.
36. There is a clear public interest in disclosure of information and evidence which shows how the government reached the point of making its proposals; this would include information on the DDRBs role and the evidence given to the DDRB to make its recommendations. All of this could potentially increase understanding of the positions taken during subsequent negotiations which would be in the public interest.
37. The Commissioner is satisfied that there was a genuine public interest in, what at the time of the request, were the proposed reforms to doctors' contracts. The DDRB report had been published when the request was made and did summarise some of the evidence provided on the Government's arguments for change and the counter arguments from other parties.
38. There was therefore already a great amount of information available to facilitate an informed public debate on the issue. In the case of the meeting notes it is likely disclosure would add to the information already available and the public debate but the extent to which it would have to be balanced against the harm, at the time of the request, to the ongoing negotiations and the need for a safe space to discuss how to proceed with the proposed reforms.
39. Turning now to the DoH's case for withholding the information, the arguments for maintaining the exemption essentially focus on the concept of a "safe space". The idea behind the safe space argument, accepted by the Commissioner, is that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
40. The need for a safe space will be strongest when an issue is still live. In this case the DoH has confirmed that the policy process was live at the time of the request and remains ongoing. At the time of the request, the DDRBs recommendations had been published but a safe space was still required to conduct negotiations based on these recommendations. The Commissioner accepts that to disclose information which recorded frank views on key issues could have impacted these negotiations.

41. In saying that, the Commissioner notes that the narrative and diary entries do not contain any details of views or negotiations but simply record the dates, nature of meetings and attendees. The Commissioner considers it unlikely the disclosure of this information would have impacted on negotiations as the information does not reveal anything significant about the Government's views that were not already known at the time of the request.
42. For the three documents which do contain details of views and evidence of the Government's negotiating position the Commissioner is satisfied the policy development was ongoing at the time of the request and as such he recognises there was a considerable public interest in allowing the government a safe space to continue the policy development process without the fear that information would be made public that might damage that process.
43. In the Commissioner's view disclosure of the information in these documents would have been likely, at the time of the request, to lead to greater speculation and the policy development being hindered by external comment, media attention or pressure from other interested parties. This would have distracted from the ongoing sensitive negotiations surrounding contract reform and would not have been in the public interest.
44. The Commissioner has weighed these arguments and acknowledges there is a strong public interest in disclosure of information which would demonstrate that this sensitive issue has been properly managed and that there is a sound evidence to support the Government's position. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case.
45. Balanced against that the Commissioner has to accept there is significant weight to the safe space arguments given the timing of the request, coming soon after the publication of the DDRBs recommendations. Disclosing any information which revealed frank views and would hinder upcoming negotiations and discussions to develop on these recommendations would not have been in the public interest.
46. The Commissioner therefore considers that for the documents which contain the details of the meetings the balance of the public interest in disclosure is outweighed by the public interest in maintaining the section 35(1)(a) exemption as these documents contain frank views and opinions and the Government's evidence base for the initial contract reform proposals which, at the time of the request, would have impacted on negotiations and development of the Government's policy.

47. For the narrative and diary entries the Commissioner does not accept that the information would impact on the development of the Government's policy or would have hindered negotiations. The information is simply a record of the dates of meetings with a general description of the nature of the meeting and attendees. This would not reveal anything about the Government's position which was not already known at the time of the request.
48. It is more difficult to see how this information would have had an impact if it were disclosed at the time of the request and therefore, as there are strong arguments for disclosure for any information on the contract reform issue, the Commissioner considers the public interest arguments for maintaining the exemption are outweighed by those in favour of disclosure for the narrative and diary entries.
49. However, the DoH also considers section 35(1)(d) provides a basis for withholding this information and section 40(2) to the extent that any of the information is personal data. Therefore the Commissioner has gone on to consider the application of the exemption to the narrative and diary entries.

Section 35(1)(d) - operation of any Ministerial private office

50. Section 35(1)(d) provides that:

"Information held by a government department ... is exempt information if it relates to –

(d) the operation of any Ministerial private office"

51. The DoH argues that the narrative and diary entries in this case engage section 35(1)(d) as they relate to administrative matters within Minister's private offices, namely the working patterns of Ministers and the set-up of their diary.
52. The Commissioner accepts that section 35(1)(d) is applicable in this case as the information was taken from diary entries relating to the operation of a Ministerial private office. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosure

53. The DoH recognises there is a general public interest in disclosure of information that increases openness in Government and may increase public trust in, and engagement with, the Government.
54. The DoH acknowledges there is a public interest in understanding how ministerial private offices operate but argues that this would not be met

by disclosure as it would not add anything to the public knowledge in terms of the way in which private office are run or administrated.

55. The complainant argues that Ministers and public officials should not be allowed protected space and does not see how disclosure of the information would prohibit the efficient and effective carrying out of ministerial business.
56. The complainant also argues that there is no evidence that the experienced officials including politicians and civil servants involved in the meetings would have been given or sought any assurance as to confidentiality. The severity of the prejudice in terms of the effect on individuals must therefore be fairly minimal.

Public interest arguments in favour of maintaining the exemption

57. The DoH argues that disclosure would prejudice the effective running of a ministerial private office and it is important that ministerial private offices are free to make arrangements for the minister's diary to facilitate the most efficient and effective carrying out of ministerial business.
58. The DoH further argues that ministers must be able to rely on these arrangements and must be confident these staff members remain independent and do not allow extraneous considerations such as presentational concerns or possible perception of diary arrangements to affect their judgement in administering the private office. There is therefore a strong public interest in ensuring there is a protected space around ministers to ensure good decision-making is supported.

Balance of the public interest arguments

59. In reaching a decision the Commissioner has drawn heavily on an earlier decision notice² and subsequent decision of the Information Tribunal³ in which the issue of the disclosure of ministerial diary entries was considered. In the Tribunal case the diary entries contained more than just lists of names in some cases and yet both the Commissioner and

² ICO decision notice FS50406024 https://ico.org.uk/media/action-weve-taken/decision-notice/2013/812324/fs_50406024.pdf

³ EA/2013/0087
[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1237/Department%20of%20Health%20EA.2013.0087%20\(17.03.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1237/Department%20of%20Health%20EA.2013.0087%20(17.03.14).pdf)

the Tribunal concluded that the public interest favoured disclosure for a large number of the diary entries.

60. The Tribunal found at paragraph 85 of its decision that:

"the diary entries could not be guaranteed to give an exhaustive picture of who had access ... but we consider it to be clear that the diary entries would have provided worthwhile additional information on the topic of external access"

61. The Commissioner considers this to be an important point that carries considerable weight here. The DoH does publish lists, by month, of gifts, hospitality and travel for Ministers including a one line description of meetings attended by the Minister. This gives some insight into external access to the Minister but the same cannot be said for internal access i.e. within the department or government. Disclosure of information from the Minister's diary would give a similar insight into access to the Minister as that which can be gained from the published lists showing external meetings.
62. The Tribunal also recognised that disclosure would have a high impact on the contribution to the public understanding of how the Minister spent his time and how government works. The Commissioner accepts this was in relation to diary entries sometimes containing more than just a list of attendees and dates and times but that regardless these arguments still carry weight here. Disclosure would contribute to public understanding of how government works as it would show the level of the meetings attended by the Minister by revealing details of the attendees and the nature of the meetings.
63. The DoH's main arguments against disclosure relate to the prejudice to the effective running of the ministerial private office and the fact that Ministers must be confident staff members are independent and do not allow external considerations to affect their judgement in administering the private office. The DoH goes on to argue there is a need for a protected safe space to ensure good decision making is supported.
64. The Commissioner considered some of these points in his previous decision notice and found in that case that whilst there is a public interest in ensuring ministerial offices are efficiently run the DoH had not demonstrated how the disclosure of the specific information would impact on this. The Commissioner finds similarly in this case, the DoH has not argued how disclosing the attendees at the meeting would have any impact on the running of the office and the Commissioner cannot realistically see how the stated prejudice would occur. As such he has given little weight to this argument.

65. The DoH's point regarding having confidence in staff members to administer the office is not particularly coherent. The Tribunal had considered the issue of external scrutiny in the context of the public reading into the diary entries and it found that there was *"some limited substance in the concern about disclosure possibly fuelling speculation about relations between Ministers, or between Ministers and senior officials ... we accept that in some cases ... this could be a distraction from more useful work. Speculation is frequent in any event, and we consider that concern is a modest factor."*
66. The situation here is very similar - disclosure of any information from the diary entry may lead to speculation, even if it is only a list of attendees, as it may result in speculation as to the nature of the meeting based on the people involved. But, as the Tribunal found, this concern is limited at most and is clearly outweighed by the benefits and public interest in transparency.
67. The Tribunal had also accepted the Commissioner's view that the diary entries gave no detail about discussions or objectives so it was not satisfied that the information required protection for the preservation of substantive safe space. The Tribunal highlighted the fact that press speculation and public speculation about the views of Ministers happens frequently and the diary entries revealed little on the matter of policy, the fact a meeting existed even when the topic of the discussions is known, does not reveal anything about the decision and view of the Minister.
68. In this case disclosing the attendees or the nature of the meeting from the diary entry or the narrative would also not reveal anything about the Minister's view or affect any decisions he may be making with regard to policies. Although this information comes from the diary entry it is essentially a list of dates of meetings, the topic for discussion and the names of attendees and the Commissioner cannot accept that disclosing this information would impact on the protected space needed by Ministers as it would not show anything about the specific nature of the discussions in the meeting or any conclusions reached. For this reason, the Commissioner gives this argument little weight.
69. The Commissioner does not therefore attribute any substantial weight to the arguments provided by the DoH in favour of maintaining the exemption. In this case, as there is a presumption in favour of disclosure and the arguments for releasing the information are more well evidenced, the Commissioner has concluded the public interest in favour of maintaining the section 35(1)(d) exemption does not outweigh the public interest in disclosure.

70. However, the DoH has applied section 40(2) to withhold some of the names of attendees so the Commissioner has now gone on to consider the use of this exemption.

Section 40(2) - third party personal data

71. Section 40(2) FOIA provides an exemption for information which is the personal data of any individual, other than the requester, where disclosure of that personal data would be in breach of any of the data protection principles.

72. In this case, the DoH only considers this exemption applicable to names of certain attendees at the meetings referred to in the narrative information and listed in the diary entries that it has identified to the Commissioner. These are more junior members of staff at the public authority. The DoH has therefore applied section 40(2) to the names of several individuals across several diary entries as identified to the Commissioner during the course of his investigation.

73. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as :

“data which relate to a living individual who can be identified –

(a) from those data,”

74. In this case as the information is the names of individuals it is clear that this information constitutes personal data for the purposes of section 1(1) of the DPA.

75. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) – where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle. This states that *“personal data shall be processed fairly and lawfully”*.

Likely expectations of the data subject

76. The Commissioner notes the DoH has provided very limited arguments to support its position but as this relates to personal data he has a duty to consider the use of this exemption and any arguments he believes may be relevant.

77. The Commissioner considers that more junior officials would not have had any reasonable expectation their names and presence at these meetings would be disclosed into the public domain. The Commissioner

cannot be certain but it is likely that more junior individuals are less likely to be in public roles so would have a lesser expectation of their names being disclosed. The Commissioner is also aware that it is not just the disclosure of the names that is the issue in this case, it will also reveal that the individual took part in the meeting which is the subject of this request and this may lead to scrutiny the individual concerned would have had no reasonable expectation of.

Would disclosure cause damage or distress to the data subjects?

78. The Commissioner considers it can be difficult to quantify what damage and distress may be caused but in any event it is only necessary to show that there is a possibility of this happening. For much the same reasons as above, the Commissioner acknowledges there is a possibility of the individuals concerned being distressed by the disclosure of their names and the fact they were involved in the meeting. More senior officials in public facing roles would be aware that they have a lesser expectation of privacy but for more junior members of staff this is not the case. However, the information does relate to the work life of the individuals and not their private life so this does diminish the argument.
79. That being said the Commissioner cannot discount the possibility of this information causing some distress to the individuals involved in a meeting to discuss the sensitive contract reform proposals and negotiations as it would lead to speculation about the roles of these individuals in the meeting and the nature of the meeting.

The legitimate public interest

80. The Commissioner considers that whilst there is some legitimate public interest in understanding how Ministers organise their time it is not clear how disclosing the names of attendees at the meeting would meet this legitimate public interest.
81. Taking into account the data subjects' likely expectations and the possibility of distress, as disclosure of the information withheld under section 40(2) would not to any great extent meet the legitimate public interest in this case, the Commissioner considers the exemption has been correctly applied in relation to the names the DoH has identified as being more junior individuals.
82. As the Commissioner has upheld the section 40(2) exemption to withhold the names of the more junior attendees at the meeting but does not accept the section 35(1)(d) exemption provides a basis for withholding the names of the other attendees, the Commissioner now requires the DoH to disclose the names of the remaining attendees at the meeting.

Right of appeal

83. 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

84. 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.
85. 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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