

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2016

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

Decision (including any steps ordered)

1. The complainant has requested information on who advised the Health Secretary about a report published in the British Medical Journal on the increased mortality associated with weekend hospital admissions. The Department of Health (DoH) withheld the information under sections 35(1)(a) – information relating to the formulation of government policy, and 35(1)(d) – information relating to the administration of a ministerial private office.
2. The Commissioner's decision is that although section 35(1)(a) is engaged, the public interest in maintaining it does not outweigh the public interest in disclosure. The Commissioner finds that the exemption provided by section 35(1)(d) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Communicate the requested information to the complainant.
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 8 September 2015, the complainant wrote to the DoH regarding an article by Nick Freemantle published in the British Medical Journal on 5 September 2015 entitled "Increased mortality associated with weekend hospital admission: a case for expanded seven day services?" The complainant went on to request information in the following terms:

"I wonder if you have any information relating to this publication in terms of who told Jeremy Hunt the study's findings (meeting/emails)? and also has Jeremy Hunt discussed this study with anyone including NHS England workers/media/politicians etc (meetings/emails)?

If so, can I see the minutes/any documentation relating to these discussions/emails?

If you have no information relating to this then I would be grateful if you could ask Jeremy Hunt formally who fed him the information of the study's findings so many weeks before it was published?"

6. The DoH responded on 6 October 2015. It confirmed it held information captured by the request. However it withheld that information, relying on the exemptions provided by section 35(1)(a) – information relating to the formulation of government policy, and section 35(1)(d) – information relating to the administration of a ministerial private office, to do so.
7. Following an internal review the DoH wrote to the complainant on 3 November 2015. It maintained its position that the information was exempt under the two exemptions cited.

Scope of the case

8. The complainant contacted the Commissioner on 11 November 2015 to complain about the way his request for information had been handled. In particular he argued that there was a strong public interest in disclosing the information. In broad terms, this is because the article reported on research in to the increased risks faced by those admitted to hospitals at week-ends which relates to the Government's proposed reform of doctors' contracts.
9. The Commissioner considers that the matter to be determined is whether the information identified by the DoH as being captured by the request is exempt by virtue of either section 35(1)(a) or 35(1)(d).

10. The Commissioner will start by considering the application of section 35(1)(a).

Reasons for decision

The withheld information

11. The DoH has only identified a very limited amount of information falling within the scope of the request. It is not appropriate to go into any detail as to the nature of that information in the open version of this notice. However it should be noted that the complainant has pointed to a speech made by the Health Secretary on 16 July 2015, over six weeks before the findings of the research were made public, in which he appears to have used a statistic from the research to promote seven day care within the NHS. As that speech predates the information identified by the DoH, this prompted the Commissioner to challenge the DoH as to whether it held any additional information. In response the DoH explained that the Health Secretary's speech drew on advice provided by NHS England. From this the Commissioner understands that although NHS England provided some statistics these were not derived from the research to which the request relates. The DoH confirmed that the information it had already provided to the Commissioner was all that it held falling within the scope of the request.

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

12. Section 35(1)(a) FOIA states that information is exempt from disclosure if it relates to the formulation or development of government policy. It is a classed based exemption in that the information simply needs to be of the type described in order for it to be exempt. There is no need for its disclosure to cause any harm for the exemption to be engaged. However as the exemption is subject to the public interest, any harm caused by disclosing the information will be considered when assessing the value in maintaining the exemption.
13. The term 'relates to' can be interpreted quite widely. As the Commissioner is unable to discuss the details of the information in the main body of this notice he has produced a confidential annex which has been made available only to the DoH. This explains why the Commissioner is satisfied the withheld information does relate to policy formulation. For the purposes of the open version of this notice the Commissioner can say that the requested information relates to an article which discusses the latest research on whether patients admitted to hospital at weekends are at greater risk than those admitted on a weekday. This issue is one of the drivers behind the Government's

proposals to implement a seven day NHS Service. This in turn required changes to doctors' contracts. At the time the requested information was created, formulation of the Government's proposals on doctors' contracts was at a very advanced stage. Nevertheless, having viewed the information the Commissioner is satisfied that it does deal with the process by which policy is formulated and steered through to its implementation. Therefore the exemption is engaged.

Public interest test

14. Section 35(1)(a) is subject to the public interest test which provides that, even where an exemption is engaged, the information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
15. The DoH recognises that openness in Government may increase public trust in and engagement with Government. It also acknowledged that there is a public interest in knowing what information the Secretary of State received, when and from whom. The Commissioner considers this underestimates the public interest in disclosing the information. The proposals to provide a seven day NHS Service, is a major piece of Government Policy. The implementation of that policy would have a major impact on those living in the UK.
16. Furthermore, in order to create a seven day NHS service the Government is proposing to reform doctors' contracts. At the time of the request, September 2015, it was already clear that there was some resistance to these proposals, particularly from junior doctors and their representative the British Medical Association (BMA). The BMA had described the proposed new contract as being unfair and unsafe, and in August had refused to re-enter contract negotiations. In September, albeit after the request was made, the junior members of the BMA voted for industrial action. This is indicative of the state of the industrial relations which existed at the time of the request. The dispute was and still is a major news story and the issue is one which the public has very real concerns about. Both sides to the dispute have naturally sought to gain the public's support for their position.
17. The research and subsequent article in the British Medical Journal identified that patients admitted during the weekend were more likely to die than those admitted during the week. The complainant has argued that the DoH used the research to support its position in favour of introducing a seven day NHS Service. The Commissioner does not dispute the complainant's contention that the DoH used the report's findings to support its reform.

18. The complainant contends that if the DoH is using the report in such a way, the public should have access to information which sheds light on the independence of that report. Although the Commissioner is satisfied that the withheld information does not reveal any interference with the report's conclusions, he does recognise the strength of the complainant's argument that there is a value in disclosing information relating to the extent of the DoH's involvement in the report.
19. In favour of withholding the information the DoH has argued that section 35 is intended to ensure that the formulation and development of policy is not prejudiced by concern over the potential for information recording the candid exploration of all options to be disclosed. It has stated that civil servants and subject experts need to be able to engage in the free and frank discussion of all the policy options internally, to expose their merits and demerits. Their ability to do so will be affected by their assessment of whether the content of such discussions will be disclosed in the near future.
20. The Commissioner accepts the potential for the disclosure of information to have the chilling effect described above. However the extent to which the disclosure of any particular piece of information would have such an effect depends on the nature of the information itself. Having viewed the withheld information the Commissioner finds that the majority of it simply reports information provided by third parties and which those parties intended to disclose to the public. The remaining information does contain, what the DoH says is in effect, advice but the Commissioner considers that advice to be a very routine response to the issue it deals with. He is not convinced its disclosure would have any significant chilling effect.
21. The Commissioner has also considered the stage which the policy process had reached at the time of the request. The intention to deliver a seven day NHS Service was a manifesto commitment of the current Government. The pay review body responsible for providing independent advice to the Government on pay for doctors, the Doctors and Dentists Remuneration Board (DDRB) had already been tasked with providing the Government with its recommendations and observations on the proposed changes to doctors' contracts. The DDRB was given this remit in 2014 and it published its conclusions in July 2015. Since then NHS Employers and doctors have been in negotiation over the reforms and changes to contracts. It is clear therefore that the formulation of the Government's policy in respect of doctors' contract was at very advanced stage by the time the request was made.
22. The Commissioner also notes that in July 2015 the Health Secretary gave a speech at the King's Fund, London which is described on the

GOV.UK website as setting out the direction of reform for the future NHS.

23. All of this would suggest that the policy process had been completed, or was reaching its conclusion. Certainly some elements of the policy appear to have been entering their implementation stage.
24. However it is too simplistic to say that the Government's policy on the reform of the NHS was fully formed by the time the request was made. It is understood from the DoH that the Government's intention is to introduce its seven day NHS Service over the life time of the current parliament. The relevance of the research discussed in the BMJ article is of relevance to the overall policy, not just the reforms of doctors' contracts. Therefore although the policy formulation was at an advanced stage the Commissioner accepts that at the time of the request it was likely that further formulation or development of that wider policy would be required. Furthermore, until the negotiations with the doctors had been concluded there was still potential for the policy in respect of the reform of their contracts to be refined or amended.
25. The Commissioner finds that at the time of the request the policy process was at an advanced stage, but that it is likely the policy formulation process was still ongoing and that some elements of the overall policy were entering the implementation stage.
26. Therefore although the Commissioner considers that due to the character of the requested information, the risk of its disclosure having a significant chilling effect, is slight, he concedes that any effect it could have would impact on ongoing policy work. This increases the public interest in maintaining the exemption. The reform of the NHS is a major policy objective of the Government and therefore represents a significant proportion of the DoH's work. This increases the public interest in maintaining the exemption.
27. As there is still scope for further policy formulation the Commissioner also accepts the need for the DoH to have safe space in which debate issues are free from external interference and distraction. However the Commissioner again has to have regard for the nature of the actual information requested. Having viewed that information he is not convinced it can be characterised as a record of a candid internal debate and this decreases any argument that it should be withheld to preserve the safe space required by officials and ministers when formulating policy.
28. The complainant has provided a counter argument to the need to preserve safe space. In broad terms, the complainant, who describes the proposed contract reforms as flawed and potentially dangerous,

argues that if the requested information provided grounds for challenging the policy it is in the public interest to disclose that information before the policy is fully in force. The Commissioner cannot comment on the complainant's premise that the policy is flawed, but recognises the logic of an argument that there is value in disclosing information that would allow the public to challenge a policy before it is set in stone. However this would always need to be balanced against any harm that would arise. More importantly however, having regard for the actual information captured by the request, the Commissioner does not consider it would fuel the public debate of the Government's reforms to any significant degree.

29. The DoH has described the reform of doctors' contracts as an extremely sensitive and controversial issue. At the time of the request the NHS Employers were still involved in negotiations with the doctors' representative, the BMA. The DoH has argued that disclosing the information would have a negative effect upon the ability of the NHS and the Government to implement the new contract and to successfully conclude negotiations. Although the Commissioner accepts that the information does relate to a controversial issue, he does not find that the information itself is controversial. Furthermore, if the DoH's argument is that disclosing the information could strain relationships between the employers and the doctors, this argument has to be viewed against the relations as they existed at the time of the request. The Commissioner does not consider the disclosure of the information would exacerbate what was already a difficult relationship.
30. In weighing the public interest the Commissioner has taken account of the character of the information itself. He has found that there would only be very limited harm caused to either the formulation of policy or the ongoing negotiations with doctors which aim to implement elements of the proposed reforms. Against this is the public interest in disclosing information which would reveal the extent of the DoH's knowledge of, or involvement in, the research. The Commissioner places weight on the public having confidence in the integrity of research that supports the DoH's case for reforming the NHS. This public interest is sufficient to outweigh the limited public interest in maintaining the exemption. Therefore as the public interest in maintaining the exemption does not outweigh the public interest in disclosure the Commissioner finds that the DoH is not entitled to rely on the exemption.
31. The Commissioner will now consider whether the DoH can rely on the exemption provided by section 35(1)(d).

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

32. Section 35(1)(d) states that information held by a government department is exempt if it relates to the operation of any Ministerial Office. Section 35(5) defines a ministerial private office as being any part of a government department which provides personal administrative support to a minister of the Crown
33. As with section 35(1)(a) the term 'relates to' is interpreted widely. However, as explained in the Commissioners guidance on section 35, this does not mean that all information with any link to a ministerial private office is protected by the exemption. Section 35(1)(d) refers specifically to the **operation** of a private office. In effect therefore the exemption is limited to information which is itself about the routine administrative and management processes of the private office.
34. Having viewed the withheld information the Commissioner finds that it does not relate in any obvious way to the operation of the Ministerial private office. The DoH's arguments as to how the exemption is engaged are limited. It has simply explained that the information relates to advice provided to a minister and how that advice was given.
35. The Commissioner has looked at the public interest arguments presented in favour of maintaining the exemption to see whether these shed more light on the DoH's grounds for applying the exemption. The DoH has lead with similar arguments to those it presented in support of maintaining section 35(1)(a), ie the risk that disclosure would prejudice the ability of officials to provide timely advice without having to be concerned about the possible reactions of the public if that advice was disclosed. It argued that it is important that the independence of the advice is preserved and not subject to this chilling effect. The DoH continues that there is a public interest in Ministers' private offices being able to organise the Minister's day free from concerns about public perception.
36. The Commissioner accepts that the advice passed through the Minister's private office. However this does not mean that the information necessarily relates to the operation of that office. Nor has it been explained how the disclosure of the information would impact on the ability of the Minister's private office to organise the Minister's day. The Commissioner is sceptical that the potential for one particular piece of advice to be the subject of an FOI request at some time in the future would be a factor considered by a Minister's private office when deciding which of the issues, competing for the minister's attention, should be prioritised.

37. Therefore the Commissioner is not satisfied that the information relates to the operation of the Ministerial private office. The exemption is not engaged. Therefore the Commissioner is not required to consider the public interest test,
38. As the Commissioner has found that neither of the exemptions cited by the DoH can be relied upon to refuse the request, the Commissioner requires the DoH to communicate the information to the complainant.

Right of appeal

39. 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

40. 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.
41. 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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