

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the financial modelling of the reforms to junior doctor contracts. The DoH refused to disclose the requested information under section 35(1)(a) FOIA.
2. The Commissioner's decision is that section 35(1)(a) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 8 March 2016 the complainant requested information in the following terms:

"I would like to request some information please, preferably in electronic form, and preferably in spreadsheet (e.g. Excel) format. I will also accept the information in other forms.

On the NHS Employers website, in the Q&A section on Junior Doctor Contracts, the site mentions that "modelling is ongoing to establish the exact costs of pay protection for each year to 2019".

I am interested in seeing any modelling that has been done thus far (including nonfinalized information) in regards to Pay Protection, but also more widely to Junior Doctor pay. The website mentions modelling out to 2019, however I would also be interested to see Junior Doctor

pay forecasts beyond 2019, if available. I would also like to see all previous iterations of the modelling, as the proposals to the BMA have changed, up to the most recent available.

To clarify, this request is in regards to total (aggregate) Junior Doctor pay per year for England, and forecasts depending on proposed new contracts."

5. The DoH responded on 6 April 2016 and refused to provide the requested information citing section 35(1)(a) of the FOIA as its basis for doing so.
6. DoH provided an internal review on 22 April 2016. It maintained its original position.
7. On 27 April 2016 the complainant contacted the ICO as he was dissatisfied with the application of section 35(1)(a) FOIA. During the course of the Commissioner's investigation, the DoH altered its position and applied section 12 FOIA to the request of 8 March 2016 as it said that it would exceed the cost limit to comply.
8. Based upon the DoH's updated response, the complainant made a refined request on 15 October 2016 under the following terms:

"I will now provide revisions to the original request, as specified below in accordance with the suggestions, to hopefully satisfy the criteria (DoH suggestions underlined): 1) exclude a preference for a specific format; I will accept ANY format. (NB: A preference, by definition, still means I would accept any format). 2) cut down the number of years, so narrowing down the datelines involved in the searches; I would like to see modelling from 2016 to 2019. 3) limit to either final or non-finalized information; I will accept final information. If not available, I will accept non-finalized information. This should not be used as grounds of refusal - I am providing flexibility to the benefit of the DoH. 4) review your need all previous iterations. I do not need all previous iterations. I would be satisfied with one iteration."
9. On 14 November 2016 the DoH responded, if refused to disclose the information falling within the scope of the refined request as it said that it was exempt under section 35 FOIA.
10. As the complainant was dissatisfied with the DoH's response to his refined request he asked for an internal review.
11. On 9 December 2016 the DoH provided the complainant with the result of the internal review in relation to his refined request, it upheld the application of section 35(1)(a) FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 17 December 2016 to complain about the way his refined request (dated 15 October 2016) for information had been handled.
13. The Commissioner has considered whether the DoH was correct to apply section 35(1)(a) FOIA to the withheld information.

Background

14. The DoH explained that the dispute regarding the junior doctors terms and conditions of service was a very high profile and contentious political issue in 2016. It involved six sets of industrial action by NHS staff.
15. It went on that while the British Medical Association (BMA) removed the immediate threat of further industrial action on 26 October 2016 (which post-dates the refined request), it remains in dispute with the DoH and NHS Employers over the contract and it is not the case that, because the mandate for industrial action has been lifted, the documents relate to an old policy and therefore may be disclosed. It said that this remains an active "live" policy area with direct links to the policy on the Government's commitment to a seven day NHS. Disclosing sensitive financial material that relates to the DoH's position in negotiations will affect its current and future position in achieving seven day services.
16. It confirmed that the BMA has not formally to date accepted the new contract. There was a meeting at the BMA on 16th February 2017 and industrial action remains a standing item on the agenda. Certain sections of the junior doctor community continue to adopt an adversarial approach with the DoH. A recent letter from the BMA to the Prime Minister dated 17 January 2017 addressing the levels of funding in the NHS, demonstrate the nature of the BMA's relations, and by analogy certain sections of junior doctors, with the DoH.

Reasons for decision

Section 35(1)(a)

17. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
18. 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.
19. 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.
20. The information that has been requested is on the transitional costs associated with the introduction of the new contract for junior doctors.
21. The modelling of these costs is necessary in order to facilitate the effective implementation of the overall policy on the new contract. The Commissioner is satisfied that it forms part of the process for formulating the policy.
22. The introduction of a new contract for junior doctors is part of the Government's wider policy objective of creating, what is often referred to as, a seven day national health service. It is a major piece of Government policy.
23. At the time of his request the Government's policy on junior doctors' contracts had been finalised, however in its submission to the Commissioner, the DoH has argued that the junior doctors' contract has not been completely rolled out across the country, and will not be for some time. There is a phased approach to implementation that runs to October 2017. However, in the absence of a collective agreement with the BMA, the new contractual arrangements can only be introduced for individual junior doctors at the individual Trusts when a junior doctor moves to a new training placement and takes up a new contract of

employment. As such, the policy was still under development at the time of the initial request.

24. The Commissioner is satisfied that although the Government had very clearly signalled its intention to implement the new contract for junior doctors by the time the request was made, the actual process of refining the terms of the contract so that the policy could be implemented is ongoing due to ongoing dispute. This includes the modelling of the transitional costs.
25. In light of this the Commissioner accepts that the information that is being withheld is likely to have fed into ongoing negotiations and can therefore be said to be related to the formulation and development of government policy, therefore section 35(1)(a) is engaged.
26. 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 test

Public interest arguments in favour of disclosure

27. The DoH acknowledged that there is a general public interest in openness and transparency.

Public interest arguments in favour of maintaining the exemption

28. The DoH argued that there is a public interest in protecting the internal deliberative process, which is a key part of all policy making. It said that there is a public interest in ensuring that Ministers are not deterred from a full and proper deliberation of policy formulation. It considers that releasing the material into the public domain at the present time would undermine Ministers' and officials' space for consideration and debate.
29. The DoH believes that any release at this stage of information relating to transitional costs would continue to be damaging to the positive outcomes of the on-going negotiations and this would mean that the taxpayer would not receive the necessary value for money against the budget currently made available.

Balance of the public interest

30. The DoH is concerned that to disclose the requested information whilst the dispute over the junior doctors' contract is still ongoing would erode that safe space and make it more difficult to have the sort of conversations that are needed to develop robust policy. Although the

information itself does not record policy discussions it does set out the basis on which the policy decisions around the costs of introducing the new contract are based. Furthermore it is clear that the modelling process is an ongoing one. The Commissioner accepts that being able to set out the intricate details of the policy for internal scrutiny is an important part of the policy process. It is plausible that to disclose this information at a sensitive time in the policy's development would exacerbate the dispute making it more difficult to effectively deliver the policy.

31. There is an ongoing dispute and relationships between the two sides of that dispute need to be sensitively managed. In these circumstances there is an argument that the DoH also needs a safe space in which to conduct negotiations with the doctors' representatives in order to give the policy the best chance of being successfully introduced. It may therefore not be appropriate to disclose information produced to facilitate such discussions to the world at large, which a disclosure under FOIA is regarded as being. The Commissioner is therefore satisfied that disclosing the information would have a detrimental impact on the ongoing policy process and on the chances of the policy being effectively implemented.
32. The Commissioner has also considered whether disclosing the information would have any chilling effect on the candour of internal policy discussions. The 'chilling effect' is a term used to describe the impact that disclosing one piece of information at a given time could have on future internal debates. If disclosing the withheld information in the circumstances that existed at the time of the request meant that officials and ministers felt unable to discuss other policy matters as openly in the future this would work against the public interest. The Commissioner is normally sceptical of chilling effect arguments. However each case needs to be considered on its own merits. In this case the request was received when there was the threat of industrial action. The Commissioner considers that to disclose the information in these circumstances could be prejudicial. It follows that if it was disclosed officials might speculate that other, similar, information which they previously thought exempt from disclosure could be released. This would make them more reluctant to discuss such matters as freely and frankly as they had before.
33. The impact would be greatest on the formulation or development of policies associated with the introduction of the new contract for doctors. Given the breadth of the proposed health service reforms and their high profile, it is possible that the chilling effect would be felt in a number of related policy areas.

34. In weighing the public interest in favour of disclosure against the public interest in favour of maintaining the exemption the Commissioner has had regard for the genuine public debate around the reforms to the health service and the new contract for junior doctors in particular. However the Commissioner is satisfied that disclosing the information in the circumstances that existed at the time of the request would be detrimental to the ongoing negotiations with the BMA and therefore the ongoing policy making process and would make the effective phased introduction of that policy more difficult. There is also the potential for the disclosure to have some chilling effect on the quality of other policy debates on health reforms. On balance the Commissioner finds that the public interest in maintaining the exemption is greater than the public interest in disclosure. The section 35(1)(a) FOIA exemption was therefore correctly engaged.

Right of appeal

35. 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

36. 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.
37. 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

Pamela Clements
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