

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 June 2017

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

#### Decision (including any steps ordered)

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1. The complainant has requested email correspondence between particular individuals for a particular period. The DoH refused to disclose the requested information under section 35(1)(a), section 36(2)(b)(i) and (ii) and 40(2) FOIA.
2. The Commissioner's decision is that section 35(1)(a) and 40(2) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

#### Request and response

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4. On 5 July 2016 the complainant requested information of the following description:  
  
*"Please provide all emails sent/received (or cc:d in) between between Jane Allberry at the DH and Sir Bruce Keogh at NHS England for the last 24 months.  
Please provide any attachments with the emails.  
If any emails are withheld under any exemption, please state how many emails have been withheld."*
5. On 27 July 2016 the DoH responded. It refused to provide the requested information under section 35(1)(a) and 40(2) FOIA.
6. The complainant requested an internal review on 27 July 2016. The DoH sent the outcome of its internal review on 9 August 2016. It

provided the complainant with some information but upheld the application of section 35(1)(a) and 40(2) FOIA to make redactions to the information provided and upheld the application of section 35(1)(a) FOIA to withhold some information in full.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 10 August 2016 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the DoH additionally applied section 36(2)(b)(i) and (ii) in the alternative to section 35(1)(a) FOIA.
9. The Commissioner has considered whether the DoH was correct to apply section 35(1)(a) or section 36(2)(b)(i) and (ii) and 40(2) FOIA to the withheld information.

## **Reasons for decision**

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### **Section 35(1)(a)**

10. Section 35(1)(a) provides that information is exempt if it relates to the formulation and 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 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.
12. 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.

13. The DoH considers that the withheld information relates to the Government policy on a seven day NHS. The policy in formulation relates to the roll-out of seven day services within the NHS and links directly to the work being undertaken on health professionals' work contracts. It said that the Government is committed to seven day services in NHS hospitals being fully implemented by 2020.
14. The information therefore 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 5 July 2016 after the Review Body on Doctors' and Dentists' Remuneration (DDRB) report on contract reform<sup>1</sup> was published. The withheld information dates from July 2015 (at the time this report was published) to January 2016. The Commissioner has previously acknowledged that the publication of the report 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."*

15. 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.
16. The exemption is interpreted broadly and will capture a wide variety of information. The information contained within the emails clearly relates to the evidence base for seven day services within the NHS and therefore feeds directly into ongoing contract reform at that time.
17. 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.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445742/50576\\_DDRB\\_report\\_2015\\_WEB\\_book.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445742/50576_DDRB_report_2015_WEB_book.pdf)

18. 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**

19. The DoH acknowledges the strong public interest in disclosing information about seven day services, which is a live and high profile issue. The NHS is a strong, emotive subject and continues to remain at the forefront of the public mind, as is demonstrated by the unrivalled national media coverage the NHS receives on a daily basis. The importance placed by the public on information regarding the NHS is clear and acknowledged by the DoH. In addition to this, disclosure would be in line with the Government's transparency and openness agenda.

### **Public interest arguments in favour of maintaining the exemption**

20. The DoH considers that the withheld information is exempt from disclosure pursuant to s. 35(1)(a) of the FOIA, since the request for information relates to the formulation of seven day hospital services policy and links directly to the work being undertaken on health professionals' work contracts, for example, junior doctors' contracts. It said that this is a live, ongoing and highly sensitive policy area.
21. It explained that the British Medical Association (BMA) remains in dispute with the government and NHS Employers over the introduction of the new contract for junior doctors. It also remains in negotiations with the government and NHS Employers on reform of the consultant contract. The next meeting to negotiate this will be held on 16 June 2017. This will be followed by a BMA consultant conference where negotiations will be discussed at the beginning of July. It said that any disclosure of the withheld information at this stage could have an impact on negotiations and on industrial relations.
22. It went on to say that the information sought in this case engages this exemption because it relates to advice and frank exchanges between the DoH and officials and it's external delivery partner - NHS England - during the development of the policy.
23. The Department considers that specific harm may result from the release of this information. It said that the majority of the emails contain full and frank exchanges between senior officials who are

working under pressure and leading teams to prepare work for the Secretary of State.

24. The DoH takes the view that the section 35 exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options. The DoH must be afforded the possibility to openly consider all of the options, including strengths and weaknesses. The options that are being presented in the withheld information have not been written to include a full analysis of the pros and cons of each option. To make disclosure at this stage may give a one-sided view of the options and lead to scaremongering.
25. Civil servants and officials need to be able to engage in the free and frank discussion of all the policy options internally, to expose their merits and demerits and their possible implications as appropriate. Disclosure of information protected under section 35 could prejudice good working relationships, and the neutrality of civil servants who may not feel able to present all of the options for fear of the information being released into the public domain.
26. It considers there is a very strong public interest in ensuring that there is a safe space within which senior officials are able to discuss a wide range of issues, freely and frankly. Putting this information in the public domain would mean that officials might be impeded from offering full and frank advice in the future potentially resulting in poorer decision making and public services. This could impact adversely on value for money for taxpayers and impact the quality of services for patients.
27. The DoH referenced a request for similar information relating to seven day services which was recently appealed to the First Tier Tribunal (Tribunal reference EA/2016/0140 and ICO reference FS50604954). The DoH relied on section 35(1)(a) to withhold the requested information and the Tribunal has upheld the application of the exemption.

### **Balance of the public interest**

28. 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.
29. The withheld information contains emails between the DoH, officials and NHS England from July 2015, the time leading up to, and following

the speech announcing the government's ambition to deliver a seven day NHS service, and January 2016. The request was then made in July 2016. The DoH has previously explained that implementation of the junior doctors contracts was planned for August 2016.

30. 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 further understand the evidence base behind the reforms.
31. The Commissioner has also looked at the fact that the reform of doctors' contracts is a matter of significant public interest. The reforms formalise 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.
32. This increases the public interest in the disclosure of information on the discussions between the DoH and NHS England relating to the evidence base behind the reforms. It is also important to be transparent about the issues discussed within government behind the negotiations to show that the decision-making process was based on sound discussions and advice.
33. 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 argue 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.
34. The Commissioner is satisfied that the withheld information contains candid deliberations relating to the ongoing development of this Government policy however it may not include a full analysis of the pros and cons of each option under consideration. Whilst it may not present a balanced view it 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.
35. It is likely disclosure would add to the information already available and would inform the public debate but the extent to which it would has 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 reforms.

36. 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.
37. 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.
38. The Commissioner notes that the withheld emails discuss some aspects of the evidence base behind the reforms which may have had an impact upon negotiations. It does contain details of views and evidence of the Government's negotiating position. As the Commissioner is satisfied the policy development was ongoing at the time of the request, 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.
39. 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.
40. 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, that there is sound evidence to support the Government's position and that all pros and cons of options have been explored. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case.
41. Balanced against that the Commissioner has to accept there is significant weight to the safe space arguments given the timing of the request; a month prior to the planned August 2016 implementation for junior doctors.

42. The Commissioner therefore considers that 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 on the exploration of options, disclosure at the time of the request would have impacted on negotiations and the ongoing development of the Government's policy. The exemption was therefore correctly engaged.

### **Section 36(2)(b)(i) and (ii)**

43. Since the Commissioner is satisfied that this information is exempt under section 35, it is not permissible to claim the exemption at section 36 in respect of the same information. The Commissioner has therefore not considered the application of section 36 further.

### **Section 40(2)**

44. Section 40(2) FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3)(a)(ii) is satisfied.
45. One of the conditions, listed in section 40(3)(a)(ii), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act (DPA).
46. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.
47. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
- from that data,
  - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
48. In this instance the DoH has explained that the withheld information includes the telephone numbers, email addresses and the names of junior staff below Senior Civil Service (SCS) level.
49. The Commissioner does consider that this is information from which the data subjects would be identifiable and therefore does constitute personal data.
50. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of



personal data is fair and lawful. The Commissioner has initially considered whether the disclosure would be fair.

51. The DoH explained that the junior officials named would not have any expectation that their personal data would be placed into the public domain, whereas officials graded at Senior Civil Service (SCS) level would as they are responsible for their respective policy areas. Therefore, the DoH would expect that the names of the junior officials should be protected for these reasons.
52. The Commissioner has therefore gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subject set out above by the DoH.
53. Whilst the Commissioner considers that there is a wider public interest in transparency surrounding this matter, she does not consider that there is a legitimate public interest in disclosure of the names and direct contact details redacted.
54. After considering the nature of the withheld information and the reasonable expectation of the data subjects, the Commissioner believes that disclosure under FOIA would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subjects in this case. Therefore the Commissioner's decision is that section 40(2) FOIA is engaged and provides an exemption from disclosure of the redacted information.

## Right of appeal

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55. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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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**Information Commissioner's Office**  
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