

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2018

Public Authority: Department of Health and Social Care (DHSC)

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant requested information held by the Department of Health and Social Care (DHSC) into delayed payments to suppliers and the impact of the falling pound on NHS finances following the referendum on exiting the European Union.
2. The DHSC confirmed it held a report on the analysis on the potential effects of the UK's exit from the European Union and the rate of pound sterling on NHS finances but considered this exempt from disclosure by virtue of the exemptions at sections 43, 36, 27 and 29 of the FOIA.
3. The Commissioner's decision is that the DHSC has correctly applied sections 43(2), 36(2)(b)(i) and (ii) to withhold the information.

Request and response

4. On 11 January 2017, the complainant wrote to the DHSC (the then Department of Health) and requested information in the following terms:

"FOI requests delayed payments

In recent testimony before the PAC committee David Williams acknowledged that trusts were delaying payments to suppliers. Under FOI could you please provide:

- 1) *Any estimates seen by Mr Williams of the extent of this.*

- 2) *Copies of any reports produced in the last 3 months and seen by Mr Williams into the extent of delayed payments to suppliers*
 - 3) *Any estimates of the liability arising from this.*
 - 4) *Any estimates of the increase in the length of time it takes the NHS to pay suppliers as a result.*
 - 5) *Any reports produced in the last 7 months seen by Mr Williams into the affect of the falling pound no [sic] NHS finances.*
 - 6) *Any reports produced in the last 7 months seen by Mr Williams into the affect of BREXIT/EU referendum no [sic] NHS finances."*
5. The DHSC responded on 8 March 2017. For parts 1-4 of the request the DHSC provided information. For parts 5 and 6 the DHSC confirmed information was held and the DHSC had carried out an analysis on the potential effects of the UK's exit from the European Union and the rate of pound sterling on NHS finance. The DHSC considered this information exempt under section 43 of the FOIA.
 6. The complainant requested an internal review of this decision, specifically the decision by the DHSC to withhold information held in relation to parts 5 and 6 of his request.
 7. Following an internal review the DHSC wrote to the complainant on 14 July 2017. It stated that it had reviewed the request and found that section 43(2) did not apply to all of the information being withheld but for the information that did still engage the exemption, the public interest favoured withholding the information. The DHSC also identified that for the remaining information not already exempt under section 43(2), sections 36(2)(b)(i), (ii) and (c) provided a basis for withholding the information.

Scope of the case

8. The complainant contacted the Commissioner on 14 August 2017 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the DHSC also sought to apply sections 27(1)(a) and 29(1)(a) and (b) to withhold the requested information. The Commissioner considers the scope of her investigation to be to determine if any of the cited exemptions apply and provide a basis for withholding the requested information.

Reasons for decision

10. The Commissioner has first considered the use of section 43(2) to withhold certain information from the complainant. This information has been highlighted by the DHSC in its submissions to the Commissioner.

Section 43(2) – prejudice to commercial interests

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

12. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

13. The withheld information is contained in the report, specifically the information that contains analysis estimates of suppliers' exposure to the changing rate of sterling. This information is commercial in nature as its purpose is to examine the commercial impact of exiting the EU on suppliers to the NHS.
14. Having determined that the information identified in the report by the DHSC is commercial in nature the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

The nature and likelihood of the prejudice occurring

15. The DHSC initially stated that it considered disclosing this information would prejudice both its own commercial interests and those of the suppliers. However its arguments seem to focus more on the prejudice to its own commercial interests and the Commissioner has therefore focused her attention on this.

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

16. In addition to this, the DHSC has provided no evidence to suggest it consulted with any of the suppliers about the alleged prejudice to their commercial interests. On this basis, the Commissioner would be unable to accept the arguments relating to the suppliers commercial interests. Arguments need to be more than just speculative and the Commissioner would expect any third party to be consulted unless it can be demonstrated that a public authority has prior knowledge of a third party's concerns. Whilst the Commissioner does not dispute that the DHSC can probably state with some certainty that suppliers would not consent to the disclosure of the withheld information, this is not the same as being able to demonstrate that there would be likely to be prejudice to the supplier's commercial interests. Without the suppliers input on this the Commissioner does not accept it has been shown that disclosing the requested information would be prejudicial to the supplier's commercial interests.
17. In terms of the prejudice to the DHSC's commercial interests; the DHSC argues that disclosure could weaken its position in negotiations with suppliers by revealing market sensitive information that contains analysis estimates of suppliers' exposure to the changing rate of sterling. The DHSC argued this would impact on its bargaining positions in future contractual negotiations. Further discussion of the prejudice arguments can be found in the confidential annex provided to the DHSC.
18. The Commissioner accepts that the commercial information in the report would have a prejudicial impact on the DHSC's commercial interests should it be disclosed. Her view is that when an issue is ongoing, as Brexit negotiations are, there is likely to be a greater argument that disclosing information not otherwise publicly known about the process, such as the analysis of the impact of the fluctuating value of sterling on suppliers to the NHS, will impact on DHSC's processes and negotiations. This is because any contractual negotiations it may have in the future will already be made more difficult just by the fact there is uncertainty on the future following the decision to leave the EU but if it was also made known the analysis that the DHSC has done to consider any potential fluctuations this would give an insight into the DHSC's position and has the real possibility of influencing negotiations.
19. The complainant argues that the claim that disclosure of the exchange rate exposure of individual firms would be prejudicial is not supported by argument and can be countered, for example those with an interest can estimate exposure just as the DHSC has, and it is possible that this exposure is already well understood by investors, the market and companies and already discounted.
20. The complainant also argues that to engage section 43(2) it has to be shown that the commercial activity is conducted in a competitive

environment. He argues the NHS is a monopsony - it is in most cases the only purchaser and therefore regardless of whether this information is disclosed the suppliers will have little choice but to sell for the price offered by the NHS.

21. This may well be the case and it cannot be discounted that investors and companies, including suppliers, will be well aware of the situation and will estimate exposures. It is also to some extent true that suppliers will have no choice but to still sell products or services to the NHS and the DHSC regardless of the situation; however this argument dismisses the fact that the NHS and DHSC is also reliant on the suppliers and there is a very real risk that disclosing the withheld information will undermine the negotiating positions of the NHS and DHSC by revealing information on its potential commercial position following the decision to leave the EU. This information is not in the public domain and, whilst it may have been speculated on, revealing details of the specific forecasting done would impact on the ability of the DHSC to engage in effective negotiations to get the best quality for the best value. More details on this are included in the confidential annex which has been provided to the DHSC.
22. The Commissioner considers that section 43(2) FOIA was therefore correctly applied and she has gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

23. The DHSC recognises the public interest in the disclosure of information that allows for the scrutiny of how public money is spent, particularly where a public authority is purchasing goods or services. There is a public interest in ensuring public authorities get value for money and this is very relevant at a time when there is a public debate around the role private companies have in delivering public services.
24. The DHSC also acknowledges the strong public interest in making information readily available on the NHS and the importance of openness and transparency in Government. The NHS remains at the forefront of public consciousness as can be seen by the level of national media coverage it receives on a daily basis. The DHSC therefore recognises the weight this places on the public interest in disclosure. There is a public interest in the scrutiny of how public money is spent, particularly where a public authority is purchasing goods or services.
25. The complainant argues that the public has been provided with contradictory and often misleading views as to the effect of Brexit on NHS finances and that it is therefore in the public interest for information such as this to be disclosed to allow the public to have

accurate information on which to make decisions and have informed debates.

26. The complainant also points to the fact that prior to the EU referendum it was claimed that Brexit would allow millions to be added to NHS finances². This was then contradicted by a senior NHS official warning of the costs of Brexit to the NHS on national television³. This contradictory information is the reason the complainant argues there is a public interest in disclosure.

Public interest arguments in favour of maintaining the exemption

27. The DHSC argues that releasing such commercially sensitive information could be seen to undermine the supplier-purchaser relationship and may deter suppliers from taking forward commercial activity with the DHSC in the future. This would in turn reduce competition and prevent the DHSC from getting the best value for public funds. The DHSC believes the likelihood of suppliers being somewhat deterred from dealing with it in future is significant as they would be concerned of the risk that information that could be harmful to their commercial interests could be placed in the public domain.
28. The DHSC also considers that releasing such commercially sensitive information would weaken its position in negotiations with suppliers by revealing market sensitive information that contains analysis estimates of suppliers' exposure to the changing rates of sterling. DHSC believes this could prejudice its commercial interests if made public by impacting on its bargaining positions in future contractual negotiations.

Balance of the public interest arguments

29. The Commissioner recognises there is a strong public interest in the disclosure of information which sheds some light on to the situation regarding NHS finances post-referendum. She is aware that there has been much debate on the subject of the NHS and the seemingly contradictory information provided by both campaigns in the run up to the referendum. Clearly disclosing information which would assist in informing the public about this would be in the public interest.

² www.bbc.co.uk/news/uk-politics-eu-referendum-36450749

³ www.bbc.co.uk/news/uk-politics-eu-referendum-36353145

30. The Commissioner is conscious of the fact that at the time of the request, the Government and DHSC were in the early stages of negotiations with the EU on the terms of the UK's exit. There was a great deal of uncertainty and it was necessary for all areas of government to forecast and analyse the impact of the result of the referendum. In this case, the information that the DHSC seeks to withhold under section 43(2) relates to the contracts held with suppliers and how these may be impacted by the fluctuating currency. This information, it argues, would weaken negotiations with suppliers and broader negotiations with the EU by disclosing details of the situation which would not otherwise be publicly known.
31. The Commissioner has accepted there would be a prejudice to the DHSC's commercial interests through disclosure of this information and she must therefore accept that there is weight to the argument this would not be in the public interest. Disclosing information which would put the DHSC at a disadvantage with its suppliers when re-negotiating contracts or working within existing arrangements would not be in the public interest.
32. The arguments for disclosure are somewhat weakened when considered in the context of the specific information that has been withheld. Information on contracts and the analysis of the impact of the fluctuations in sterling on these contracts is still likely to be of some interest but it is not broader information on the NHS in general and its future which would likely carry greater weight. The information in question is specific to one particular area and although it would offer greater transparency it is not sufficient to outweigh the significant public interest in preventing prejudice to DHSC's commercial interests and its ability to negotiate contracts and the government's terms of exit with the EU.
33. Therefore, the Commissioner considers that the public interest in ensuring the DHSC was not put in a commercial disadvantage outweighs any public interest in disclosure. Section 43(2) was therefore properly engaged.

Section 36 – prejudice to the effective conduct of public affairs

34. The remaining information in the report that was not found to engage section 43(2) has been withheld on the basis of section 36(2)(b)(i), (ii) and 36(2)(c).
35. Section 36(2)(b)(i) and (ii) provide that information is exempt if in the opinion of a public authority's qualified person, disclosure would or would be likely to prejudice:

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation

36. For the exemption to be engaged the proper qualified person for the public authority must have given his or her opinion on the application of the exemption. The qualified person may apply the exemption on the basis that inhibition either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
37. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur. The choice between the two limbs will affect the balance of the public interest test.
38. In this case the DHSC provided the Commissioner with information to show that the proper qualified person, Lord O'Shaughnessy, gave his opinion that disclosure *would* prejudice the free and frank provision of advice, and the free and frank exchange of views on 3 July 2017.
39. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the DHSC is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
40. The Commissioner has issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:
- "The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*

41. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
42. The Commissioner has considered the information placed before the qualified person and is satisfied that it included the relevant arguments. The qualified person was provided with a submission outlining the reasons for applying the exemptions as well as the counter arguments in favour of disclosure. The qualified person also had access to the withheld information which includes an initial analysis of the impact of current fluctuations on finance, purchasing, operations, income and contracts and the Commissioner is satisfied that the qualified person was sufficiently well informed to allow them to form a reasonable opinion on whether or not the information should be disclosed.
43. The Commissioner has reviewed a full un-redacted version of the withheld information and is satisfied that the qualified person's opinion that disclosure would inhibit the free and frank exchange of views and the frank provision of advice was reasonable. The portions of the report not already withheld under section 43(2) contain an appraisal and analysis of the potential impact of the fluctuating currency on various aspects of NHS operations. Apart from the specific contractual issues which are discussed in the analysis of the section 43(2) exemption, the report focuses on the effects on operations, general finances and purchasing. It is a free and frank discussion and analysis about live and ongoing issues recorded at a sensitive time, not long after the referendum.
44. In light of this the Commissioner considers that it was at least reasonable for the qualified person to conclude that disclosure would affect the candour with which its officials contribute to future discussions and discourage individuals from sharing their free and frank views.
45. The Commissioner has decided that the section 36(2)(b)(i) and (ii) exemptions are engaged and she has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

46. The complainant argues that the public has been provided with contradictory and often misleading views as to the effect of Brexit on NHS finances and that it is therefore in the public interest for information such as this to be disclosed to allow the public to have accurate information on which to make decisions and have informed debates.

47. The complainant also points to the fact that prior to the EU referendum it was claimed that Brexit would allow millions to be added to NHS finances. This was then contradicted by a senior NHS official warning of the costs of Brexit to the NHS on national television. This contradictory information is the reason the complainant argues there is a public interest in disclosure.
48. For its part the DHSC said that it recognised that there is a public interest in promoting transparency and openness in the way public authorities operate. It acknowledged that there is a general public interest in transparency of discussions within government and in particular how it plans and implements its strategy for presentation of its policies.

Public interest arguments in favour of maintaining the exemption

49. The DHSC's reasons for maintaining the exemption focused on the 'chilling effect' and 'safe space' arguments. It explained that in its view there is a strong public interest in ensuring a safe space for officials to discuss issues freely and frankly in the knowledge that the contents of those discussions will remain private. If this information was released, it would, it said, create a future 'chilling effect' where officials felt unable to provide frank advice and views over concerns that those communications could be made public in the future. It argued that this would be a highly undesirable position, especially in respect of referendum/election periods where unexpected issues regularly arise and frank discussions are essential in order to make difficult decisions as quickly and effectively as possible.
50. In addition, the DHSC said that it considered the 'chilling effect' adds further weight to the public interest in withholding the information because it relates to a live issue and one that is front and centre of the UK's exit from the EU. It argued that officials needed to be afforded a safe space in order to have such discussions about live issues openly and candidly, adding further weight to withholding the information. It argued that disclosing the information could have a detrimental impact on value for money for taxpayers which could reduce the resource available for tax payers.
51. Finally, the DHSC referred to the timing of the request which it said was a key consideration because issues such as the UK's exit from the EU are still live and high profile. It said that release of information pertaining to the effects of Brexit on DHSC and the NHS may prejudice the conduct of negotiations instigating the UK's exit from the EU. It argued that the need for a safe space will be strongest when an issue is still live.

Balance of the public interest arguments

52. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
53. The Commissioner has first considered the arguments for disclosure and acknowledges that the Brexit is a matter of great public interest. The finances of the NHS are particularly of interest as there was a great deal of discussion before the referendum on the impact of the UK's exit from the EU on the NHS.
54. Therefore the Commissioner would accept that there is a public interest in transparency and accountability around the Government's analysis post-referendum on the fluctuating currency and the impact on NHS finances.
55. Having reviewed the information that continues to be withheld under these exemptions the Commissioner considers that the public interest in disclosure is relatively high. The information clearly shows details of the analysis of NHS finances in a post-referendum world and this is likely to be of interest to those who were persuaded to vote either way even partly by arguments relating to the NHS. That being said, the information will not affect the outcome of the referendum now and whilst it will provide transparency about the Government's analysis in a post-Brexit environment this must be weighed against the potential harm that would be caused if the information were to be disclosed.
56. The DHSC's arguments focus on the 'chilling effect' of disclosure whereby officials would be likely to be less candid in the free and frank exchange of views or when providing advice. It also referred to the 'safe space' argument which is about the need for a "safe space" to formulate policy and debate 'live' issues" without being hindered by external comment and/or media involvement
57. The Commissioner has reviewed the withheld information and it is clear that the issues discussed were sensitive and still live at the time the complainant made his request. The information records a free and frank analysis provided to the DHSC and in the Commissioner's view disclosure at this point would have been likely to have a chilling effect on the ability of officials to contribute to future discussions about these issues. The report was provided soon after the referendum result and provides the initial analysis of the situation. This was to be used to start planning for possible outcomes. The Commissioner would accept there is

a public interest in allowing the government a safe space to discuss the issues raised by the report free from outside interference given the earlier stages of discussions on the UK's exit from the EU at the time of the report and the request. The timing of the request also adds to the weight given to the chilling effect arguments.

58. On balance the Commissioner finds that there is a strong public interest in maintaining the exemption as disclosure would ultimately lead to poorer quality decision making and hinder the DHSC's ability to discuss and formulate policy on these issues in future.
59. In balancing the public interest the Commissioner has also given due weight to the opinion of the qualified person. As noted above the qualified person's opinion is that disclosure would, rather than would be likely to, have the effects in section 36(2)(b)(i) and (ii), and this carries through greater weight into the public interest test.
60. In conclusion, the Commissioner has found that the withheld information relates to live issues which are still being discussed within government and therefore there is a strong public interest in maintaining the exemption and in all the circumstances of the case the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.
61. As the Commissioner has found these exemptions to provide a basis for withholding the information she has not gone on to consider sections 36(2)(c), 27 or 29 of the FOIA.

Right of appeal

62. 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

63. 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.
64. 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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