

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 October 2018

**Public Authority:** Department of Health and Social Care  
**Address:** 39 Victoria Street  
Westminster  
London  
SW1H 0EU

### Decision (including any steps ordered)

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1. The complainant has requested the second report produced by Sir Robert Naylor on NHS estates in London. The Department of Health and Social Care (DHSC) initially refused the request on the basis of section 43 and later also sought to rely on sections 41 and 35 of the FOIA.
2. The Commissioner's decision is that the section 35(1)(a) exemption is engaged and the public interest favours maintaining the exemption. The Commissioner has therefore not gone on to consider the use of the other exemptions and she does not require any steps.

### Request and response

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3. On 17 June 2017, the complainant wrote to the Department of Health and Social Care (DHSC) and requested information in the following terms:

*"Sir Robert Naylor Review NHS land – Second Paper dealing with London only – FOI Request*

*I refer to the comments in Health Service Journal Expert View London Eye – Ben Clover on 28 April and 4 May 2017 which refer to a presentation by Sir Robert Naylor to the King's Fund and a further report relating to London NHS property only (Weblinks below)*

28 April <https://www.hsj.co.uk/more/newsletters/london-eye-where->



9. As the section 41 exemption was only introduced at a late stage the Commissioner wrote to the DHSC to ask for some further information around the application of this exemption. The DHSC responded to confirm that it also sought to rely on section 35(1)(a) to withhold the information as it related to the formulation of government policy.
10. The Commissioner therefore considers the scope of her investigation to be to determine if any of the cited exemptions – section 43, 41 or 35 – are engaged and, if so, whether the balance of the public interest supports disclosure of maintaining the exemptions.

## Reasons for decision

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### Section 35 – formulation or development of government policy

11. Section 35(1)(a) of the FOIA states that information held by a government department is exempt from disclosure if it relates to the formulation or development of government policy.
12. In order for the exemption to be engaged, the requested information must relate to the formulation or development of government policy. In her guidance on section 35<sup>1</sup>, the Commissioner explains that the term “*relates to*” can be interpreted broadly. The guidance also explains that the Commissioner considers that the term “*the formulation or development of government policy*” refers both to the design of new policy and the process of reviewing or improving existing policy. However, the section 35 exemption does not cover information relating purely to the application or implementation of established policy.
13. The Commissioner also recognises that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process and prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private, and preserves the confidentiality of advisers.
14. Consideration of this exemption involves two stages. First, the exemption will be engaged if the information in question falls within the class described in this section. Secondly, as section 35 is a qualified

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

exemption, it is subject to the public interest test. For information to be withheld, the public interest in maintaining the exemption must outweigh the public interest in disclosing the information.

*Does the withheld information relate to the formulation or development of government policy?*

15. The DHSC has provided some background to explain the reasons for the existence of the second Naylor report which is the subject of this request.
16. In April 2016 the then Secretary of State for Health commissioned Sir Robert Naylor to undertake an independent review of NHS Property and Estates. Sir Robert Naylor was asked to make recommendations on the options available to the NHS to realise better value from the NHS estate in line with the delivery of the vision set out in the Five Year Forward View and to support the delivery of the DHSC's target to release £2 billion of assets for reinvestment and to deliver land for 26,000 homes. The Government response to the Naylor Review, published in January 2018, sets out the strategy for the transformation of the NHS estate.
17. The DHSC states that the timeframe to release land for the 26,000 homes is from 2015-16 to 2019-20 under the Government's Public Land for Housing programme. The disposal of £2 billion of assets was due in 2021-22 but following the 2017 Autumn Budget this target increased to £3.3 billion in capital receipts from 2017-18 to 2022-23. The DHSC argues that this shows the development of policy in relation to these targets is an ongoing issue.
18. The Commissioner does not disagree with this point; there is clearly a push from Government to overhaul the NHS estate to achieve better value and the original Naylor Review was to set out ways to achieve this. The plans to release assets for reinvestment and deliver land for new housing all fed into the Government's overarching aim to transform the NHS estate and deliver the vision set out in the Five Year Forward View<sup>2</sup>. It therefore follows that information on how to achieve this would be information relating to the formulation and development of Government policy on transforming the NHS estate.
19. That being said, the second Naylor review was slightly different. The DHSC has explained that Sir Robert Naylor was asked to provide advice on how to support progress on high value property transactions in

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<sup>2</sup> <https://www.england.nhs.uk/wp-content/uploads/2014/10/5yfv-web.pdf>

London. The analysis presented in the review demonstrated that London represents 57 percent of the total potential value of the financial opportunity in the NHS. To consider this issue in more detail the review developed a second report which explored the opportunities to release estate value and build new homes in London. This is the second report referred to in the request.

20. The second report aimed to identify where effective interventions could make a positive difference (in terms of governance, value realisation or health care benefit) to delivery of projects and programmes of capital investment. The report was commissioned and produced to inform and advise the Secretary of State on the opportunities available in the NHS in London to support the delivery of the DHSC's targets. It is argued it was important that the advice provided was candid and as realistic as possible and the report therefore explored opportunities which were at differing stages of development.
21. The second Naylor report is a strategic analysis of the opportunities available and is used as an evidence source for decisions by Ministers and for policy development. Ministers, through the NHS Property Board, have asked Sir Robert Naylor in his roles as National NHS Estates Advisor to support the delivery of major projects, some of which are considered by the second report. The DHSC states this work is ongoing and although it is aimed at supporting the trusts to deliver their own plans, the report's analysis will continue to inform Sir Robert Naylor, officials and Ministers on the options available and on potential future decisions concerning capital investment priorities. The DHSC maintains the second Naylor report is a crucial tool in ongoing and future policy development and it is of vital importance that advice to Ministers is protected within the safe space provided by section 35(1)(a) of the FOIA.
22. Having had regard to the DHSC's explanations, and having viewed the withheld information, the Commissioner is satisfied that the information, produced for the purpose of exploring opportunities in London to better manage the NHS estate, relates to the development of the Government's wider policy for NHS reform in that it forms part of a wider body of advice to Ministers on how to realise the vision set out in the Five Year Forward View. The Five Year Forward View published by NHS Commissioning Board (NHS England) set out the possible future for the NHS and how to achieve this.
23. The Commissioner therefore considers that the withheld information engages the exemption at section 35(1)(a) of the FOIA.
24. As the Commissioner considers the exemption is engaged, she will go on to consider the public interest arguments.

*Public interest arguments in favour of disclosing the requested information*

25. The complainant argues that the report is of considerable public interest in London as it deals with prospective high-value land sales in London of the NHS estate. The complainant was of the view that if information in the review was on land sales programmes and speculation as to value and commercial partners, specifically in relation to fixed deals already anticipated then this would be in the public interest.
26. The complainant also argues there is a public interest in understanding why those bodies charged with providing health services might be weighing up the advantage of capital receipts and future strategy on services and premises required to provide them now and in the future.
27. It is also argued that all public authorities have to provide land values and there should be no withholding of information on such an important issue as the disposal of heavily used London facilities especially in light of the stated aim of the first Naylor report – to support high value property transactions. There is a public interest in openness and accountability.
28. The complainant believes there is a need to have appropriate healthcare facilities available in London to serve the needs of its population and that any information on decisions to sell NHS assets should be publicly available. This is particularly relevant at a time when there is a public debate around the increasing role private companies have in delivering public services. Transparency around this would assist in open, properly-informed debates.

*Public interest arguments in favour of maintaining the exemption*

29. The DHSC advanced “safe space” arguments in support of maintaining the exemption.
30. It said that in the interests of good government, a safe space is required to develop ideas, debate live issues and reach decisions away from external interference and distraction. It argued that disclosure would hinder its ability to pursue full, candid and proper deliberation of live policy formulation and development, including the exploration of all options as the safe space would be compromised and the ability to formulate sound policy could be hindered by outside influence.
31. It is also argued that section 35 is about the processes that may be inhibited if information is disclosed about government policymaking. In other words, it is not only about the specific information itself, but the broader issue of whether disclosure would inhibit the processes of providing advice in general, leading to poorer policymaking. It is based on the concept of the “chilling effect”.

32. The chilling effect refers to the concept that the disclosure of the detail of discussions would inhibit free and frank discussions in the future, on any issue, and that the resultant loss of frankness and candour amongst contributing parties would damage the quality of advice provided to decision-makers and would potentially lead to poorer policymaking.

*Balance of the public interest*

33. In forming a conclusion on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in transparency and openness regarding the work of the DHSC, and in matters relating to the NHS and its future.
34. When considering the balance of the public interest in relation to section 35(1)(a) the Commissioner generally considers it relevant to take into account the public interest in preserving a degree of confidentiality in the policymaking process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would be considered away from external interference and would remain confidential, where appropriate.
35. The Commissioner recognises that the argument concerning the preservation of a safe space within which to carry out the policymaking process is, in general, valid on the grounds that this will assist in the open discussion of all policy options, including any that may be considered controversial. However, the weight that this argument carries in each case will vary, depending on the circumstances.
36. In this case the Commissioner has taken into account that the information in question relates to the NHS estate; this is an area that gained a lot of media coverage following the first Naylor review. The recommendation in the first review that up to £2 billion of NHS land should be sold to build homes was not without controversy. Whilst it was argued that this would save the NHS money in maintenance and repairs there was also criticism of the plans to refuse access to capital funding to those NHS Trusts that did not identify surplus buildings. The second Naylor review sought to expand on the findings of the first review by identifying opportunities in London and the Commissioner notes the level of detail is much greater, in terms of identifying particular areas of surplus than in the first review which set out the more general principles to meet the vision of the Five Year Forward View.
37. The Commissioner recognises that there is a strong public interest in the preservation of a safe space in which to carry out policy formulation on matters relating to the NHS estate. This is in order that policy consideration can be fully uninhibited and deliver the best outcomes in this important area.

38. The age of the information in question and the stage reached in the policy formulation process at the time of the request is also relevant when considering safe space arguments. In this case, at the time of the request the first Naylor review had been published so the proposals were publicly known. However, there had been no public declaration from the Government as to whether it would be taking up the recommendations. The second review was intended to sit alongside the first review which was at a national level. The second review was intended to identify high value London assets and recommend actions that could be taken.
39. The Commissioner considers it was clear that at the time of the request the policy formulation was an ongoing process and the withheld information was relevant to that process.
40. In view of this, and the detail the withheld information goes into the Commissioner accepts that it will form part of a wider body of material which will be relevant to the policymaking process. Whilst this does not mean that there is an indefinite requirement for this safe space, the Commissioner accepts that there was a public interest in preserving such a space at the time of the request. Preserving the safe space for this policy formulation process is a valid and weighty factor in favour of maintenance of the exemption in this case.
41. However, the fact the information in question relates to an important area of government policy may also be cited as a public interest argument in favour of disclosure of the information. There is a legitimate public interest in disclosure of information relating to how the Government proposes to tackle an important issue for which it intends to introduce policy. This weighs in favour of disclosure of the information in question in this case.
42. In conclusion, the Commissioner has recognised that there are legitimate public interest arguments in favour of disclosure of the information in question. She has also, however, recognised that there is significant public interest in the DHSC being able to carry out this policymaking process effectively, which may be disrupted if the safe space for carrying out that process is not protected.
43. The view of the Commissioner is that the public interest in avoiding that disruption tips the balance in favour of maintenance of the exemption. Her decision is, therefore, that at the time of the request, section 35(1)(a) of the FOIA was engaged and the public interest favoured maintaining the exemption. As a result, the DHSC was not obliged to disclose the requested information.

## **Other matters**

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44. Although the DHSC has apologised to the Commissioner for the delays in this case, the Commissioner is disappointed that the DHSC failed to respond to her enquiries as soon as possible. The Commissioner wrote to the DHSC in April and although the Commissioner understands that the DHSC did, in this time send out an extremely delayed internal review response, the Commissioner did not receive a substantive response from the DHSC until 30 August 2018.
45. In the future, the Commissioner would remind the DHSC to respond to the Commissioner's enquiries promptly so that she is not prevented from carrying out her investigation.

## Right of appeal

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46. 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)

47. 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.
48. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**SK9 5AF**