

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2018

Public Authority: NHS Improvement
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant requested a copy of a Board document. The NHS Improvement (NHSI) refused the request under sections 36(2)(b) and 36(2)(c) as it considered that disclosure would inhibit the free and frank provision of advice or exchange of views, or would otherwise prejudice the effective conduct of public affairs.
2. The Commissioner's decision is that NHSI correctly applied section 36(2)(b) of the FOIA to the withheld information and the public interest favours maintaining the exemption. The Commissioner does not require the public authority to take any action.

Request and response

3. On 21 October 2017 the complainant requested the following information:

'Please disclose Board Document: BM/17/48(P) "Provider policy and new care models", presented by [name redacted] at the NHSI Board meeting of 25.5.17.

I request an electronic version- no paper copy requested.'

4. On 17 November 2017 NHSI responded and cited section 36 to refuse to provide the requested information. The then Chief Executive, Jim Mackey, as the qualified person, concluded that the exemptions under sections 36(2)(b)(i) and (ii), and 36(2)(c) were engaged on the basis that disclosure of the report would inhibit the free and frank provision of

advice, would inhibit the free and frank exchange of views and would otherwise prejudice the effective conduct of public affairs.

5. The complainant requested an internal review on 17 November 2017.
6. NHSI sent him the outcome of its internal review on 16 January 2018 upholding the decision. As part of that review, the matter was placed before the current Chief Executive and qualified person, Ian Dalton, for his opinion in relation to the application of the exemption. He concluded that the exemptions under sections 36(2)(b)(i) and (ii), and 36(2)(c) applied on the basis that disclosure of the report would inhibit the free and frank provision of advice, would be likely to inhibit the free and frank exchange of views and would be likely otherwise to prejudice the effective conduct of public affairs. However, in error the letter that went to the complainant stated that the exemptions under sections 36(2)(b)(i) and (ii), and 36(2)(c) would inhibit the free and frank provision of advice, would inhibit the free and frank exchange of views and would otherwise prejudice the effective conduct of public affairs.

Scope of the case

7. The complainant contacted the Commissioner on 21 December 2017 to complain about the way his request for information had been handled.
8. The Commissioner has focused her investigation on examining whether NHSI correctly applied section 36(2) of FOIA to withhold the information.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

9. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (b) would or would be likely to inhibit:
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.

10. The Commissioner first considered whether the public authority was entitled to withhold the information within the scope of the complainant's request on the basis of the exemptions at section 36(2)(b)(i) and (ii).
11. In determining whether these exemptions were correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly, the Commissioner must:
 - establish that an opinion was given;
 - ascertain who was the person or persons that gave the opinion;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
12. In this case, NHSI explained that the qualified person for NHSI is its Chief Executive, Ian Dalton. During the Commissioner's investigation, NHSI reconsidered the request and a further form was completed by Mr Dalton on 29 May 2018. His opinion remained the same. NHSI has provided the Commissioner with a copy of the three submissions that were sent to both the previous and current Chief Executive. The first was to the previous Chief Executive in November 2017 and then two to the current Chief Executive in January and May 2018. The Commissioner accepts this as evidence that an opinion has been given by the qualified person for NHSI.
13. The submissions explained to the qualified person that the withheld information concerned a copy of the report, 'Provider policy and new care models' from the private session of the NHSI Board meeting on 25 May 2017.
14. The qualified person has given his opinion that disclosing this information would inhibit the free and frank provision of advice and would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.
15. The Commissioner is satisfied that NHSI has obtained the opinion of the proper qualified person. Therefore, this element of the exemption under 36(2)(b)(i) and (ii) is met.
16. The Commissioner will consider the application of section 36(2)(b)(i) and (ii) in the first instance. It will only therefore be relevant to consider the application of section 36(2)(c) if the Commissioner does not find sections 36(2)(b)(i) or (ii) to be engaged.

17. 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 subsections of section 36(2) that NHSI is relying on;
 - The nature of the information and the timing of the request; and
 - The qualified person's knowledge of or involvement in the issue
18. The Commissioner has published guidance on section 36¹ and with regard to what can be considered a "reasonable opinion" it states the following:
- "The most relevant definition of 'reasonable' in 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."*
19. 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.
20. Having examined all the information provided to the qualified person, the Commissioner is satisfied that the information included the relevant arguments. The qualified person was shown a copy of the report which constitutes the withheld information. In addition, the qualified person was provided with the draft responses to the complainant and to the Commissioner which explained that
- The established procedure of the Board is to have both public and private sessions. The information being withheld is a paper for a private session of the Board of NHSI which contains preliminary views and ideas which are not yet the view of NHSI.
 - The private sessions of the Board provide it with a 'safe space' in which to develop ideas, debate live issues, and reach decisions. Disclosure of the private Board papers would prejudice the 'safe space' created by the use of private Board sessions which would reduce the quality of both debate and decision making.

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

- In order to carry out NHSI's statutory functions, senior members of staff must be able to express themselves openly, honestly and completely when advising NHSI's committees and its Board.
 - On receipt of advice, the NHSI Board needs to be able to hold the free and frank exchange of views on recommendations put to it without fear of public disclosure, in particular where policy is not yet settled.
21. In this case, NHSI explained to the Commissioner that the information concerns provider policy development, the development of new care models with NHS England and NHS trust powers. It references sensitive policy discussions with providers, CQC and the Department of Health, touching on potential changes to legislation.
 22. The NHSI Board needs clear recommendations on these issues in order to develop policy and must be able to hold free and frank discussions on these issues in order to make effective decisions.
 23. NHSI also explained that each of the policy questions addressed in the paper remains live and subject to further policy development. Disclosure would restrict the free and frank provision of advice. The NHSI Board needs a safe space to discuss and develop policy on these issues. Disclosure would be likely to restrict the candour and frankness of similar future discussions.
 24. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach the view that disclosure would inhibit the free and frank provision of advice (section 36(2)(b)(i)) and would be likely to inhibit the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)).
 25. As a result, the Commissioner is satisfied that both limbs of section 36(2)(b) of FOIA are engaged and must go on to consider the public interest test.

Public interest test

26. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
27. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's decision in the case of Guardian Newspapers Limited and Heather

Brooke v Information Commissioner and BBC (the Brooke case)². The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.

28. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

Public interest arguments in favour of disclosure

29. NHSI states that it has considered that there is a clear public interest in transparency and openness in relation to decisions affecting the NHS. The potential development of new care models may involve significant changes to the delivery of healthcare services in England and could have significant implications in relation to public expenditure.
30. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in the users of healthcare services and the wider public being provided with an understanding of NHSI policy.

Public interest arguments in favour of maintaining the exemption

31. NHSI stated that there is a strong public interest in NHSI's Board being able to receive open and candid advice and recommendations on developing policy and to hold free and frank discussions about policy development. It is important to have a safe space to discuss and develop policy, without concern that the detail of those discussions will be disclosed whilst the issues remain live and unsettled.
32. In particular, NHSI stated that the policy on new care models is a subject of ongoing and sensitive discussions between NHSI, NHS England and the Department of Health.
33. NHSI considered that the disclosure of policy thinking that does not amount to settled policy has the potential to be misleading and to cause confusion. NHSI publishes information about its settled policy intentions. This would include the development of new care models. Settling policy intentions requires the agreement of the Department of Health and NHS England, neither of whom would expect unsettled policy proposals to be published at this stage.

² EA/2006/0011; EA/2006/0013

34. The Commissioner is satisfied that there are public interest arguments in favour of maintaining the exemption. Disclosure would inhibit the free and frank provision of advice and would be likely to compromise the free and frank discussions during the Board meetings.

Balancing the public interest arguments

35. NHSI has stated that the qualified person acknowledges the strong public interest in openness and transparency but recognised the stronger public interest in allowing the provision of frank advice to the Board and the safe space to conduct free and frank discussions for the purposes of deliberation and decision making.
36. The Commissioner has agreed that the opinion of the qualified person was reasonable. This gives some weight to the arguments that disclosing the information would have an inhibiting effect. With that in mind the Commissioner now goes on to consider the severity, extent and frequency of that inhibition in reaching her decision.
37. In this case, broadly speaking, the information concerns the contents of a paper on new care models provided to the private session of the NHSI Board meeting. At the time of the request, the content of the paper presented to the meeting was still live, was still under debate and there were no settled decisions/policies formed. The paper was the subject of ongoing and sensitive discussions between NHSI, NHS England and the Department of Health.
38. Therefore, the Commissioner considers that the disclosure of the withheld information would affect the confidence with which NHSI officials give advice to NHSI Board meetings and would be likely to severely inhibit the free and frank discussions in relation to policy development in the future.
39. In light of the above the Commissioner finds that although there is a significant and important public interest in the public understanding of NHSI policy, there is a greater public interest in allowing NHSI the safe space in which to receive free and frank advice and to discuss potential policy without premature disclosure under FOIA at a time when they were still in the process of deliberation and had not made any firm decisions. The public interest favours withholding this information.
40. In conclusion, the Commissioner finds that NHSI is entitled to withhold the information and she does not require NHSI to take any steps.

Right of appeal

41. 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

42. 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.
43. 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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