

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 01 November 2011

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant made a freedom of information request to the Department of Health for a copy of its strategic risk register. The public authority refused the request under section 35(1)(a) (Formulation and development of government policy) and the complainant appealed the decision to the Commissioner. The Commissioner has now investigated the complaint and found that the section 35(1)(a) exemption is engaged and that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner requires the public authority to disclose the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 28 February 2011 the complainant made a freedom of information request to the public authority for a copy of the public authority's strategic risk register relating to the government's proposed NHS reforms. The request read as follows:

"I would like to ask under FOI legislation for the latest version of the Department of Health's strategic risk register covering business as usual, transition and the new health system".

3. The public authority responded to the request on 28 March 2011 when it confirmed to the complainant that it held the requested information. However, it said that the information was being withheld under section 35(1)(a) of the Act which provides for an exemption for information which relates to the formulation and development of government policy. It referred to the "modernisation of the NHS" as the relevant policy and explained that it had concluded that the public interest favoured maintaining the information as disclosure "would jeopardise its ability to manage the transition and modernisation of the NHS, which would be detrimental to the totality of the policy, thereby risking the implementation of Government policy and taxpayers' money". However, it informed the complainant that some information regarding the policy was already in the public domain and referred him to the following sources:
 - The command paper (Liberating the NHS: legislative framework and next steps)
 - Sir David Nicholson's letter to the NHS
 - The NHS Operating framework
 - Impact Assessment (Health and Social Care Bill 2011: coordinating document for the Impact Assessments and Equality Impact Assessments).
4. On the same day the complainant asked the public authority to reconsider its response and to carry out an internal review of its handling of the request.
5. The public authority presented the findings of its internal review on 17 May 2011. It now said that having reviewed its response it had identified a possible failure to comply with section 1(1)(a) of the Act which provides the right for an applicant to be informed whether a public authority holds information of the description he/she specified in their request. The public authority explained that the officials who had dealt with the initial response had interpreted the request as a request for the risk register which centred on the Government's Health and Social Care Bill but had not specified to the complainant what that information was. It also said that having revisited the request it had identified the department's strategic risk register which would fall within the scope of the request. It now appeared to suggest that it was this particular register which should properly be seen as falling within the scope of the request. It then went on to consider whether this information was suitable for release but concluded that it was also exempt under section

35(1)(a) and the public interest favoured maintaining the exemption, for the reasons referred to in its initial response. The public authority also informed the complainant that as junior members of staff were identified in the information it was also applying the section 40(2) exemption for this particular information.

The Investigation

Scope of the case

6. On 18 May 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose the information he requested under section 35(1)(a).

Chronology

7. On 7 June 2011 the Commissioner contacted the public authority with details of the complaint. The Commissioner now asked to be provided with a copy of the withheld information as well as the public authority's reasons for refusing the request. In doing so the Commissioner asked for details of the government policy to which the information related and details of what stage the policy process had reached by the time the complainant submitted his request. As regards the public authority's application of section 40(2) the Commissioner asked the public authority to confirm, assuming that it had applied the exemption on the basis that disclosure would contravene one of the data protection principles, which principle would be contravened and why. In doing so the Commissioner asked the public authority to confirm the seniority or grade of the members of staff concerned.
8. The public authority responded on 7 July 2011 and provided a copy of the withheld information which it explained was the department's strategic risk register for February 2011. The public authority also provided further details about why the information was considered to be exempt and why it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosing the requested information.
9. On 26 July 2011 the public authority provided the Commissioner with further information on the government's policies regarding the NHS modernisation and the stage at which the policy process had reached at the time the complainant submitted his request.

Findings of fact

10. On 12 July 2010 the Government published its White Paper *Equity and Excellence: Liberating the NHS* setting out its long-term vision for the future of the NHS. The White Paper set out how the government would:
 - put patients at the heart of everything the NHS does;
 - focus on continuously improving those things that really matter to patients - the outcome of their healthcare; and
 - empower and liberate clinicians to innovate, with the freedom to focus on improving healthcare services
11. The White paper is available on the public authority's website:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353
12. The White Paper was opened to consultation which closed on 11 October 2010. The proposed reforms were also subject to a separate public consultation which opened on 18 October 2010.
13. On 15 December 2010 the government published *Liberating the NHS: Legislative framework and next steps* which sets out how it intended to legislate for and implement the proposed forms, taking into account the responses received during the consultation period.
14. The Health and Social Bill was introduced into Parliament on 19 January 2011 but its progress was halted following the government's announcement on 6 April 2011 that it would engage in a listening exercise intended to address the concerns that have been raised regarding the scale and pace of the reforms.

Analysis

15. A full text of the relevant provisions of the statutes referred to in this section is contained within the legal annex.

Scope of the request

16. At the internal review stage the public authority referred to two separate risk registers which it said were relevant to the request and held by the department – the “risk register centred on the Health and Care Bill” and the “strategic risk register”. However, when responding to the Commissioner the public authority said that it considered the strategic risk register to be the subject of the complainant’s request. For the avoidance of doubt, the Commissioner wishes to state that he agrees with the public authority on this point and that it is the strategic risk register which should properly be seen as falling within the scope of the request. This is because the complainant specifically asked for the “strategic risk register” rather than any other register and the copy of the strategic risk register provided to the Commissioner analyses risks in relation to “Business as usual”, “Transition” and the “New system” which the complainant had referred to in his request.

Exemptions

Section 35(1)(a) – Formulation and development of government policy

17. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy. Section 35(1)(a) is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
18. The Commissioner considers that the term ‘relates to’ can safely be given a broad interpretation. This is because the exemption is qualified and a public authority would be obliged to disclose information where there is no significant harm to the public interest. 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. In this case the public authority has explained that the strategic risk register is used to manage risk associated with the government policies regarding the modernisation of the NHS, including the possible effects of the implementation of the policy on other areas of the public authority. On reviewing the information it is very clear that it relates to

the public authority's policies on NHS modernisation. Indeed the Commissioner considers that at the time of the request this information would have related to the development of the policy as it was used as a management tool to guide the policy work being carried out. The Commissioner is satisfied that the information relates to the formulation and development of government policy and therefore is exempt from disclosure under section 35(1)(a) of the Act.

The public interest test

20. Section 2(2)(b) provides that where a qualified exemption applies information shall only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

21. The complainant has argued that the public interest favours greater transparency of the risks associated with the government's plans for the modernisation of the NHS due to the controversial nature of the reforms and widespread public concerns.
22. In the Commissioner's view disclosure would also serve the public interest by aiding public understanding of the government's reforms and the associated risks. This would have allowed the public to better contribute to the public debate surrounding the reforms. The Commissioner notes that he must consider the public interest in disclosure at the time the request was made, which was before the listening exercise was announced on 6 April 2011.
23. The complainant has also referred the Commissioner to a previous decision where he ordered the disclosure of a risk register related to the expansion of Heathrow airport. The complainant suggests that there is a similarity between the two cases and a precedent has been set for the disclosure of risk registers. Disclosure would also provide reassurance that the public authority appropriately manages risks associated with proposed policies.

Public interest arguments in favour of maintaining the exemption

24. The public authority has argued that the public interest favours maintaining the exemption because releasing the risk register at the time of the request would have jeopardised the success of the policy.
25. In its submission to the Commissioner the public authority has said that the modernisation of the NHS is a high profile, sensitive and

complex project and that in its view officials must be afforded the freedom to use management reporting tools such as the strategic risk register without fear or concern that the information will then be placed in the public domain in an unmanaged way whilst the policy continues to be developed. This would, it suggests, hinder its ability to ensure correct and proper governance and robust management of such a policy.

26. In addition, the public authority said that the public interest favoured maintaining the protection offered by section 35(1)(a) so as to ensure that that the possibility of disclosure would not deter from full, candid and proper deliberation of policy formulation and development, “including the exploration of all options, the keeping of detailed records and the taking of difficult decisions”. It argued that officials needed to be able to engage in free and frank discussion of all policy options and that releasing the information prematurely would prevent them from conducting their business “unfettered and free from unwarranted scrutiny” which it suggests would severely compromise the successful delivery of the policy.

Balance of the public interest arguments

27. The Commissioner finds that there is a very strong public interest in disclosure of the information, given the significant change to the structure of the health service the government’s policies on the modernisation of the NHS will bring. There has also been widespread public debate amongst the general public, commentators, experts and those who work in the NHS. The debate has covered the scale and pace of the changes being proposed. The Commissioner notes that opposition to the reforms has been expressed by groups including the British Medical Association and the Royal College of Nursing. Disclosure would significantly aid public understanding of risks related to the proposed reforms and it would also inform participation in the debate about the reforms. The Commissioner must consider the public interest at the time the request was made.
28. The public authority has suggested that the public interest in disclosure is met to a large extent by the information already in the public domain, which the public authority referred to in its response to the complainant, as well as the published reporting of the Parliamentary process of the passage of the Health and Social Care Bill. However, the Commissioner does not accept this argument and considers that disclosure would go somewhat further in helping the public to better understand the risks associated with the modernisation of the NHS than any information that has previously been published. For these

reasons the Commissioner has given the public interest in greater transparency and accountability particular weight in this case.

29. Whilst the Commissioner finds that the public interest in disclosure is strong, he must also take into account of the significant public interest arguments in favour of maintaining the exemption. The public authority is essentially relying on the “safe space” and “chilling effect” arguments which are well understood and have been considered in a number of cases before the Information Tribunal.
30. The safe space argument concerns the importance of government having the freedom to debate policy and make decisions without being hindered by external comment. In *Department for Education and Skills v the information Commissioner and The Evening Standard* the Tribunal recognised the importance of this argument stating:

“Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.”¹
31. The Commissioner accepts that generally speaking there is a public interest in a safe space as disclosure acts as a distraction whilst the policy process is ongoing. The weight that will be attributed to this factor largely depends on the timing of the request. Where a policy is still live the public interest in maintaining a safe space will be stronger because greater protection is required whilst the policy is still in the formulation and development stages. In this particular case the public authority has demonstrated that at the time the request was received the policy was at a sensitive point and was still under active consideration.
32. The public authority explained that the policy development was at an early stage and the listening exercise had not yet taken place. To illustrate this point it provided the Commissioner with what were, at the time of the request, minutes of the most recent meetings of the public authority’s Board and its Audit and Risk Committee. This information shows that when the request was received policy around the NHS reforms was still very much under discussion, with stakeholders having on-going dialogue with ministers and officials. Furthermore, the public authority explained that at the time of the

¹ Department for Education and Skills v The Information Commissioner and the Evening Standard [EA/2006/0006], para. 75, point iv.

request it was still awaiting the findings of the Commission on Funding of Care and Support after which further discussions and decisions would need to take place in what it described as this “key and sensitive” area.

33. In considering the importance of the safe space the Commissioner has also taken into account the nature of the information contained in the risk register. The Commissioner accepts that disclosure at the time the request was made could have distracted the policy work being undertaken at this time. In light of this the Commissioner has found that at the time of the request a safe space around the policy was still required and that there was a significant public interest in maintaining this safe space
34. As regards the ‘chilling effect’ the Commissioner would generally give some weight to arguments that disclosing information relating to a particular policy whilst that policy is still being formulated/developed, could effect the frankness and candour with which relevant parties would continue to contribute to that particular policy making process. Again, given that the policy was still being developed at the time of the request and in view of the fact that the risk register is under constant revision the Commissioner is prepared to accept that disclosure could have some affect on the frankness of future policy discussions on the modernisation of the NHS. However, he does not consider that disclosure would affect the detail and frankness of future risk registers of this nature. The expectation that risk registers must be completed with full frankness would clearly remain a core governance requirement. He also notes that the content of the register does not reveal detail of the policy discussions in the same way as other policy information, for example - reports, emails and draft papers. In reaching this view the Commissioner is mindful of the decision of the Information Tribunal in *Office of Government Commerce v Information Commissioner*. The Commissioner sees a parallel with this case where the Tribunal rejected arguments that disclosure would affect the frankness and candour with which officials would contribute to government gateway reviews.²
35. The Commissioner finds that the factors are finely balanced in this case but the considerable public interest in disclosure means that the information should be disclosed. Consequently the Commissioner has decided that in all the circumstances of the case the public interest in

² Office of Government Commerce v Information Commissioner [EA/2006/0068 & EA/2006/80]

maintaining the section 35(1)(a) exemption does not outweigh the public interest in disclosure.

Other exemptions

36. The public authority had indicated that the section 40(2) exemption for personal information would apply to the names of any junior officials featured in the risk register. However, it acknowledged that there is a legitimate interest in knowing the names of senior officials and said that accountability for high profile projects and policies is in the Senior Civil Service grades. The Commissioner has reviewed the withheld information he has been passed by the public authority and found that of the names featured, all are members of the Senior Civil Service or senior NHS officials. Therefore it is the Commissioner's view that section 40(2) has not been applied to this information and therefore there is no barrier to the names featured in the risk register being released.

Procedural Requirements

37. As it noted in its internal review, the public authority initially failed to identify exactly what information fell within the scope of the request. It subsequently corrected this at the internal review stage and therefore met its obligation under section 1(1)(a) of the Act which provides that a person making a request for information is entitled to be informed in writing by the public authority whether it holds the information of the description specified in the request. However, the Commissioner considers that the public authority breached section 10(1) (Time for compliance) of the Act by failing to identify what information it held, within 20 working days of receiving the request.

The Decision

38. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority breached section 1(b) of the Act by failing to disclose the requested information.
 - The public authority breached section 10(1) of the Act by failing to identify the information it held within 20 working days of receiving the request.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - The public authority shall disclose the requested information to the complainant.

40. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Dated the 1st day of November 2011

Signed

**Steve Wood
Head of Policy Delivery
Information Commissioner's Office
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SK9 5AF**

Legal annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (c) the formulation or development of government policy,
- (d) Ministerial communications,
- (e) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (f) the operation of any Ministerial private office."