

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 January 2016

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

#### Decision (including any steps ordered)

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1. The complainant has requested minutes and papers from the Department of Health's (DoH) transactions board. The DoH provided some information to the complainant but withheld some of the papers on the basis of section 43(2) and 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the DoH has correctly applied section 43(2) to withhold the majority of the documents. For the remaining documents which were subject to section 35, the Commissioner finds the exemption is engaged but the balance of the public interest lies in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the documents entitled "Dalton Incentives recommendation" with the names of junior officials redacted
4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 20 January 2015, the complainant wrote to the Department of Health ("DoH") and requested information in the following terms:

*"I would like to see copies of the minutes, papers and agenda for the last three meetings of the DH's transactions board please."*

6. The DoH responded on 17 February 2015. It stated that it held information relevant to the request but considered it exempt on the basis of section 35(1)(a) of the FOIA.
7. Following an internal review the DoH wrote to the complainant again on 4 June 2015 disclosing the majority of the information but continuing to withhold a small amount of information relating to the formulation of policy and information that it considered may prejudice the commercial interests of third parties.

## Scope of the case

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8. The complainant contacted the Commissioner on 16 June 2015 to complain about the way his request for information had been handled.
9. The complainant confirmed that the DoH had disclosed the Transactions Advisory Board (TAB) agendas and minutes for meetings from June, July, September and November 2014. Within the minutes certain documents which were attached were withheld, most notably from the minutes of the TAB meeting on 16 July 2014. These documents were withheld on the basis of section 43(2) of the FOIA. The DoH also redacted some personal data from the TAB agendas but has not considered the use of section 40(2) to redact this personal data as the complainant has expressed no interest in this.
10. The Commissioner noted that in its internal review response the DoH also cited section 35(1)(a) of the FOIA as a basis for withholding some of the information but it was not clear which documents this related to as the information disclosed to the complainant stated section 43(2) was being relied on for redactions.
11. The Commissioner wrote to the DoH to confirm the documents which were part of the TAB minutes that were being withheld and the exemptions that were being applied to each of these and he has confirmed the information which is being withheld is in the documents listed below with their relevant exemptions:

- Dalton Incentives Recommendation – section 35(1)(a);
  - Transaction Board principles and precedents v6, v7, v8, v9 – sections 35(1)(a) and 43(2);
  - Transactions rec – sections 35(1)(a) and 43(2);
  - Transactions pipeline updated 16 July 2014 – section 43(2);
  - Provision of income to support transactions revised – sections 35(1)(a) and 43(2);
  - Dalton Review demonstrator sites proposal 251114 – section 43(2); and
  - Transactions pipeline – section 43(2)
12. The Commissioner therefore considers the scope of his investigation to be to determine if the DoH has correctly applied the section 35(1)(a) and 43(2) exemptions to withhold information in the above documents.

## Background

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13. The TAB role and remit is to set the framework under which national parties enter into and fund transaction, which refers to mergers, acquisitions and other financial arrangements, and to ensure the shared planning and budgeting of potential future transaction costs.
14. The information in question here relates to the role of national bodies in supporting provider transactions, the availability of funding for such transactions and the terms on which it can be provided.

## Reasons for decision

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### Section 43 – prejudice to commercial interests

15. 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.
16. In this case the DoH has applied the section 43(2) exemption to information contained in the following documents:
- Transaction Board principles and precedents v6, v7, v8, v9

- Transactions rec
- Transactions pipeline updated 16 July 2014
- Provision of income to support transactions revised
- Dalton Review demonstrator sites proposal 251114
- Transactions pipeline

“Transaction Board principles and precedents v6, v7, v8 and v9”

17. The DoH has sought to withhold the information within these documents on the basis of section 43(2). In explaining its reasoning for considering the information to be exempt the DoH has stated that the TAB role and remit is to set the framework by which national parties enter into and fund transactions.
18. The DoH describes the work of the TAB as providing an integral framework for negotiating individual transactions and argues this is genuinely policy work in progress, which will go to Ministers for decision, and may include a decision that the principles are not needed or not required, and may or may not be published.
19. All versions of this document constitute a discussion paper initiating the development of an overarching transaction policy by setting out policies and principles applicable to NHS provider transactions where central support is required or where there is a requirement for coordination or oversight from national bodies. Included in the documents are examples of precedents set with named Trusts and financial details.

“Transactions rec 020914” and “Provision of income to support transactions revised”

20. The DoH has explained that these are papers associated with the Transaction Board principles and precedents papers. To clarify this further the DoH has explained that in the context of this work, transactions are defined as mergers, acquisitions and the separation of NHS bodies such as the takeover of failing hospital trusts by successful ones. These transactions are a tool for dealing with trusts with financial, clinical and operational difficulties. The transactions can also involve significant levels of financial support over an implementation phase, provided by NHS England (NHSE) and/or the DoH.
21. The sum of all of the requests for financial support for these transactions exceeds the resources available to NHSE and the DoH. Monitor and NHS Trust Development Authority (TDA) act as agents of the DoH to negotiate the financial settlement of individual transactions.

22. The Commissioner has examined the information in these documents and notes that in the case of the Transaction Rec document it discusses and offers recommendations for transactions and processes. For the Provision of Income document, the information comprises of a discussion paper to support transactions and monitor risk ratings.

#### Transaction pipelines

23. These documents contain information on the position of transaction processes at various NHS Trusts.

#### Dalton Review demonstrator sites proposal

24. The Dalton Review referred to in the title of this document is a review led by Sir David Dalton which was published in December 2014<sup>1</sup>. This review document was intended to complement the NHS Five Year Forward View<sup>2</sup> and provided organisational delivery vehicles to help translate the ideas in the Forward View and put them into practice. Chapter 3 of the Dalton Review which dealt with 'Making Change Happen' included a paragraph (157) which recommended that organisations could be supported to be 'demonstrator sites' and these organisations would be those which already had well thought out plans to implement some of the organisational forms listed in the report.
25. The information in this document consists of a proposal for operations and governance for demonstrator sites.
26. For all of these documents and the information contained within them, the DoH has argued that disclosure would prejudice both its own commercial interests and those of NHS England (NHSE).
27. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43<sup>3</sup>. This comments that;

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384126/Dalton\\_Review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384126/Dalton_Review.pdf)

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

3

[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx)

"...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."

28. The information which has been identified by the DoH as engaging the section 43(2) exemption all relates to either financial transactions which are underway, proposed or recommendations for transaction processes. As these transactions are a means for dealing with Trusts with financial, clinical and operational difficulties the Commissioner accepts that information relating to ongoing transactions and the transactions process will constitute a commercial activity as these transactions are crucial to ensuring the ability of Trust's to continue to remain solvent and operate competitively. The information contained in the above documents would therefore appear to fall within the remit of section 43(2) of the FOIA.
29. In this case, the DoH and NHSE considers that the prejudice 'would' occur and the Commissioner has gone on to consider how any prejudice to the commercial interests of the DoH or NHSE would be caused by the disclosure of the withheld information.
30. In relation to the DoHs own commercial interests it has explained that mergers, acquisitions and separation of NHS bodies, known as transactions, are an essential tool for dealing with Trusts with significant financial and operational difficulties. However, they can also be very expensive and carry significant reputational, financial and operational risks. The DoH therefore needs to have a forum to discuss, agree and negotiate packages of support that effectively balance the risks against the total investment required by taxpayers and this is the role of the TAB.
31. The DoH has argued that releasing the anticipated costs of transactions as well as information on agreed and proposed central principles *would* prejudice and compromise the ability of the DoH and NHSE to secure value for money in transactions and would inhibit Monitor and the TDAs ability to act as vendors and negotiate transactions.
32. The Commissioner accepts these general points but in determining if the exemption is engaged a public authority must be able to demonstrate there is a causal link between the proposed prejudice and the specific information in question.
33. To illustrate this point the DoH has provided some further detail on the types of referrals about forthcoming transactions (mergers and acquisitions) made to the TAB for consideration:

- Trust A is intending to acquire Trust B (hypothetically owned by the Secretary of State) and the information in some of the TAB files would compromise the vendor's (the Secretary of State) ability to negotiate. The responsibility in some cases can be delegated to the TDA.
  - X is looking enter into a joint agreement with local GPs – disclosing details or the fact that discussions with X and the DoH about Xs underlying financial deficit and the fact it needs investment from the DoH to be able to enter into the transaction/joint agreement would prejudice its commercial interests.
  - With regard to the pipeline; organisations on the pipeline document are not always aware they are being considered by TAB. Organisations on the list will be perceived to have financial issues and will prejudice their ability to enter into contracts with suppliers.
34. The Commissioner accepts this shows that there are ongoing referrals to the TAB on forthcoming transactions and disclosure of information in the withheld documents could potentially impact on each of these issues but this is not necessarily evidence of a causal link between the withheld information and prejudice to the DoHs commercial interests.
35. However, the DoH has gone on to further explain that when the DoH is negotiating, for example with Trust A, disclosure of information on this transaction or information on the transactions principles would prejudice the commercial interests of the DoH. This is because it would make public the details of the limits and expectations of what might be funded which is part of a commercial negotiation. The DoH, with its above examples of referrals to the TAB, has demonstrated that these types of negotiations and transactions are often referred to the TAB so there is a real and significant risk that disclosing details of the negotiations in one transaction would have an impact on other transactions and there will be other transactions of the same nature referred to the TAB.
36. The Commissioner accepts that the DoH has demonstrated there is a causal link between disclosure of the information withheld under this exemption and prejudice to its commercial interests. He notes that the DoH considers the higher threshold of 'would' prejudice is met in this case. This means that the likelihood of prejudice occurring is more likely than not. To meet this threshold the Commissioner expects a public authority to be able to demonstrate that either:
- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice

would occur on only one occasion or affect one person or situation; or

- given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.

37. In this case the DoHs arguments for the higher threshold appear to be based on the potential for prejudice to occur frequently. The DoH has provided information and examples to support the fact that the TAB is frequently used as a referral point for consideration on forthcoming transactions which the DoH are generally involved in, in the capacity of undertaking commercial negotiations with various health bodies.
38. As such the frequency of situations arising in which the prejudice would occurs is high and the likelihood of prejudice is more probable than not so the Commissioner accepts the higher threshold of 'would' prejudice is met and the section 43(2) exemption has been correctly engaged.

*Public interest arguments in favour of disclosure*

39. The DoH recognises the general public interest argument in favour of openness and transparency to assist in understanding the decision making process and scrutinising the use of public money.
40. The complainant has not provided any specific arguments in support of the view that information should be disclosed.

*Public interest arguments in favour of maintaining the exemption*

41. The public interest arguments presented by the DoH are largely similar to the arguments to support the potential prejudice.
42. The DoH has argued that it is important it is able to agree and negotiate packages of support that balance risks against taxpayer investment and the disclosure of the withheld information would prejudice this. This would not be in the public interest as it would affect the DoHs ability to obtain value for money in transactions.
43. The DoH also considers that releasing details of the costs of transactions and principles would impact on Monitor, the TDA and NHSE in their roles as vendors and in negotiating transactions. This would in turn harm relationships between bodies as well as harming the value for money to taxpayers which would not be in the public interest.



*Balance of the public interest arguments*

44. The Commissioner has considered the arguments made in favour of disclosure and maintaining the exemption and he recognises that decisions relating to the financial and operational running of health bodies are of particular public interest, particularly at a time when the NHS is under scrutiny. As such, information which may provide an increased understanding of the oversight of NHS Trust's and other health bodies will be in the public interest.
45. The specific information in this case on mergers, acquisitions and separation of NHS bodies would provide a much greater understanding of the process by which trusts with financial and operational difficulties are dealt with, particularly in terms of financial investments and the use of public funds. Information on the operation and spending on NHS bodies is always likely to be of high public interest due to the huge numbers of individuals reliant on NHS services.
46. The Commissioner accepts that the public interest in transparency for public spending and openness in demonstrating the process by which transactions are negotiated and discussed could be seen to have been met by the disclosure of a substantial amount of information in response to this request. The information which has been withheld is only a small amount compared to that which has been disclosed already and it is only that which is considered to be the most commercially sensitive. The Commissioner has accepted that disclosure of this commercially sensitive information may impact on the DoHs (and to a lesser extent, NHSE) ability to achieve value for money investments which would not be in the public interest as it may impact on the operation of NHS bodies and the delivery of services.
47. The DoH consulted with NHSE regarding the withheld information and NHSE provided the DoH with its arguments as to why the information should not be disclosed.
48. NHSE commented that as a provider of funding for certain cost elements of reconfigurations it considered this to be a commercial issue. NHSE explained it is frequently engaged in discussions and negotiations, sometimes directly and sometimes via Monitor or the TDA, with providers who are proposing reconfigurations or acquisitions, over the funding. NHSE has to ensure that any agreement reached is value for money for the taxpayer and is a good use of NHSE funds.
49. In these cases NHSE provides information on possible transactions and their potential costs to the DoH to support strategic planning and this information is not intended to be disclosed more widely. If it were to be

disclosed it could disadvantage NHSE in its discussions and negotiations by revealing details of potential funding contributions to other parties.

50. NHSE concluded therefore that the disclosure of information on forthcoming transactions and their forecast costs, and the principles and precedents, would risk damage to NHSEs commercial interests and the value for money secured for taxpayers from the use of their funds.
51. The Commissioner accepts that the arguments provided by NHSE do carry some weight here. NHSE have argued that disclosure would impact on its negotiations and achieving value for money. For much the same reasons as the Commissioner accepts this argument in relation to the DoH, he also accepts this is valid in relation to NHSE. Clearly, any impact on achieving value for money from public funds will not be in the public interest.
52. When making a decision the Commissioner has also referred back to the examples provided by the DoH of referrals about transactions made to TAB and in particular notes that this can cover a wide range of scenarios and will often not be widely known to the public, for example if a Trust is considering entering a merger or a joint agreement due to financial issues. The Commissioner considers that disclosing information of this nature to the public while negotiations are ongoing and under consideration would not be in the public interest as it may prejudice the negotiations and compromise the ability to reach a commercially sound and viable agreement. The withheld information in this case relates to both completed and ongoing transactions to varying degrees in the different documents and, certainly where the transaction is underway would not be in the public interest.
53. The DoH has highlighted that it understands the importance of details of financial assistance and transaction funding being made available to the public at the appropriate time and does routinely publish<sup>4</sup> the outcome of individual transactions once concluded, as well as the purpose of the funding, the foreseen benefits and the process for approval. The Commissioner accepts that the DoH therefore is aware of the importance of disclosing information on funding to show how public funds are being used and is prepared to do this at a point when it would not be prejudicial to achieving value for money to do so.
54. On balance, the Commissioner therefore considers that due to the sensitive nature of the transactions being considered and the

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<sup>4</sup> <https://www.gov.uk/government/groups/independent-trust-financing-facility>

information contained in the withheld documents which shows the financial and operational situation at a number of health bodies and how these issues are considered by TAB, it would not be in the public interest to disclose this information whilst negotiations and decisions are ongoing. He accepts that there is a public interest in transparency about decisions affecting NHS bodies and the use of public funds but this is not outweighed by the need to allow the DoH to ensure that transactions can take place with the appropriate oversight and achieving value for money outcomes.

55. On balance, the Commissioner therefore considers that in this case the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosing the information.

### **Section 35(1)(a) – formulation or development of government policy**

56. Section 35(1)(a) of FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
57. The information must relate to the formulation or development of government policy. The term 'relates to' is interpreted broadly and any significant link to production of government policy will be sufficient to bring that information within the scope of the exemption. However the information must relate to 'formulation' or 'development' of such policy. That is it must relate to the process of creating or producing of policy including the refinement of an existing policy. If it relates purely to the implementation of a policy the information will not be covered by the exemption.
58. In this case, the DoH considers section 35(1)(a) is engaged in relation to the information in the document titled 'Dalton Incentives Recommendation'.
59. The information here is contained within early drafts from junior officials of a later policy led by Sir David Dalton known as the Dalton Review. The Commissioner has examined the information to establish if they contain information which is related to the formulation or development of a government policy.
60. In determining this, the Commissioner has looked at the Dalton Review policy document which as published in December 2014. This document was intended to complement the NHS Five Year Forward View and provided organisational delivery vehicles to help translate the ideas in the Forward View into reality.

61. At a very high level the Commissioner accepts that the Dalton Review is part of the Government's policy on NHS transformation as it feeds into the Forward View which sets out the policy aims over the upcoming years. The Dalton Review aims to put the ideals of the Forward View into practice and as such can be seen to be related to the formulation of the NHS transformation policy. On this basis, the Dalton Incentives Recommendation documents do contain information which engages the exemption as they constitute early drafts of the Dalton Review policy.
62. The Commissioner can therefore accept that this information relates to the policy making process and engages the exemption provided by section 35.

*Public interest arguments in favour of disclosing the information*

63. The DoH has acknowledged there is a general public interest in openness and greater transparency to understand how government develops its policies.

*Public interest arguments in favour of maintaining the exemption*

64. The DoH has argued that officials need to be able to discuss policy options without the apprehension that their comments will be published before the policy in question has been formulated. Premature disclosure of sensitive and potentially controversial information such as in this case would lead to confusion and misinterpretation and create animosity between key stakeholders collaborating to resolve financial difficulties at a time when the health sector is under scrutiny.
65. With specific reference to the earlier drafts of documents forming part of the Dalton Review; the DoH considers that the wider public interest has been satisfied by the later publication of the Dalton Review and disclosure of earlier parts of the report would not provide a true reflection of the current policy intention of the more senior policy owners.

*Balance of the public interest arguments*

66. The Commissioner accepts both the general arguments in favour of disclosure and the more specific arguments in favour of maintaining the exemption. The Commissioner is aware that there is a strong public interest in the disclosure of information which relates to the governance and operation of NHS bodies and which, in a broader sense, is linked to plans for progress within the NHS. The Dalton Review and the Forward View form part of this process and any information which provides an insight into how the policy reviews and papers were finalised would be in the public interest.

67. However despite these public interest arguments the Commissioner must also consider the public interest in maintaining the exemption and preventing any harm which section 35 is designed to protect against that would be caused by the disclosure of the drafts.
68. Of key importance in this case is the timing of the request and the age of the information in question. At the time the request was made the Dalton Review had been published, in December 2014. This set out recommendations for ways for NHS bodies to put into place ways of delivering better models of care. The early drafts prepared by junior officials were from September 2014 and contain early draft ideas on certain sections of the Dalton Review.
69. The arguments presented by the DoH relate to the need for a safe space for officials to discuss policy options without the fear of their comments being published before policy has been fully formulated.
70. The Commissioner accepts these arguments can be valid where a policy is still being formulated or in cases where discussions need to continue to take place in the future in a free and frank environment. However, the information in this case is an early draft of a part of the Review which has subsequently been published and was at the time of the request.
71. Disclosure of this information at the time of the request would not have impacted on the Dalton Review as this had already been published and the Commissioner cannot see how releasing early drafts that contributed towards the final version of the Dalton Review would be harmful to the formulation or development of government policy at a time when the Review had been finalised.
72. The Commissioner has also considered whether there would be any chilling effect on the officials involved. The chilling effect refers to the potential that officials may be deterred from being candid or from providing frank advice to others, including ministers. In this case, the Commissioner cannot accept that there would be any chilling effect from the disclosure of this information as officials will still be required as part of their jobs to be involved in the drafting of policies or reviews in their early stages. Whilst it would not necessarily be expected this would be disclosed, once the final version has been published any potential harm in disclosure is significantly, if not completely, diminished.
73. The safe space and chilling effect arguments discussed relate mainly to the actual policy process. The Commissioner has also considered the impact disclosing the information would have on the policy itself. In its broadest terms the policy to which the information relates is the Forward View, in that the Dalton Review looked to provide

recommendations to put aspects of this into practice. This is an area which is of some public interest, as any aspect of NHS reform is, but the Commissioner must weigh this against any adverse impact on the policy that may occur from disclosure of this information. In this case, he is not minded to accept that disclosure would have any negative impact on the policy as it has already been finalised and published.

74. The Commissioner has therefore not given much weight to the arguments that there would be erosion of the safe space required for good policy making or to the argument relating to the chilling effect of officials. He does not consider that these arguments demonstrate there would be an adverse impact on the policy making process or the policy in question. Whilst the Commissioner is also not persuaded the arguments for disclosure are strong in this case either he has concluded, on balance, that the public interest in transparency and accountability does outweigh the arguments in favour of maintaining the exemption in this case.
75. The Commissioner concludes that section 35(1)(a) is engaged and the balance of the public interest lies in disclosure. He now requires the DoH to disclose the Dalton Incentives recommendation document to the complainant with the names of junior officials redacted as appropriate.

## Right of appeal

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76. 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)

77. 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.
78. 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**  
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**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
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