

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2023

Public Authority: NHS England
Address: PO Box 16738
Redditch
B97 9PT

Decision (including any steps ordered)

1. The complainant has requested correspondence between NHSE staff and the National Advisor for LGBT Health. NHS England disclosed some information but also withheld information under section 36(2)(b)(ii) (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the withheld information engages section 36(2)(b)(ii) and the public interest lies in maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 9 September 2022 the complainant requested:

"Please can you provide me with any correspondence either to, from or between NHS England employees Ruth May, Chief Nursing Officer, Jane Robinson, Clinical Improvement Project Lead, and Dr Michael Brady, National Advisor for LGBT Health which include the following terms:

- Mermaids
- Stonewall

- Gendered Intelligence
- LGBT Foundation

Please include all correspondence which mentions these organisations, includes the above terms, or is to or from workers for these organisations and the three named NHS employees between 1.01.2021 and today, 09.09.2022.”

5. The Commissioner understands that NHSE is currently reviewing the Delivering Same Sex Accommodation¹ guidance and this request relates to that review.
6. NHS England ('NHSE') responded on 1 February 2023. It disclosed information to the complainant but also withheld information under section 22 (information intended for future publication), section 36 (prejudice to the effective conduct of public affairs) and section 40(2) (personal information).
7. The complainant requested an internal review on 3 February 2023. They expressed concerns that NHSE had failed to identify all of the information that would fall within scope of the request. They also disputed NHSE's application of section 22 and section 36.

Scope of the case

8. The complainant contacted the Commissioner on 17 April 2023 to complain about the way their request for information had been handled, at this point, NHSE had failed to conduct its internal review.
9. During this investigation, NHSE identified emails which fell within the scope of the request. It disclosed this information on 14 July 2023, with redactions made under section 21 (information reasonably accessible to applicant via other means) and section 40(2) (personal information).
10. Also during this investigation, NHSE identified direct messages exchanged from and to Dr Brady's twitter account which fell within the scope of the request. It disclosed this information to the complainant on 17 July 2023.
11. NHSE revoked its reliance on section 22 and clarified its position to be that all of the withheld information engaged section 36(2) and some of

¹ [NEW-Delivering same sex accommodation sep2019.pdf \(england.nhs.uk\)](#)

that information would also engage section 41 (information provided in confidence).

12. NHSE has explained that the review of the guidance commenced in September 2021 and therefore there isn't any information held, that would fall within the scope of the request, before this date.
13. The complainant hasn't raised any concerns about NHSE's application of either section 21 (and the Commissioner can verify the information being withheld under section 21 is correspondence exchanged between it and the complainant) or section 40(2).
14. The complainant also hasn't raised any further concerns about whether NHSE has identified all of the information within the scope of the request, and on the balance of probabilities, the Commissioner is satisfied that NHSE has.
15. Therefore, the Commissioner considers the scope of his investigation is to consider NHSE's application of section 36(2) and, depending on his findings, he may go onto consider section 41 also.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

16. Section 36(2) of FOIA states that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

 - (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 purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”
17. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person ('QP') for that public authority.
18. It's important to highlight that it's not necessary for the Commissioner to agree with the opinion of the QP for the exemption to be applied appropriately. Furthermore, the opinion does not have to be the only

reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it's an opinion that a reasonable person could hold.

19. Section 36 is a qualified exemption, other than for information held by Parliament. This means that even if the Commissioner finds that the exemption has been applied properly, the public authority must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Who is the qualified person and how was their opinion sought?

20. NHSE's QP is its Chief Executive Amanda Pritchard. The QP's opinion was sought in relation to a previous, similar request on 6 January 2023 and the QP's opinion was given on 10 January 2023. It's important to note that the previous case dealt with some of the same withheld information but it had a narrower scope. Therefore, the QP's opinion was sought again on 26 May 2023 in relation to this request and granted on 5 June 2023.
21. Whilst NHSE's correspondence to the complainant also cites section 36(2)(c), which concerns the prejudice to the effective conduct of public affairs, the Commissioner notes that no such separate or distinct arguments were presented to the QP for their consideration.
22. In both instances, the QP was provided with a copy of the withheld information, supporting arguments of the section 36(2)(b)(ii) exemption and a description of the effects of disclosure. The Commissioner notes that no counter arguments in relation to section 36(2)(b)(ii) were put forward for the QP's consideration.
23. In both instances the QP's approval was expressed to the FOI team via the Director of Policy.

Is the qualified person's opinion reasonable?

24. In order to engage section 36(2)(b)(ii), the QP must give an opinion that disclosure would, or would be likely to, prejudice the free and frank exchange of views for the purposes of deliberation. To reiterate, since the QP did not consider any arguments in relation to section 36(2)(c), it can't be engaged.
25. The Commissioner acknowledges that, in order to conduct public affairs effectively, members of staff within a public authority must be allowed to exchange views for the purposes of deliberation freely and frankly. The Commissioner considers it's a reasonable opinion for the QP to have that disclosure would be likely to prejudice the free and frank exchange of views in the future.

26. Since section 36(2)(b)(ii) is engaged on the lower threshold of prejudice, the Commissioner will go onto consider the balance of the public interest.

Public interest test

Arguments in favour of maintaining the exemption

27. Section 36(2)(b)(ii) is about protecting processes, rather than what is actually within the withheld information. To engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. However, the Commissioner notes the withheld information discusses transgender individuals in the context of the same sex accommodation guidance; these are complex, nuanced but also divisive and emotive discussions.
28. The Commissioner accepts that it's more likely the disclosure of free and frank opinions would be likely inhibit the such exchanges in the future and this is known as the 'chilling effect.' Chilling effect arguments are likely to be strongest if the issue in question is still live and the Commissioner understands that, at the time that the request was made, the guidance was still in draft form and discussions between NHSE and the Department of Health and Social Care (DHSC) have not yet concluded.
29. The information that is actually being withheld is largely draft versions of the revised guidance. The other information being withheld discusses these drafts. NHSE is concerned that:
- 'Once it is published, the guidance will be applicable to all NHS providers in England and will have an impact on patients. We consider disclosure of an incomplete guidance document of this nature may cause confusion for clinicians and patients in terms of implementation.'
30. It's not in the public interest to inhibit the processes needed to create an effective and robust piece of guidance, especially within a healthcare setting where that guidance is designed to give dignity and fair treatment to all.
31. NHSE is finally concerned that 'disclosure would be likely to impact NHS England's relationship with key stakeholders, including the DHSC...we consider release of a draft guidance document, which the DHSC have not yet had input into, would damage our existing relationship with the DHSC.'

Public interest arguments in disclosure

32. There is always a public interest in transparency and public authorities opening up the guidance reviewal process for scrutiny. There are also arguments to be made that disclosure could actually lead to better quality discussions and advice amongst public officials.
33. When requesting their internal review, the complainant explained 'There is a huge public interest in knowing the extent of lobbying by special interest groups on public servants, particularly if this may have had an influence on a review process which is central to public policy at the NHS.'
34. The Commissioner agrees, there is a public interest in understanding and scrutinising the influence of lobbyist groups, especially in the context of central government and policies which will affect a significant body of the population.
35. The complainant also explained 'There have already been numerous concerns raised about the impartiality² of those involved in the FOI/the review of the single sex wards and therefore refusing to be transparent on this topic will further these concerns.'

The balance of the public interest

36. The Commissioner considers this to be a finely balanced public interest test. However, he has decided the balance of the public interest lies in maintaining the exemption. In making this decision, he has considered the content of the withheld information and the information which has already been disclosed.
37. The withheld information contains free and frank views, exchanged between the individuals named within the request and also external stakeholders. These individuals will all be involved in the development of the guidance which is ongoing. The Commissioner is wary that it's not in the public interest to dilute or compromise the safe space required to review the same sex accommodation guidance, especially when its implementation will affect so many individuals and significantly.
38. Furthermore, the Commissioner notes that the information NHSE disclosed on 14 July 2023 goes some way in addressing the specific public interest arguments about the influence of lobbyists on the reviewal process. The disclosed information contains correspondence

² The Commissioner believes the complainant is referencing the following [Fears over 'flawed' NHS single-sex wards review carried out by 'trans advocate' \(telegraph.co.uk\)](https://www.telegraph.co.uk/health/nhs/single-sex-wards-review-carrying-out-by-trans-advocate/)

exchanged between NHSE and Stonewall, NHSE and the LGBT Foundation and NHSE and Gendered Intelligence. It also lists Mermaids as a group for consultation. NHSE is not seeking to withhold the influence of these lobbyists groups, as it has actually disclosed the correspondence between itself and these parties in response to the request.

39. The Commissioner also believes that the complainant's concerns about impartiality have been addressed within correspondence the complainant exchanged with NHSE. This information has been withheld under section 21 as it is reasonably accessible to the complainant.
40. Furthermore, the disclosed information thoroughly explores discussions and concerns about how the same sex accommodation review will apply to, and affect, both transgender and cisgender individuals. Again, the NHSE has not withheld this information from disclosure or scrutiny.
41. The Commissioner is sceptical of NHSE's argument that disclosure of an incomplete draft guidance could cause confusion amongst the bodies that the guidance is aimed at. He accepts that messaging that is subject to change has the potential to trickle down to healthcare settings as a result of disclosure. However, he questions the extent to which this would occur since all of the drafts are clearly watermarked as such and contain annotations and notes.
42. The complainant has argued that the relationships between the bodies to whom the requested information relates, including the NMC³ and NHS England, can't be damaged since all are public bodies subject to FOIA. However, FOIA is slightly more nuanced than that. Whilst public officials are not expected to be easily deterred from sharing their views, chilling effect arguments can't be dismissed out of hand. Furthermore, section 36(2)(b)(ii) is a qualified exemption and just because information is held by a public authority doesn't mean that the public interest will always be served by disclosure.
43. Ultimately, the Commissioner is satisfied that NHSE has recognised the specific public interest in the requested information. In doing so, it has released a significant amount of information which demonstrates how its engaging with specific groups, and the considerations its making in reviewing the same sex accommodation guidance. However, it's also recognised that disclosure of the draft guidance, and specific

³ [The Nursing & Midwifery Council - The Nursing and Midwifery Council \(nmc.org.uk\)](https://www.nmc.org.uk)

accompanying correspondence, might inhibit the guidance itself and therefore, should be withheld.

Procedural matters

44. Section 10 of FOIA states that a request must be complied promptly and within 20 working days of receipt of the request. In failing to disclose all non-exempt information within scope within twenty working days of receipt of the request, NHSE breached section 10.

Other matters

45. The Commissioner's guidance states that internal reviews should be carried out within 20 working days of receipt of the internal review request. In exceptional, complex circumstances, this timeframe can be extended to 40 working days. NHSE exceeded this timeframe.

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF