

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 June 2024

**Public Authority:** Buckinghamshire, Oxfordshire & West Berkshire (BOB) Integrated Care Board (ICB)

**Address:** Unipart House  
Oxford  
OX4 2PG

#### **Decision (including any steps ordered)**

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1. The complainant has requested a deep dive report into primary care in Buckinghamshire. Buckinghamshire, Oxfordshire & West Berkshire (BOB) Integrated Care Board (ICB) ("the public authority") refused the request, citing section 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the report engages section 36(2)(b)(ii) 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 report.
4. The public authority must take these steps within 30 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 25 September 2023 the complainant requested the following:

“At last week's meeting of the Bucks Health and Wellbeing Board [Redacted] said that GP representatives produced a paper as part of your "deep dive" into Primary Care. I should be grateful if you could email me a copy of this paper.

I hope this won't be a problem from the point of view of ICB willingness to be open in line with the ICB's adopted Communications and Engagement Strategy which references "transparency" in five places.”
6. The public authority responded on 28 November 2023 and refused to provide the requested information, citing section 36 (prejudice to the effective conduct of public affairs).
7. The complainant requested an internal review on 4 December 2023.
8. The ICB provided the outcome to its internal review on 3 January 2023. It upheld its previous position.

## Scope of the case

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9. The complainant contacted the Commissioner on 5 January 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether the public authority can withhold the requested information under section 36.

## Reasons for decision

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11. 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.”
12. 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. The QP's opinion must also be a 'reasonable' opinion.
  13. It's not necessary for the Commissioner to agree with the opinion of the QP for the exemption to be applied appropriately. The opinion doesn't need 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.
  14. Section 36 is a qualified exemption which means it's subject to the public interest test.

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

15. The public authority have confirmed to the Commissioner that the QP is its Chief Executive and their opinion was sought on 2 November 2020. In order for the QP to form their opinion, they were provided with arguments in favour of the application of section 36(2)(b)(ii) and 36(2)(c), counter arguments and a description of the withheld information. The QP wasn't invited to consider the public interest, but they aren't required to do so.

### **Is the qualified person's opinion reasonable?**

16. In relation to the exemption at section 36(2)(b)(ii), the QP must give an opinion that the release of the requested information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
17. The QP signed off on concerns that:  
  
“This paper was used to stimulate discussion on current primary care challenges, prior to system wide work on the BOB ICB primary care strategy which is intended for publication in the forthcoming months... Therefore, a without prejudice, free and frank discussion of the primary care issues in Buckinghamshire were required...sharing papers from this meeting would inhibit the free and frank exchange of views for the purposes of deliberation, as it would likely cause partners to write with public scrutiny in mind.”

18. In relation to the exemption at section 36(2)(b)(c), the QP must give an opinion that the release of the requested information would, or would be likely to, otherwise prejudice the effective conduct of public affairs. The use of 'otherwise' indicates that the prejudice must be separate and distinct to that covered by section 36(2)(b)(i) and (ii).
19. The QP also signed off concerns that:

"Sharing papers from this meeting...would also most certainly otherwise prejudice, the effective conduct of public affairs."
20. The Commissioner is satisfied that the opinion expressed in relation to section 36(2)(b)(ii) is reasonable. If officials are fearful that their views might be disclosed, they will be more guarded in their discussions and the exchange of views.
21. The QP has engaged the exemption on the higher threshold of prejudice, disclosure 'would' inhibit the free and frank exchange of views for the purposes of deliberation. 'Would' means the prejudice will be more likely than not to occur; in other words, there is a more than 50% chance of disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
22. If a public authority claims that prejudice would occur, they need to establish that the chain of events is so convincing that prejudice is clearly more likely than not to arise. There is nothing in the QP's opinion, or the public authority's submission, that persuades the Commissioner that this prejudice is more likely than not to occur. So the Commissioner has found the exemption is engaged but on the lower threshold of prejudice, disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.
23. However, the Commissioner isn't satisfied that the QP's opinion expressed in relation to section 36(2)(c) is reasonable. The submission put to the QP doesn't explain **how** disclosure would, or would be likely, to otherwise prejudice the effectiveness conduct of public affairs. The QP doesn't consider any causal link between the withheld information and the prejudice envisaged; they merely imply that the inhibition on free and frank discussions would, in turn, prejudice the effective conduct of public affairs and this is the same argument as section 36(2)(b)(ii).
24. In its internal review outcome, the public authority argued:

"The Panel considered shared document management vs document control, and whether permissions had been applied to the sharing of documents produced by external organisations and discussed at partnership discussion/decision making forums, of which BOB ICB is a member, and with whom responsibility for disclosure lay. As this was

ambiguous, it would not be appropriate or proper for this information to be shared.”

25. This argument could be relevant to section 36(2)(c), if the public authority was arguing that its relationship with other parties that contributed to the report would be damaged by disclosure, and therefore its ability to collaborate with said parties would be impacted. However, this wasn't the argument that was put to the QP so section 36(2)(c) can't be engaged on that basis.
26. The Commissioner also notes that if information is held by a public authority, for the purposes of FOIA, it will have the final say on whether that information is disclosed in response to a request for information. Whether or not the other parties, which may or may not be subject to FOIA, consent to disclosure or what the data sharing agreement is, it's up to the public authority that received the request to fully consider its disclosure.
27. Since the Commissioner doesn't consider the QP's opinion in relation to section 36(2)(c) reasonable, the exemption isn't engaged. However, since section 36(2)(b)(ii) is engaged, the Commissioner will go onto consider the balance of the public interest and whether it's better served by disclosure of the report or in maintaining the exemption.

### **Public interest test**

#### **Factors in favour of maintaining the exemption**

28. Section 36(2)(b)(ii) public interest arguments are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would be likely to inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.
29. The Commissioner notes that it's not in the public interest for the quality of advice to be impacted, which could lead to poorer decision-making, especially in a healthcare setting when robust decisions are necessary to protect patients.
30. The public authority is concerned that:

“Releasing this document, as written, could be open to interpretation without detailed context and fact, as the paper was only intended for discussion at EP to support developing the BOB ICB primary care strategy.”

31. The Commissioner dismisses this argument. FOIA allows access to information as it is held by a public authority, regardless of the intended audience or its accuracy. It's also obvious that reports such as these will contain work which is ongoing and subject to change. If, however, the public authority was worried about how the report would be interpreted, it could always publish a supplementary statement alongside it.

### **Factors in favour of disclosure**

32. There is always a general public interest in transparency and disclosure under FOIA allows public authorities to be accountable for their decisions.

33. There is undeniably a public interest in the report, which discusses current primary care challenges in the area and how the public authority intends to address them. It's of interest to the complainant, as it will be to any patients, or their family members, treated within the area.

### **The balance of the public interest test**

34. The Commissioner has determined that the balance of the public interest lies in disclosure.

35. Since the Commissioner found that the opinion was reasonable, he's accepted that disclosure would be likely to inhibit free and frank discussions. However, the Commissioner must consider the severity, extent and frequency of that inhibition himself in order to determine where the balance of the public interest lies.

36. The public interest arguments that the public authority has discussed in its refusal notice and internal review outcome are minimal. Even though it was asked to expand on these arguments in its submission to the Commissioner, it didn't.

37. The public authority has argued that:

'In support of the initial request BOB ICB can advise that a report drawing on the 'Primary Care Deep Dive Report' (and other sources) has now been published and can be found here.'<sup>1</sup>

38. The Commissioner can't verify what information this link is meant to contain because it's broken. He also can't verify whether the information

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<sup>1</sup> <http://yourvoicebob-icb.uk.engagementhq.com>

was in the public domain at the time that the request was made, which it would need to be in order to meet the public interest that the request represents.

39. The link appears to be a survey link, which the Commissioner notes wouldn't meet any public interest in the report if it's asking for information, rather than giving it.

40. In their internal review request, the complainant expressed concern that:

"The ICB is currently inviting members of the public to "help shape the future of primary care"...I can only assume that access to the deep dive report will be helpful to me and the public generally to enable us to be information when we contribute to this engagement exercise and it is therefore in the public interest for it to be in the public domain."

41. Even though the Commissioner suspects (as per paragraphs 37-39) that this survey is now closed, he agrees with the complainant. At the time that the request was made, disclosure of the report would have helped inform the comments fed back to the public authority. This increases the public interest in disclosure.

42. The Commissioner understands that, during the initial handling of the request, the public authority explained that it meets the public interest in the subject via its quarterly updates. However, the complainant is concerned that mention of the report in the quarterly updates is minimal, discussing how it provides opportunities for collaboration and integrated working but not any detail.

43. In considering the extent, frequency and severity of any inhibition that would be likely to occur, the Commissioner must consider the information that is actually being withheld. The report begins by setting out the 'National Landscape' of Primary care, so Buckinghamshire, Oxfordshire & West Berkshire's performance can be considered alongside it. The National Landscape section of the report discusses information that's in the public domain, including the Hewitt Review<sup>2</sup>, the Future of General Practice report<sup>3</sup> and the Fuller Stocktake.<sup>4</sup>

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<sup>2</sup> [The Hewitt Review: an independent review of integrated care systems - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441212/hewitt-review-report.pdf)

<sup>3</sup> [The future of general practice - Health and Social Care Committee \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/commons-select/health-and-social-care-committee/pages/the-future-of-general-practice/)

<sup>4</sup> [NHS England » Next steps for integrating primary care: Fuller stocktake report](https://www.nhs.uk/england/next-steps-for-integrating-primary-care-fuller-stocktake-report/)

44. The Commissioner doesn't see how disclosure of this information could result in the chilling effect identified. It's just repeating what's already in the public domain and, more importantly, focuses on nationwide issues, not specifically the issues of the public authority. The Commissioner considers it unlikely disclosure of this information would be likely to result in a chilling effect.
45. Looking at the rest of the report, the public authority hasn't directed the Commissioner to any examples of particularly sensitive information. The Commissioner notes that public officials are expected to be impartial and robust when giving advice and participating in discussions, and not easily deterred from expressing their views by the possibility of disclosure.
46. The report does contain frank scrutiny of primary care services in Buckinghamshire, Oxfordshire and West Berkshire. Primary care services are the first point of contact in the healthcare system, acting as the 'front door' of the NHS and the Commissioner recognises the subject of the report is sensitive in itself and free and frank discussions are needed to fully participate in such discussions.
47. The Commissioner considers this to be a finely balanced decision. On the one hand, discussions about challenges to primary care, and proposed solutions, need to be as robust as possible in order to make effective decisions which will improve services and benefit patients. On the other hand, there is undeniably a public interest in allowing the report, and the public authority's solutions, to be scrutinised.
48. Looking at the report, it discusses the views of the panel (which includes various different organisations) but as a whole rather than attributing views or opinions to an individual or an individual organisation. In the Commissioner's opinion, this minimises the chance of the chilling effect.
49. The Commissioner isn't dismissing the chilling effect arguments out of hand, the report contains free and frank discussions of the challenges the public authority faces. However, he does acknowledge the complainant's point that the report 'was used to stimulate discussion and as such it was clearly a precursor to free and frank exchange of view and did not of itself constitute the exchange.'
50. The report is dated July 2023 and the Commissioner notes the request for information was made in August 2023. The Commissioner recognises that, when it comes to chilling effect arguments, once a decision has been made or a piece of work concluded, a safe space for deliberation will no longer be needed. If it was a major decision, there might still be a need for a safe space to properly promote, explain and defend its key points without getting unduly side-tracked. However, this can only last



for a short time and the public authority would have to explain clearly why it was still needed at the time of the request.

51. The public authority has put forward no such arguments as to why the report needs to continue to be withheld. The public authority can't claim that disclosure of a report which has been concluded, could lead to a generalised chilling effect on all future discussions. The public authority has failed to provide either the Commissioner or the complainant with context as to what will happen now the report has concluded, and how these findings will be implemented. If the findings of the report need to be implemented, it follows that further free and frank discussions, between all of the parties involved in the report, will need to occur.
52. However, ultimately the Commissioner has been swayed by the compelling public interest in the report and the fact that, despite the public authority's assertions, there is currently no information in the public domain that meets this public interest.

## Right of appeal

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53. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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