

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 May 2017

Public Authority: NHS Commissioning Board (NHS England)

Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested copies of slides and presentations produced by Deloitte for meetings with NHS England. NHS England refused to provide the information on the basis of section 36(2)(b)(ii), 36(2)(c) and 43(2) of the FOIA.
2. The Commissioner's decision is that NHS England has correctly applied the exemption from disclosure at section 36(2)(b)(ii) and that the public interest favours maintaining the exemption and withholding the requested information. She requires no steps to be taken.

Request and response

3. The complainant initially made a request in February 2016 to NHS England ("NHSE") for the minutes of a meeting that took place in November 2015 between Deloitte and NHSE. NHSE provided this information to the complainant. Following this, on 1 April 2016, the complainant wrote to NHSE and requested further information in the following terms:

"would it be possible to request to see the Deloitte slides from the November meeting?"

Also would it be possible to get hold of the Deloitte presentation from Feb 2015?"

Also is there any way you can find out who actually attended the Feb 2015 meeting?"

4. NHSE responded on 9 August 2016. It stated that it held some information within the scope of the request but did not hold any recorded information to show who attended the meeting in February 2015 as no minutes or attendance were taken. In terms of the slides for the November meeting and the presentation from the February 2015 meeting; NHSE considered that sections 36(2)(b)(ii) and (c) of the FOIA were engaged and the public interest favoured maintaining the exemptions. NHSE also cited section 43(2) as a basis for refusing the request.
5. Following an internal review NHSE wrote to the complainant on 6 September 2016. It stated that it upheld the decision to withhold the presentation and slides on the basis of section 36 and 43 and still considered the balance of the public interest favoured maintaining the exemptions.

Scope of the case

6. The complainant contacted the Commissioner on 7 September 2016 to complain about the way his request for information had been handled. In particular he strongly disagreed that the public interest favoured maintaining the exemptions and withholding the information.
7. The Commissioner considers the scope of his investigation to be to determine if NHSE has correctly applied either the sections 36(2)(b)(ii), 36(2)(c) or 43(2) exemptions and if so where the balance of the public interest lies.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

8. Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
9. Section 36(2)(c) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to prejudice the effective conduct of public affairs.

10. In determining whether either of the two limbs of the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
11. NHSE has explained that for the purposes of section 36 its qualified person is its Chief Executive. In this case the opinion was provided by the Chief Executive and the Commissioner is satisfied this was the qualified person at the time the request was made.
12. NHSE has explained that the qualified person was provided with the withheld information which consists of different versions of the same slide packs which were amended and progressed over time as well as a current service list and one email referencing the slide packs. The slides were prepared by Deloitte to facilitate discussion and consideration of the impact and challenges associated with seven day service reforms to the NHS. They were then shared at various stages with the National Medical Director (and others) with the iterations that followed the initial January draft building on comments received from the NHSE team. NHSE confirmed that no final version of the slide pack was produced but the analysis generated by the discussions and in the slides themselves informed the instructions given to the policy team.
13. NHSE put forward to the qualified person that disclosure of this information would be likely to inhibit the "free and frank exchange of views for the purposes of deliberation". The slides were intended to generate discussions and facilitate consideration of issues relating to seven day services, prior to the formal policy development process. It is a necessary part of policy formulation to enable such discussion in the early stages of the process. The discussions took place between a small group of individuals, and on the basis that the discussions would be private, and individuals could openly express their views.
14. It said that premature disclosure of this information would have a "chilling effect" on these free and frank discussions, with the effect being that individuals may start to moderate their comments. It said that the "chilling effect" is likely to apply to both this project, and future projects. This is because work is still underway to develop the formal policy that will underpin seven day services, and this development may be hindered if free and frank discussion does not continue. In addition, it said

disclosure of this information could also impact future projects and discussions about controversial and sensitive policy issues, in that staff would have reason to believe that all discussion could be released to the public.

15. It went on that this “chilling effect” would, in turn, impair the quality of policy making by NHSE. The resulting situation would be one where such decisions were made without NHSE having all the relevant information; and without full and frank deliberations over options having taken place. Premature disclosure of the information would generate considerable media coverage, which would distract from the process of developing and agreeing the formal policy on seven day services. It said that the most helpful way for the information to be made available to the public is via the formal communications plan.
16. NHS England’s qualified person explained that the information considered relates to a number of versions of the same slide pack, which was produced by Deloitte in order to showcase the analysis of the case for a seven day service. Between each set of slides there was a meeting, during which key staff from NHSE and the Department of Health discussed the analysis. Between each meeting Deloitte amended the slides, in line with the ongoing analysis. NHSE is currently in the process of generating the final policy, which builds on the analysis in the slides. The qualified person considered the arguments for and against disclosure. His view is that disclosure of the information in question would be likely to have a “chilling effect” both specifically in relation to the ongoing policy development process, and generally in terms of NHSE’s ability to consider and analyse proposals.
17. Whilst the qualified person acknowledged that the underlying approach has been agreed, there is still a need for a space for free and frank discussion. There must be an ongoing safe space in which individuals feel able to raise concerns and discuss the drafting of the policy, even at the later stages. Disclosure of this analysis would be likely to mean that staff avoid raising concerns or points for discussion which could benefit the work, for fear that their comments would be made public. Whilst the seniority of staff involved may be considered to weaken this argument, those involved in the discussions (no matter what their pay grade) would have an expectation that their comments would remain confidential. Whilst staff have an understanding of FOIA, there is still an expectation that the type of free and frank discussion in question will remain confidential.
18. The Commissioner considers that the withheld information dates back to 2015 and facilitated and reflected candid discussions relating to the reforms to the seven day NHS services. As the withheld information goes back some time, discussions have moved on as the underlying

approach has now been agreed which means the analysis is no longer being deliberated. However this Government initiative is not yet complete and is still a controversial topic of significant public debate. This request made in April 2016, predates the planned implementation of the reforms to doctor's contracts which was scheduled for August 2016. Whilst the slides themselves would not necessarily have contained details of the discussions that then took place they were key in providing the basis for such discussion. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore the section 36(2)(b)(ii) exemption was correctly engaged.

19. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

20. NHSE acknowledged that there is a strong public interest in the information relating to seven day services and the underlying analysis due to the national media interest in this matter and in the interests of it operating openly and transparently.
21. The complainant considers disclosing the information is in the public interest as there is a lack of clarity over the origin of the information that was used to inform decisions on the need for the reforms and disclosing any information which would shed light on this would be in the public interest.

Public interest arguments in favour of maintaining the exemption

22. NHSE argued that there is a public interest in allowing free and frank discussion of options, especially at the initial stages of policy development. This allows for debate and testing of all options, and in turn, allows NHSE (or indeed any policy maker) to perform its functions to a higher standard, and significantly decreases the likelihood of policy being implemented that is unsuccessful or unworkable.
23. Further to this, all levels of staff are likely to be affected by this disclosure, both in respect of this project and future work. There is a wider public interest in ensuring staff feel they have a "safe space" in which to discuss controversial and sensitive issues. This is likely to be diminished when purported private discussions are published in the media.
24. NHSE said that an argument can be made that making this information available could help correct misleading or incorrect information currently in the public domain. However, NHSE has considered whether, in view of

the passage of time, information would now be suitable for release. NHSE confirmed that it remained of the position that this information should not be disclosed. The information is now out of date and is very likely to be superseded by an upcoming impact assessment of seven day hospital services by the Department of Health. As such, it considers that in addition to being unsuitable for release at the time of the request, it remains unable to release this information now, as to do so would be misleading to the public and would not be in the wider public interest.

Balance of the public interest arguments

25. The withheld information contains analysis which facilitated and to some extent reflects candid discussions between senior individuals within NHSE and the Department of Health in relation to the seven day NHS reforms. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry some weight in that disclosure would provide transparency and accountability and allow the public to further understand the reasoning behind the reforms.
26. The Commissioner has also looked at the fact that this issue is a matter of significant public interest. The reforms formalise the arrangements for, seven day working by consultants together with the training and working practices of junior doctors. All of which is intended to deliver improved health care for the public. The withheld information reflects the thinking behind and journey towards the overall approach that has now been agreed.
27. The Commissioner considers it important to emphasise the significance of the media interest in this issue, with wide spread concern from doctors over the Government's proposals. Bodies representing doctors were arguing that the proposals were a threat to the health service and put patient safety at risk and the press reported on the division between the doctors and Government over the changes to the contracts for junior doctors.
28. The Commissioner is satisfied that the withheld information sheds light on reasoning and thought processes behind the reforms and altogether would increase transparency on matters which could impact on all inhabitants of the UK. The proposed changes would have a long term effect and there is clearly an ongoing public debate of the issues which is not confined purely to the media.
29. It is likely disclosure would add to the information already available and would inform the public debate but the extent to which it would have to be balanced against the harm, at the time of the request, to the ongoing discussions and implementation of the reforms.

30. Turning now to the case for withholding the information, the arguments for maintaining the exemption focus on the 'chilling affect' argument, that officials would be likely to be less candid in the free and frank exchange of views for the purpose of deliberation.
31. The chilling affect argument will be strongest when an issue is still live. In this case, NHSE has confirmed that the withheld information is outdated and is very likely to be superseded by an upcoming impact assessment of seven day hospital services by the Department of Health. The withheld information was approximately 12 months old or older at the time the request was made as it is dated between January and May 2015. At the time of the request the Government had already announced its ambition to deliver a seven day NHS service but implementation of the junior doctor's contracts was not planned to commence until August 2016 and negotiations for consultant's contracts were still ongoing. Therefore a substantial amount of weight is attributed to the chilling affect argument in terms of discussions ongoing relating to implementation of the reforms.
32. The Commissioner is however mindful that senior individuals within NHSE and the Department of Health tasked with developing these reforms would be expected to undertake this task to the best of their abilities despite and because of public scrutiny of the reforms.
33. The Commissioner also notes that NHSE touched on the idea that a 'safe space' was needed to allow it to discuss the contents of the slides without undue public scrutiny. Although NHSE did not expand any further on this idea, the Commissioner does accept that the slides and presentations were integral to the discussions taking place and to informing the decisions that were made. It is reasonable to therefore conclude that due to the 'live' nature of the issue at the time of the request a safe space was needed to have discussions and freely and frankly debate the contents of the withheld information. It would not have been in the public interest to place this information in the public domain whilst this was ongoing as it may have influenced the ability of NHSE, the Department of Health and the government to make an impartial decision free from the pressures of public and media scrutiny.
34. The Commissioner has weighed these arguments and acknowledges there is a strong public interest in disclosure of information which would demonstrate that this sensitive issue has been properly discussed and deliberated. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case.
35. Balanced against that the Commissioner has to accept there is some significant weight to the chilling affect and safe space arguments given

that at the time of the request there were still discussions to be had going forward relating to further development and implementation of the reforms.

36. The Commissioner therefore considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the section 36(2)(b)(ii) exemption in this case. She has therefore not gone on to consider the use of the other exemptions in this case.

Right of appeal

37. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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