

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

### **Decision notice**

**Date:** 17 July 2018

**Public Authority:** NHS Commissioning Board (NHS England)

**Address:** 79 Whitehall

London

SW1A 2NS

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

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1. The complainant has requested the emails/documents which detail Deloitte's calculation which come up with the figure of 6700 (relating to the 7 day NHS reforms). NHS England refused to provide some of the information requested under section 36(2)(b)(i) and (ii), section 36(2)(c) FOIA. Some information was provided but redactions were made to it under section 40(2) FOIA. The complainant does not consider that NHS England located all information falling within the scope of the request and therefore considers further information is held. The complainant did not however dispute the redactions made under section 40(2) FOIA.
2. The Commissioner's decision is that NHS England correctly applied section 36(2)(b)(ii) FOIA to the withheld information and that no further information is held under section 1(1)(a) FOIA other than that which has already been provided.
3. The Commissioner requires no steps to be taken.

### **Request and response**

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4. On 4 August 2016 the complainant requested information of the following description:

"I would like to make a new FOI request:

On 16/7/15 at 18:05, NHS England's [redacted] wrote via email to [redacted] at UCL:

"Thanks very much for your advice today. In the end we managed to

supply our press / media teams with the simplest possible statement, as follows. [ FYI the "estimate" was made by Deloitte, and was actually 6700 ]

The 6,000 figure is an estimate of additional deaths in hospital, based on an analysis of 2013/14 HES data that is due to be published in the BMJ shortly."

Please provide the emails/documents which detail Deloitte's calculation which come up with the figure of 6700. Please provide all attachments with emails.

Please state how this figure was given to the secretary of state or Department of Health.

Please provide the email/letter chain giving the figure to the Department of health/secretary of state, with attachments."

5. On 25 August 2016 NHS England responded. It refused to disclose the information requested at part 1 of the request under section 36 and 43 FOIA, it provided information in response to parts 2 and 3 of the request but made redactions under section 40(2) FOIA.
6. The complainant requested an internal review on 25 November 2016. Essentially he asked NHS England to review its application of exemptions to part 1 of the request, asked further questions about the contents of that withheld information and confirmed that he was concerned that not all information within the scope of the request had been located as NHS England had not "provided any emails providing the Department for Health and Social Care (DHSC) with the 6700 (?6000, ?5700) figure".
7. NHS England did not provide an internal review.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 7 March 2017 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, NHS England did provide the complainant with some of the information contained within the withheld slide pack. It also withdrew its application of section 43(2) FOIA.

10. The Commissioner has considered whether NHS England was correct to apply section 36(2)(b)(i) or (ii) or section 36(2)(c) FOIA to the information being withheld under these exemptions. She has also considered whether any further information is held, falling within the scope of the request, under section 1(1)(a) FOIA.

## Reasons for decision

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### Section 36

11. Section 36 FOIA provides that,

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

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance.
13. In determining whether the exemption was correctly engaged by the NHS England, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
14. NHS England explained that the qualified person is Mr Simon Stevens, Chief Executive of NHS England. The qualified person's opinion was provided on 28 February 2018. The qualified person's opinion was that

section 36(2)(b)(i) and (ii) and (2)(c) were applicable in this case as disclosure would be likely to prejudice the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would otherwise be likely to prejudice the effective conduct of public affairs. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person were provided to the Commissioner as well as a copy of the qualified person's opinion.

15. In this case the opinion was not sought until during the course of the Commissioner's investigation as NHS England had relied upon a previous opinion relating to a separate request for a different version of the slide pack. The Commissioner informed NHS England that as the qualified person's opinion had not been sought in relation to this particular request, this would be required if NHS England wanted to reply upon the section 36 exemption. NHS England therefore sought the qualified person's opinion in relation to this specific request and provided it to the Commissioner on 28 February 2018.
16. The withheld information is the second drafting of the May 2015 version of the slide pack prepared by Deloitte to facilitate discussion and consideration of the impact and challenges associated with seven day service reforms to the NHS.
17. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance.
18. NHS England put forward to the qualified person that the information requested has already been released showing the wording in the pack on the "6000/6700 deaths". However NHS England should apply section 36 on release of the slide pack as a whole for the following reasons:

The slides were intended to generate discussions and facilitate consideration of issues relating to 7-day services, prior to the formal policy development 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.

Disclosure of this information would have a "chilling effect" on these free and frank discussions. There is a recognised public interest in enabling a "safe space" within which controversial or sensitive ideas can be explored.

The "chilling effect" is likely to apply to both this project, and future projects. Work is still underway to develop the formal policy that will underpin 7-day services, and this development may be hindered if free and frank discussion does not continue.

In addition, 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. This "chilling effect" would, in turn, impair the quality of policy making by NHS England and its ability to frank, high quality advice to the Department of Health and Ministers. The resulting situation would be one where such decisions were made without having all the relevant information; and without full and frank deliberations over options having taken place.

Finally, a number of the cost estimates included in the draft material are directly relevant to commercially sensitive future contracting negotiations affecting NHS staff unions.

19. NHS England's qualified person explained that the information is one of 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 NHS England and the Department of Health discussed the analysis. Between each meeting Deloitte amended the slides, in line with the ongoing analysis.
20. The qualified person's opinion is that disclosure of the information in question would be likely to have the "chilling effect" and that this would apply both specifically in relation to the ongoing policy development process, and generally in terms of NHS England's ability to consider and analyse proposals. All levels of staff are likely to be affected by this disclosure, both in respect of this project and future work. The qualified person considers that it is vital 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.
21. The Commissioner considers that the withheld information dates back to 2015 and facilitated and reflected candid discussion relating to the reforms to the seven day NHS services. The withheld information dates back to 2015 and discussions have now 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 August 2016, was made at the time of the planned implementation of the reforms to doctor's contracts which was scheduled for August 2016. In particular NHS England has indicated that disclosure would reveal confidential costing information relevant to the Department of Health and Social Care's ongoing negotiations on the new Consultant contract and Agenda for Change staff groups across the NHS. Based upon this, the Commissioner does consider

that the opinion of the qualified person is reasonable and therefore the exemption was correctly engaged.

22. 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**

23. NHS England acknowledged that NHS England has a duty to carry out its functions in an open and transparent way.
24. The 7-day services have been reported on in the media, and it is acknowledged that there has been significant public interest in this issue.

**Public interest arguments in favour of maintaining the exemption**

25. NHS England 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 NHS England (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.
26. 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.
27. NHS England 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, NHS England has considered whether, in view of the passage of time, information would now be suitable for release. It confirmed that it remains of the position that this information should not be disclosed.

## **Balance of the public interest arguments**

28. The withheld information contains candid views of senior individuals within NHS England in relation to the 7-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.
29. 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.
30. The Commissioner believes 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.
31. 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.
32. It is likely disclosure would add to the information already available and would inform the public debate but the extent to which it would has to be balanced against the harm, at the time of the request, to the ongoing discussions and implementation of the reforms.
33. Turning now to the case for withholding the information, the arguments for maintaining the exemption essentially 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.
34. The chilling affect argument will be strongest when an issue is still live. The withheld information was over 12 months old at the time the request was made. At the time of the request the Government had already announced its ambition to deliver a seven day NHS service (however the withheld information post-dates this announcement and



therefore relates to discussions and analysis as to how this could be delivered) but implementation of the junior doctors contracts wasn't planned to commence until August 2016 (at the time the request was made) 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 going forward relating to implementation of the reforms.

35. The Commissioner is however mindful that senior individuals within NHS England and the Department of Health and Social Care 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.
36. 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.
37. Balanced against that the Commissioner has to accept there is some significant weight to the chilling affect arguments given that at the time of the request there were still discussions to be had going forward relating to implementation of the reforms.
38. The Commissioner therefore considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.

## **Section 1**

39. Section 1(1)(a) of FOIA states that, "Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request". Section 1(1)(b) of FOIA states that, "If that is the case, to have that information communicated to him".
40. NHS England said that as the focus of the applicant's request was the Deloitte slide pack, the searches conducted by NHS England focused on the slide pack. It confirmed that there are no emails which detail Deloitte's calculation of the 6700 figure. Deloitte had been commissioned to conduct the analysis which generated the 6700 figure, and this was contained within the slide pack. There was therefore no business need for NHS England to duplicate this information in the form of emails.



41. The Commissioner wrote to NHS England as she was not satisfied that the searches conducted were wide enough to cover the scope of the request. The Commissioner noted that the contents of the slide packs may not have been duplicated in emails but she explained that she considers that the request is wider than this. She asked NHS England to ensure that searches were conducted for emails communicating the slide pack (but not necessarily discussing the contents) to determine whether any such emails are held as these would fall within the scope of the request.
42. Following further searches, on 12 March 2018 some further information was provided to the complainant.
43. NHS England explained that its position was that the email which was disclosed to the applicant on 12 March 2018 was not captured by the scope of the original request. It was the position of NHS England that the scope of the request was limited to emails in which the 6700 figure was contained within the body of the email. It said in its response to the Commissioner of 17 January 2018:

“As previously outlined to the applicant and the Commissioner, there are no emails which detail Deloitte’s calculation of the 6700 figure. Deloitte had been commissioned to conduct the analysis which generated the 6700 figure, and this was contained within the slide pack. There was therefore no business need for NHS England to duplicate this information in the form of emails.)”
44. It went on that upon receipt of the Commissioner’s follow up correspondence with regard to this case, it became apparent that NHS England’s interpretation of the scope of the request did not match that of the complainant. It was NHS England’s understanding from this point that the scope should be considered to include the email in which the slide pack containing the 6700 figure was shared with DHSC. The slide pack was shared with DHSC once, on 6 August 2015. NHS England searched for this email within the specific working area for the NHS England Medical Directorate. It knew that this was where the information was held, as the attached slide pack had been previously located as part of its work on this FOI request. As such, there was no need to conduct any additional searches for this information.
45. It reiterated that a copy of the email was shared with the applicant on 12 March 2018. It is therefore satisfied that no further information falling within the scope (either NHS England’s original interpretation of the scope, or the extended scope referred to above) of the request is held.

46. It did however clarify that additional information was attached to the email in which the 6700 version of the slide pack was sent to DHSC. There were four additional attachments relating to 7DS output modelling and assumptions which include technical annex notes, output model, excel workbook and a previously shared 7DS background slide pack. It confirmed that that NHS England does not consider that those documents fall within the scope of the request, as they are not related to the Deloitte slide pack.
47. It explained that the complainant requested "*the emails/documents which detail Deloitte's calculation which come up with the figure of 6700. Please provide all attachments with emails*". As such, in order to fall within the scope of this request, the documents would need to either "detail Deloitte's calculation which come up with the figure of 6700", or be attached to an email which "detail[s] Deloitte's calculation which come up with the figure of 6700". NHS England said that they do not fall into either category, and as such cannot be considered to fall within the scope of the request.
48. It provided the Commissioner with a copy of the email to which these documents were attached. It said that it does not detail Deloitte's calculation of the 6700 figure, and as such does not fall within the scope of the request. The subject of the email to which the documents were attached is "7 Day Services costing". The documents were provided to the recipients to supplement discussions on 7 Day Services costings, and as such the documents relate to the financial considerations of 7 Day Services. We are therefore satisfied that the attachments are not related to the calculation of the 6700 figure.
49. It therefore concluded that as neither the attachments themselves, nor the email to which they were attached, relate to "Deloitte's calculation which come up with the figure of 6700", they do not fall within the scope of the request.
50. Based upon NHS England's submissions the Commissioner is satisfied that on the balance of probabilities, there is no further information held falling within the scope of the request under section 1(1)(a) FOIA.

## **Right of appeal**

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51. 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)

52. 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.
53. 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 .....**

**Pam Clements**  
**Group Manager**

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