

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2016

Public Authority: Office of Manpower Economics
Address: Fleet Bank House
2 – 6 Salisbury Square
London
EC4Y 8JX

Decision (including any steps ordered)

1. The complainant has requested minutes of the oral evidence given to the Doctors and Dentists Remuneration Board (DDRB) during the recent review of doctors' pay and contracts which took place in 2015. The Office of Manpower Economics (OME), withheld the information under section 36(2) – prejudice to the conduct of public affairs.
2. The Commissioner's decision is that the OME is entitled to rely on section 36(2)(b)(ii) to withhold the requested information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 19 August 2015 the complainant quoted from a report by the Doctors and Dentists Remuneration Board (DDRB),

"1.23 In addition we took oral evidence from the then Parliamentary Under Secretary of State for Health, Dr Dan Poulter; officials from the Health Departments across the United Kingdom; NHS Employers; Sir Bruce Keogh, the Medical Director at NHS England; and the senior leadership of the BMA. We are grateful to all who submitted evidence for their time and effort in preparing and presenting evidence to us, both in writing and orally."
5. He went on to request information in the following terms:

"The report stated the above and I would like to request to see the minutes/documentation of all the oral evidence given to the DDRB."

6. On 28 August 2015 the OME responded. It refused to provide the requested information and cited the exemption provided by section 36(2)(c) as the basis for doing so.
7. The complainant subsequently asked the OME to carry out an internal review. In order to ensure its independence, the OME asked the Low Pay Commission to conduct the review. The Low Pay Commission sent the complainant the outcome of the review on 24 September 2015. The review upheld the decision to refuse the request under section 36.
8. During the course of the Commissioner's investigation the OME clarified that it was withholding the information under sections 36(2)(b)(ii) – inhibition to the free and frank exchange of views for the purposes of deliberation, as well as section 36(2)(c) – prejudice to the conduct of public affairs.

Scope of the case

9. The complainant contacted the Commissioner on 26 September 2015 to complain about the way his request for information had been handled, however it was only after he submitted all the relevant documentation on 12 October 2015 that his request was accepted as eligible for investigation. The complainant argued that the public interest favoured disclosing the information.
10. The Commissioner considers that the matter to be decided is whether either of the section 36 exemptions cited are engaged, and, if so, whether the public interest favours maintaining the exemption/s. As both exemptions have been applied to all the withheld information, if the Commissioner finds that one exemption can be relied on, he will not need to go on to look at the other.

Background

11. The OME is sponsored by the Department of Business Innovation and Skills and provides an independent secretariat service to eight Pay Review Bodies including the DDRB. The role of these Pay Review Bodies is to provide independent advice and recommendations to government about pay and reward for different groups of public sector workers.

12. In October 2014 the DDRB was asked by the UK Government, the Welsh Government and the Northern Ireland Executive to make recommendations on changes to contractual arrangements for junior doctors, including a new system of pay progression. It was also asked to make observations on pay proposals for reforming consultants' contracts. In order to fulfil these remits the DDRB asked for written evidence from interested parties from both the employers' and employees' side. It then invited some of those parties to provide oral evidence separately.
13. Such arrangements provide an opportunity for a Pay Review Body to clarify points in their written evidence and for the Pay Review Body to test hypothetical recommendations. It also gives the parties involved the chance to signal what their priorities would be if resources were limited and might therefore need to be targeted towards particular groups and places. The written evidence is shared with all parties, but the oral evidence is not. The request is for the minutes of the meetings at which the oral evidence was given.
14. The DDRB published its report in July 2015. The recommendations and observations contained within it informed and contributed to the negotiations between the employers and employees that followed. The report's recommendations are just that, recommendations, they do not prescribe the terms of contract. They simply set out the DDRB's views on what the parameters of the subsequent negotiations should be, for example,

"Recommendation 1: Pay should be based on stages of training and actual progression to the next level of responsibility, ..." .

Reasons for decision

Section 36(2) – prejudice to the conduct of public affairs.

15. The Commissioner will start by considering the OME's application of section 36(2)(b)(ii).
16. In broad terms, the OME has argued that the DDRB needs to have private discussions with relevant parties representing both employers and employees, so that they have safe space in which to discuss their positions and air their concerns. Disclosing the information, they argue, would inhibit these free and frank discussions. This in turn would prejudice the DDRB's ability to fulfil its remit to provide the administrations with the recommendations and observations they sought.

17. Section 36(2)(b)(ii) of FOIA states that information is exempt 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 purpose of deliberation.
18. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the OME, 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.
19. The OME has advised the Commissioner that its qualified person for the purposes of section 36 is their Director and have provided a link to an archived document produced by, what was then, the Department of Constitutional Affairs, which confirmed this to be the case.
20. The OME is a small public authority and their refusal notice of 28 August 2015 was signed by its head, the Director. Furthermore during his investigation it was the Director himself who answered the Commissioner's enquiries. The Commissioner is therefore satisfied that the qualified person did give an opinion. Although the OME has not stated when their qualified person first gave his opinion that the information was exempt under section 36, it is clear from the fact that he signed the refusal notice that he considered the information exempt under section 36(2)(c) by that date. However the Commissioner can only be certain that the qualified person was of the opinion the information was also exempt under section 36(2)(c) when he responded to the Commissioner's enquiries on 19 November 2015.
21. It has been established at Tribunal that there is nothing to prevent a public authority applying an exemption during the Commissioner's investigation.
22. When considering whether the qualified person's opinion is a reasonable one the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.

23. The OME has argued that the DDRB's discussions with the parties representing both employers and employees need to remain private, so that they have safe space in which to discuss their positions and air their concerns. Disclosing the information, the OME argues, would inhibit these free and frank discussions. This inhibition would not only affect the work of the DDRB, the impact could be felt by all Pay Review Boards if the disclosure of the requested information in this case signalled to others that their discussions could also be made public.
24. The qualified person considers that in order to fully explain their position and consider hypothetical possibilities while still preserving room to manoeuvre in their negotiating positions, the employers and employees' representative need to be able to hold discussions with the DDRB in private. He has also argued that it is established practice for only the written evidence to be shared with all parties. The minutes of the meetings are not even shared with the party which gave the oral evidence. It would go against the expectations of the parties to now publish minutes of the oral evidence.
25. The Commissioner notes that in the OME's refusal notice, at which time the OME only cited section 36(2)(c), the qualified person stated that in his opinion disclosing the requested information 'would be likely to' affect the conduct of public affairs. In his submission to the Commissioner the qualified person stated his opinion to be that inhibition to the free and frank exchange of views 'would' occur. It is on the basis that the prejudice would occur that the Commissioner has conducted his investigation. This means that the qualified person considers that it is more likely than not that the prejudice would occur.
26. The qualified person has informed the Commissioner that when forming his opinion he consulted with the Chair of the DDRB itself as well as colleagues in the OME who have many years' experience in supporting different independent Public Sector Review Bodies. He also considered the responses to the triennial reviews that are conducted by the relevant Government Department in respect of each of the different Pay Review Bodies. This included the most recent joint review of the DDRB and NHS Pay Review Body carried out by the Department of Health in 2015. These reviews, which assess how well the different review bodies are performing, are initiated by the relevant Government Department calling for evidence from interested parties. In the case of the joint review of DDRB and NHS Pay Review Body a short questionnaire was made available to would be respondents and the Commissioner notes that the final question specifically asks for the respondent's views on whether the DDRB is open and transparent and whether it publishes sufficient documentation to ensure an appropriate level of trust in its processes.

27. The triennial review of the DDRB and NHS Pay Review Body has not been published yet and at the time of the Commissioner's enquiries the qualified person no longer had access to the draft triennial report. However, he was able to advise the Commissioner that there was no strong view on either the employers' or employees' side that there was a need to publish the oral evidence.
28. In light of the above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one and that therefore the exemption provided by section 36(2)(b)(ii) is engaged.

Public interest test

29. Section 36 is subject to the public interest test and the requested information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing the public interest in maintaining the exemption the Commissioner will consider both the impact on the work of the DDRB in respect of the particular proposals for contract reform to which this request relates and more generally the impact on the DDRB's future reviews, together with those of other Pay Review Bodies. As explained earlier, the Commissioner does not have to agree with the qualified person's opinion to accept the exemption is engaged. However in this case, by accepting the opinion is reasonable, the Commissioner does recognise there is the potential for the both employers' and employees' sides to be more circumspect when discussing their positions with the DDRB and, to a lesser extent, any other pay review body. In assessing the public interest he will consider the severity, extent and frequency of this inhibition occurring.
30. At the time the request was made the OME had already published the DDRB's recommendations. The DDRB's deliberations on the issues had therefore been completed. However, both employers and employees still required safe space in which to conduct negotiations based on the DDRBs recommendations. The Commissioner considers that to disclose the withheld information, which in places record candid views on pertinent issues, could have impacted on those negotiations. There is also the risk that any reporting of the oral evidence would not have been conducive to constructive negotiations. The Commissioner is satisfied that to disclose information at such a sensitive time would have a marked effect on the parties' willingness to be open and frank with the DDRB in the future as well as eroding the safe space required by the doctors and their employers when negotiating new contracts.
31. In terms of how frequent the impact would be, the Commissioner recognises that the DDRB's review of the Government's proposed contract reforms was rather different to its more routine role of

recommending pay awards under the terms of an existing contract. However there is always the potential for the DDRB to be handed special remits. Of more significance is the fact that the DDRB will be required to work with the parties to the oral evidence on an annual basis in its more usual role of reviewing pay. The Commissioner therefore finds that the inhibition would occur on a frequent basis.

32. The extent of the inhibition is more difficult to assess. Clearly both employers and employees would wish to take the opportunity provided in the oral evidence sessions to press their cases as strongly as possible. It can be argued that they would not be easily deterred from doing so. They may also recognise that this particular request relates to oral evidence provided in respect of a special remit rather than in more routine circumstances. In addition those from the employers' side, for example, the Department of Health and NHS England, are themselves public authorities for the purposes of the FOIA and therefore would be more familiar and more comfortable with the principle of information being disclosed.
33. The Welsh Government and Northern Ireland Executive were also invited to give oral evidence as employers and the complainant subsequently made requests to these public authorities for any minutes or notes which they held of their oral evidence. The Welsh Government simply explained that it did not hold any information. The Northern Ireland Executive similarly advised the complainant that it held no minutes, but it did provide him with a very brief note relating to the oral evidence session contained in an email sent the day after the evidence was given in March 2015. Having viewed the email the Commissioner notes that to a large extent it simply lists the topics that the DDRB was interested in rather than discussing the Executive's own position. The Commissioner does not consider these responses mean that the Welsh Government or the Northern Ireland Executive favour greater transparency around the oral evidence. Nothing can be gleaned by the Welsh Government's response and the information released by the Northern Ireland Executive sheds too little light on how the Executive presented its own position to the DDRB.
34. The Commissioner reminds himself of the qualified person's view that as far as yet unpublished report of the most recent triennial review is concerned; there was no strong consensus of opinion that the oral evidence should be published. Therefore the Commissioner accepts that disclosing the requested information would erode the trust between the employers' side and the DDRB and this would have a chilling effect on the candour with which they presented their position in future meetings.
35. It is less clear what impact any disclosure would have on the BMA's willingness to discuss matters in a free and frank manner when

providing oral evidence. The complainant has provided the Commissioner with a copy of the BMA's response to the recent triennial review from which it is clear that the BMA believes the disclosure of the oral evidence should be the standard practice, stating,

"Parties submitting evidence should have sight of and be able to comment on the meeting notes from the oral evidence sessions, particularly to correct errors of fact."

The submissions to the triennial review were made between July and early August 2015. As this was after the BMA had provided oral evidence to the DDRB it can be assumed that it would be happy for the minute of its evidence to be disclosed, at least to the other parties. It is not absolutely clear whether it would be happy for oral evidence to be routinely disclosed to the public at large. However in the case of the DDRB, the Commissioner accepts that those from the employers' side are more likely to be more guarded in their discussions with the DDRB than some from the employees' side.

36. It is not only the impact disclosure would have on those parties immediately involved in pay reviews conducted by the DDRB that needs to be considered though. The OME is concerned with the wider impact the disclosure might have on the work of other Pay Review Bodies. The OME's concern is that releasing this information would signal to other employers and employees that the oral evidence they gave to their Pay Review Bodies would not necessarily remain confidential. There is logic to this argument, but the Commissioner finds that the impact would be less severe than on those directly involved in either the particular review process to which this request relates, or other reviews conducted by the DDRB. Nevertheless there would be some impact and this increases the frequency and extent of the inhibition which the OME is seeking to prevent by applying section 36(2)(b)(ii).
37. Furthermore the Commissioner considers that although in this case the main representative of the employees, the BMA, seems content for minutes of its oral evidence to be released, there may be other bodies representing employees that are less keen on the prospect of their evidence being disclosed. The qualified person did not limit himself to considering just the triennial reviews of the DDRB, but looked at those of other Pay Review Bodies too, and from his submission it would appear that there is no unanimous view in favour of disclosing oral evidence from the employees' side. As the OME has highlighted, there may be occasions when a party, including one representing employees, wishes to advise its Pay Review Body where its priorities lie in a particular pay settlement. Disclosing such discussions could undermine its negotiating position with an employer later. Therefore disclosure of the requested minutes could stifle discussions during the oral evidence sessions.

38. In his submissions the complainant has argued that the OME has not provided any evidence that the politicians and officials who gave oral evidence were given or sought any assurances as to confidentiality. In the absence of any promise of confidentiality he does not believe there could be any chilling effect. However in his submission to the Commissioner the qualified person advised the Commissioner that those attending the sessions were told that what they said during their sessions is solely for the Pay Review Body members and the secretariat. When pressed on this issue during a telephone conversation, the qualified person confirmed that all parties understood very well that the oral evidence was confidential. This is supported by the fact that in its evidence to the triennial review the BMA argued against the established practice of the oral evidence remaining confidential. The Commissioner is prepared to accept that, certainly by custom and practice, it is recognised by those who provide oral evidence to Pay Review Bodies that their discussions will remain private.
39. The complainant considers that the public should be concerned if politicians or officials had required confidentiality in order to provide oral evidence. The Commissioner acknowledges that the public have the right to expect senior officials and politicians to have developed sound, robust positions and to be prepared to be held to account for their decision making. However this expectation has to be seen in the context of the role of the Pay Review Bodies. There is an element of negotiation in the oral evidence they provide and in these circumstances all parties need to preserve room for manoeuvre and have a right to present a range of options and indicate their priorities.
40. In favour of disclosing the minutes the OME recognises a general public interest in transparency. The Commissioner considers this seriously underestimates the public interest in disclosure. As the complainant points out, the reform of doctors' contracts is a matter of significant public interest. The reforms considered by the DDRB represent a key element of public policy, which introduces, or at least formalises 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. This greatly increases the public interest in the disclosure of information on how the DDRB formulated its recommendations and observations as contained in its report and which formed the basis of subsequent negotiations between doctors and their employers.
41. Even at the time of the request there was media coverage of the doctors' concerns over the Government's proposals. Bodies representing doctors were arguing that the proposal 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. The Commissioner also notes that shortly after the request was made, a petition was launched on the UK Government and Parliament website opposing the DDRB's recommendations which attracted over 111,000 signatures and was debated in Parliament.

42. The Commissioner is therefore satisfied that the oral evidence related to important matters that 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 press.
43. Although at the time of the request it may not have been envisaged that the dispute between doctors and the Government would have led to strikes, there was certainly media coverage of what was described as the Health Secretary's ultimatum to doctors to accept the proposals or they would be imposed upon them. The press also reported the doctors' reactions to the Government's approach.
44. This all adds weight to the public interest in having access to evidence on which the DDRB made its recommendations and observations which helped inform the Government's proposals. If the information shed light on the positions adopted during the subsequent negotiations, this could assist the public's understanding of the parties managed those negotiations and this would increase the public interest in disclosing the minutes.
45. The OME has argued that the public interest in understanding how the DDRB came to its recommendations is already satisfied by the publication of the DDRB's report. Chapters 4 and 5 of that report fully summarises both the written and oral evidence on which it based its recommendations. The Commissioner has considered the DDRB's report and recognises the oral evidence contained within it. He is satisfied the report in no way misrepresents any of that evidence and that it goes some way to meeting the public interest. However this does not extinguish the public interest in disclosing the full minutes which naturally contain additional material and captures more of the nuances of the evidence that was presented.
46. The Commissioner is satisfied that there was a genuine public interest in, what at the time of the request, were the proposed reforms to doctors' contracts. The details of the proposed changes were already in the public domain together with a large amount of information on the employers' arguments in favour of the changes and the employees' grounds for resisting those changes. Such information was contained in the DDRB's report itself, the websites of the interested parties as well as being widely reported in the press. There was therefore already a great

amount of information available to facilitate an informed public debate on the issue. Although the disclosure of the oral evidence would have added to that information, the extent to which it would do so has to be balanced against the harm to process by which the DDRB collects the evidence it requires when conducting pay reviews or fulfilling any special remit it is given.

47. The Commissioner finds that disclosing the oral evidence would have a significant chilling effect on the willingness, certainly on the employer's side, to provide full and frank oral evidence to the DDRB in the future. There would also be an impact more generally on employers and employees' willingness to provide candid oral evidence to other Pay Review Bodies. This is because those providing oral evidence need to be assured of safe space in which to set out their positions and talk honestly about their priorities. Such a chilling effect would seriously undermine the ability of the DDRB and other Pay Review Bodies to carry out their functions. The Commissioner is satisfied that this harm outweighs the value in disclosing the minutes of the oral evidence. The public interest favours maintaining the exemption. The Commissioner does not require the public authority to take any further action in this matter.

Right of appeal

48. 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

49. 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.
50. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF