

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2016

Public Authority: Office of Manpower Economics
(acting on behalf of the Doctors and Dentists
Remuneration Board)

Address: Fleet Bank House
2 - 6 Salisbury Square
London
EC4Y 8JX

Decision (including any steps ordered)

1. The complainant has requested minutes of meetings at which ministers or officials from the Department of Health (DoH) provided oral evidence to the Doctors and Dentists Remuneration Board (DDRB). The Office of Manpower Economics (OME) which provides secretariat services to the DDRB refused the request under section 36(2)(b)(ii) – inhibition to the free and frank exchange of views and section 36(2)(c) – 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 refuse the request.
3. The Commissioner does not require the public authority to take any further action in respect of this request.

Request and response

4. On 11 October 2015 the complainant requested information of the following description:

"I would like to know:

- 1) Within the last 24 months, whether there has been any meetings between the DDRB (or members thereof) and any of: the Health Secretary (Jeremy Hunt), OR staff of the Department of Health OR any

civil servants from the Department of Health OR any junior ministers for Health. If so, please can I have:

- a. The people involved in such meetings
- b. The number of such meetings
- c. The date of such meetings
- d. The minutes of such meetings

2) Within the last 24 months, whether there has been any communications [e.g. letter/email/fax/telephone call] between the DDRB (or members thereof) and any of: the Health Secretary (Jeremy Hunt), OR staff of the Department of Health OR any civil servants from the Department of Health OR any junior ministers for Health. If so, please can I have:

- a. The people sending and receiving such communications
- b. The number of such communications
- c. The date of such communications
- d. Copies of such communications"

5. Briefly, the DDRB is a pay review body established to provide the government with independent recommendations on pay for doctors and dentists. It can also be given special remits to provide recommendations on, for example, proposed changes to their contracts. The OME provides a secretariat service to the DDRB and other similar pay review bodies.
6. The OME responded on 9 November 2015. It provided the details of the meetings requested at points 1a – c but withheld any minutes of those meetings as requested at 1d under section 36(2)(b)(ii) – inhibition of the free and frank exchange of views for the purposes of deliberation, and section 36(2)(c) – prejudice to the conduct of public affairs. It refused to provide the information sought in part 2 of the request on the basis that to do so would exceed the appropriate limit established under section 12 of the FOIA. The appropriate limit is a cost limit above which a public authority is not required to comply with a request.
7. On the 14 November 2015 the complainant emailed the OME challenging its decision to withhold the minutes of the meetings requested at point 1. From the details provided by the OME in response to parts 1a – c, he identified five particular meetings, three of which were minutes of meetings at which ministers or officials from the DoH provided oral

evidence to the DDRB. Those oral evidence meetings were described as follows:

- a. "16 December 2013 DDRB meeting – Oral Evidence
 - b. 15th December 2014 – Oral evidence for 43rd report from Department of Health minister and officials
 - c. 9 March 2015 – Oral evidence contract reform."
8. Following an internal review the OME wrote to the complainant on 10 December 2015. It maintained its application of section 36(2)(b)(ii) and (c) to the minutes of the oral evidence and clarified that it did not hold minutes of the other two meetings referred to by the complainant.

Scope of the case

9. The complainant contacted the Commissioner on 14 December 2015 to complain about the way his request for information had been handled. His particular concern was that the OME has withheld the minutes of the three meetings at which the ministers and officials had provided oral evidence.
10. The Commissioner considers that the issue to be decided is whether the OME is entitled to rely either of the exemptions provided by section 36(2)(b)(ii) or 36(2)(c) to withhold the requested information.
11. The DDRB takes evidence from a number of different bodies over the course of a day and, usually, each body will give their evidence separately. Minutes are produced which cover the evidence provided over the entire session. However the request is only for the minutes taken at those parts of the meetings at which the DoH was in attendance. The findings of this notice relate only to the information recording those particular parts of the proceedings. Having said that, in reaching his conclusions the Commissioner has found it necessary to read the minutes of all three meetings in full and is satisfied that the decision would apply equally to the full minutes.
12. The Commissioner will start by looking at the application of section 36(2)(b)(ii) – inhibition to the free and frank exchange of views for the purpose of deliberation.

Background

13. As previously mentioned, the DDRB provides recommendations to government on the level of pay award it considers appropriate for doctors and dentists to receive. The Commissioner understands recommendations are provided on an annual basis. Two of the meeting minutes captured by the request relate to evidence taken to inform such recommendations. The evidence taken at the 16 December 2013 meeting informed the DDRB's report published in March 2014 and provided recommendations on the pay award for the financial year 2014 to 2015. The 15 December 2014 meeting informed the report published in March 2015 containing recommendations for 2015 to 2016.
14. The meeting of 9 March 2015 took evidence to inform the DDRB's report on the reform of doctors' contracts which was published in July 2015. The remit to produce that report was given to the DDRB in October 2014 when it 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.
15. In order to formulate its recommendations on pay awards and contract reform the DDRB asks for written evidence from interested parties from both the employers' and employees' side. It then invites some of those parties to provide oral evidence.
16. Such arrangements are common to all the Pay Review Bodies which the OME provides a secretariat service for. This provides the Pay Review Body with the opportunity to clarify points in the 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 minutes of the oral evidence are not even shared with the party which gave the evidence.
17. It should be noted that DDRB only makes recommendations. These are not binding on the parties involved. The final settlements are usually the product of further negotiation between employers and representatives of the employees.
18. In respect of the reform of doctors' contracts, although the DDRB only became involved in October 2014, negotiations between the British Medical Association (BMA) and employers on changes to contracts had

begun back in 2013. In October 2014 the BMA walked away from negotiations citing concerns over the safety of patients and doctors. It re-entered negotiations in September 2015. The dispute between junior doctors and the government, which has included strike action, has been well documented by the press.

Reasons for decision

19. Section 36(2)(b)(ii) 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.
20. 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, 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.
21. Although the DDRB is a public authority in its own right, the OME has advised the Commissioner that for the purposes of section 36, the qualified person is the OME's Director. It has provided a link to an archived document produced by, what was then, the Department of Constitutional Affairs, which confirmed this to be the case.
22. The refusal notice issued by the OME on 9 November 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)(b)(ii) by that date.
23. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange either 'would' occur or would

only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.

24. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition to the free and frank exchange of views should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
25. The refusal notice did not address this issue. However in his correspondence with the Commissioner the qualified person states that the inhibition "would" occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.
26. When considering whether the opinion is reasonable 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.
27. 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 qualified person 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.
28. The qualified person considers that in order to fully explain their position and consider hypothetical possibilities while still preserving room to manoeuvre in any subsequent negotiations, 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.
29. The OME is a small body with a relatively limited range of functions. The Commissioner accepts that as such its staff, including its Director, would be closely involved in the provision of secretariat services to the DDRB and other Pay Review Bodies. The Director would have developed a good understanding of the issues raised by the disclosure of the requested information and the concerns of the parties involved.

30. Furthermore, 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.
31. 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.
32. 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

33. Section 36 is subject to the public interest test as set out in section 2 of the FOIA. This means that 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 the impact on the DDRB's ability to gather the evidence it requires when formulating recommendations on pay awards or in respect of special remits such as contract reform. He will also consider the impact on the work of other Pay Review Bodies.
34. 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.

35. The information captured by this request covers a period when the National Health Service was in a state of flux. This remained the position at the time the request was made. The minutes relating to the oral evidence on contract reform relate directly to those changes. They record the positions being adopted by ministers and officials on the need for contract reform, the priorities for, difficulties in and potential obstacles to any reforms. Although the minutes relating to the two earlier meetings relate primarily to pay awards, which the Commissioner assumes would have been implemented by the time of the request, the oral evidence was given at a time when contract reform was already being discussed between the employers' side, including the DoH, and representatives of the employees. This is reflected in the minutes that the Commissioner has viewed. Furthermore there is continuity between the officials and some of the ministers involved in the meetings, or in the ministerial team which led the officials. As such it would be inappropriate to try and treat the minutes of the pay award meetings as if they related solely to issues that had been resolved by the time of the request. The Commissioner is satisfied that all three sets of minutes relate, at least to some extent, to the major changes that were being considered to the National Health Service. These issues were live at the time of the request and were proving to be very controversial.
36. The severity and extent of the inhibition to the free and frank exchange of views that would be caused by disclosing the minutes has to be considered in this context. Disclosure could make negotiations with doctors more difficult as well as having wider implications for the DoH when pursuing the Government's policy for reforming the health service. If information about such a particularly sensitive matter was released it could well result in the DoH being far more guarded in expressing its views when giving evidence in the future.
37. This is particularly so when it is remembered that even the DoH has not seen the minutes itself and has not had the opportunity to comment on how accurately the DDRB has interpreted the views expressed by ministers and officials. The qualified person has advised the Commissioner that the parties giving oral evidence are told that what they say during the session is solely for the Pay Review Board members and the secretariat. The DoH, in common with other parties, understood that the evidence presented would remain private, with only a summary being included in the DDRB's final reports. To disclose the minutes in the face of such assurances would seriously undermine the trust the DoH and other parties had in the pay review process.

38. In light of the above the Commissioner finds that disclosing the minutes in the circumstances of this case would have a very significant impact on the ability of the DDRB to gather evidence of the quality it needs to formulate robust recommendations on the issues it has been tasked to address. As the party directly affected by the disclosure, the DoH is likely to be the most guarded in future discussions. This impact would be most acute in the years immediately following any disclosure as many of the officials and some of the ministers involved in the meetings captured by the request are likely to have a role in future pay reviews.
39. However other parties invited to give oral evidence to the DDRB may also become less candid. The extent to which different parties may be affected may vary. In a previous case, reference FS50600923, concerning a request for minutes of all the oral evidence given to the DDRB on contract reform, the Commissioner was provided with evidence that suggested some parties, such as the BMA, would welcome greater transparency of the process, including the disclosure of the minutes of oral evidence. Nevertheless, based on the qualified person's submission which was informed by discussions with the Chair of the DDRB, senior colleagues and the results of previous triennial reviews, the Commissioner accepts that a significant number of parties would be less open when providing evidence to the DDRB in the future.
40. The qualified person has also argued that the impact would be felt by other Pay Review Bodies, not just the DDRB. His 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 the particular reviews to which this request relates. Nevertheless there would be some impact and this increases the extent of the harm disclosure could cause.
41. In light of the above the Commissioner is satisfied that there would be a significant impact on the quality of the evidence available to the DDRB if the requested minutes were disclosed. This is likely to be most marked in the evidence from those involved in the meetings to which the request relates. However, there would also be some impact on the work of other Pay Review Bodies. The DDRB reviews pay on an annual basis and may be tasked with special remits as the need arises. It is assumed that this is the same for other Pay Review Bodies. Therefore the harm caused would be frequent.
42. There is clearly a public interest in maintaining the exemption provided by section 36(2)(b)(ii) in order to prevent this level of harm. It is now necessary to consider the public interest factors in favour of disclosure.

43. 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.
44. As previously discussed all the minutes have some bearing on the issue of the proposed reforms to doctors' contracts. Clearly the minutes of the 9 March 2015 meeting directly relate to this issue whereas the earlier minutes are more loosely connected. Nevertheless the Commissioner is satisfied that they too provide some insight on the DoH's position in respect of the proposed reforms.
45. 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. Therefore there is a public interest in disclosing information from the 9 March 2015 meeting as it would help people understand how the DDRB formulated its recommendations and observations as contained in its subsequent report and which formed the basis of the negotiations between doctors and their employers that followed.
46. In respect of the minutes from the earlier meetings the public interest in disclosure is less. However, although their disclosure would not shed light on how the DDRB formulated its recommendations, the minutes do provide some indications of the DoH's position in respect of the reforms and its relations with the other parties involved in negotiating the reforms.
47. 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 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.
48. The Commissioner is therefore satisfied that the minutes contain information on issues of importance 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 about not only the proposed changes themselves but the manner in which both employer and employee sides have handled the negotiations.
49. 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 and to information which could shed light on the positions adopted by the DoH during the

subsequent negotiations. This could assist the public's understanding of how the government managed those negotiations.

50. The qualified person has argued that the public interest in having access to information on the oral evidence is already satisfied by the publication of the relevant DDRB reports. Certainly having considered the summary of oral evidence contained in the DDRB's report on contract reform he is satisfied the report in no way misrepresents the evidence. This goes some way to meeting the public interest. However this does not extinguish the public interest in disclosing the full minutes of the DoH's evidence which naturally contain additional material and captures more of the nuances of the evidence that was presented.
51. Therefore the Commissioner finds there is a weighty public interest in disclosing the information contained in the minutes of the DoH's evidence. However disclosing the oral evidence would have a significant chilling effect on the willingness of parties 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 Commissioner finds that the public interest favours maintaining the exemption. He does not require the public authority to take any further action in this matter.

Right of appeal

52. 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

53. 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.
54. 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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