

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2017

Public Authority: NHS Commissioning Board (NHS England)
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested copies of attachments to emails previously disclosed to him beginning with '7DS'. NHS England refused to provide the requested information under section 36(2)(b)(ii) and section 36(2)(c) FOIA.
2. The Commissioner's decision is that NHS England correctly applied section 36(2)(b)(ii) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 10 May 2016 the complainant requested information of the following description:

"From the emails provided under FOI-008384, please provide a copy of each of the attachments beginning with '7DS'. These are PDFS and can be sent easily by email."
5. On 4 August 2016 NHS England responded. It refused to provide the requested information under section 36(2)(b)(ii), 36(2)(c) and 43(2) FOIA.
6. The complainant requested an internal review on 4 August 2016. NHS England sent the outcome of its internal review on 6 September 2016. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 5 October 2016 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, NHS England withdrew its application of section 43(2) FOIA.
9. The Commissioner has considered whether NHS England was correct to apply section 36(2)(b)(ii) or section 36(2)(c) FOIA to the withheld information.

Reasons for decision

Section 36

10. 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.

11. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance.
12. In determining whether the exemption was correctly engaged by the Trust, 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.
13. NHS England explained that the qualified person is Mr Simon Stevens, Chief Executive of NHS England. The qualified person's opinion was sought on 14 July 2016 and was provided on 21 July 2016. The qualified person's opinion was that section 36(2)(b)(ii) was applicable in this case as disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. 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 was provided to the Commissioner as well as a copy of the qualified person's opinion.
 14. The withheld information consists of different versions of the same slide packs which were amended and progressed over time. 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 NHS England team. It 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.
 15. NHS England 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.
 16. 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.
 17. It went on that this "chilling effect" would, in turn, impair the quality of policy making by NHS England. The resulting situation would be one

- where such decisions were made without NHS England 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.
18. 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 NHS England and the Department of Health discussed the analysis. Between each meeting Deloitte amended the slides, in line with the ongoing analysis. NHS England are 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 NHS England's ability to consider and analyse proposals.
 19. 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.
 20. 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. The withheld information dates back to 2015 and 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 May 2016, predates the planned implementation of the reforms to doctor's contracts which was scheduled for August

2016. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore the exemption was correctly engaged.

21. 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

22. NHS England 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.

Public interest arguments in favour of maintaining the exemption

23. 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.
24. 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.
25. 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. NHS England 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

26. The withheld information contains analysis which facilitated and to some extent reflects candid discussions between senior individuals within NHS England 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.
27. 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.
28. 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.
29. 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.
30. 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.
31. 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.

32. The chilling affect argument will be strongest when an issue is still live. In this case, NHS England 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 doctors contracts wasn't 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.
33. The Commissioner is however mindful that senior individuals within NHS England 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.
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 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 exemption 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

Pamela Clements
Group Manager

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