

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2024

Public Authority: NHS Business Services Authority (NHSBSA)
Address: Stella House
Goldcrest Way
Newburn Riverside Park
Newcastle upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant has requested NHSBSA to disclose email correspondence between specified dates, relating to the Infected Blood Inquiry's second interim report. NHSBSA refused to disclose the information citing sections 36(2)(b)(i) and (ii) and 36(2)(c) of FOIA.
2. The Commissioner's decision is that NHSBSA is entitled to refuse to disclose the requested information in accordance with sections 36(2)(b)(i) and (ii) and 36(2)(c) of FOIA as disclosure would be likely to prejudice the conduct of public affairs.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 18 May 2023, the complainant wrote to NHSBSA and requested information in the following terms:

"All e-mail correspondence sent to, CC'd to or from EIBSS by/to DHSC or the Cabinet Office during the period 1st April 2023 – 18th May 2023 which relates to the Infected Blood Inquiry's second interim report."

5. NHSBSA responded on 16 June 2023. It refused to disclose the information citing sections 36(2)(b)(i) and (ii), 36(2)(c) and 40 of FOIA (personal data).
6. The complainant requested an internal review on 19 June 2023.
7. NHSBSA carried out an internal review and notified the complainant of its findings on 14 August 2023. It upheld the application of the exemptions initially cited.

Scope of the case

8. The complainant contacted the Commissioner on 6 September 2023 to complain about the way their request for information had been handled. They disagree with the application of sections 36(2)(b)(i) and (ii) and 36(2)(c) of FOIA. No complaint was raised about NHSBSA's application of section 40 of FOIA.
9. The Commissioner considers that the scope of his investigation is to determine whether or not NHSBSA is entitled to rely on section 36(2)(b)(i) and (ii) and/or section 36(2)(c) of FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

10. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. NHSBSA confirmed that it obtained the opinion of its qualified person (its Chief Executive) on two occasions – once prior to issuing its refusal notice and then prior to issuing its internal review response. On both occasions it was the qualified person's opinion that section 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA applied. The application of both

exemptions was authorised by the qualified person on 15 June and 19 July 2023. The qualified person had sight of the withheld information and submissions detailing the request itself and concerns over the disclosure of the withheld information.

12. By way of background, NHSBSA advised that the complainant's request refers to correspondence regarding the Infected Blood Inquiry's second interim report. The second interim report was published on 5 April 2023¹. It confirmed that it sets out the Inquiry's recommendations in relation to compensation of individuals affected by infected blood, in particular the establishment of a compensation scheme prior to the Inquiry issuing its final findings and recommendations. NHSBSA stated that on 19 April 2023, the Minister for the Cabinet Office and Paymaster General, Jeremy Quin MP, stated to the House of Commons "The Government are considering intensely the recommendations outlined in this report, and work is under way at pace across all relevant Departments to respond fully²". At the time of the request and NHSBSA's submissions to the Commissioner, the Government had not yet responded.
13. NHSBSA confirmed that it only holds limited information within the scope of the request and this is an email dated 28 April 2023, including a 5-page attachment titled "Second Interim Payments – NHSBSA Initial Considerations". It said that the scope of the information itself is substantially narrower than totality of matters covered by the second interim report or the Inquiry generally. The withheld information relates explicitly to NHSBSA's initial considerations over "Second Interim Payments", also known as "Further Interim Payments" (term used in the second interim report itself).
14. NHSBSA wished to point out that it is also important to distinguish these recommendations for second/further interim payments, arising from the second interim report published on 5 April 2023, from interim payments recommended in the Inquiry's first interim report, which was published on 29 July 2022. In particular:
 - (a) At the time of the request, the second interim report was very recently published, only 44 days prior;

¹ [Second Interim Report | Infected Blood Inquiry](#)

² [Infected Blood Inquiry Update - Hansard - UK Parliament](#)

- (b) The Government has not yet responded to the second interim report (whereas the Government responded to the first interim report on 17 August 2022); and
 - (c) The Commissioner's decision notice dated 1 September 2023 concerning a request to DHSC (reference IC-238814-G7T9³) which concerned, amongst other things, the application of section 35 exemption (formulation and development of Government policy) to correspondence regarding the Inquiry, relates to different information predating both the request and withheld information, and indeed the second interim report itself, that is relevant in this case.
15. NHSBSA explained how it has been directed by the Secretary of State to administer the England Infected Blood Support Scheme (EIBSS) and the Infected Blood Interim Compensation Scheme (IBICPS). It is an administrator, not a policy maker or the subject of the Inquiry's recommendations to Government – such matters are the responsibility of relevant Government departments, including DHSC.
 16. It said that the withheld information was created as a result of a request by DHSC to NHSBSA for its initial considerations over the administrative issues arising from the Inquiry's recommendation for second/further interim payments, consequent to the publication of the second interim report. This was in view of NHSBSA's existing role in administering EIBSS and IBICPS and in anticipation of NHSBSA being asked to administer second/further interim payments at some point in the future.
 17. NHSBSA confirmed that it is the qualified person's opinion that sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged and its arguments in support of each refer to similar issues because the inhibitions/prejudices claimed are all intrinsically and causally interlinked.
 18. As detailed above, it said the withheld information was created for the purposes of providing advice, as part of an overall process undertaken by DHSC in considering how to respond to the Inquiry's recommendations with the second interim report. It confirmed that at all relevant times this process was, and remains ongoing.
 19. In the qualified person's opinion it is necessary for DHSC to be able to seek, and NHSBSA to provide, such free and frank advice in order for DHSC to develop and implement policy effectively in relation to the Inquiry, which is of fundamental importance and public interest. In their

³ [ic-238814-g7t9.pdf \(ico.org.uk\)](https://ico.org.uk/238814-g7t9.pdf)

opinion there is a genuine risk that ongoing provision of advice for the purposes of deliberation by DHSC – and the policy and decision making process overall -would be prejudiced if disclosure of its initial advice prior to the Government having formulated or communicated its response to the Inquiry's recommendations occurred.

20. In the qualified person's opinion disclosure prior to the formal and final policy and response being announced by the Government as the policy-maker, would present an unbalanced, misleading and partial perception of the Government's response, potential policy direction and design of any scheme for second/further interim payments. The withheld information is its initial advice, that has since evolved and it will continue to evolve until the finalised policy and decision is made and announced.
21. It commented further that the withheld information relates to important live issues and processes in respect of which there needs to be free and frank exchange of advice and views between the policy and decision maker, DHSC and the administrator, NHSBSA, for the purposes of deliberation by DHSC. NHSBSA stated that such advice and views relate to matters that the qualified person has substantial knowledge and involvement in, being also the Chief Executive of NHSBSA.
22. NHSBSA confirmed that it is also the qualified person's opinion that disclosure would be likely to compromise its relationship with DHSC, as the matter is still live and under discussion and the withheld information is sensitive. The qualified person also felt that disclosure would mislead the public and could provide an unbalanced view of DHSC's position. Both of which would be likely to otherwise prejudice the effective conduct of public affairs.
23. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
24. The Commissioner notes that at the time of the request the second interim report had only recently been published and Government had made no formal response to that report and was still in the process of considering its options. He considers it is a reasonable opinion to hold that disclosure at the time of the request would have been likely to prejudice the ongoing free and frank provision of advice between NHSBSA and DHSC and the free and frank exchange of views for the

purposes of deliberation and the ability of the Government to finalise its position and formally respond to the recommendations. He is therefore satisfied that section 36(2)(b)(i) and (ii) is engaged.

25. With regards to section 36(2)(c), for this to apply the prejudice claimed to the effective conduct of public affairs must be different to that which falls under section 36(2)(b)(i) and (ii) of FOIA.
26. The Commissioner notes that the majority of submissions have been made in support in both sections 36(2)(b) and (c) because NHSBSA considers the arguments are so intrinsically linked and intertwined. But it is the Commissioner's view that arguments relating to the need for safe space, as the issue is live and ongoing, prejudice to the provision of advice and exchange of views for the purpose of deliberation and finalising the Government's response and position come under section 36(2)(b)(i) and (ii).
27. However, in this case NHSBSA has referred to disclosure compromising good working relationships with DHSC, due to the sensitive nature of the withheld information and the circumstances at the time of the request and how this would otherwise prejudice the effective conduct of public affairs. It has also referred to premature disclosure, prior to the Government's final position and formal response to the second interim report, misleading the public and providing an unbalanced view of DHSC's deliberations. These are arguments that do fall within section 36(2)(c).
28. Considering the circumstances at the time of the request, the Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to have such effects. He is therefore also satisfied that section 36(2)(c) of FOIA is engaged in this case.

Public interest test

29. NHSBSA advised that it recognised the public interest in openness, transparency and accountability and in allowing access to the withheld information given the on-going public Inquiry and to demonstrate that proper process is being/has been followed. It also said that disclosure would aid the public in understanding the complexities involved the scheme, how it is to be managed and the issues facing Government at this current stage.
30. However, it felt that the public interest rests in maintaining the exemptions and avoiding the prejudice to the live issue and ongoing policy -and decision - making processes in relation to the Government's response to the second interim report. NHSBSA outlined how the withheld information relates to matters of fundamental public interest

and importance and how, therefore, an initial safe space is required for consideration, discussion, advice and policy development. Although there are significant public interest arguments in favour of disclosure, it considers these do not outweigh the public interest in avoiding prejudice to the new compensation schemes in response to the second interim report. It argued that the second interim report said that such compensation "should be paid as soon as possible", and this depends upon the policy – and decision – making processes in order to implement compensation schemes that operate effectively.

31. NHSBSA is of the view that the public interest in disclosure will be served in due course by future reports by the Inquiry, the Government's formal responses, and the announcement, implementation and operation of the compensation schemes in question. It considers disclosure at the time of the request and whilst matters are still live and under discussion would not further the public interest.
32. The Commissioner considers the public interest test considerations under section 36 of the FOIA require him to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
33. The Commissioner notes that at the time of the request the second interim report had only just been published, DHSC was in the process of considering NHSBSA's initial considerations over second interim payments (the withheld information) and Government had not yet finalised its position or indeed responded formally to the second interim report. Given the circumstances at the time of the request, matters being very much live, ongoing and subject to deliberation, the Commissioner accepts the extent, frequency and severity of the inhibitions claimed by NHSBSA would have been significant.
34. There are clear and significant public interest arguments in favour of disclosure. The Inquiry itself and the issue of compensation for affected individuals and families is of significant public interest and importance. There is a clear need to compensate those affected appropriately and effectively and efficiently as possible. The withheld information would aid public understanding over where matters are now, what Government is contemplating and discussing ahead of its formal response to the second interim report.
35. However, given the circumstances at the time of the request (as already referenced), the Commissioner considers the public interest rests in maintaining the exemptions. This is because Government should be afforded the safe space to discuss advice and views, deliberate free and frankly without the distraction and inhibition premature public disclosure would cause. This is how effective policy decisions are made. The Commissioner also accepts that disclosure would be likely to hinder the

ongoing working relationship between NHSBSA and DHSC, because this safe space is still very much required and the withheld information is of a sensitive nature. Disclosure could also mislead the public or provide a misconstrued picture of where the Government is on further payments. It needs the safe space to consider all options to ensure that the most appropriate formal response is provided to the public and the most effective policy decisions are made.

36. For these reasons, the Commissioner has concluded that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

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