

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 December 2009

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested copies of all the submissions received by the public authority in relation to a public consultation on excluding overseas visitors from receiving free NHS primary medical services. The public authority refused the request under section 35 on the basis that the information related to the formulation or development of government policy. During the course of the Commissioner's investigation the public authority disclosed all of the submissions except for one which had been provided by the Home Office.

The Commissioner has concluded that, whilst section 35 was engaged, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He has consequently ordered the disclosure of the withheld information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 13 September 2007 the complainant requested "... information concerning the Department of Health Consultation, *Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services*, which closed on 13 August 2004. Specifically, I am requesting two things.

1. Complete copies of all the submissions to this consultation.

2. A complete list of all the organisations and individuals who made submissions to the consultations.”
3. On 2 October 2007 the public authority provided the complainant with a list of respondents to the consultations. However, it informed him that it was unable to disclose the individual submissions as these were exempt under section 35(1)(a) of the Act as the information related to the formulation or development of Government policy.
4. The public authority indicated that the responses highlighted a range of difficult and sensitive issues that were being considered as part of a joint Department of Health and Home Office review of the rules governing access to the NHS by foreign nationals. It went on to state that the review was due to be completed shortly. This would then be followed by a public consultation as part of the wider migration strategy and any changes resulting from the review and consultation were intended to be in place by September 2008.
5. On 15 November 2007 the complainant requested that the public authority carry out an internal review of its decision and set out a number of arguments as to why the information should be disclosed.
6. On 31 December 2007 the public authority informed the complainant that the result of its internal review was to uphold its original decision. It set out the public interest factors which had been taken into account in reaching that decision.

The Investigation

Scope of the case

7. On 14 January 2008 the Commissioner received a complaint from the complainant about the way his request for information had been handled. The complainant specifically asked the Commissioner to determine whether the public authority was entitled to withhold any of the responses to the consultation. He set out detailed arguments as to why he believed that the public authority's decision was incorrect.
8. During the course of the Commissioner's investigation the public authority disclosed all of the responses to the consultation, with some personal data removed from a few of the responses with the complainant's agreement. Once this had been done, the only matter that remained for the Commissioner to consider was whether the public authority was entitled to withhold a response provided by the Home Office.

Chronology

9. There were a considerable number of communications between the Commissioner, the public authority and the complainant. The most significant communications are identified below.

10. On 14 March 2008 the public authority informed the Commissioner that it was likely that the withheld information would be published in late spring 2008.
11. On 7 May 2008 the public authority informed the Commissioner that it proposed to publish the withheld information in the middle of June 2008, although this was not guaranteed as there were a number of processes that needed to be completed before publication could occur.
12. On 10 July 2008 the public authority informed the Commissioner that the publication of the withheld information had been delayed until October 2008, after the Parliamentary recess, due to a number of issues still having to be resolved.
13. On 5 November 2008 the Commissioner contacted the public authority to ascertain the position with regard to the withheld information. He was informed that it was expected that the information would be released but that this needed Ministerial approval.
14. On 24 November 2008 the Commissioner was informed by the public authority that it had contacted the parties who had provided responses to the consultation to ascertain if any had objections to disclosure. The deadline for any parties to respond was 28 November 2008. It anticipated that information that was not viewed as exempt from disclosure would then be released in December 2008.
15. On 25 November 2008 the Commissioner wrote to the public authority and requested a copy of all of the withheld information and a full explanation of why any parts of it were considered exempt from disclosure. He also informed the public authority that once the deadline for its consultation had passed, he expected that any information that it determined was not exempt would be disclosed to the complainant without further delay.
16. On 16 December 2008 the public authority confirmed to the Commissioner that it intended to publish the vast majority of responses to the consultation in relation to which there were no issues of confidentiality or sensitivity. It was expected that this would be done on 23 or 24 December 2008.
17. On 23 December 2008 the public authority contacted the Commissioner to inform him that it had now been decided not to release any of the responses to the consultation until the issues that had been identified in relation to a relatively small number of the responses had been resolved. This was because it was concerned that partial disclosure of the information might lead to misconceptions on the part of the public.
18. The Commissioner informed the public authority that there was no basis for the vast majority of responses to be withheld as it was not claiming that they were exempt from disclosure under the Act. He confirmed that, unless these responses were released to the complainant, he would have to consider taking further action. In addition, he stated that he required copies of the information that was believed to be exempt and a full explanation of the basis for this view within the next 10 working days. If this deadline was not met, he informed the public

authority that he would serve an Information Notice requiring it to provide a full response.

19. On 6 January the public authority provided the Commissioner with most of the responses to the consultation. Shortly afterwards, it provided him with copies of the remaining responses in relation to which it had concerns about the disclosure of all or part of the document.
20. In early to mid January 2009, there were numerous discussions between the Commissioner, the public authority and the complainant. During the course of these discussions, the Commissioner indicated to the public authority that he was considering serving an Enforcement Notice to compel it to disclose the large number of responses which were not claimed to be exempt from disclosure.
21. The Commissioner also discussed with the public authority and the complainant whether particular types of personal data could be redacted from a small number of responses in order to ensure that there were no breaches of the principles contained in the Data Protection Act.
22. On 22 January 2009 the public authority disclosed to the complainant all of the responses to the consultation with the exception of two responses which it believed might be exempt from disclosure. A small number of the responses were redacted to remove some personal data.
23. On 26 January 2009 the public authority disclosed one of the two responses which it had continued to withhold. It redacted a small amount of personal data with the complainant's agreement. There was subsequently some additional information disclosed to the complainant by the public authority in relation to a few of the other responses.
24. On 16 February the public authority wrote to the Commissioner to explain why it believed that the one remaining withheld response, which was from the Home Office, was exempt from disclosure under section 35(1)(a). These arguments are considered in detail in the "Analysis" section of this notice.
25. On 4 March 2009 the Commissioner asked for further clarification from the public authority of some of the points made in its previous letter with regard to the possible application of section 35.
26. On 22 April 2009 the public authority provided the Commissioner with responses to the queries he had raised.
27. On 5 May 2009 the complainant wrote to the Commissioner providing him with arguments as to why he believed that the information should be disclosed. These arguments are considered in detail in the "Analysis" section of this notice.
28. On 17 June 2009 the Commissioner asked the public authority to provide him with a more detailed explanation as to how the policies related to excluding overseas visitors from NHS primary medical services continued to be formulated from the end of the consultation to the time of the request.

29. On 8 July 2009 the public authority provided the Commissioner with details of policy formulation during the relevant period.
30. On 13 July 2009 the Commissioner provided the complainant with a general indication of the nature of the policy process provided to him by the public authority.
31. On 23 July 2009 the public authority provided the Commissioner with some additional information in support of its arguments.
32. On 25 August 2009 the complainant raised some further points to the Commissioner with regard to the public authority's arguments.
33. On 3 September 2009 the complainant provided some further evidence to the Commissioner which he believed to be of relevance to the issues under consideration.

Analysis

34. The full text of the provisions of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant provisions are summarised below.

Exemption

Section 35

35. The public authority argued that the Home Office's response to the consultation exercise was exempt from disclosure under section 35(1)(a) of the Act.
36. Section 35(1)(a) provides that

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy"

37. Section 35 is a qualified exemption and, if the exemption is engaged, requires a public interest test to be carried out.
38. The withheld information was a response by the Home Office to a consultation document issued by the Department of Health in May 2004 entitled "*Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services*". The consultation document set out proposals in relation to changing and clarifying the rules on the eligibility of overseas visitors to receive free NHS primary medical services and for charging those who would not be eligible under the new rules. Over 270 individuals and organisations responded to the consultation exercise.

The Home Office's response was provided to the Department of Health in August 2004.

39. The Commissioner, having viewed the withheld information, accepts that it contains comments from one government department to another related to the formulation of government policy regarding the eligibility of foreign nationals to receive free NHS medical services. He is therefore satisfied that section 35(1)(a) was engaged.

Public interest test

40. The Commissioner, having determined that section 35(1)(a) was engaged, then considered whether, at the time that the decision was taken to withhold the information, the public interest in maintaining the exemption would have outweighed the public interest in disclosure.
41. The Commissioner notes the 11 guiding principles for considering the public interest in relation to section 35(1)(a) set out by the Information Tribunal in its decision in the *Department for Education and Skills v The Information Commissioner (EA/2006/0006)*. He has considered those principles that are particularly relevant to the request under consideration.

Public interest arguments in favour of disclosing the requested information

1. The information itself

42. In the *DfES* case, the Information Tribunal stated that:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case." (para 75)

43. In this case, the information contains comments by the Home Office on proposals to change the rules regarding the provision of free NHS medical services to foreign nationals. This is clearly a controversial policy area which tends to elicit strong views.
44. There is consequently a legitimate public interest in the disclosure of this information to allow the public to have a better understanding of the views of the Home Office on the Department of Health's proposals in 2004. This would have provided an insight into the Home Office's thinking in relation to those proposals at that particular point in time.
45. The views of the Home Office in this area had gained in significance at the time that the request was made as it had then become a joint party, with the Department of Health, in reviewing access to healthcare for foreign nationals. This had been announced in March 2007 in the Home Office document *"Enforcing the Rules: A Strategy to Ensure and Enforce Compliance with our*

Immigration Laws". This would tend to increase the public interest in ascertaining its views on the proposals that were being considered in 2004.

46. The Home Office's comments were made in relation to the specific proposals to change and clarify the rules in this area put forward by the Department of Health. The comments are responses to standard questions asked by the Department of Health as part of the consultation exercise. The requested information is therefore not a detailed document analysing the various possible policy options but is a response to very specific questions. None of the points made are extensive and some of the comments are statements of fact rather than comments on the specific proposals.
47. Prior to the request, in March 2007, the Home Office had announced in its document "Enforcing the rules", that there would be a new review of the rules governing access to the NHS by foreign nationals within the context of enforcing immigration laws. It appears therefore that the issue of access to healthcare by foreign nationals was being considered in a much broader context than during the consultation exercise in 2004 which would potentially result in other factors affecting the relevant policy considerations.
48. Disclosure of the response may have been of value in identifying problems which could have existed with the specific proposals contained in the consultation document from 2004. It would then be possible to determine whether, if similar proposals were made in future, those problems had been effectively addressed and appropriate solutions designed.

2. Timing of the request

49. As previously noted, at the time of the request the Home Office's response was over three years old. Since that response had been provided there had been a general election, which can often result in a change of direction in relation to specific policies, and the Home Office had become a joint party in developing the policy in this area within the broader context of general immigration policy.
50. Given the passage of time there could be no guarantee that the points being made by the Home Office in 2004 were likely to be of significance in relation to its approach in 2007 or that they reflected its thinking at that point in time.

3. The consultation exercise by which the Home Office provided its views

51. The Home Office provided its views on proposals from the Department of Health contained in a public consultation document. Consultation exercises allow public scrutiny of policy analysis and the implementation options under consideration. It allows additional evidence to be sought from a range of interested parties so as to inform the development of the policy or its implementation. Consultations can bring to light valuable information which government can use to identify potential problems in a particular area and design effective solutions. There is therefore clearly a very significant public interest in the disclosure of the information in the interests of effective and open government.

52. The Cabinet Office Code of Practice on Consultations in place at the time of the consultation stated that the code applied to all UK public consultations by government departments. It provided that, as far as possible, a summary of the responses to a consultation should be published within three months of the closing date (para 4.3). The Code states that

“The summary should give an analysis of the responses to questions asked for each question there should be a summary of responses to that question and then an explanation of how it is proposed to change the proposal in light of the responses received. There should also be information provided on themes that came out of the consultation which were not covered by the questions.” (para 4.4)

53. Reflecting the contents of the code, page 4 of the public authority's consultation document stated that a summary of the outcome of the consultation would be placed on its website by 12 November 2004. However by the time of the request in September 2007, a summary had yet to be published.

54. The guidance on the Code which is available from the Department for Business Innovation & Skills states that

“Even if there is no significant action in the months following the close of the consultation exercise or the policy becomes dormant, it is important to communicate this to those who participated in the consultation exercise, to publish a summary of the responses and to alert people to this publication. In such circumstances it is good practice to do this within three months of the close of the consultation exercise.”

55. In the absence of the public authority publishing a summary of the responses there is clearly an increased public interest in the disclosure of the individual responses to allow the public to ascertain the range of responses and views that were received. In addition, there would clearly have been an expectation on the part of those who participated in the consultation process by providing responses that details of the differing views received would be published in some form. Of the respondents, the views of the Home Office would have been of particular significance and importance given its likely pivotal role in influencing policy in this area.

56. The consultation document contains a clear presumption in favour of the disclosure of the individual responses. On page 14 of the consultation document it states that

“Your response will be used to inform the further development of this proposed policy and therefore responses, including the name and address of respondents, may be made public unless confidentiality is specifically requested. In accordance with the freedom of information legislation, individual responses will be made available to anyone who asks for them, unless one of the exceptions in the legislation applies, for example the

information was provided in confidence, or its disclosure would prejudice third parties.”

57. There would presumably have been other means by which the Home Office could have made its views known to the Department of Health on the issues raised other than by responding to a public consultation exercise in relation to which there was a clear expectation that responses were to be made public under the Act.
58. In its response, the Home Office requested that the response be treated in confidence and not released if a request was made for it under the Act on the basis that it was exempt from disclosure under section 35. The only reason suggested for the need for confidentiality is that the response relates to the formulation of government policy. No other reason was suggested as to why the information should be regarded as confidential, for example because it contained personal data of a sensitive nature.
59. The request for confidentiality would not therefore appear to raise additional issues other than those that are relevant to determine whether section 35 is applicable to the withheld information.

Public interest arguments in favour of maintaining the exemption

1. The information itself

60. The public authority argued that the issues raised by the consultation formed an explicit part of the terms of reference for the joint Home Office and Department of Health review of access to the NHS. This review built upon the preparatory work and findings of the 2004 consultation and was ongoing at the time of the request. The Government had yet to publish its recommendations. The public authority therefore considered that this policy remained in the early stages of formulation, with options being generated and sorted and risks being identified.
61. The public authority was of the view that the premature disclosure of frank inter-Departmental discussions of this sensitive area would be more likely to encourage ill informed or inflammatory public participation in this policy, thereby inhibiting the ability of officials and Ministers to scrutinise the competing arguments in a “private thinking space”.
62. It contended that it was a fundamental principle of good government that Departments were allowed to formulate policy in an environment that was free from unproductive or premature media, political or public pressures that could jeopardise frank, balanced and measured consideration of all options, no matter how radical or unpopular.
63. In the public authority's view the fact that the withheld information had been provided as part of a public consultation exercise demonstrated its commitment to meaningful public involvement in the formulation of this policy. It believed that this offered clear evidence of its willingness to expose this policy to the broadest possible scrutiny for the purposes of accountability.

64. The Commissioner acknowledges that there is a valid argument that government departments should be given sufficient space away from public scrutiny to carry out the policy making process effectively. There is clearly a public interest in ensuring that all possible options are fully debated and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward.
65. However, whilst he accepts that the information relates to the formulation of government policy, as he noted earlier, it is limited in nature in that it contains specific comments on specific proposals. The information in question is not a detailed consideration of a range of possible policy options. At the time of the request the issue of the rules governing access to the NHS by foreign nationals was being considered in a much broader context, that of enforcing immigration laws, than in the original consultation exercise in 2004.

2. Timing of the request

66. At the time that the request was made, the public authority has informed the Commissioner that it was in discussions with the Home Office over possible policies in relation to the eligibility of overseas visitors to receive free NHS medical services. It also confirmed that the comments contained in the Home Office's response to the consultation in 2004 related to options which were still under consideration when the request was received. It was of the view that to disclose this information would have arguably opened up the safe space for consideration of these different options to public scrutiny.
67. The public authority also confirmed that, whilst the comments made by the Home Office were made as part of a public consultation exercise, they formed part of a continuing discussion of policy options from the time that the response was provided until the point at which the request was made. No definite policy had been determined at the stage at which the request had been received.
68. The Commissioner acknowledges that there is significant public interest in civil servants and ministers being able to formulate policy, debate live issues and reach decisions without being hindered by external comment and media involvement. Support for the public interest in this "safe space" whilst policy formulation and development is ongoing can also be found in a number of Information Tribunal decisions.
69. At the time that the request was made, however, he notes that over three years had elapsed since the Home Office had provided its views in response to the initial consultation exercise. Given the passage of such a period of time, the changing context in which the policy was being developed, such as a general election having occurred, the wider focus within which the issue was being considered and the setting up of a joint review, it would no longer be clear whether the views expressed in 2004 still reflected the views of the Home Office at the time that the request was made. Nor would it be possible to determine from the disclosure of this information whether the views expressed in the response represented any options which were being given serious consideration at the time

that the request was made. These factors would significantly reduce the sensitivities around the disclosure of this information.

3. The consultation exercise by which the Home Office provided its views

70. The public authority pointed out that the Home Office requested that its response be treated in confidence on the basis that it related to the formulation of government policy. No other reason was provided as to why the information should be regarded as confidential. As suggested in the public interest arguments in favour of disclosure, the request for confidentiality would not therefore appear to raise additional issues other than those that have already been considered in determining whether section 35 is applicable to the withheld information.

Balance of the public interest arguments

71. The Commissioner recognises the public interest in providing government departments with sufficient safe space away from public scrutiny to be able to carry out the policy making process effectively. However, he notes in this particular case that the information was provided as part of a public consultation exercise which explicitly contained a strong presumption in favour of the disclosure of the individual responses and that, at the time that the request was made, some three years after the consultation exercise had concluded, the public authority had not provided a summary of the contents of the responses, despite indicating that it would do so within three months of its conclusion.

72. The Commissioner has also taken account of the fact that the responses were specific comments on specific proposals rather than a consideration of a range of policy options, that a very significant period of time had elapsed by the time that the request was made which was likely to have reduced the sensitivity of the views expressed and the context within which the related policy was being developed had also changed. Given these factors, he has therefore determined that the public interest in maintaining the exemption in relation to this information does not outweigh the public interest in disclosure and that the information should be disclosed. The Commissioner would emphasise however that his decision is based on the somewhat unusual set of circumstances which were relevant to this particular case.

Procedural requirements

73. By not providing the requested information to the complainant within 20 working days of the request, the public authority breached sections 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

The Decision

74. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:

- it incorrectly applied section 35 to the withheld information that fell within the scope of the request; and
- it breached section 1(1)(b) by not providing the complainant with the withheld information that fell within the scope of the request by the time of the completion of the internal review and section 10(1) by not providing it within 20 working days of the request.

Steps Required

75. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the withheld information.

76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

77. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

78. Provided the information is held, section 1(1)(b) of the Act requires a public authority to release the information requested unless an exemption applies. In its original response to the complainant, the public authority withheld the requested information as it believed section 35(1)(a) of the Act applied. On internal review in December 2007, the public authority maintained this stance, but advised that they would “*publish the responses to the 2004 consultation when the review of Access to the NHS by foreign nationals goes out to public consultation in spring 2008*”.

79. The public authority continued to rely upon its intention to publish the majority of the requested information throughout March 2008. In May the public authority advised the Commissioner that publication would take place in June of that year, although it was careful to explain that this was not guaranteed.

80. In July, the Commissioner was advised that publication of the information was to be delayed still further, until October 2008. The publication date continued to be delayed throughout November, and the following month the Commissioner was advised the consultation responses would not be released until some issues with a relatively small number of replies had been resolved. At no stage did the public authority seek to rely upon the exemption provided at section 22(1) of the Act (information intended for future publication), nor did it provide substantive reasons for the non-disclosure, relying instead upon apparent organisational tensions as to whether it was appropriate to place the information in the public domain. In

January 2009, over a year after the complainant made his request for information, the public authority did eventually provide the majority of the information required.

81. The Commissioner would like to express his disappointment at the public authority's handling of this request, not least because a warning of formal enforcement action was required in order to persuade the authority to release the majority of the requested information. The Commissioner would like to make clear to all public authorities that he does not consider such an approach to be acceptable practice.
82. The Commissioner hopes that the public authority will consider the concerns he has raised in relation to this case, and take steps to ensure that a similar situation does not arise in future.

Failure to comply

83. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

84. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 3rd day of December 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.