



Department of Health

request-341972-ecd1f49d@whatdotheyknow.com

FAO Dr Paul Thornton

5 October 2016

Dear Dr Thornton

FREEDOM OF INFORMATION ACT (FOIA): INTERNAL REVIEW

DH CASE REFERENCE IR 1040141

Thank you for your email dated 19 July in which you requested an internal review into the handling of your original FOI request (FOI-11040141). I am sorry for the delay in providing the outcome of the internal review. The chronology of this matter is set out in **Annex A**.

Internal Review

The Department of Health (DH) has undertaken a review into the handling of your original request (FOI-1040141).

We have reviewed the information which falls within the scope of your request. Following our review, we are releasing the information attached in PDF format. These are emails from the NHS Identity Helpline to the Vote Leave campaign, regarding the use of the NHS logo on Vote Leave EU Referendum campaign materials.

We are continuing to withhold the remainder of the information and maintain that exemptions under the Freedom of Information Act (FOIA) apply, namely section 42 (legal professional privilege) and section 43 (commercial interests). We also now rely on the exemption at section 36(2)(b) and (c) (prejudice to effective conduct of public affairs). Where appropriate, we have provided additional explanatory information to help you better understand the rationale behind our use of these exemptions.

Please note that we no longer rely on section 41 to withhold any of the information.

Section 42 – legal professional privilege (LPP)

DH maintains this exemption is properly engaged and the information to which this exemption applies should be withheld.

LPP covers confidential communications between lawyers and clients, along with certain other information that is created for the purposes of litigation, or for the purposes of obtaining legal advice or assistance in relation to rights and obligations. This is a qualified exemption and subject to a public interest test.

DH recognises that there is a general public interest in making information available to promote greater transparency and accountability in DH's decision-making process. However, we consider there is also a compelling public interest in upholding the established principle of confidentiality in communications between lawyers and their clients, and therefore upholding the principle of LPP.

The principle of LPP is well established. The requirement for high quality, comprehensive legal advice, which is provided without fear of disclosure, and which assesses both the strengths and weakness of a proposed decision or policy, or defence of a legal claim, is essential for the effective conduct of DH business.

We have, therefore, concluded that the public interest in withholding this information substantially outweighs any public interest that there might be in releasing the information sought.

Section 43 – commercial interests

We maintain that some of the information held is exempt from disclosure under section 43 of FOIA, on the basis that its release would, or would be likely to, prejudice the commercial interests of DH and NHS England.

We are confident this exemption applies, as the commercial matter in question was 'live' and commercially sensitive at the time of your request and remains so. We are therefore satisfied that disclosure would have, or would have been likely to, prejudice this matter and accordingly the commercial interests of DH and NHS England.

When arriving at this decision we have also considered whether the public interest in disclosing the information outweighs the public interest in withholding it. Again, we are satisfied that on balance the public interest lies in withholding the information and protecting the commercial interests of DH and NHS England.

Preserving the commercial interests of DH and NHS England is vital in ensuring these organisations continue to operate effectively, leading the health and care system in England and delivering services. While recognising the vital public interest in transparency of government decision making to ensure accountability, we take the view that in this instance the nature and potential prejudice to DH and NHS England's commercial interests (and their importance to service delivery) mean that the public interest lies in withholding the material.

Section 36 (2) (b) and (c) of the FOIA

During the course of the review, DH considered it would also be appropriate to consider the engagement of the exemption at section 36(2)(b) and (c) of the FOIA which provides that information to which this section applies is exempt from release if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice or views for the purpose of deliberation (section 36(2)(b), or would otherwise prejudice (or would be likely to prejudice) the effective conduct of public affairs (section 36(2)(c).

In this case, it was the reasonable opinion of the qualified person that the information in question is exempt under both section 36(2) (b) and (c) above. DH has outlined its reasons above for relying on the exemption in section 43. The potential for damage to the commercial interests of DH are inextricably linked to prejudice to public affairs, where damage to those interests can directly impact on NHS service delivery.

Furthermore, internal discussions surrounding Vote Leave's use of the NHS logo were taken with a view to the appropriate handling of this issue. Officials should be afforded a safe space to discuss candidly the issues facing the department and to allow the provision of frank advice and views for the purpose of deliberation. Although the referendum is now over, the issues remain very much live and open to debate and scrutiny. If the information sought was released, it could create a future 'chilling effect', where officials felt unable to provide frank advice and views over concerns that those communications could be made public in the future. This would be a highly undesirable position, especially in respect of referendum/election periods where unexpected issues regularly arise and frank discussions are essential, to make difficult decisions as quickly and effectively as possible.

Section 36 is a qualified exemption and the subject of a balance of the public interest between releasing the information and withholding it.

We acknowledge it is in the public interest to release information about how government decisions are taken wherever it is possible. However, in this instance, we consider that officials should be able to discuss difficult and urgent issues with a wide range of stakeholders to help them support and advise ministers effectively, without fear that the substance of these discussions could become public. On that basis, we consider that the public interest lies in favour of withholding the information sought.

The review is now complete.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner (ICO) for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by the Department. The ICO can be contacted at:

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

Yours sincerely

TONY DOOLE
Senior Casework Manager
Freedom of Information

Annex A

Chronology

Original request

You originally wrote to the Department of Health (DH) on 26 June to request the following:

"I refer to the leaflet distributed to all households by the Vote Leave campaign in respect of the recent referendum which portrayed that £350m per week paid to the EU might otherwise be diverted to the National Health Service. In making this claim the copyrighted NHS logo was incorporated into that message in the leaflet. The same message and graphic was used on the side of the much televised campaign bus as shown at this link:

<http://m.voanews.com/a/spy-chiefs-britain-exit-from-eu-would-be-damaging/3327184.html>

In an email dated 21 June 2016 from a member of staff at the NHS Brand and Identity Helpline, I was provided with confirmation that the use of the logo was unauthorised for this purpose in the following terms;

"The letters 'NHS' and the NHS logo are registered UK trade marks. As such, they should only be used by NHS organisations, or on services and information where the NHS has involvement."

"The organisation you refer to is not authorised to use the NHS trademark, or an adaptation of it. The Department of Health is in contact with Vote Leave about misuse of the NHS brand."

"The NHS Identity (letters and logo) generates high levels of trust and reassurance among patients and the public. Therefore, please be reassured we take unauthorised use, or adaptation of the NHS trademark, very seriously."

"NHS Brand and Identity Helpline

nhs.identity@dh.gsi.gov.uk

Tel: 020 7972 5250

www.nhsidentity.nhs.uk "

Under the provisions of the Freedom of Information Act, please provide the information held by the DH in respect of the use of the NHS logo in this material This information will be located within copies of communications between DH and Vote Leave, along with records of meetings and telephone calls.

Please also provide copies of any related communication between the DH and any other public body including the Advertising Standards Agency or the Electoral Commission."

Department of Health reply

DH replied to you on 19 July as follows:

"Thank you for your request of 26th June 2016 under the Freedom of Information Act (2000). Your exact request was:

[See above for brevity]

I can confirm that the Department holds information relevant to your request.

However, we consider that some of this information is exempt under Section 43 of the Freedom of Information Act (FOIA), which exempts from the general duty to release information which would, or would be likely to, prejudice the commercial interests of any entity, including the public authority holding the information.

Section 43 is a qualified exemption and, as such, we are required to assess the public interest in withholding this information against that of its release. We recognise a general public interest in the EU Referendum and Government interaction with the associated campaign groups. However, we also consider that the disclosure of the requested information would be prejudicial to the commercial interests of the Department and the NHS, which in itself is, in our view, contrary to the public interest. Therefore, we consider that the public interest in withholding the requested information outweighs the public interest in disclosing it.

Additionally, we consider that some information of the requested is exempt from release under Section 41 of the Freedom of Information Act, under which a public authority is not obliged to disclose information provided in confidence.

Finally, we consider that the remainder of the information requested is exempt from release under Section 42 of the Freedom of Information Act (legal professional privilege (LPP)). Section 42 is a qualified exemption and, as such, we are required to assess the public interest in withholding this information against that of its release.

To explain, LPP covers confidential communications between lawyers and clients, along with certain other information that is created for the purposes of litigation, or for the purposes of obtaining legal advice or assistance in relation to rights and obligations.

The Department recognises that there is a general public interest that is served in making information available to promote greater transparency and accountability in the Department's decision-making process. However, the Department considers that there is also a compelling public interest in upholding the established principle of confidentiality in communications between lawyers and their clients, and therefore upholding the principle of LPP.

The principle of LPP is well established. The requirement for high quality, comprehensive legal advice which is provided without fear of disclosure, and which assesses both the strengths and weakness of a proposed decision or policy, or defence of a legal claim, is essential for the effective conduct of the Department's business. This advice needs to be offered with a full appreciation of all the relevant facts, and on the basis that it will remain confidential between the parties. It is in the public interest that decisions taken by the Department are informed by, or based on, legal advice, as necessary. Furthermore, it is the Department's view that waiving LPP would impede that decision-making process, which would be contrary to the public interest and also contrary to a very settled practice which is recognised by the Courts and the Information Tribunal. Through disclosure, there is a risk that in the future, clients and lawyers may avoid making a permanent record of advice that is sought or given, or may make only a partial record where there is the prospect that any resulting legal advice may be disclosed. This would be most certainly be contrary to the public interest, as it would diminish the quality of record keeping with adverse consequences on the decision-making process as a whole.

Therefore, taking all these factors into account, we have concluded that the public interest in withholding this information substantially outweighs any public interest that there might be in releasing the information you seek.

If you have any queries about this email, please contact me. Please remember to quote the reference number above in any future communications.

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to:

Head of the Freedom of Information Team
Department of Health
Room G18
Richmond House
79 Whitehall
London
SW1A 2NS
Email: freedomofinformation@dh.gsi.gov.uk

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner (ICO) for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by the Department. The ICO can be contacted at:

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

Yours sincerely"

Internal Review request

You subsequently wrote on 19 July to request an internal review in the following terms:

"Thank you for your letter of the 26th June 2016 advising of your intention to withhold the information you hold in respect of the use of the NHS logo by the Vote leave campaign.

I would be grateful if you would regard this as a request for review of that decision.

To the extent that part of the information requested does genuinely fall under the provisions of Section 42, I do not pursue that part of the information. However, information contained in communications between DH and the Vote Leave campaign (or any other third party apart from legal advisors to the DH) cannot be regarded as carrying the protection of legal professional privilege and so this exemption cannot be engaged for much of the information

requested. Please identify and publish any information that has been incorrectly categorised in that regard.

I do, however, continue to pursue all of the information that you have withheld that you perceive as exempt under Section 41 or Section 43(1).

In respect of section 41, you have provided no substantiation that Vote Leave provided part of the disputed information to you under any request for confidentiality, certainly not under any terms that provide the information with the qualities that need to accrue for a lawful duty of confidentiality to be engaged, and certainly no grounds to suggest that the department should or could contract itself out of the FOIA provisions by requesting or accepting this information from Vote Leave under an unchallenged claim of confidentiality.

Is a claim of confidentiality persists, have you approached the Vote Leave campaign to seek their consent to the publication of the information in response to this request? The terms of their response will impact the validity of the claimed exemption and the public interest arguments.

In respect of section 43(1), you have provided no clarification of exactly what documentation you hold in this matter. You have provided no clarification of the nature of the commercial interest that you perceive requires protection. You have provided no clarification of the mechanism by which publication would be detrimental to that commercial interest. Nor have you provided any evidence of the extent of such detriment. Similarly, you have provided no clarification of how that commercial interest would be protected if you continue to withhold the documentation, nor the extent of that protection.

As the information is in the possession of the Vote Leave campaign, there are no grounds for withholding the information from the wider public. Have DH provided information to Vote Leave that would be of significant detriment to the commercial interest of the DH?

Without the above clarification, engagement of the exemptions is unsubstantiated. But in addition, the public interest analysis is wholly inadequate and should be re undertaken.

If you continue to claim that information that would be detrimental to the commercial interest of the DH has been placed in the guardianship of the vote leave campaign, there is an additional public interest in publication so that openness and public scrutiny can further protect the use of the NHS logo. If the Vote Leave campaign threatened control of the use of the NHS logo there is a further clear public interest in this information being placed in the public domain.

Yours sincerely"