



Department  
of Health

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Dr Minh Alexander  
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30 August 2017

Annex A: DH response to initial request dated 17 February 2017  
Annex B: Request for internal review dated 18 February 2017

Dear Dr Alexander

**FREEDOM OF INFORMATION ACT (FOIA): INTERNAL REVIEW  
CASE REFERENCE 1069346**

You originally wrote to the Department of Health (the DH) on 23 January 2017 requesting all correspondence about the establishment, terms of reference and selection of members of the *Just Culture Taskforce*. In addition you asked about the taskforce's funding, outcome measures, whether it would be subject to FOIA and for the email addresses of Tim Jones and Paul Stonebrook.

We responded to you on 17 February 2017 (Ref FOI 1069346) stating that a *Just Culture Taskforce* has not yet been established and therefore DH held no information within scope. We also withheld e-mail addresses for Tim Jones and Paul Stonebrook under Section 40(2) – personal information. A copy of our response, including the full text of your request is at Annex A.

You subsequently emailed DH on 18 February 2017 requesting an internal review into the handling of your original request. A copy of your email is at Annex B.

The purpose of an internal review is to assess how your FOI request was handled in the first instance and to determine whether the original decision given to you was correct. This is an independent review as I was not involved in the original decision.

I have now undertaken further discussions with the officials who have policy responsibility related to your request. We have considered the request again and I can confirm that DH has carried out searches for information within a broader interpretation of the scope of your request and has now identified a number of emails which relate to the establishment of the *Just Culture Taskforce*, its terms of reference and selection of its members. However, we consider these emails to be exempt from disclosure under Section 36 (2)(b)(i) and (ii) and (c) – prejudice to the conduct of public affairs. In addition we also withhold some of the information in the emails under s.40(2) as it relates to the names of stakeholders, their contact details and in some cases, their personal views. We continue to withhold the email addresses for Tim Jones and Paul Stonebrook under s.40(2). The Department's reasons and public interest test are set out in full below.

**S. 36(2)(b)(i) and (ii) and (c)**

Under this exemption information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure:

- (b) would, or would be likely to, inhibit:
  - (i) the free and frank provision of advice
  - (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

We have sought the view of the DH's qualified person who is of the reasonable opinion that s.36(2)(b)(i)(ii) and (c) is indeed engaged in order to maintain the confidentiality necessary between Ministers and their advisers for the implementation and presentation of policy, and in accordance with the constitutional convention of Ministerial responsibility.

In relation to the public interest considerations, we recognise that there is public interest in promoting transparency and openness in the way public authorities operate through the release of information. There is a general public interest in transparency of discussions within government and in particular how it plans and implements its strategy for presentation of its policies. NHS issues remain live and open to debate and scrutiny and the public interest argument in favour of disclosing information related to this issue is recognised by DH. In addition to this, we recognise the strong public interest in making information readily available on the NHS and we recognise the importance of openness and transparency in government. The NHS is a strong, emotive subject which continues to remain at the forefront of the public mind, as demonstrated by the unrivalled national media coverage the NHS receives on a daily basis. Therefore we recognise the weight this places on the public interest in this disclosure.

However, we consider disclosure of the withheld information would, rather than 'would be likely to', inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. In addition, we consider disclosure of this information would, rather than 'would be likely to', otherwise prejudice the effective conduct of public affairs.

There is also a strong public interest in ensuring a safe space for officials to discuss issues freely and frankly with stakeholders in the knowledge that the contents of those discussions will remain private. If this information was released, it would create a future 'chilling effect', where officials felt unable to seek the views of stakeholders and experts outside the framework of a formal consultation or 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 periods where unexpected issues regularly arise and frank discussions are essential in order to make difficult decisions as quickly and effectively as possible.

In addition, we consider the 'chilling effect' adds further weight to the public interest in withholding the information because the requested information relates to live issues. The establishment of the *Just Culture Taskforce* remains a policy option which Ministers have asked officials to explore and officials may be required to seek views from the public or Ministers as part of policy development. Therefore, this is particularly sensitive information and there is a risk that should this information be released into the public domain it could significantly limit the scope of future Ministerial decisions.

We consider officials need to be afforded a safe space in order to have such discussions about live issues openly and candidly, which again adds further weight to withholding the

requested information. Disclosing the information could result in poorer decision making thereby impacting adversely on patient safety and value for money for taxpayers and which could in turn impact on the quality of services for patients.

As stated above, the timing of the request is a key issue I have considered and the development of our policy regarding a just culture taskforce is ongoing. The Information Commissioner considers the need for a safe space will be strongest when the issue is still live and therefore, disclosure would inhibit the provision of advice or the exchange of views and would cause prejudice to the effective conduct of public affairs. For all these reasons, we consider the public interest in withholding this information outweighs the public interest in disclosure.

### **S.40(2)**

DH is withholding the names of junior DH officials, the names of stakeholders, any personal views expressed and personal contact details such as telephone numbers and email addresses.

The DH considers that any release of this information would breach the first data protection principle in that:

- the processing would not be fair and;
- in particular none of the conditions in Schedule 2 are met.

Section 40(2) of the Freedom of Information Act provides for the protection of personal information. Section 40 prohibits a public body from disclosing personally identifiable information as doing so would contravene data protection principles. In this specific case, we are withholding the names of junior staff below Senior Civil Service (SCS) level under the exemption at section 40 (2) of the FOIA to protect personal data where there is no expectation that the information would be released into the public domain, whereas officials graded at SCS level would as they are responsible for their respective policy areas. Therefore, the DH would expect that the names of the junior officials should be protected for these reasons.

In addition, DH considers it would be unfair to release the names of stakeholders, their personal opinions expressed in the emails and any personal contact information since there is no expectation on the stakeholders' part that such information would be released into the public domain. Further, DH does not consider it fair to prejudice a stakeholder in any way by releasing details of their expressed personal opinions.

### **Conclusion**

I have concluded that the initial response that you received on 17 February 2017 was not compliant with the FOIA at the time, since searches for information within the intended scope of your request were not carried out and DH incorrectly advised you that the requested information was not held. However, after careful consideration I am satisfied that on balance the public interest favours non-disclosure of this information under s.36(2)(b)(i) (ii) and (c) and s.40(2).

The review is now complete.

Our work on *Just Culture* is born out of the recommendation of the Expert Advisory Group for the Healthcare Safety Investigation Branch to set up a Just Culture Task Force to support the whole healthcare system to move towards a just culture of safety. The policy for taking this forward is still under development and any discussions and policy thinking are therefore exempt for the reasons set out above. However, our intention is that whistle-blowers and NHS staff will be properly engaged in this work.

I would add that when we are making decisions, the Equality Act 2010 gives us a duty to take into account the need to:

- eliminate discrimination, harassment and victimisation
- advance equality of opportunity
- foster good relations between different parts of the community

This covers age, disability, gender reassignment, marital or civil partnership status, pregnancy and motherhood, race (including ethnic or national origin, colour and nationality), religion or belief (including lack of belief), sex and sexual orientation.

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

HARISH SEHDEV  
*Deputy Head of Freedom of Information*  
*Department of Health*

## Annex A DH response to initial request dated 17 February 2017

FOI-1069346

Dear Dr Alexander,

Thank you for your request of 23 January 2017 under the Freedom of Information Act (2000). Your exact request was:

*“Please can the Department disclose all correspondence about the establishment, terms of reference of and selection of ‘members’ (or whatever term that the Department uses) for the Just Culture Taskforce, that was sent and copied to, or by, the Secretary of State, Tim Jones, Paul Stonebrook and officers of the NHS Litigation Authority including Suzette Woodward. Please also advise what funds the Department has allocated to this project, what period this funding relates to and when and how funding will be reviewed. Please advise of any outcome measures that the Department has identified for evaluating the performance of the Just Culture Taskforce. Please could you also clarify whether, given that this has been identified as a project by the Department of Health, which involves Departmental staff, any records of proceedings / activity by the Just Culture Taskforce will be subject to Freedom of Information provisions and Department of Health policy on Equality and Diversity. Please could you also advise me of the email addresses for Tim Jones and Paul Stonebrook.”*

We are not providing the email addresses for Tim Jones and Paul Stonebrook, as personal data about officials is exempt from disclosure pursuant to section 40(2) of the FOI Act, which provides for the protection of personal information which would not otherwise be available in the public domain, as disclosing this information would contravene data protection principles.

With regard to your other requests, the Department of Health does not hold this information as a Just Culture Taskforce has not yet been established. The External Advisory Group for the Healthcare Safety Investigations Branch published its report last year *Improving safety investigations in healthcare*. This concluded that there should be a concerted and coordinated action from across the system, based on careful and coordinated analysis from a wide group of experts and stakeholders to promote a ‘just culture’ in healthcare. The recommendation states:

*“We recommend a Just Culture Task Force be established, bringing together safety and improvement experts with representatives of the legal and complaints systems, healthcare professionals, and patient and families representatives. This should determine the appropriate policies, practices and institutional arrangements that are required to move the healthcare system firmly towards a just culture of safety.”*

James Titcombe and Martin Bromiley were asked by the Department of Health to consider the best way of initiating this, and three other individuals were invited to contribute to these discussions. They are not a formally constituted body.

The Department has expressed its willingness to support the actions arising from this work (consultation and stakeholder engagement) by providing a secretariat, and has

envisaged a small level of funding, yet to be agreed, should the need arise for meeting venues, catering, and other expenses.

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](mailto: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

## **Annex B Request for internal review dated 18 February 2017**

From: Minh Alexander [mailto:minhalexander@aol.com]

Sent: 18 February 2017 10:18

To: FreedomofInformation

Cc: bernard.jenkin.mp@parliament.uk; sarah.wollaston.mp@parliament.uk; meghilliermp@parliament.uk; Jones, Tim; Stonebrook, Paul; MB-SOFS; Jones, Edward; pressOffice@ico.org.uk

Subject: Transparency and inclusivity of the NHS Just Culture Taskforce (ref: 1069346)

To Department of Health, Freedom of Information Team, 18 February 2017

Dear Sir,

Transparency and inclusivity of the NHS Just Culture Taskforce

Thank you for your attached response to my questions about the establishment of the NHS Just Culture Taskforce, and your following answers so far:

“James Titcombe and Martin Bromiley were asked by the Department of Health to consider the best way of initiating this, and three other individuals were invited to contribute to these discussions. They are not a formally constituted body.”

“The Department has expressed its willingness to support the actions arising from this work (consultation and stakeholder engagement) by providing a secretariat, and has envisaged a small level of funding, yet to be agreed, should the need arise for meeting venues, catering, and other expenses.”

I should point out that this is at variance to the account originally published by Messrs Bromiley, Titcombe et al, who reported that they were the core group of the Taskforce.<sup>1</sup>

Matters arising

1. I asked you if the Just Culture Taskforce, as a DH instigated and funded project will be subject to Freedom of Information provisions.

I asked partly as there are serious concerns about issues of inclusivity and the lack of transparency about the process so far.

The DH has declined to answer this on the basis that the Just Culture Taskforce has not yet been established:

“With regard to your other requests, the Department of Health does not hold this information as a Just Culture Taskforce has not yet been established.”

I do not agree that this is a valid basis for not answering this question. The DH must surely have a position on whether the Just Culture Taskforce will be subject to Freedom of information provisions once it is established.

Please review your response to this question and indicate whether the Just Culture Taskforce will be subject to FOI once established.

2. I asked you if the Just Culture Taskforce will be subject to DH policy on Equality and Diversity.

The DH has also declined to answer this on the basis that the Just Culture Taskforce has not been established.

I do not agree that this is a valid basis for not answering this question. The DH must surely have a position on whether the Just Culture Taskforce will be subject to Equality and Diversity policy once it is established.

Please review your response to this question and indicate whether the Just Culture Taskforce will be subject to will be subject to Equality and Diversity policy once established.

3. The DH has not disclosed the requested correspondence relating to the commencement of this project. It has not given a specific reason for this.

If the DH relies on the general reason that it has given, i.e. that the Just Culture Taskforce has not been established, this is not valid because I asked for correspondence on how the Just Culture Taskforce would be set up, and the records of the DH's approach to the individuals whom it asked to initiate the process.

Please review your response and either disclose the requested correspondence or give specific grounds for refusal.

This is a high profile public venture, set in a context of serious injustices by the Health Service to many parties and is of significant public interest.

The records about this project are of even greater public interest given the substantial variance between what Messrs Bromiley and Titcombe originally claimed, and what the DH now claims.

Concerns of cronyism by the DH add to the public interest.

The records are clearly a matter of significant public interest and it is for the DH to demonstrate otherwise.

4. As the DH now maintains the Just Culture Taskforce has not yet been constituted, may I take this opportunity to ask the DH if it will also invite:

a) whistleblowers

b) NHS staffside representatives

to contribute at this stage and to "consider the best way of initiating" the Just Culture Taskforce?

Yours sincerely,

Dr Minh Alexander

cc Chairs of Public Administration and Constitutional Affairs Committee, Public Accounts Committee, Health Committee  
Secretary of State  
Paul Stonebrook DH  
Tim Jones DH