

Our ref: DE00000611726

23 May 2011

Dear Lord Owen,

Thank you for your email of 26 April to the Department of Health requesting, under the Freedom of Information (FOI) Act, information relating to legal advice on the Health and Social Care Bill and EU Law. Your email has been passed to me for reply.

1. What legal advice was given to the Secretary of State or other Ministers in the Department about the implications of any willing provider" in the Health and Social Care Bill on EU Competition law or EU procurement law either for the Explanatory Notes or at any other time?

Any Qualified Provider (previously Any Willing Provider) is a policy intention and is not the subject of clauses within the Health and Social Care Bill. It may be useful to know that that legal advice was integral to the Department's advice to Ministers on the introduction of the Health and Social Care Bill. However, no separate legal advice was commissioned by officials on the impact of the Bill upon the application of EU competition law to the NHS. Advice was sought (in 2007) on the application of EU competition law during the process of establishing the Cooperation and Competition Panel. The Health and Social Care Bill does not change current UK or EU competition legislation or procurement legislation. The 2007 advice cannot be released on the grounds of legal professional privilege.

You should be aware that this advice to Ministers on policy formulation is exempt from disclosure under section 35 of the FOIA. Section 35(1)(a) of the FOI Act relates to the formulation or development of Government policy. It is a qualified exemption, and so we are required to assess as objectively as possible whether the balance of public interest favours disclosing or withholding the information in question.

The Department recognises a general public interest in promoting openness in the way in which public authorities develop policy. However, Section 35 of the FOIA seeks to protect the internal deliberative process, as it relates to policy making. The Department's strong and determined view is that there is a clear and compelling requirement to withhold this information in order to protect policy development and formulation.

The Department takes the view that the s35 exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions. Premature disclosure of information protected under s35 could prejudice good working relationships, the neutrality of civil servants and, ultimately, the quality of Government.

Thus, the Department takes into account a strong public interest in not prejudicing by release, the decisions that have still to be taken and the ongoing process of development of a specific policy area.

For these reasons, we have concluded that the public interest in withholding this information outweighs the public interest to release. We are therefore withholding the information you request.

2. I would also like to seek information on the legal implications for the replacement wording 'any qualified provider'?"

No legal advice or information on the legal implications of the change of name is held. The revised name more accurately reflects the policy proposals for extending AQP beyond elective care, which are subject to the outcomes of the listening exercise.

If you have any queries about this response, 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 317
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's Office (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:

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

Yours sincerely,

Laura Stocken
Freedom of Information Team
Department of Health

Please do not reply to this email. To contact the Department of Health, please visit the [contact page](#) on the Department's website.