FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Appeal References:
EA/2016/0140
EA/2016/0141
EA/2016/0144
EA/2016/0183

Heard at Fleetbank House
On 6 & 7 March 2017

Before

JUDGE PETER LANE
ANDREW WHETNALL
DAVID WILKINSON

Between

BEN DEAN
JONATHAN STURGEON

Appellants

and

INFORMATION COMMISSIONER
DEPARTMENT OF HEALTH
OFFICE OF MANPOWER ECONOMICS

Respondents

Representation:

The Appellants:	In person
Information Commissioner:	Rupert Paines, Counsel
Department of Health:	Julian Milford and Joe Barrett, Counsel

Office of Manpower Economics: Andrew Sharland, Counsel

DECISION AND REASONS

A. Background

1. These appeals concern requests for information arising out of the Government's wish to see work for the NHS undertaken by consultants and junior doctors governed by new contracts. That wish proved to be very controversial, leading to strikes of junior doctors.

2. The appellants are two doctors who work in the NHS. As will become evident, they presented their cases with skill and tenacity.

3. On 16 July 2015, the Secretary of State for Health, Mr Jeremy Hunt, made a speech at the King's Fund. Speaking about the Government's interest in 7-day services in the NHS, the Secretary of State said:–

"Around 6,000 people lose their lives every year because we do not have a proper 7-day service in hospitals. You are 15% more likely to die if you are admitted on a Sunday compared to being admitted on a Wednesday."

4. The Doctors' and Dentists' Review Body ("DDRB") is one of the seven non-statutory pay review bodies for which the Office of Manpower Economics ("OME") provides the secretariat. The OME was created in 1971 as an independent entity to provide support for the PRBs. OME officials do not answer to Government on questions of policy, such as recommendations made by a PRB.

5. In October 2014, the DDRB received a "special remit" from the United Kingdom government, the Welsh government and the Northern Ireland Executive to make recommendations on changed contractual arrangements for doctors and dentists in training, including a new system of pay progression linked to the policy objective of delivering healthcare services seven days a week in a financially sustainable way. The DDRB was asked to make observations on the pay progression proposals which had been put forward.

6. The DDRB published its report in July 2015. The report included a number of recommendations and observations.

7. The information requests with which we are concerned involve both the Secretary of State's speech to the King's Fund and the process leading to the DDRB's report. Some six

weeks after the speech, an academic study on weekend mortality rates was published by Freemantle and Others ("Freemantle 2015"). That study will also feature in what follows.

B. Appeal 0140

8. On 8 September 2015, Dr Dean made the following request to the Department of Health regarding Freemantle 2015:-

"The study's findings were mentioned in a speech by Jeremy Hunt at the King's Fund in July 2015, around six weeks before the study was published by the BMJ [British Medical Journal]. I wonder if you have any information relating to this publication in terms of who told Jeremy Hunt the study's findings (meetings/emails)? and also has Jeremy Hunt discussed this study with anyone including NHS England workers/media/politicians etc. (meetings/emails)? If so, can I see the minutes/any documentation relating to these discussions/emails? If you have no information relating to this then I would be grateful if you could ask Jeremy Hunt formally who fed him the information of the study's findings so many weeks before it was published?"

9. The Department of Health confirmed it held information within the scope of the request but refused the request by references to section 35(1)(a) and (d) of the Freedom of Information Act 2000 ("FOIA"). The Information Commissioner decided that the exemption was not engaged and ordered disclosure. The Department complied with that order.

10. Dr Dean, however, appealed to the Tribunal on the basis that he contended that the Department had failed to identify all the material falling within the scope of the request. Dr Dean relies on other publicly available information, in particular a BBC news item and a letter from the British Medical Journal, which he contends makes it clear that elements of the King's Fund speech were derived from the Department having advance sight of "headline figures" in the Freemantle 2015 report.

11. Furthermore, using emails released by NHS England in response to a separate FOIA request, Dr Dean argues that the 6,000 figure was arrived at using data from 2013/2014 hospital admissions, which form part of an analysis conducted by Deloitte, the management consultancy.

12. The Department of Health's case, which is accepted by the Information Commissioner, is that the 6,000 figure came not from Freemantle 2015 but, rather, an earlier study in respect of the same subject matter by the same researchers, which is known as "Freemantle 2012". Accordingly, the figure lies outside the scope of Dr Dean's request. Nevertheless, the Department has conducted enquiries in order to identify the circumstances in which the figure came to be included in the Secretary of State's speech. These enquiries indicate that the information was provided to the Secretary of State during a discussion with NHS England.

Submissions of Dr Dean and Dr Sturgeon

13. At the start of the hearing the appellants helpfully agreed that they need not restate their arguments why the disclosure of the requested information is justified under the terms of the Freedom of Information Act, and would have been in the public interest at the time of the request. These arguments were set out, request by request, in fully reasoned submissions and skeleton arguments, and the public interest arguments were justified in relation to a body of supporting information.

14. Dr Dean in particular supported his submissions by reference to a body of analysis of the potential danger to patient safety of dealing with a supposed "weekend effect" within a cost neutral envelope, following a prolonged period of pay restraint, without an explicit plan as to what seven day service meant and how it is to be achieved, and as though the main obstacle to achieving better service lay in the contract conditions of doctors as an alleged cause of the observed "effect". He cites an impressive weight of analysis that the "effect" is unlikely to be explained wholly by medical staffing issues, and that there are limited grounds for believing that it can be remedied or reversed by changes in contract conditions.

15. His argument addresses the nature of the research purporting to show a weekend effect: essentially this looks at mortality rates (over 30 days) for patients admitted at weekends compared to rates for those admitted on weekdays. Estimates of excess deaths have been calculated, following adjustments for various factors including the case mix and the tendency for weekend admissions to include a higher proportion of patients with high risk conditions, by applying the higher levels of reported mortality for weekend admissions to data on the overall number of reported deaths following admissions.

16. It is important in Dr Dean's view that such research should be peer reviewed and tested before being relied on as a justification for the policy of seven day working. Freemantle 2015, which he takes to be the origin of the purported weekend effect, as expressed in terms of 6,000 excess deaths in the Secretary of State's speech, had not been peer reviewed or published at that date. There are remaining questions about the validity of its conclusions. The Editor of the BMJ had written to the Secretary of State objecting to the use made of it, and the lead author had warned that it did not support the Secretary of State's conclusions. As published it includes a caveat that the observed effect has complex causes and should not be taken to be reversible.

17. Moreover, analysis of similar data by others, as presented by Dr Dean, concludes that the reported effect is one of a number of temporal variations in survival rates, not all easily explicable or demonstrating adverse impacts of weekend working patterns. Work at the University of Manchester concludes that the weekend effect is a statistical fabrication. Patients admitted at weekends through A &E departments are on average sicker than those admitted on weekdays. This is noted in table 2.1 of the Curran report as discussed below. Their mortality may tend to be worse whatever treatment they receive.

18. Although an improvement in hospital staffing at weekends would be desirable, it is widely accepted in Dr Dean's submission that it would need to be supported by adequate financial provision both for more doctors attending at weekends, for nursing staff and for diagnostic services. As things stand, senior NHS England staff, the Secretary of State's senior officials (in a leaked risk assessment) and his Parliamentary Secretary at the relevant time (Dr Dan Poulter, no longer in post) question that seven day service can be provided within the available envelope for pay and other resources. In Dr Dean's submission (which he supports by reference to evidence to and a report of the Public Account's Committee) the recruitment and retention of medical staff are already falling well short of requirements in certain specialities and parts of the country, are not being effectively planned and addressed, and will go more deeply into crisis as a result of imposed contract changes. Dr Dean attaches representations on behalf of most Royal Colleges and others representing staff, and from organisations representing patients to the effect that imposition of contract change in these circumstances will have adverse consequences for patient safety.

19. The DDRB's conclusion that there is an uncontested weekend effect is therefore, in the view of Dr Dean and many others well positioned to analyse it, based on no sound evidence. Such evidence as is given was not peer reviewed and had not been included in written submissions, depriving other parties of the chance to contest it. It was therefore reasonable to seek information on how questionable material came to be used as the basis for recommendations by the DDRB and policy by the Secretary of State. It was reasonable to suspect that all available information had not been disclosed, and that disclosure of oral evidence could throw light on the way in which decisions were reached where the relevant information had not been included in written evidence. In so far as the Secretary of State had been given advice based on unpublished research this should be disclosed. The Secretary of State's reasoning and the DDRB's apparent endorsement would be better understood and could be more effectively debated if underlying factual and analytical material is made available. In the circumstances he submits the balance of public interest required by FOIA clearly favours disclosure and asks the Tribunal to overturn the Information Commissioner's decisions.

20. Chapter and verse for all these statements in the form of extracts and summaries of the cited works were included in Dr Dean's bundle of supplementary documents. Dr Sturgeon also stressed that many studies which had not found evidence of a weekend effect. He listed 13 studies which would have been available at the time the DDRB was preparing its report, and a further three since, contrasting these to the four studies including Freemantle 2012 and 2015, which do show a weekend effect. Dr Sturgeon also noted that the BMA questioned the significance or correctness of any weekend effect in their submission to the DDRB, although the BMA accepted the premise of a properly funded seven-day service. Dr Sturgeon argued that if the DDRB had assessed the evidence, the veracity of the weekend effect should have been called into question. Disclosure of the minutes of oral meetings would establish whether the DDRB was deficient in scrutinising the evidence or the Department of Health was deficient in giving it. This, in turn, would help ensure such deficiencies did not reoccur.

Evidence of Martin Wilson

21. The Tribunal heard evidence from Martin Wilson, a senior civil servant with the Department of Health since November 2016, prior to which he was a senior manager and executive director in the England National Health Service for around fifteen years. As such, Mr Wilson's roles included positions in London teaching hospitals and strategic health authorities. For three years he was a management consultant with McKinsey & Company, specialising in healthcare.

22. Mr Wilson's present role is Deputy Director within the Acute Care and Workforce Group, leading a patient access and flow branch. This has responsibility for policy, performance and arm's length body accountability for issues related to hospital access, patient flow and NHS performance issues affecting hospitals, including 7-day services. The branch was established in summer 2016.

23. Mr Wilson proceeded to describe the background.

24. In a press release, published on 13 August 2015, NHS England set out the relevant findings of Freemantle 2012, explaining how their figure of 6,000 deaths could be derived from it:–

> "The estimated excess in-hospital deaths associated with admission on Saturday or Sunday compared with Wednesday is 5,745. The 95% confidence interval for this is [4,977, 6,486]."

25. There was also the following:–

> "In November 2014, Deloitte were invited to a meeting of the NHS England Medical Directorate Senior Management Team (SMT) to update on progress.
>
> The same update was then presented to the senior leadership of NHS England in February 2015, where further information and analysis was requested.
>
> Consequently, on 5 February 2015, University Hospital Birmingham was asked by NHS England to re-run the analysis used in the 2012 paper on 2013/14 data to assess if there was still a weekend effect.
>
> In March 2015, Professor Sir Bruce Keogh was asked to give evidence to the DDRB on the case for improving seven day services, where the top level findings of the latest analysis were shared. A copy of the report can be found here. [link provided in original]
>
> From March 2015, high level findings from the latest analysis were also shared by the programme leads with policy colleagues at NHS England, Department of Health, health unions including the British Medical Association, Royal Colleges, Deloitte and the Health Select Committee.

> It is routine for high-level findings of key studies to be shared and debated among experts and interested parties alongside peer review and publication in a medical journal.
>
> On 16 July 2015, the Secretary of State used a figure of 6,000 in a speech to the King's Fund.
>
> NHS England provided figures for excess deaths of Department of Health, the calculation can be found here. The figure was also calculated by Deloitte using a similar method. There was a delay in publishing the source of the figure as key officials who could confirm this were unavailable.
>
> The figure does not feature in the 2015 paper and is not based on the findings of the 2015 study, as made clear by the authors of the 2015 BMJ study."

26. Thus, says Mr Wilson, the calculation referenced by NHS England was a copy of that previously published by the Department, using 2009/2010 hospital emergency statistics and the mortality risk ratio from Freemantle 2012.

27. On 24 February 2016, the Prime Minister, responding to a question from the Leader of the Opposition, said:–

> "Let me answer very directly the question about excess deaths. The 6,000 figure for excess deaths was based on a question asked by the Health Secretary of Sir Bruce Keogh, the medical director of the NHS."

28. According to Mr Wilson, this explanation is consistent with the outcome of the Department's enquiries, resulting from Dr Dean's request. The Secretary of State's private office searched for information explaining the introduction of the 6,000 figure, without producing any results. In short, the Department holds no written record of how the 6,000 figure was provided to the Secretary of State and no record of any discussions by him in relation to it. Thus, Mr Wilson considers that the figure was, indeed, most likely provided verbally to the Secretary of State by Sir Bruce Keogh.

29. At page 145 of the bundle, we find an email of 19 August 2015 from Mark Svenson of the Department, copied to the National Statistician, in which he stated that "the estimate used in the speech had been circulated within NHS England and DH in the context of policy developments and advice. It was based on unpublished analysis of previously published research". Mr Wilson said that that previously published research was the research for Freemantle 2012.

30. Under cross-examination by Dr Dean, Mr Wilson was asked whether any slides existed in respect of the Deloitte's work. He wished to know whether Deloitte's modelling work had used the figure of 6,000.

31. Mr Wilson replied that Dr Dean's information request was about where the figure referred to in the Secretary of State's speech had come from. The evidence showed that it had come from Sir Bruce Keogh of NHS England.

32. Mr Wilson said that the figure for what he described as weekend deaths in Freemantle 2015 was, in fact, in the region of 11,000. Mr Wilson had spoken to Sir Bruce Keogh in the course of compiling his evidence. Sir Bruce had told him that the 6,000 figure was based on the work for Freemantle 2012 and had been used in "common discussion", by the teams involved in the 2012 study. At page 66 of the bundle, there was an email exchange in which Deloitte on 12 January 2016 had confirmed "that we did not see the Freemantle paper, final draft, prior to publication in September 2014". The paper in question was, in fact, Freemantle 2015 (not 2014), as is apparent from the email from Simon Bennett, to which Deloitte's email was a response.

Discussion

33. The Tribunal is fully satisfied that it is more likely than not that the reference in the Secretary of State's King's Fund speech to 6,000 deaths came from the conversation the Secretary of State had with Sir Bruce Keogh, who was drawing on the information supplied in connection with the Freemantle 2012 report. Mr Wilson's conversation with Sir Bruce Keogh confirms that fact. Whatever the strength of his other criticisms (as to which see paragraph 37 below), Dr Dean has not shown that the investigations described by Mr Wilson into the source of the figure have lacked thoroughness or that they are part of some dishonest attempt to produce a *post-hoc* rationalisation.

34. Despite some earlier confusion, as indicated in email exchanges set out in the bundle, the Tribunal finds no good reason to doubt the categorical statement of Deloitte that it did not see the Freemantle 2015 paper, in draft or in its final version. The fact that this is more likely than not to be true is reinforced by the fact that Freemantle 2015 has this to say about the "weekend effect":–

> "Our analysis of 2013–14 data suggests that around 11,000 more people die each year within 30 days of admission to hospital on Friday, Saturday, Sunday or Monday compared with other days of the week (Tuesday, Wednesday, Thursday). It is not possible to ascertain the extent to which these excess deaths may be preventable; to assume that they are avoidable would be rash and misleading. From an epidemiological perspective, however, this statistic is 'not otherwise ignorable' as a source of information on risk of death and it raises challenging questions about reduced service provision at weekends."

35. Two points emerge from this. First, if Deloitte had had access to the Freemantle 2015 materials, it is highly unlikely that they would have arrived at a figure of around 6,000 deaths. Second, it is not believable that the Secretary of State, wishing to make what he saw as a significant point in his King's Fund speech, as regards the "weekend effect", would have chosen to refer to 6,000 deaths, if he had had access to the Freemantle 2015 materials, which indicated a much higher figure.

36. We are satisfied that neither Dr Dean's request which is the subject of this 0140 appeal, nor any of his other requests in these linked appeals, covered a request for information

concerning Deloitte's work. The fact that the estimate arrived at by Deloitte for weekend deaths was 6,700 does not mean that its work was more likely than not to have been the source of the figure given in the Secretary of State's King's Fund speech. We are, accordingly, fully persuaded that none of the Information Commissioner's decision notices, with which we are concerned, is defective in this regard.

37. Out of deference to the quality of Dr Dean's submissions on the issue, we wish to say the following. Clearly, the Department was not well prepared to produce an immediate written justification of the Secretary of State's figure of 6,000 for excess deaths. It is a fair criticism, accepted by the Department, that those wishing to understand the figure had no immediate published explanation, leading the UK Statistics Agency to prompt the Department to consider how best to supplement the information currently available so that all users could understand how it had been arrived at. Although, as we have explained, we can identify no written documentation within the scope of the request that the Department could be ordered to disclose, with the result that we uphold the Information Commissioner's decision, it is possible that there may be material relevant to the Department's reliance on the weekend effect and its general relevance to policy in a form produced by Deloittes. We accept this is a matter for another FOIA request. Dr Dean's general arguments on the invalidity of both the existence of the effect and the policy based on it may apply with equal force to any claim that there are 11,000 excess deaths due to a weekend effect. The disagreement may or may not be capable of conclusion, although the published materials Dr Dean has cited appear to be very relevant. The more the arguments and analysis of all parties are exposed, the better chance of reaching a reasoned conclusion on an important matter and the better public understanding will be.

Decision

38. For the reasons given above, this appeal is dismissed.

C. The other two witnesses

39. At this point, it is necessary to set out the evidence of the other two witnesses who gave evidence, since what they say is relevant to the three remaining appeals.

Evidence of Timothy Sands

40. Mr Sands is a senior official in the Department of Health. He is Deputy Director for NHS Pay Pensions and Employment Services and, as such, is responsible for policy on the pay, terms and conditions of NHS staff covered by national contracts for England and Wales.

41. Mr Sands describes the DDRB as follows:–

> "18.The DDRB is the specialist, independent, pay review body for doctors and dentists in the NHS. It is a non-departmental public body. The DDRB exists to provide independent, expert,

advice and recommendations to Government about pay and reward matters for doctors and dentists. Its views are not binding on Government; rather, it provides independent expert advice that help shape Government policy.

19. The DDRB typically provides annual recommendations on pay and rewards, but from time to time it also undertakes special remits for Government. When a pay remit or special remit is issued by government to the DDRB, it invites written evidence from relevant stakeholders, most significantly the employer and workforce side. The written evidence that stakeholders submit is published and available to other interested parties, who can comment and respond accordingly. This ensures that there is a very high degree of public information and transparency in respect of the review processes that the DDRB carries out.

20. The DDRB also supplements the detailed written evidence with private, confidential, meetings with the parties. These meetings are specifically intended to be private and confidential. The discussions are not published and what the parties have said is solely for the information and consideration of the DDRB. This allows the DDRB to probe the parties' positions and exchange views, in a way that would not be possible if the meetings were public. It also ensures that the parties can share confidential, sensitive, and entirely frank views and comments about their position, and the issues, in a manner that would be impossible, and also unhelpful, if the meetings were public."

42. Both the Information Commissioner and the Department of Health are agreed that the remaining withheld information has been properly withheld in accordance with the qualified exemption contained in section 35(1)(a) of FOIA:–

"**35. – Formulation of government policy, etc.**

(1) Information held by a government department or by the Welsh Government is exempt information if it relates to –

(a) the formulation or development of government policy …"

43. By reason of section 2(2)(b) of FOIA, the information may be withheld if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". Dr Dean and, in his connected appeal, Dr Sturgeon (see below), submit that this test is not met.

44. Mr Sands' statement describes the background in some detail. In December 2012, NHS employers reported that the then current national contract for junior doctors was "no longer fit for purpose". The Department accepted the main recommendations of the report.

45. In March 2013, the DDRB's 41st report noted the need to restructure the contract for junior doctors to shift the balance away from the banding supplements towards basic pay and to ensure that starting salaries did not fall behind those of other graduate-entry professions. The DDRB noted the broad agreement that the current contract was no longer suitable, although noting that the BMA were not signatories to the final report.

46. In June 2013, draft heads of terms were agreed between the Department of Health, NHS employers and the BMA. In October 2013, the Department issued a "mandate for negotiations" and from October 2013 to October 2014 the parties engaged in detailed negotiations seeking to agree a new national contract for junior doctors.

47. On 16 October 2014, the BMA issued, via Twitter, a "PRESS RELEASE: doctors not prepared to accept contract changes that put patient safety at risk".

48. On 23 October 2014, the chair of the management side for the junior doctors' negotiations wrote to Dr Dan Poulter MP (who was then Parliamentary Under Secretary for Health), stating that the management side "would be content with the Government's proposal that the DDRB should seek evidence on issues connected with the contract". Accordingly, on 30 October 2014, the Minister wrote to Professor Paul Curran of the DDRB to request it to make observations and recommendations that take into account work undertaken during negotiations. For doctors and dentists in training, the DDRB was asked to make recommendations on new contractual arrangements including a new system of pay progression.

49. Between November 2014 and July 2015, the DDRB considered "a very significant volume of written and oral evidence for more relevant stakeholders". These included the Department, NHS employers and the BMA. Oral evidence was taken from Dr Poulter, officials from the Department, NHS employers and the senior leadership of the BMA.

50. On 9 March 2015, Dr Poulter gave oral evidence in a confidential session to the DDRB. Before that session, he was given a confidential briefing pack prepared by civil servants in the Department.

51. In July 2015, the DDRB's report "Contract reform for consultants and doctors and dentists in training – supporting healthcare services seven days a week" was published. It contained the DDRB's analysis and recommendations, based on all the evidence submitted to it.

52. The Executive Summary stated:–

> "2. We consider that the recommendations and observations in this report provide a roadmap of what could and should be achievable in the interests of everyone with a stake in the NHS. It now depends on the parties to resume negotiations in the right spirit and with a commitment to long-term as well as short-term objectives …
>
> 3. … We thank all parties for their written and oral evidence and we hope that our report assists them in reaching a negotiated conclusion on both contracts to support the provision of excellent patient care …
>
> 5. … Both of the proposed pay systems [for junior doctors and consultants] look to improve patient outcomes across the week, through providing separate unsocial hours payment. Both seek to reward greater responsibility and professional competence, in their approach to basic pay and progression … We think these key principles are reasonable.

> 6. We consider that there is a sound basis for negotiation of the junior doctors' contract and make recommendations that we hope the parties will find helpful in order to progress to negotiated agreement quickly … We consider the proposals are fair …
>
> 17. We find the case for expanded seven-day services in the NHS in order to address the 'weekend effect' on patient outcomes, where studies show that mortality rates, the patient experience, length of patient stay and re-admission rates are all poorer for those patients admitted at weekends, to be compelling. We note that this is the area of common ground between the parties and our response to the proposals has been influenced by this broad agreement, although we realise that this is not the only driver for change to junior doctors' and consultants' contracts."

53. As is well-known, the BMA did not accept the DDRB's recommendations. The resulting dispute was, in Mr Sands' words, a "high profile and contentious political issue throughout 2015 and 2016. The dispute involved six sets of industrial action by junior doctors (including a complete withdrawal of labour including for emergency care, which was unprecedented in the NHS)".

54. Following the rejection of the new contract, the Secretary of State announced in July 2016 that he was asking NHS employers to proceed with the introduction of the contract that had been agreed with the BMA's negotiators. Planned further strike action was cancelled by the Junior Doctors Committee ("JDC") in October 2016. The current stance of the JDC is to engage with NHS employers and the Department to seek changes to the new contract. Mr Sands considers, however, that there was "a significant minority within the JDC who did not agree with this decision and who wished to return to industrial action".

55. Mr Sands addresses the issue as to whether the policy aspect is still current, for the purposes of section 35. He submits that it is. Notwithstanding that the mandate for industrial action has ended, Mr Sands says the issue remains "an active policy area. In my opinion, disclosing sensitive material of this sort will affect the current and future position".

56. The present situation is that the BMA "has not formally accepted the new contract and remains in dispute with the department and NHS employers". The Department's view is that the dispute will only be at an end "when the BMA ends its dispute in relation to the new contract". Meanwhile, some junior doctors remain unhappy about the new contract, particularly that it was introduced without agreement:–

> "They have raised particular concerns about transitional pay protection for Foundation doctors and on Saturday pay. They are clear that their role on behalf of their members is to 'hold feet to the fire' on implementation and that it is quite possible that the JDC may feel that their concerns aren't being sufficiently acted upon and that further action may be called for."

57. The new national contract is being rolled out on a phased basis, which is not due to be completed until October 2017. Mr Sands believes it is inevitable with new contractual

agreements that there will be "teething problems". These are likely to be more challenging "when a contract is being introduced without agreement on the trade union side".

58. Mr Sands considers that the success of reaching agreement, albeit that it was ultimately not supported in the BMA's membership ballot, was only possible because the parties were able to negotiate privately in a "safe space". Furthermore:–

> "In the course of those negotiations a variety of positions were taken by both sides that do not reflect the final position that was reached. An exercise in examining confidential documents relating to an earlier stage in the ongoing contract dispute to seek to uncover positions that may be different from those finally arrived at can only make it more difficult for the parties to reach a position where industrial relations with the BMA are normalised and they bring the dispute to an end."

59. It is the view of Mr Sands that the DDRB:–

> " …has played a very valuable role in the NHS by, generally, taking the annual pay negotiations out of the sphere of collective bargaining and encouraging an evidence-based approach. It has also carried out a number of special remits on aspects of pay, of which the report in the present case is one. As I have explained above, there is a very clearly established process employed by the review bodies. This involves taking written evidence from all stakeholders that is publicly available.
>
> 50. As part of the process of weighing and assessing that evidence, meetings are also held. These sessions are private and allow the review bodies to probe evidence, sometimes hypothesise about options and gauge the views of the relevant stakeholders about issues in a way that they may feel uncomfortable putting down on paper or stating publicly. In between rounds, the chairs of review bodies also have informal meetings with key stakeholders (of which the minutes of the meeting between Paul Curran and Lord Prior are an informal note); again for free and frank discussions."

60. Mr Sands understands "that there have been FOIA requests for release of the minutes of oral evidence sessions with the BMA that have been resisted. The Department would support that approach; even when it might mean we get insights into the BMA's position on various issues, as it undermines the effectiveness of a process that serves the NHS well".

61. Mr Sands seeks to emphasise that the DDRB's remit was not to determine the need, or otherwise, for 7-day services. The evidence relating to 7-day services was the subject of a claim for judicial review brought by junior doctors. The High Court concluded, after scrutinising the evidence that, "the evidential basis upon which the Secretary of State relies is cogent and significant".

62. In cross-examination by Dr Dean, Mr Sands was asked whether he saw the DDRB as a forum for negotiation or as an independent pay review body. Mr Sands said that the DDRB provided a mediation role. Its remit was to address the issues of availability of staff

and the cost of doing so at weekends. The 7-day working issue, accordingly, was contextual, so far as the DDRB was concerned.

63. In closed session, Mr Sands explained the nature of the Q and A briefing document for the Minister. He explained that the withheld information within the document was directed to explaining to the DDRB the Department of Health's view of the context in which the review arose.

64. Mr Sands explained the position in the present negotiations, and the position in August 2015. He gave his view on the likely impact if the withheld information had been disclosed in August 2015, namely that it would have been likely to prejudice negotiations with consultants and discussions with junior doctors.

65. Mr Sands indicated that the difference between the public and private statements of the Department of Health was in tone and detail, as opposed to the public and private statements being inconsistent. He explained that the Minister was probably not asked questions on all the matters covered in the brief and at the point that he was answering questions only the Department of Health and the DDRB would have been in the room.

66. On the withheld meeting note, he explained that this was the note of an informal discussion. In his experience, pay review body Chairs often probe during such discussions to see what was in the Minister's mind. Mr Curran's actions were, in his view, within the remit of the DDRB. Lord Prior was new to his role, and was speaking informally on a "first thoughts" basis. He had only been in post for a month.

Evidence of Martin Williams

67. In his statement, Mr Williams describes his role as Director of the OME, in which capacity he has oversight of all the PRBs. Amongst other things, Mr Williams is responsible for identifying issues that are common to all of the bodies and seeking to address these.

68. Mr Williams states that the OME is an independent, non-statutory body, which provides the secretariat to the pay review bodies, including the DDRB. It was created as an independent entity in 1971 to provide support for PRBs. Officials of the OME are civil servants, based in the Department for Business, Energy and Industrial Strategy but do not answer to a Government Minister on questions of policy, such as the recommendations made by a PRB.

69. PRBs provide independent advice to Government about pay and reward for different public sector work forces, where successive Governments have determined that collective

bargaining is inadequate or inappropriate. At present there are seven PRBs, each separately constituted, but sharing some core procedures. Those procedures have been developed over several decades and are intended to enable PRBs to interact appropriately with the parties and offer the best possible advice and recommendations to government.

70. When a pay remit or special remit is received, the PRB will invite written evidence from relevant parties, notably the employer and any recognised representatives of the workforces, and ensure that this evidence is available to all the parties. Each party has to present its written evidence transparently, so as to allow that evidence to be commented on by the other parties. The evidence may be "fleshed out" in private oral sessions with the PRB members.

71. Mr Williams says that the procedures he describes are well established and understood by all the parties. The procedures seek to offer maximum transparency over facts, data and public positions, while reserving for all the parties the chance also to have a safe space for free and frank exchanges with the review body. According to Mr Williams, the written evidence provides the transparency; the oral evidence, conducted with each of the parties individually, provides the safe space. What parties say during oral evidence sessions is solely for the information of the PRB members and the secretariat. The OME secretariat takes minutes of the meeting so that members can refresh their memory of the session when considering their recommendations. This may occur several weeks later. The minutes, however, are not shared, even with those who actually gave the oral evidence. This arrangement, having been in place for many years, is well understood and will not necessarily be restated in every evidence round.

72. Mr Williams considers that the procedures for oral evidence discussions allow the PRB to test different hypothetical recommendations with the parties, and to get the parties' responses. They also enable the parties themselves, if they so wish, to signal to the PRB what their priorities would be if resources were limited. The PRB can then take this evidence into account in producing its final report and recommendations. Those reports are published in full and represent the end-point to which all the evidence has to lead.

73. The conclusions of a PRB are only recommendations. Ministers decide whether they accept the recommendations or not. Depending on the issues, ministers may conclude that further negotiation is needed. Indeed, a PRB may itself recommend that some details are settled by negotiations between the parties.

74. The DDRB is one of the oldest of the PRBs, having been established in the 1970s. It comprises eight members and is currently chaired by Professor Sir Paul Curran. The members are appointed to provide independent advice and recommendations.

75. Turning to the meetings in question, Mr Williams said that the minutes of the meeting of 9 March 2015 involved a meeting with NHS employers, the Scottish Government, the Welsh Government, HM Treasury, the Northern Ireland Executive, HM Treasury and the Department of Health, including Dr Daniel Poulter who was then Parliamentary Under

Secretary of State for Health. The evidence taken covered a range of information, relating to the remuneration and new contracts for NHS doctors. The minutes contain the views of the different parties in their separate sessions with the review bodies, about the progress of negotiations on contract reform for consultants and junior doctors, the negotiating priorities of those giving evidence and what they perceived to be the priorities of other parties and what they thought or hoped would be the eventual outcome of the negotiations. Mr Williams says that the notes "record the parties' candour in their discussions with the DDRB".

76. The minutes of the meeting of 23 March 2015 involved an oral evidence session from NHS England (Sir Bruce Keogh and officials) and from the British Medical Association (Mark Porter, Chair of the BMA Council, various BMA sub-committee chairs, and officials).

77. Mr Williams considers that, if the information were released, it would cause parties giving evidence in the future to adopt a more cautious approach to the information they provide to the DDRB and would inhibit the review body's own discussions. Whilst recognising the particular public interests in the subject matter of the report with which we are concerned and the general expectation that senior officials and ministers should expect to be held to account, Mr Williams nevertheless rejects the notion that the public interest is best served by publication of the oral evidence. The eventual report covered "a very sensitive area of health policy. The surrounding disagreements between the Department of Health and British Medical Association have been well-reported in the media and are not as yet fully resolved". Given this, Mr Williams considers it to be extremely important for all the PRBs to have discussions with all stakeholders which remain private, so that they have the benefit of a safe space in which to discuss their positions and air their concerns.

78. Mr Williams' statement deals, finally, with the "weekend effect". Mr Williams seeks to make clear that evaluation of the weekend effect, including its existence or non-existence "was simply not within the remit of the DDRB for this report. Indeed, it would also be on the DDRB's terms of reference and the expertise of its members". Mr Williams rejects any assertion that the evidence was "manipulated to favour one particular stakeholder. There was no pressure on the DDRB to draw its conclusion; it arose because the evidence submitted to it was not challenged".

79. Under cross-examination by Dr Dean, Mr Williams reiterated that it was reasonable to refer to the evidence surrounding the weekend effect as "compelling", given that the BMA was also of the view that there was "an effect". Dr Dean said that it was not so much an effect as a difference in mortality but no-one knew why the difference occurred. Mr Williams said none of the members of the DDRB could make medical judgments; they were merely suggesting that it might be possible to do something about the weekend effect.

80. So far as cost effectiveness was concerned, the DDRB did not cost things in detail. Those were the matters for negotiation between the parties. The DDRB would not have been

able to deal with evidence regarding the weekend effect in oral sessions if it considered that that evidence was contentious. One could not put in data in oral evidence.

81. Dr Dean suggested that that was what had happened in the present case.

82. Under cross-examination from Dr Sturgeon, Mr Williams agreed that the scope of the exercise that the DDRB was undertaking was, in some respects, somewhat wider than occurred in other cases but was not particularly unusual. In Mr Williams' view, pay for out-of-hours work was an issue of remuneration. Mr Williams said that witnesses at oral sessions would be told that the body would make use of written materials but would not give out a record of their evidence.

83. Dr Sturgeon asked about the relationship between the oral evidence and the eventual report. If the report encapsulated everything, he asked how that was compatible with the OME's stance regarding disclosure of oral evidence. Mr Williams said that the DDRB and other PRBs were cautious about how it used the oral evidence to inform its published report.

84. Dr Sturgeon asked about the table at 2.1 of the DDRB's report. He enquired of Mr Williams where it had come from. Mr Williams said that it appeared to have come from NHS England. Part of the information in the table was in NHS England's written evidence. Information relating to 2013–14, however, was not.

85. Mr Williams said, in response, that the OME assumed that parties putting forward written material to a PRB would publish that written material. Dr Sturgeon said that this did not appear to have happened with table 2.1. Mr Williams responded that the DDRB would not have considered the matter one way or the other, as the members were not equipped to deal with the "weekend effect" and did not regard it as relevant. Had table 2.1 been considered to be within its remit, then the DDRB would have had to have looked at it critically. That was not, however, the case.

86. Re-examined, Mr Williams agreed that the evidence in the left-hand column of table 2.1 [1]could be seen to have come from the written evidence published by NHS England, to be found beginning at page 265 of the bundle relating to Dr Sturgeon's appeal (0183).

[1] Table 2.1 shows an analysis of the risk of 30 day mortality for patients admitted at weekends, compared to 30 day mortality for patients admitted on Wednesdays. Data is given for two years, 2009-10 (the left hand column) and 2013-14 (the right hand column. The 30 day mortality is + 11 for Saturday admissions compared to Wednesday in 2009-10, and +10% for 2013-14. For Sunday admissions the mortality rates in the two years are +16% and +15% compared to Wednesday admissions. There are a number of footnotes on the sources and statistical significance of the data. Footnote 2 reads: "While the overall number of patients admitted at the weekend is lower, the proportion of very sick patients is higher, on average, than during the week. There is an increased proportion of elderly and young admissions. On a risk score of 0=lowest risk of death to 4=highest risk, the proportion of low risk patients is constant throughout the week, but the proportion of high risk patients increases by around 25 per cent on a Saturday and around 30 per cent on a Sunday. "

87. In answer to further questions, Mr Williams said that, had table 2.1 been thought to be central to the DDRB's discussions, it would have taken a firmer view about the source of the evidence.

88. The following is the agreed gist of the closed session with Mr Williams:–

"1. Mr Williams verified his unredacted statement.

2. Mr Williams was taken to one particular part of the closed evidence in these appeals by Counsel for the OME. He was asked questions in relation to the origin of table 2.1 in the DDRB report. Following his questions, the OME has formally confirmed that:

'The OME can confirm that the figures in the second column of table 2.1 in the report are not contained in the minutes of oral evidence of the DDRB. The OME believe that this evidence was provided to the DDRB in writing after the oral evidence was given in March 2015.'

3. Mr Williams was asked by Counsel for the IC whether he would consider that further written evidence supplied by NHS England fell within the scope of the requests in these appeals. He stated that it would not.

4. He was then taken to example points in the closed evidence by Counsel for the IC. He was asked whether, if those pages were disclosed, that would assist with the transparency of DDRB's processes. He replied that there was always an argument in favour of release and that it was necessary to balance two sets of interests. He stated that in his view, the review body's views would be expressed (more appropriately) in its reports, and that he hoped that DDRB reports were seen as seeking to be even-handed and independent.

5. The other points in Dr Dean's skeleton argument were then put to Mr Williams in the context of the closed material. He stated that transparency was an important interest and that disclosure would assist with this, but that there were other interests in play also.

6. Mr Whetnall asked Mr Williams what effect disclosure would have on other PRBs given the particular context of the 'special remit'. Mr Williams stated that there were seven other PRBs, and that disclosure could have two consequences:

a. To undermine the assumption that the DDRB does not release the oral evidence and thereby the integrity of the negotiating process, and potentially to require the DDRB to look at other ways of ensuring a safe negotiating space; and

b. In the particular consequences of the junior doctors' controversy, potentially to inflame the dispute.

7. Mr Williams emphasised that the DDRB process was a form of industrial relations negotiation.

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8. Mr Williams was asked what effect he thought a private process in which both BMA and government could speak frankly and reveal potential deficiencies in their hand actually had. He stated that it was particularly helpful given that all the parties were part of an ongoing negotiating process, and that it affected the form and content of the DDRB's recommendations. If parties were not able to be frank with the DDRB, they would simply replay their bilateral negotiations before the DDRB – the DDRB offered the opportunity of bringing in a third party which understood the system, hopefully to produce a report that worked."

C. Appeal 0141

89. On 17 July 2015, Dr Dean asked the Department of Health for information, as follows:–

> "I would like to enquire if Professor Paul Curran of the DDRB has met any politician/civil servants to discuss the document 'review body on doctors' and dentists' remuneration' which was published in July 2015. If so, I would like to know who was involved in the meetings and I would like to see the documentation of the meetings.
>
> I would be grateful if you could search the appropriate department records for this information and not fob me off with your normal stonewalling tactics."

90. The Information Commissioner's decision required the Department of Health to disclose certain of the requested information. Although the Department initially appealed against that part of the decision, the relevant material has now been supplied and the Department's appeal has been withdrawn.

91. As a result, appeal 0141 involves the following documents:–

> (a) the note of a meeting between the DDRB and the Health Minister, Lord Prior, on 17 July 2015 (withheld in full); and
>
> (b) the note of the Department's oral evidence session on 9 March 2015 (which has been redacted in part).

92. In his submissions, Dr Dean placed particular emphasis upon the observation in the DDRB's report that the evidence regarding the "weekend effect" was "compelling". In his view, the DDRB had been used by the Government to further the latter's aims. The DDRB was different from a conciliation body such as ACAS. Mr Sands had described the DDRB in different terms from that to be found in their formal remit.

93. Instead of using the DDRB inappropriately, the Government should have approached ACAS. That would have been a far more appropriate route. In Dr Dean's view, the BMA could only return to the negotiating table if it signed up to all the DDRB recommendations. The Secretary of State had in reality issued an ultimatum to the BMA.

94. Dr Dean considered that disclosure would help negotiations in the future and persuade the Government that it should go to ACAS earlier. The Secretary of State was wrong to use the DDRB as a conciliation forum.

95. So far as the public interest was concerned, if there was little weight in the withheld information, then it should be disclosed. Lessons needed to be learned. Dr Dean considered that "we need to shine a light on this in order to learn".

Discussion

96. The Tribunal has considered all the evidence and submissions in deciding the public interest issue. We find that there is a significant public interest in revealing the withheld information. There is, on its face, an interest in the public being able to learn as much as possible about the dispute between the BMA/consultants/junior doctors and the Government regarding new contracts and 7-day operations.

97. Neither Dr Dean nor Dr Sturgeon had, however, any evidence to refute that of Mr Sands and Mr Williams that not only the DDRB but each of the other pay review bodies serviced by the OME operates by inviting written evidence, which can be made public and arranging oral evidence sessions, involving the body and representatives of a particular party (be that employer, Government or employee), at which full and frank discussions can take place.

98. Dr Dean endeavoured to draw a sharp distinction between, on the one hand, a conciliation body such as ACAS and, on the other, a pay review body, such as the DDRB. In reality, however, the evidence demonstrates that no bright line separates them. In order to discharge its responsibilities, the DDRB may well need to know the "bottom line" of those concerned and to probe strengths and weaknesses, which might not find articulation (or such frank articulation) in the publicly available written materials.

99. We accept the evidence of Mr Sands that the Chair of the pay review body in question has a key role. A one-to-one discussion with a Minister or leading figure in, say, the BMA may well result in insights, which lead to ways through otherwise intractable problems.

100. Dr Dean's case for striking the public balance in favour of disclosure might be stronger if he were able to demonstrate that the DDRB, on this particular occasion, exceeded its remit. Dr Dean contends that the reference in the report to the "compelling" case for a 7-day effect is evidence of such overstepping.

101. We do not consider that this is a valid criticism. As is plain from the quote from the report, the DDRB proceeded on the basis that "this is the area of common ground between the parties". So far as the BMA was concerned, that seems to be correct or, at least, a reasonable conclusion to have drawn. It appears to us that the DDRB did not realise the extent to which the basis and causes of the mortality data reported in Table 2.1 could be

disputed. This may have had something to do with NHS England providing the material in the way it did (see paragraph 88(2) above).

102. As Mr Williams pointed out, the DDRB is not competent to undertake its own findings as to the strength or otherwise of the evidence for a "weekend effect". Its function is to make findings on pay. In that regard, perhaps, its use of the word "compelling" in paragraph 17 of the report may be said to have been ill-advised. We suspect that, with the benefit of hindsight, the DDRB might now wish it had expressed itself differently. That is, however, far from being a sufficient reason to adopt the radical course of disclosing the withheld material. The position might possibly be otherwise if the DDRB had accepted a view of the data that was not based on adequate evidence or which was otherwise irrational. But, as Green J held in R (Justice for Health Limited) v Secretary of State for Health [2016] EWHC 2338 (Admin) this was not the position:

> "In my judgment in the area of policy where there is a genuine conflict of views between reputable professionals the Secretary of State is perfectly entitled to take one side of the argument and the fact that there is a respectable body of expert opinion on the other side of the argument is not sufficient to result in the conclusion that the Minister acted irrationally" (paragraph 185).

103. There is, we consider, a very strong public interest in maintaining the continued roles of the DDRB and its sister pay review bodies. To disclose sensitive briefing materials and the record of meetings between the Chair and senior representatives of the parties concerned in a particular review would, we find, seriously threaten the continued utility of the pay review bodies.

104. The fact that the scope of the review is controversial and that individuals and groups hold very strong views is not a reason why disclosure should be found to be appropriate. The issue of pay is, plainly, of great importance to any employee or office holder. The nature of the work undertaken by those falling within the remit of the pay review bodies is also likely to be of significant relevance to the public. Whilst we accept that, in the case of the junior doctors in particular, public interest has been extremely high, any difference between the present case and another is, at best, one of degree, rather than kind.

105. For these reasons, we do not consider that a successful case would exist for requiring disclosure, even if the parties before the DDRB were now wholly reconciled. If the Tribunal were to require disclosure of the information still withheld in this appeal, the likely consequence is that anyone dealing with the DDRB or any of its sister bodies in the future will be seriously concerned that any frank oral interaction with the body (including its Chair) might be disclosed to the world at large. This would be very likely to damage the future effectiveness of the pay review bodies, which have long operated on the well-understood and generally accepted basis described by Mr Williams.

106. In any event, the dispute between the BMA / consultants / junior doctors and the Secretary of State and his Department cannot be said to be at an end. We accept the evidence of Mr Sands on this matter. A new contract is currently in the process of being "rolled out",

without formal agreement. Having viewed the closed material, we are firmly of the view that to have disclosed it in August 2016 would have been highly likely to have had very damaging consequences. The information discloses a party's frank views about the situation, as it was at that time. As can be seen from what we have said, the process has, throughout, been a dynamic one. This is not particular to the present dispute involving the junior doctors and consultants. It is manifestly a feature of many, if not most, industrial relations disputes. Accordingly, positions expressed at a particular point in time may well not represent a party's current view and disclosure of his or her past view runs a risk of damaging any progress that may have been made in the meantime.

Decision

107. Weighing all relevant matters, we find that the public interest in withholding the relevant information outweighs the public interest in its disclosure. This appeal is, accordingly, dismissed.

D. Appeal 0144

108. On 19 August 2015, Dr Dean asked the OME if he could see "minutes / documentation of all the oral evidence given to the DDRB". The OME and, later, the Information Commissioner, interpreted this request as being about the oral evidence given by Dr Dan Poulter, officials from the Department across the United Kingdom, NHS employers and Sir Bruce Keogh. The OME refused to disclose the information, relying under section 36 of FOIA. The Commissioner agreed that section 36 was engaged and held that the public interest favoured the maintenance of the exemption.

109. Section 36, so far as relevant, provides as follows:–

> "**36. – Prejudice to effective conduct of public affairs**
>
> …
>
> (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –
>
> …
>
> (b) would, or would be likely to, inhibit –
>
> …
>
> (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."

110. The qualified person concerned is Martin Williams, Director of the OME, whose evidence is set out at paragraphs 40 to 66 above. For present purposes, the law on the meaning and significance of the phrase "reasonable opinion of a qualified person" is well-settled. The opinion is "essentially a judgment call on what might happen in the future, on which people may disagree" (Guardian Newspapers Ltd and Brooke v Information Commissioner and BBC: EA/2016/0011 and 0013). More than one opinion may be "reasonable". An opinion will not, however, be "reasonable" if it is irrational in public law terms.

111. Once a reasonable opinion has been given, the view of a qualified person must be given weight "as an important piece of evidence" in assessing the public interest balance (Brooke at [92]).

112. Both Dr Dean and Dr Sturgeon consider that there is such a strong public interest in disclosing the OME's record of the oral evidence sessions and related material as to outweigh any adverse effect of disclosure. In essence, their written and oral submissions are based on exceptionality. The material should be disclosed in the present case because the entire process was flawed.

Discussion

113. There is no doubt that the efforts by the Secretary of State to achieve new contractual arrangements regarding junior doctors and consultants have been highly controversial. However, despite Dr Dean's and Dr Sturgeon's very able efforts, the fact of the matter is that an objective and dispassionate observer of the ensuing dispute would be likely to conclude that there is a case to be made on each side. To accept, as we do, that Drs Dean and Sturgeon, their junior doctor colleagues and perhaps even a significant section of the public, are opposed to the Secretary of State's policy and the way it has been driven does not mean that there must have been administrative misfeasance on the part of the OME and the DDRB in its dealings with the parties to the dispute. The case for disclosure, as an exceptional matter, would be greater if, as both Dr Dean and Dr Sturgeon contend, the DDRB's report had, in some way, been manipulated by Government. The evidence, however, falls far short of showing that this is likely to have occurred.

114. It was apparent from Mr Williams' oral evidence that he was, in retrospect, uncomfortable about the inclusion in the report of table 2.1 and what was said about the evidence for the "weekend effect" being "compelling". As we have already stated, we do not, however, find that this discloses any material impropriety on the part of the DDRB or the OME. The view was, we find, genuinely held at the time that the parties, including the BMA, were agreed that there was a "weekend effect". The fact that table 2.1 and the use of the word "compelling" would prove to be highly controversial was not foreseen. As we

have already said, perhaps (or even probably) with the benefit of hindsight, it should have been. That, however, is not a sufficient basis upon which to find that the public interest outweighs the factors described by Mr Williams as requiring information regarding the oral evidence sessions to remain private.

115. Accordingly, the case for disclosure cannot be said to be based upon an exceptional set of circumstances, which would be unlikely to occur in the future and which the PRBs and those engaging with them in the future would recognise as being exceptional. This means that there is real force in the submissions of the respondents that, if disclosure is ordered in these appeals, there is likely to be a profound "chilling effect" on the efficiency of all the PRBs. Henceforth, parties to a pay review being conducted by a PRB would be likely to fear that, since supposedly private discussions involving the DDRB in 2015 had been disclosed under freedom of information legislation, there was a risk of the same happening in their cases.

116. We accept that recourse to arguments based on a "chilling effect" must be scrutinised with some care. The fact remains, however, that in the present case, the ability of parties to pay negotiations to speak fully and frankly with the relevant PRB is plainly integral to the operation of the system. Although, as we have said, there are differences between a PRB and the conciliation body, ACAS, the evidence of both Mr Sands and Mr Williams makes it plain that the PRBs provide the important function of enabling the various parties to place their cards on the table, on the understanding of confidentiality. As a result, progress may be made in ways that would otherwise be difficult or impossible. This is so, as regards both the oral evidence sessions and the particular role of the Chairs of the PRBs in one–to-one discussions.

117. It would be inappropriate to put the future of the PRBs at risk by disclosing the withheld information in these appeals. We find that actual and potential users would be very likely to consider that, if disclosure could occur in the present case, then it could occur in others, including their own.

118. We have, in this appeal also, viewed the withheld information and the redacted parts of Mr Williams' statement. For the same reasons as given in paragraph 98 above, we are in no doubt that disclosure of this information, besides having the negative consequences just described, would be likely to damage the public interest by inflaming a situation which is still unresolved.

Decision

119. Weighing all relevant matters, we find that the public interest in withholding the relevant information outweighs the public interest in its disclosure. This appeal is, accordingly, dismissed.

E. Appeal 0183

120. On 11 October 2015, Dr Sturgeon wrote to the OME as follows:–

> "I would like to know:
>
> (1) Within the last 24 months, whether there has been any meetings between the DDRB (or members thereof) and any of: the Health Secretary (Jeremy Hunt) OR staff of the Department of Health OR any civil servants from the Department of Health OR any junior ministers for health. If so please can I have:
>
> (a) the people involved in such meetings
>
> (b) the number of such meetings
>
> (c) the date of such meetings
>
> (d) the minutes of such meetings
>
> (2) Within the last 24 months, whether there has been any communications [e.g. letter / email / fax / telephone calls] between the DDRB (or members thereof) and any of: the Health Secretary (Jeremy Hunt), OR staff of the Department of Health OR any servants from the Department of Health OR any junior ministers for health. If so please can I have:
>
> (a) the people sending and receiving such communications
>
> (b) the number of such communications
>
> (c) the date of such communications
>
> (d) copies of such communications"

121. As with appeal 0144, the OME relied upon section 36(2) of FOIA in refusing to disclose the information. The Information Commissioner agreed.

Discussion

122. Again, the issue in this case is the balance of the public interest. Unlike appeal 0144, Dr Sturgeon seeks information concerning only interaction between the Secretary of State and his Department and the OME / DDRB. Even if, however, he had sought such information regarding each of the parties, the public interest would, we find, still firmly favour withholding the information.

123. In his reply, which we have considered along with all the other written and oral submissions, Dr Sturgeon, like Dr Dean, expresses extreme dissatisfaction with and mistrust of the way in which the DDRB's report treated the issue of the "weekend effect".

124. Dr Sturgeon submitted that the "man on the Clapham omnibus" would regard table 2.1 in the DDRB report as being presented as "scientific evidence". We agree that that might be the case. However, for the reasons that we have given earlier, the presence of table 2.1 does not mean that the DDRB report was tainted by impropriety. We accept the evidence of Mr Williams on this matter. Whether or not table 2.1 was discussed in oral evidence takes Dr Sturgeon's case no further forward.

125. The fact that the report was in the nature of a "special remit" report does not, contrary to Dr Sturgeon's submission, tilt the balance in favour of disclosure. Such reports are to be found in the work of other PRBs. It is not a factor of any particular weight.

126. Dr Sturgeon's written submissions contain the suggestion that the production of redacted minutes "just showing what was said by the Department of Health Ministers, or those officially acting on their behalf … should merely be an interrogation of the official Government position, this should not be a deterrent to the Government to providing evidence in the future". We agree, however, with Mr Paines that this is, with respect, to take a somewhat simplistic view. Ministers and officials are entitled to be as open and frank in their oral dealings with a PRB as are employees etc and their representatives. Were the position otherwise, the usefulness of the PRB would be undermined. Frankness on the part of all the parties is required, if it is to function properly.

Decision

127. Weighing all relevant matters, we find that the public interest in withholding the relevant information outweighs the public interest in its disclosure. This appeal is, accordingly, dismissed.

Judge Peter Lane

Date of Decision: 25 May 2017
Date Promulgated: 26 May 2017