

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2017

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

Decision (including any steps ordered)

1. The complainant has requested information on the source of statistics used by the Secretary of State for Health in a speech promoting a seven day NHS. The Department of Health (DH) provided some information but explained that it did not hold other information falling within the scope of the request. The focus of the complaint is on information relating to the source of a figure of 6,000 for the number of excess deaths associated with admissions to hospital on a weekend.
2. The Commissioner accepts that the DH did not receive this figure prior to it being provided directly to the Secretary of State for Health and therefore does not hold some of the requested information. However the request also seeks a copy of the communication by which the figure was provided to DH, regardless of whether this was before, or after the Secretary of State had received the figure. The DH has failed to satisfy the Commissioner that this information is not held. By failing to provide that information the DH has breached section 1 of the FOIA.
3. The Commissioner requires the public authority to provide the complainant with a copy of the communication by which it was provided with the source of the 6,000 figure used by the Secretary of State in his speech.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 August 2016 the complainant requested information of the following description:

"On the 16th July 2015 Jeremy Hunt stated in a speech:

"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."

(source <https://www.gov.uk/government/speeches/m...>

I request under the Freedom of Information act:

- 1) Please state who provided Jeremy Hunt with i) the '6000' figure, and ii) the 15% figure. Please also state which entity (for example NHS England) they were from.
 - 2) Please state when and how (e.g. email etc) i) the 6000 figure, and ii) the 15% figure, were provided to the Jeremy Hunt and when they were provided to the Department of Health, if earlier.
 - 3) Please provide the emails (or other communications) which provided the department of health with i) the 6000 figure, and ii) the 15% figure."
6. On 2 November 2016 the DH responded. Regarding:
- Part 1)(i) of the request ie who provided the Secretary of State with the 6,000 figure, it explained that it did not hold the requested information,
 - Part 1)(ii) of the request, the DH did provide the information on who provided the Secretary of State with the 15% figure,
 - Part 2)(i), the DH said it did not hold the information regarding when and how the 6000 figure was provided to the Secretary of State, but it did not address the issue of when this figure was provided to the Department if earlier,
 - Part 2)(ii) – it did provide the information regarding when and how the 15% figure was provided to both the Secretary of State and the DH,
 - Part 3)(i), the DH did not provide a response addressing the issue of the communication of the 6,000 figure to the Department.
 - Part 3)(ii), the DH did provide an extract of the briefing note in which the 15% figure was communicated to the Department.

7. The complainant requested an internal review on 3 November 2016 in which he raised concerns about the failure of the DH to respond to part 2)(i) in respect of how and when the DH was provided with the 6000 and to part 3) of the request. He made it clear that part 3) of the request sought a copy of the communication in which the 6,000 was communicated to the DH regardless of whether this was before or after the Secretary of State had been provided with the same information.
8. The DH sent the complainant the outcome of its internal review on 6 January 2017. It revised its position. It advised the complainant that it had identified further information but that it was withholding this information under the following exemptions:
 - Section 43(2) – prejudice to commercial interests.
 - Section 35(1)(a) – information relating to the formulation of policy
9. During the course of the Commissioner's investigation the DH changed its position again. It now argued that it had already provided all the information that it held in respect of the request. Therefore it was no longer seeking to withhold any information under sections 35 or 43. It went on to say that it no longer believed the information it had considered at the internal review stage fell within the scope of the request.

Scope of the case

10. The complainant contacted the Commissioner on 30 January 2017 to complain about the way his request for information had been handled.
11. He was satisfied with the responses received in respect of the 15% figure. He also accepted that the DH did not hold any recorded information in respect of when and by whom the Secretary of State was provided with the 6,000 figure. However he was not satisfied that the DH had dealt with his requests in respect of when and by whom the Department itself was provided with the 6,000 if this was earlier than the Secretary of State had received the figure (as requested at Part 2(i) of the request). He was also concerned that the DH had not provided copies of any communications by which the 6,000 figure had been provided to the DH (as requested in Part 3(i) of the request).
12. The Commissioner considers the matter to be decided is whether the DH has provided any information it holds in respect of when and by whom it was provided with the 6,000, if this was earlier than when that figure was communicated to the secretary of State, and whether it has provided the complainant with the communication by which it received the 6,000 figure regardless of when that figure was received.

Reasons for decision

Section 1 – general right of access to information

13. Section 1 of FOIA states that any person making a request for information to a public authority is entitled to be informed whether the public authority holds that information, and if so, subject to the application of various exemptions, to have that information communicated to them.
14. In explaining its position that it did not hold any additional information the DH referred the Commissioner to a request made by a different applicant which had already been the subject of an appeal to the First Tier Tribunal¹. That request also related to the sources of the statistics used in the 16 July speech, but was based on the premise that the figures were taken from a study by Freemantle et al². This particular study, which will be referred to as 'Freemantle 2015', was not published until 5 September 2015, i.e. after the Secretary of State's speech.
15. At the Tribunal the DH submitted evidence from a senior civil servant, the Deputy Director responsible for NHS performance issues, including seven day services. With the consent of the DH the Commissioner has considered not just the Tribunal's published decision, but also the witness statement in full, together with some of the DH's exhibits.
16. In preparation for the Tribunal the senior civil servant had conducted extensive enquiries and searches to establish how the Secretary of State had been provided with the 6,000 figure and whether there was any information recording that process. It is clear that based on the witness statement the Tribunal was fully satisfied that the 6,000 figure was provided directly to the Secretary of State during a discussion he had with Professor Sir Bruce Keogh, Medical Director of NHS England and that no records of that discussion exist.
17. Having looked at the witness statement and accompanying exhibits it is also clear that the DH maintain that the 6,000 figure was not taken from the Freemantle 2015 study, but was based on the analysis of an earlier study carried out in 2012 by the same team. That original study will be referred to as 'Freemantle 2012'³. Although the findings of Freemantle 2012 were published in 2012, it is understood that the 6,000 figure did not form part of the published study. Rather the 6,000 figure appears to

¹ Ben Dean v ICO & Department of Health EA/2016/0140

² Increased mortality associated with weekend hospital admission: a case for expanded seven day services? BMJ 2015; 351 doi: <https://doi.org/10.1136/bmj.h4596> (Published 05 September 2015) Cite this as: BMJ 2015; 351:h4596

³ A [paper by Freemantle, Richardson, Woods, Ray, Khosla, Shahian, Roche, Stephens, Keogh and Pagano \(2012\)](#) – Weekend hospitalization and additional risk of death: An analysis of inpatient data

have been derived at from a further analysis of the information contained in the Freemantle 2012 study. As a consequence, at the time of the 16 July speech the statistical evidence supporting the 6,000 figure was not in the public domain. This led to a number of questions being asked as to the source of the figure. In response to those questions the DH did publish a document entitled 'Higher risk of death associated with weekend hospitalisation' on the Government website on 13 August 2015⁴. This document sets out the data and calculations from which the 6,000 figure was derived. From the DH's submission to the Commissioner in respect of this current complaint it is understood that this information was not held by the DH prior the Secretary of State including it in his speech. It follows that this paper must have been made available to the DH by NHS England following the questions raised in response to that speech.

18. Looking at how the request for information is phrased, it is important to recognise that Part 2(i) asks when and how the 6,000 figure was provided to the Department if it received that information before the Secretary of State had. As the Commissioner is satisfied that the information was only provided to the Department after it had been provided to Secretary of State directly from Professor Sir Bruce Keogh, it follows no information exists that is relevant to this part of the request. And equally it follows that the DH does not hold this information.
19. However the DH has failed to provide any information in response to Part 3(i) of the request. Nor has it explained its grounds for not responding to this part of the request. It may be that the DH considered that Part 3 of the request was, like the other elements of the request, conditional upon the 6,000 figure being provided to the Department before it was provided to the Secretary of State. There is an argument that when read in conjunction with the rest of the request, part 3) of the request is relates to the emails referred to in part 2).
20. However part 3) of the request when taken on its own simply asks for copies of the emails, or any other means of communications by which the Department was provided with the 6,000 figure. It is not conditional on when the figure was provided to the Department. The Commissioner finds that the request can be objectively interpreted as being for a copy of the means by which the 6,000 figure was provided to the DH regardless of when it was provided. The Commissioner also notes that, in line with a previous Tribunal decision⁵, if there are two alternative and

⁴ <https://www.gov.uk/government/publications/higher-risk-of-death-associated-with-weekend-hospitalisation>

⁵ Mr A Berend v IC and LBC Richmond upon Thames (EA/2006/0049 & 0050; 12 July 2007)

equally valid interpretations of the request, a public authority is obliged to consider the applicant's intended interpretation. A public authority will have breached the FOIA if it fails to provide the information described by the applicant's intended meaning even if the public authority had not recognised there was an alternative interpretation.

21. From the DH's submissions it is understood that the source of the 6,000 figure was communicated to the DH by NHS England sometime after the conversation between the Secretary of State and Professor Sir Bruce Keogh and before its publication by the DH on 13 August 2015. It would have held the means by which those calculations were provided at that time. As the DH has offered no grounds for withholding a copy of that means of communication, the DH is required to disclose a copy to the complainant. This should include not only the actual analysis contained in the document 'Higher risk of death associated with weekend hospitalisation' that has now been published, but that information as it was presented to the DH by the NHS England, together with any covering correspondence or email. The DH's failure to provide this information to date is a breach of section 1 of FOIA.

22. As the DH developed its policy for creating a seven day NHS, NHS England commissioned several streams of research on the risks associated with being admitted to a hospital over the weekend. One of those pieces of work was carried out by the consultants Deloitte. It has become apparent during the course of the investigation that the complainant suspects that Deloitte's work was the source of the figure used by the Secretary of State in his 16 July speech. It is understood that Deloitte's research was also based on Freemantle 2012 and it too came up with figures for the number of excess deaths associated with weekend admission that approximated to the 6,000 figure used by the Secretary of State in his 16 July speech. This matter was discussed during the Tribunal case referred to earlier. The Tribunal found that simply because Deloitte's estimate for weekend deaths was 6,700 it does not mean that its work was more likely than not to have been the source of the 6,000 figure in the 16 July speech. Furthermore, in reaching this conclusion at paragraph 25 of its decision the Tribunal quoted from one of the DH's exhibits, a press release. That press release contains the following,

"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 the department of Health, The figure was also calculated by Deloitte using a similar method."

23. The Commissioner interprets this to mean that although the Deloitte work produced a similar figure to the 6,000 used in the Secretary of

State's speech, the actual figure provided by Professor Sir Bruce Keogh came from a separate, independent analysis of Freemantle 2012. This is consistent with DH's presentation of the information published by the DH on 13 August 2015 as being the source of the 6,000 figure.

Other matters

24. Throughout the investigation the Commissioner has been disappointed by the DH's failure to respond to her enquiries. The investigation commenced with an initial letter being emailed to the DH on 5 May 2017 and asked for a response by 5 June. The DH contacted the Commissioner on 5 June to ask for an extension but was unable to say for how long. When pressed by the Commissioner, it asked for an extension until 5 July. After that deadline passed without any contact from the DH, the Commissioner emailed the DH on 7 July. This resulted in the DH requesting a further extension, this time until the 4 August. Therefore on 10 July 2017 the Commissioner used her powers under section 51 of FOIA to serve an information notice on the DH in order to prevent any further delays. This resulted in the Department providing a response on 13 July 2017. The Commissioner considers the need to have to rely on an information notice to obtain responses from the DH indicates a poor level of engagement with the investigation.

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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