

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2020

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street

London

SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested the Department of Health and Social Care (DHSC) to disclose information relating to concerns he raised five years ago about a named individual. The DHSC refused to comply with the request citing section 12(2) of the FOIA.
2. The Commissioner's decision is that the DHSC is entitled to refuse to comply with the request in accordance with section 12(2) of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. The complainant submitted his request to the DHSC on 5 July 2019. The exact wording of the request is contained in a confidential annex, as it would not be appropriate to include it in the main body of the notice.
4. The DHSC responded on 25 September 2019. It refused to comply with the complainant's request, citing section 12(2) of the FOIA.
5. The complainant requested an internal review on 26 September 2019.
6. The DHSC completed an internal review and notified the complainant of its findings on 24 October 2019. It upheld its initial application of 12(2) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 24 October 2019 to complain about the way his request for information had been handled. He disagrees with the DHSC's application of section 12(2) of the FOIA and considers it should be able to comply with his request considering the importance of the requested information.
8. The Commissioner considers the scope of her investigation is to determine whether the DHSC is entitled to rely on section 12(2) of the FOIA in this case.

Reasons for decision

Section 12 – cost of compliance

9. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations').
10. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the DHSC is £600.
12. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the DHSC.
13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;

- locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
14. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
 15. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
 16. The DHSC stated that almost all relevant information it might hold is stored in physical archives due to the dates in question and are not due to be uploaded electronically. It confirmed that these archives sit in different locations and government departments, including the Department for Education, due to historical changes in government structure. The DHSC advised that in the absence of electronic search functions, officials would need to read an extremely large number of mostly paper records in those locations, in order to determine whether the DHSC holds information within the scope of the request.
 17. It explained that there is no reason for it to have a centralised record specifically for the requested information. The request is very wide in scope and the DHSC is not required to contact other organisations for information it may have received from it. It stated that the complainant was advised to contact the Independent Inquiry into Child Sexual Abuse (IICSA) directly at www.iicsa.org.uk/contact-us.
 18. In terms of an estimate, the DHSC stated that it cannot provide an accurate estimate, given the very wide scope of the request. However, it can provide an overview of the initial searches undertaken in response to the request, which brought it close to the cost limit and therefore led it to conclude that conducting the remainder of the search would take it well over the 24 hours.
 19. It explained that the relevant teams and officials in the DHSC completed a search of the department’s online record database for the named

individual (using first name and surname, then just the surname and then commonly misspelt variations of the individual's name). This resulted in approximately 500 search results, the majority of which were irrelevant because they did not refer to the individual in question. The DHSC stated that more than half a day was spent on this initial trawl for information.

20. It argued that the remaining search results referred to previous searches conducted in the course of other investigations, including the IICSA, the *Wanless-Whittam Review* and the investigation into Jimmy Saville (Broadmoor Hospital) but returned nothing within the scope of the request.
21. The DHSC advised that the search was broadened to cover documents of general relevance to the IICSA and other similar investigations, which was carried out by its Legacy Records Team. Because of the time period in question, files would have been archived by now and anything relevant would have been transferred to The National Archives. Additionally, it stated:
 - A) because of the time period in question, any relevant files would have been transferred to physical archive locations; and
 - B) the size and quantity of material related to the IICSA that would need to be reviewed was significant, potentially running to over 2000 files. Its search of all the relevant search terms returned 2057 files potentially within the scope of the request.

It confirmed that this search took a day to complete.

22. The DHSC also commented that it checked with the Home Office regarding information passed onto the IICSA and searched the relevant electronic documents.
23. It concluded that it cannot confirm that it would be able to identify, locate and extract all of the information within the scope of the request. The DHSC stated that while it endeavoured as far as possible within the cost limit to provide an answer, it became clear that section 12(2) applied.
24. The DHSC commented further that it is worth noting that the conclusions of independent reviews into child sexual abuse, to which DHSC contributed, are freely available online. It stated that this now includes the IICSA report which has been published since the complainant's request was made. The report is available at:

<https://www.iicsa.org.uk/publications/investigation/westminster>

It advised that the results of the *Wanless-Whittam review* and the *Jimmy Saville investigation: Broodmoor Hospital* are both also publically available online:

<https://www.gov.uk/government/publications/the-peter-wanless-and-richard-whittam-qc-review>

<https://www.gov.uk/government/publications/jimmy-saville-investigation-broadmoor-hospital>

25. The Commissioner is satisfied that the DHSC is unable to comply with section 1(1) (the duty to confirm if it holds any recorded information specified in the request), as the cost of complying with that paragraph alone would exceed the appropriate limit of 24 hours. It has explained how any recorded information that may be held falling within scope is now archived due to the passage of time and how there is no requirement or need to have a centralised location for any information it may hold addressing the specific matters highlighted in the request. It has carried out what searches it is able to do, using appropriate search terms, and this has produced 2057 files. It would clearly take well in excess of 24 hours to search each individual file to establish what recorded information it holds.
26. The complainant asked in his internal review why it is not possible to contact a press officer he contacted in 2014 about this matter to see who they contacted in the DHSC and why it is not possible to make a call to the inquiry itself to see what information it passed over. With regards to the first suggestion, while this may be one appropriate way of commencing searches, it still remains the case that it would need to retrieve and review over 2000 files to establish fully what recorded information it might hold. It may provide a little more information about what actions were taken by the press officer (if indeed they can be identified, still work for the DHSC and can recall accurately what they did) but it would only be a starting point. The DHSC would still need to retrieve and examine over 2000 files in order to comply with section 1(1) of the FOIA (confirming what recorded information is held). With regards to the suggestion of contacting the inquiry itself, there is no requirement under FOIA for the DHSC to do that.
27. For the above reasons, the Commissioner is satisfied that section 12(2) applies.

Section 16 – duty to provide advice and assistance

28. When a public authority applies section 12, it triggers the duty to provide advice and assistance to the applicant so far as it is reasonable and practical to do so. This can be suggestions of how they may narrow

the request to enable it to be considered under the cost limit for example. There will be occasions where it is not possible to offer any advice and assistance, if the public authority considers this to be the case, it should still inform the applicant accordingly.

29. The Commissioner notes that in this case the DHSC informed the complainant that it was unable to offer any advice and assistance due to the manner in which any recorded information it holds is held. The Commissioner considers this was an appropriate response in the circumstances given the way records are held, the fact that they have been archived and the amount of files that would have to be searched. She is therefore satisfied that it met its obligation under section 16 of the FOIA.

Procedural matters

30. Section 10 of the FOIA requires a public authority to respond to requests for information promptly and in any event no later than 20 working days from receipt. The DHSC received this request on 5 July 2019 but it took until 25 September 2019 to respond to the request. As it took longer than the 20 working days permitted, the Commissioner has recorded a breach of section 10 of the FOIA in this case.

Right of appeal

31. 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@justice.gov.uk

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

32. 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.
33. 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

Samantha Coward
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