

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 December 2022

**Public Authority:** Department of Health and Social Care  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

### **Decision**

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1. The complainant requested information from the Department of Health & Social Care ("the DHSC") about direct correspondence between two named individuals at the DHSC during a specified time period. The DHSC explained that it believes no information in scope of the request is held.
2. The Commissioner's decision is that the DHSC failed to provide an adequate response to the request. Consequently the Commissioner finds that the DHSC breached section 1(1) and section 10(1) of FOIA.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation.
  - The DHSC must issue a fresh response to the request which is adequate for the purposes of FOIA.
4. The DHSC 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 12 August 2021, the complainant wrote to the DHSC and requested information including:

"Please note that I am only interested information in receiving copies of information which was generated between 25 April 2021 and 12 May 2021.

Please note that the... reference to written correspondence and communications in the questions below should include all traditional forms of correspondence including letters and faxes, all emails irrespective of whether they were sent and or received through official and or private accounts, all Gmail messages, all text messages, and all messages sent through encrypted messages including but not limited to WhatsApp.

... I would like to receive a copy of actual communications rather than just excerpts from those communications. In the case of letters for instance this should include the letterhead, any other design features, and the signatures. As far as emails and other timed messages are concerned, I would like to see the timing of emails as well as any departmental addresses. If information must be redacted, can you, please redact it where it appears in the original document

...I am only interested in direct communications between the two individuals concerned. Please do not include the communications of any individuals acting on their behalf. I am interested in all correspondence and communication irrespective of the subject matter. I anticipate that this may include contacts and communications relating to [redacted]. I would argue that this correspondence and communication should be disclosed if it provides further evidence of [redacted].

Please do redact the names and personal details of any departmental employee (other than Mr Hancock and [name redacted]) from the documents as well as the details of any member of the public.

1....During the aforementioned period did Matt Hancock write to or communicate with [name redacted]. I am interested in receiving copies of all correspondence and communication irrespective of the subject matter. If the answer is yes, can you please state on how many separate occasions Mr Hancock wrote to or communicated with [name redacted] ... can you state the date and time they

occurred ... can you provide a brief description. For instance, was it a letter and or an email and or a text message and or a message sent through an encrypted messaging service? ... can you please provide a copy of that correspondence and communication. If you feel unable to disclose the contents of a particular piece of correspondence and communication, can you, please still provide a copy including the details relating to date and time sent as well as the form the correspondence and communication took. I would like to receive the piece of correspondence and communication even if the contents of the message are totally redacted.

2...During the aforementioned period did [name redacted] write to or communicate with Mr Hanock. I am interested in receiving copies of all correspondence and communication irrespective of the subject matter. If the answer is yes, can you please state on how many separate occasions did [name redacted] write to or communicate with Matt Hancock ... can you state the date and time they occurred .... can you provide a brief description. For instance, was it a letter an or an email and or a text message and or a message sent through an encrypted messaging service? ... can you please provide a copy of that correspondence and communication. If you feel unable to disclose the contents of a particular piece of correspondence and communication, can you, please still provide a copy including the details relating to date and time sent as well as the form the correspondence and communication took. I would like to receive this even if the contents of the message are totally redacted.

3...Since 1 June 2021 has the department destroyed any of the correspondence and communication exchanged by the two named individuals. If the answer is yes, can you, please provide the following details. How many separate pieces of correspondence and communication have been destroyed? ... can you please provide a description of the item. For instance, was it an email or a WhatsApp message (or similar) ... can you state the date it was generated and can you provide details of author and recipient ... can you state when it was destroyed and why ... if this continues to be held in another form can you please provide a copy."

6. The DHSC responded to the request for information on 20 January 2022. It stated that it held no information relevant to the request and advised that it had "conducted a search in the relevant departmental accounts (including the former Secretary of State, Matt Hancock's departmental email account)". It further confirmed that there was "no record of any information having been destroyed".

7. The DHSC further confirmed that "All ministers are aware of the guidance around personal email usage, and government business is conducted in line with this guidance".
8. Following an internal review request, the DHSC wrote to the complainant on 6 April 2022, advising "The review confirms no information is held and our original decision is upheld" and concluded "... that the response you received to your FOI request was correct and compliant with the requirements of the FOIA".

### **Scope of the case**

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9. The complainant wrote to the Commissioner on 9 April 2022, to complain about the way their request for information had been handled. The complainant asked the Commissioner to consider their concerns about the length of time taken by the DHSC to process both the initial request and the request for internal review and also to consider their concern that no information was provided by the DHSC in response to the request.
10. The Commissioner considers the scope of the investigation is to consider whether the DHSC has complied with its obligations under section 1(1) (general right of access to information) and section 10(1) (time for compliance) of the FOIA.

### **Reasons for decision**

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11. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled, under subsection (a), to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
12. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
13. The position of the DHSC is that it has answered the request by "searching for emails within scope of the request". The DHSC has confirmed that the search terms used were the two individuals surnames "along with all of their known email account names".
14. The DHSC explained to the Commissioner that the search covered the two individuals "known email accounts that are held by the department" and advised the Commissioner that:

"If a non-corporate communication channel (NCCC) is used in an exceptional circumstance, officials are responsible for ensuring that any information or communications that relate to policy and/or decision-making are captured into DHSC's systems, either by copy, forward, screenshot or export. Alternatively, a separate message, note or document which replicates or records the substance of the original communication should be created in a DHSC system. Therefore, we are confident the searches would have captured any information that would have, at one point, been recorded on a NCCC".

15. The DHSC advised that due to the above "staff were not consulted for this request".
16. The complainant advises that they have no confidence in the response provided by the DHSC as they believe that it is "highly likely given their working relationship ... that the two did correspond and communicate with each other".
17. The Commissioner considers that the DHSC did not provide the complainant with an adequate response to their request as, not only was the response not provided within 20 working days of receipt, it is clear that the searches conducted by the DHSC, for information relevant to the request, were inadequate.
18. The Commissioner noted that the DHSC's search for information was limited to searching the official email accounts of the two individuals referred to in the request, using only their surnames and email addresses as the search terms. However, the request had asked for "communications" between the two individuals, to include "letters and faxes, all emails irrespective of whether they were sent and or received through official and or private accounts, all Gmail messages, all text messages, and all messages sent through encrypted messages including but not limited to WhatsApp".
19. The Commissioner refers to his report of 11 July 2022, detailing his investigation into the use of private email and messaging apps within the DHSC.<sup>1</sup> The investigation found a lack of clear controls and a rapid increase in the use of messaging apps and technologies, such as WhatsApp and gave as an example, protectively marked information

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<sup>1</sup> <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/07/behind-the-screens-ico-calls-for-review-into-use-of-private-email-and-messaging-apps-within-government/>

being located in non-corporate or private accounts outside of DHSC's official systems.

20. The report found that there was extensive use of private correspondence channels by Ministers and staff employed by DHSC.
21. On 11 July 2022, the Commissioner issued a practice recommendation to the DHSC<sup>2</sup>, which found that DHSC practices, in relation to the exercise of its functions under FOIA, do not conform with parts 1, 4 and 10 of the section 45 code of practice.
22. The practice recommendation, at paragraph (30), advised that the DHSC should:

"Follow up with any DHSC Ministers, Non-Executive Directors or senior staff who have left during the pandemic period who may have used private devices and correspondence channels to seek confirmation in writing that all relevant records have been transferred onto the department's systems and seek to secure these where this may not be the case."
23. Although the internal review outcome was provided to the complainant before the above practice recommendation was issued, the DHSC were aware of the practice recommendation at the time that the Commissioner contacted it for submissions in this case. No reference was made, however, to any wider searches conducted through other channels for information that may have been held at the time of the request.
24. The Commissioner can only conclude, therefore, that only the 'official email accounts' of the two individuals were checked even at this late point, using limited search terms, and that other official systems or devices, such as official mobile phones, were not checked for texts or messages sent via social media, including WhatsApp.
25. The Commissioner's decision is that the DHSC has failed to provide the complainant with an adequate response to their request as it has failed to conduct adequate searches and, therefore, the DHSC has breached section 1(1) (general right of access to information) and section 10(1) (time for compliance) of the FOIA.
26. The Commissioner requires the DHSC to provide the complainant with a fresh response to their request, after conducting appropriate searches of

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/practice-recommendations/4020918/dhsc-practice-recommendation.pdf>

all relevant systems and devices. The Commissioner also asks that the DHSC contact the two named individuals to ask them to check their personal email accounts, texts, Whatsapp and other social media for any relevant information in scope of the request and either provide this or confirm that it has already been uploaded to government systems.

27. The DHSC should either provide the complainant with the requested information or an adequate refusal notice should be provided.
28. When revisiting the request in order to provide a compliant response, the DHSC should take notice of the Commissioner's decision in case IC-123460-K8B2, which found, in that case, that the DHSC was not entitled to rely on either section 12 or section 14(1) with regard to searching for WhatsApp messages.

## **Other matters**

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### **Section 45 – internal review**

29. The Commissioner cannot consider in a decision notice the amount of time it took a public authority to complete an internal review because such matters are not a formal requirement of FOIA. However, it is good practice to offer an internal review, and, where a public authority chooses to do so, the code of practice established under section 45 of FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
30. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
31. The complainant asked for an internal review on 25 January 2022. The DHSC did not provide the internal review outcome until 6 April 2022 and therefore failed to act in accordance with the section 45 code.

## **Right of appeal**

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32. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.

34. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**