

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2023

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 information relating to 'the scientific advice and evidence that was used when making the changes announced to the shielding policy in Sajid Javid's letter of 27 September 2021'. DHSC applied section 12 of FOIA, as it estimated the time it would take to comply with the request would exceed the cost limit.
2. During the Commissioner's investigation DHSC disclosed some information, but within that made redactions under section 40 of FOIA. For all remaining elements of the request DHSC maintained that section 12 of FOIA applied.
3. The Commissioner's decision is that DHSC is entitled to rely on section 12 and 40 of FOIA in this case. However, DHSC breached section 16 of FOIA by failing to provide appropriate advice and assistance, so far as it is reasonably practicable to do so.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance in accordance with section 16 of FOIA.
5. 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

6. On, 30 September 2022, the complainant requested DHSC to provide the following information:

“Please provide me with the scientific advice and evidence that was used when making the changes announced to the shielding policy in Sajid Javid's letter of 27 September 2021.

Please detail which bodies and senior individuals in the DHSC/NHS and Government had input into or review/sign off for in this letter, the dates of each of their input, review/sign off.

Please provide all briefing documents, annexes, internal emails (or other electronic communications) and any attachments that informed the content of this letter”

7. DHSC responded on 26 October 2022. It refused to comply with the request citing section 12 of FOIA.
8. The complainant requested an internal review on 3 November 2022. They disputed the application of section 12 of FOIA and said as an interim response DHSC could at least provide any complete briefing note(s) prepared by senior DHSC staff to brief the then Secretary of State to satisfy him that he could sign the letter of 27 September 2021.
9. DHSC carried out an internal review and notified the complainant of its findings on 25 November 2022. It upheld its application of section 12 of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 29 November 2022 to complain about the way their request for information had been handled. They dispute the application of section 12 of FOIA and remain unhappy that DHSC did not consider or address their suggestion to provide any briefing note(s) as an interim response.
11. During the Commissioner's investigation DHSC issued several revised responses to the complainant. By the date of this notice it had disclosed a redacted version of a submission dated 23 July 2021 which was sent to ministers. Initially redactions were made under section 35, 40 and 43

of FOIA, but by the time of this notice only redactions under section 40 of FOIA remained. It also partially answered the second part of the request on 26 April 2023 (providing the names and positions of some staff that had input into and/or reviewed and signed off the letter of 27 September 2021).

12. The complainant raised concerns over further information being held with the Commissioner and DHSC, in particular the reference to a Covid-O paper in the submission disclosed. DHSC is not disputing that further recorded information is held falling within the scope of the request or that this paper is part of the additional information held. It has maintained its application of section 12 of FOIA for all remaining elements of the request and for the further recorded information it holds.
13. The remainder of this notice will address the application of section 40 of FOIA to the submission disclosed and the application of section 12 of FOIA to all remaining elements of the request.

Reasons for decision

Section 40 – personal data

14. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
15. Section 3(2) of the Data Protection Act 2018 defines personal data as:
“any information relating to an identified or identifiable living individual.”
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. DHSC has withheld the names of junior members of staff. The Commissioner is satisfied that this information constitutes personal data. A person can quite obviously be identified from their name.
18. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:
“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

19. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
20. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
21. The Commissioner accepts that the complainant is pursuing a legitimate interest in the disclosure of this information. Disclosure would reveal the details of all members of staff who were involved and contributed to the contents of the submission. However, in this case the Commissioner does not consider disclosure of the remaining personal data is necessary to meet that interest. DHSC has disclosed the names of all senior members of staff – those who are accountable for the decisions made by the department in the context of the withheld information. Disclosing the names of junior staff, who more than likely had none or very little involvement in the decisions taken, adds little further to the information.
22. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to consider the balance between that interest and the rights and freedoms of the individuals concerned. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
23. The Commissioner has therefore decided that DHSC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 12 of FOIA – cost limit

24. Section 12 of FOIA states that a public authority does not have to comply with a request if it estimates that it would exceed the cost limit. The cost limit for DHSC is £600 or 24 hours of work, at a rate of £25 per hour. A public authority is only permitted to consider the cost of determining whether it holds the information, locating and retrieving that information and extracting that information from any information which is not in the scope of the request.
25. DHSC has applied section 12 to all remaining elements of the request. It initially applied section 12 to it all. But then during the Commissioner's investigation it decided to disclose a redacted version of the submission to ministers, after reviewing the request again and noting that it did not

respond to the complainant's suggestion of providing just the briefing note(s) as an interim response.

26. DHSC advised that it carried out a 60 minute sampling exercise to estimate how long it would take for it to determine if the requested information is held, retrieve any information in scope and extract the information from the documents. Within that 60 minutes it was able to:
 - Establish that it holds information relating to the letter sent to individuals on the Shield Patient List (SPL), and advice to ministers that informed the letter. (It confirmed that there is approximately 50 documents in this search).
 - Identify that the advice consisted of emails (approximately 700) and policy notes between officials, clinicians and other government departments, NHSE&I and NHSD.
 - Determine that following the submission to the Secretary of State, a paper was drafted for Covid-O consideration on ending the shielding programme.
 - Confirm that emails were exchanged on the content of the letter to those on the SPL, and a draft circulated, agreed and issued.
27. DHSC said that this sample exercise identified over 50 documents and over 700 emails and this is not the final number of documents.
28. It advised that the estimate is based on the quickest method of gathering the requested information – a keyword review of emails at the relevant time discussions were ongoing, as well as searching the filed documents held by the team. The sample exercise enabled to locate some, but not all, of the information, documents and emails which may contain the requested information.
29. DHSC stated that to find the detail that informed the advice, and policy notes, emails would have to be retrieved from approximately 10 individuals across DHSC. Taking a period of four months between the development of advice going to the Secretary of State (June 2021) and the letter sent to those on 27 September 2021, one individual has over 700 emails relating to shielding. Others will also have relevant emails. It argued that locating these emails took approximately one hour, checking email folders and assessing the emails in scope. It would likely take the other individuals a similar amount of time. For this is estimated 10 hours of work.
30. It then said that it would be necessary to bring the emails together, to weed out duplicates, and ensure all information was covered. It estimates that to forward the 700 sample emails into one folder/inbox

would take approximately five seconds per email, in total one hour. It would likely take the other individuals a similar amount of time. DHSC stated that it is necessary to weed out duplicates to reduce extracting and reviewing time. Additionally, there would be at minimum redactions required for personal data, in accordance with section 40 of FOIA and so weeding out duplicates would make this element of the process much easier. Again it stated that it would take 10 hours.

31. In terms of reviewing and identifying the information in scope, taking the 700 emails as a sample (but assuming more emails would be in the final extraction), it estimated that it would take approximately one minute per email to assess whether it is in scope or not. For this it estimates 11.6 hours for one person. This is without the time it would take to cross check emails and ensure that all the relevant information was being disclosed.
32. It went on to say that all the information searched was electronic. The individual that carried out the search holds no paper files, and to the best of their knowledge, there are no additional paper files in existence that would contain additional information. It said that all correspondence between officials and between DHSC and other parties was by email with draft and final attachments. No information has been destroyed – colleagues have kept emails as well as documents to assist the COVID inquiry as well as being good practice.
33. Turning to part two of the request it confirmed that it provided what information it could to the complainant in its revised response of 26 April 2023. But to establish the names and seniority of those in NHSE&I or NHSD who provided input or clearance at the time and on what date, it would need to search a variety of documents and emails to locate and extract that information. This would add to the time and cost of processing the remaining aspects of the request.
34. In total it has assessed that it would take considerably longer than 24 hours to answer the remaining elements of the request.
35. The Commissioner understands that the sample DHSC conducted identified 700 emails and 50 documents falling in scope of the request. It explained that this search did not reveal all the information it holds and how the search only covered one of 10 individuals' mailboxes that would require searches. It does not know how many emails and documents the remaining nine individuals hold, as it did not feel this was necessary for the purposes of demonstrating that it would exceed the cost limit to comply with the remaining elements of the request. Indeed there is no requirement to do so, if a public authority has sufficient evidence to provide a realistic and cogent estimate for the purposes of section 12 of FOIA.

36. However, the Commissioner considers it is not appropriate to say that it would take the other nine individuals the same time to search, locate and forward on the emails they hold. We do not know how many emails they hold. They may not hold as many and some may only hold a relatively small number. The Commissioner's decision has to be based on the supporting evidence DHSC has supplied.
37. He accepts that it would take around an hour for the individual that is the focus of the search to forward on their emails into one folder/inbox. This seems reasonable considering the task involved and allowing 20 seconds per email. The Commissioner also accepts that it would take around a minute per email, therefore 11.6 hours in total, to review and identify if it is in the scope of the request. He considers this is fairly conservative considering the nature of the request and realistically how quickly it may be possible for someone to identify if it falls in scope or not.
38. The Commissioner also accepts that additional time would be required to review this information in order to comply with the remaining element of Part 2 of the request. When the reviewer has identified that an email is in scope, they could then look for the members of staff involved from NHSE&I and NHSD and document their name, position and date of input. He feels an additional minute per email is reasonable for this to be carried out, adding an additional 11.6 hours to the total. The Commissioner feels some element of analysis will be required to establish whether a third party had input into the letter or contributed to its sign off or review or whether they were only carrying out an administrative function (for example, someone just forwarding on or coordinating correspondence on a decision maker or contributor's behalf).
39. This equates to just over 24 hours and we know that there are still nine other individuals who will hold recorded information. Whether they hold 10 emails or 100, it will still require additional time to that documented above for those individuals to search, locate and forward on the emails they do hold and then for a reviewer to establish scope and whether any of those communications contribute to the remaining element of Part 2 of the request. There is also the 50 documents identified from the search and a little time would be needed for the reviewer to establish if they are in scope or not. This additional work is not known but regardless of its size it will increase the number of hours that are required for full compliance to be achieved.
40. For these reasons, the Commissioner is satisfied that section 12 of FOIA applies to remaining elements of the request.

41. In terms of section 16 of FOIA, the application of section 12 triggers a public authority's duty to provide advice and assistance to the applicant so far as it is reasonable to do so.
42. In its initial response DHSC said that it did not know of any reasonable advice or assistance that could be offered considering the scope of the request. There is no further mention of section 16 in DHSC's internal review response, despite by this point the complainant already suggesting that in the interim it could supply any briefing note(s). It is not addressed again in any of the revised responses that were then issued to the complainant during the Commissioner's investigation.
43. DHSC has subsequently stated that because it identified the submission to ministers and shared this with the complainant, it feels it has now met its obligations under section 16 of FOIA.
44. The Commissioner does not agree. He considers DHSC could have offered the complainant some advice and assistance on how to refine the request (or elements of it) to enable them to then consider making a fresh request. It has said that it identified 50 further documents. The Commissioner does not know what these are but DHSC could potentially highlight to the complainant what these are and which were key to enable them to consider making a fresh request for some of these documents. It has not said that it cannot process any of the 700 emails within the cost limit. A refined request which asks for half of these, or those within a tighter timeframe, could be processed in the cost limit.
45. DHSC (being the public authority that holds this information) is in the best position to advise and the Commissioner does consider that some advice and assistance could potentially be provided, even if the complainant does not wish to follow that and make a fresh request.
46. For these reasons, the Commissioner has decided that DHSC has breached section 16 of FOIA in this case and is now required to provide advice and assistance to the complainant.

Other matters

47. The Commissioner would like to remind DHSC of the permitted tasks under section 12 of FOIA (determining if the information is held, locating and retrieving it and extracting relevant information from non-relevant information). The task of sifting for duplicates is not a task permitted under section 12.

Right of appeal

48. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

49. 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.
50. 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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