

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2023

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant requested information from the Department of Health and Social Care ("the public authority") about correspondence discussing a document about COVID19 and admission and care of people in care homes. By the date of this notice, the public authority had not issued a substantive response to this request.
2. The Commissioner's decision is that the public authority has failed to complete its deliberations on the balance of the public interest within a reasonable time and has therefore breached section 17(3) of FOIA.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Having confirmed whether or not information is held within the scope of the request: either disclose the requested information, if held, or, to the extent that information is to be withheld, issue a refusal notice in accordance with the requirements of section 17 of the FOIA.
4. The public authority must take this step 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

5. On 9 December 2022, the complainant made the following request for information to the public authority:

"I am writing to request information under the Freedom of Information Act 2000.

Please would you supply me with any emails, texts, Whatsapps or other written correspondence sent between 1st March 2020 and 30th April 2020 in which the contents of this document - or earlier drafts of the document - were discussed before its release:

Coronavirus (COVID-19): admission and care of people in care homes

<https://www.gov.uk/government/publications/coronavirus-covid-19-admission-and-care-of-people-in-care-homes>

Please would you also supply me with any earlier drafts of the document.

I am making this request now in light of the ICO's decision (Reference: [redacted]) regarding DHSC's refusal of my previous request for information on 20th July 2020. In its decision, the ICO said: "In the Commissioner's view, the timing of the request is the crux of this case. The request was made at the time when the pandemic had only recently been declared, was ongoing and the care home policy was still live; it was not withdrawn until April 2022" (para 41). While the ICO determined that, at the time of my previous request, the public interest lay in maintaining the exemption under section 36, the decision made clear that that would not necessarily be the case if a request were made at the time of the ICO's decision (para 42).

The pandemic is no longer at crisis levels and the guidance at the heart of this request has now been withdrawn. Moreover, as the ICO noted at para 42 of its decision, the High Court has recently ruled that the policy in question was irrational. This indicates that if DHSC argued for an exemption under section 36 in response to this request, the public interest in disclosure would outweigh it.

Urgent disclosure is overwhelmingly in the public interest, so that those lessons can be drawn and solutions implemented in advance of a winter spike in Covid cases and deaths.

I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents and it is the department's responsibility to provide the information I require. If you need further clarification please contact me by email. I would like the information to be emailed to me in electronic form.

If my request is denied in whole or in part I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees.

I would be grateful if you could confirm in writing that you have received this request and look forward to your response within 20 working days as outlined by the statute."

6. On 11 January 2023, the public authority wrote to the complainant to explain that it held information relevant to the complainant's request, but that it would need to extend the time taken to complete its public interest test considerations in respect of an exemption under section 36 of FOIA.
7. The public authority thereafter issued monthly letters to the complainant, further extending the time to respond in order to consider the public interest.
8. The complainant submitted a complaint to the Commissioner on 9 May 2023 about the public authority's delay in responding to the request.

Reasons for decision

9. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled –

 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him."
10. 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".

11. Section 17(3) of FOIA states that where a public authority is relying on a qualified exemption, it can have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information.
12. FOIA does not define how long a reasonable time is. The section 45 Code of Practice on request handling states that "it is best practice for an extension to be for no more than a further 20 working days".¹ This means that the total time spent responding to a request should not exceed 40 working days unless there are exceptional circumstances.
13. On 17 May 2023, the Commissioner wrote to the public authority, reminding it of its responsibilities and asking it to provide a substantive response to the complainant within 10 working days. Although the public authority made contact to advise that they were working on a response, to date, a substantive response has still not been provided.
14. In this case, the total time taken by the public authority has exceeded 40 working days. The Commissioner does not consider there to be any exceptional circumstances and finds that, by failing to complete its deliberations on the public interest within a reasonable time frame, the public authority has not complied with section 17(3).
15. The public authority is now required to finalise its public interest considerations under section 17(3) of FOIA and respond to the complainant.

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

16. 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

17. 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.
18. 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