

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 20 September 2010**

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

### Summary

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The complainant referred to a letter written to him by the Department of Health, in which it had referred to “a range of clinical and medical opinion” on the subject under debate. The complainant asked for a copy of this information. The DoH stated that this information was not held. After investigating the case the Commissioner is satisfied that the information is not held.

### The Commissioner’s Role

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1. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the “Act”). This Notice sets out his decision.

### The Request

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2. The complainant contacted the Department of Health (the “DoH”) on 25 February 2009 and requested the following:

“...ALL the references and or copies of ‘the range of clinical and medical opinion on this subject’ as quoted in this letter that [named Professor] has indicated.”

3. This request was in reference to a letter from the DoH to the complainant dated 24 June 2005, which stated,

“I understand that your questions to [named Professor] flow from your concern that the Standard Operating Procedures (SOPs) for taking urine samples are not being followed throughout the NHS. You have made clear that you believe that there is a risk that non-adherence to the SOPs may mean that some infections are not being detected. [Named Professor] is aware of your concerns expressed in correspondence and when we met on 1 February. [He/she] has however pointed out that there is a range of clinical and medical opinion on this subject.”

4. The DoH responded to the complainant on 23 March 2009. It referred to a similar request that the complainant had made in 2005 for the same information, and stated that,

“The range of medical opinion referred to in [...]’s letter of 24 June is [named Professor’s] experience over the last 35 years of talking to clinicians and microbiologists about the diagnosis of urinary tract infection. It was not a reference to a specific published material. It is not material held or produced by the Department of Health.

We have confirmed that this remains [named Professor’s], and the Department of Health’s, position on these issues.”

5. The complainant replied to the DoH on the same day, and stated that he believed that its response was insufficient and erroneous. He wrote,

“While I appreciate [named Professor] has a range of experience, it is neither scientific nor appropriate to have this being based on his talking with clinicians and microbiologists. So have I, and more recently. Why should my experience with talking to clinicians be discounted against [named Professor]? And I am prepared to back mine up. Including clinical papers that [he/she] appears to be wrong in [his/her] ‘talk-talk’.

[...]

...Are you seriously telling me that in 35 years there is no paper on this? But chit-chat. On something as important as this?

[...]

[Named Professor's] comments are based I understand on conversations of 35 years old..."

The Commissioner believes that this forms a request for an internal review.

6. The complainant contacted the DoH again on 24 September 2009 and stated that he had not received a response to the above. The DoH responded on 8 October 2009 and stated that it would conduct an internal review.
7. The DoH conducted an internal review and responded to the complainant on 16 December 2009. The DoH stated that,

"In considering your requests again, it is important to reiterate a point made to you in correspondence dated 3 June 2009...only questions relating to recorded information fall within the provisions of the Freedom of Information Act. As many of your previous questions relate to information which is not recorded, officials have answered them on a voluntary basis, contributing their knowledge where information in written form was not held.

There is little we can add to the explanations already provided to you..."

The DoH also made reference to section 14 of the Act, and provided a detailed explanation as to why it would find any further requests from the complainant about this topic to be vexatious.

## The Investigation

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### Scope of the case

8. The complainant contacted the Commissioner on 13 January 2010 to complain about the way his request for information had been handled.
9. During the investigation of this complaint the DoH confirmed to the Commissioner that it was not seeking to rely upon section 14 in relation to this case, and that its position is that the requested information is not held.
10. Therefore the Commissioner has considered whether the requested information, i.e. whether the DoH holds references to and/or copies of "the range of clinical and medical opinion on this subject" referred to

by the named Professor in the letter to the complainant dated 24 June 2005, is held. In determining the scope of this case the Commissioner has taken into account all of the documentation on this case. The context of the correspondence has essentially set out the scope of the matter and how it has been progressed.

## **Chronology**

11. The Commissioner contacted the DoH by way of a telephone call on 17 June 2010. He noted the detailed references in the internal review to section 14 and stated that he would be seeking clarification as to whether the DoH was relying upon this exemption in this case. Following this, he emailed the DoH on the same day and asked it to clarify whether it was relying upon section 14 or whether its position was that the requested information was not held.
12. The DoH responded on 22 June 2010 and confirmed that its position was that the requested information was not held. It stated that, "The section 14 arguments were included in an attempt to deter the applicant from corresponding any further about the same issue."
13. The Commissioner wrote to the complainant on 30 June 2010 and informed him that the DoH had confirmed that its position was that it did not hold the requested information, and that it was not relying upon section 14.
14. On the same day the Commissioner wrote to the DoH and asked it for further submissions to support its argument that the requested information is not held.
15. The DoH responded in an email dated 13 July 2010 and provided further submissions to support its argument that the requested information is not held.
16. The Commissioner wrote to the complainant on 20 July 2010. He informed the complainant that the DoH had provided further submissions. He noted that after considering these submissions it was his initial view that the requested information was not held. Therefore he asked the complainant whether he wished to proceed to a Decision Notice on this case. He also invited the complainant to provide any further submissions he wished to make to support his argument that the information was held.
17. After an exchange of emails on 20 and 21 July 2010 the complainant confirmed that he wished the Commissioner to issue a Decision Notice

for this case. He did not provide any further evidence to suggest that the requested information was held.

## Analysis

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### Substantive Procedural Matters

#### Section 1 – Is the requested information held?

18. Section 1(1) of the Act 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.”

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

19. In this case the Commissioner has had to consider whether the DoH holds references to and/or copies of “the range of clinical and medical opinion on this subject” referred to by the named Professor in the letter to the complainant dated 24 June 2005. In doing so the Commissioner has to decide whether the DoH has complied with section 1(1)(a) of the Act by stating that it does not hold this information.

20. In approaching cases such as this, where the fundamental question is whether a public authority holds requested information, the Commissioner is guided by the views of the Information Tribunal in *Bromley & others v ICO & Environment Agency* [EA/2006/0072], which stated that in cases such as this,

“The standard of proof to be applied in that process is the normal civil standard, namely the balance of probabilities...”<sup>1</sup>

21. Further to this, the Tribunal also went on to state that,

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<sup>1</sup> EA/2006/0072, para 10

"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere with a public authority..."<sup>2</sup>

22. In reaching a view on the balance of probabilities the Commissioner should take into account a number of factors, including evidence of the scope and quality of the searches carried out by the public authority. The Commissioner has also noted the views of the Tribunal in *Fowler v ICO & Brighton and Hove City Council* [EA/2006/0071] which suggested that such evidence may include,

"...evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place...."<sup>3</sup>

23. Therefore the Commissioner has considered whether, on the balance of probabilities, the DoH holds references to and/or copies of "the range of clinical and medical opinion on this subject" referred to by the named Professor in the letter to the complainant dated 24 June 2005. In doing so he has particularly borne in mind any explanation as to why the specified information is not held.

24. In reaching a decision on this case the Commissioner has considered the contents of the refusal notice and the internal review. He has also considered the DoH's submissions in its email dated 13 July 2010. In particular he has noted that:

- The DoH referred to the fact that this information had been requested in 2005 by the complainant, and its response (dated 15 September 2005) had been identical to the response in this case. The Commissioner has noted that there is no evidence that the complainant challenged that earlier response.
- When carrying out the internal review, the DoH discussed this issue with the named Professor, who confirmed that the requested information is not held. The DoH did, however, provide advice in relation to other issues raised by the complainant (these fall outside the scope of this case).

25. During the course of his investigation the Commissioner asked the DoH to provide him with any evidence of searches that it had carried out in order to ascertain whether the requested information was held. The DoH has informed the Commissioner that,

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<sup>2</sup> EA/2006/0072, para 13

<sup>3</sup> EA/2006/0071, para 24

“With regard to the 11 questions you ask concerning information searches and records management, I can confirm that we did not carry out any searches for recorded information. This is because [named Professor] made it quite clear at the outset and confirmed in a further reply, that the range of clinical and medical opinion [he/she] referred to was what [he/she] had gleaned talking to clinicians and microbiologists over the last 35 years and not from written documentation held by the Department of Health. We therefore did not carry out any searches for documents as none were held by the Department.”

26. The Commissioner notes the complainant’s arguments that opinions given by medical or scientific experts should be supported by evidence. However, this does not mean that this information should, in itself, be held by the public authority. The Commissioner has also noted that the complainant has not provided any evidence to show that the information he has requested in this case is held by the DoH.
27. Having considered the DoH’s arguments the Commissioner believes that they are reasonable and persuasive. Given this, and as the complainant has not provided any evidence to the contrary, the Commissioner is satisfied that on a balance of probabilities the DoH does not hold the requested information in this case.

## **The Decision**

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28. The Commissioner’s decision is that the DoH dealt with the request for information in accordance with the Act.

## **Steps Required**

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29. The Commissioner requires no steps to be taken.

## **Other matters**

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30. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

31. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 180 working days for an internal review to be completed, despite the publication of his guidance on the matter.
  
32. The Commissioner is also concerned about the suggestion in the internal review that future requests made by the complainant will be considered vexatious. It is the case that the relevant guidance published by the Commissioner does advise that, in certain situations, the identity of a requester and previous correspondence received might be relevant in reaching a decision as to the application of section 14. However, such decisions should be taken on a case by case basis and it is not good practice for public authorities to pre-emptively suggest that future requests submitted by an individual will automatically be deemed vexatious or otherwise not complied with.



## Right of Appeal

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33. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 20<sup>th</sup> day of September 2010**

**Signed .....**

**Andrew White  
Complaints Resolution Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Section 1

- (1)** 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.
- (2)** Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3)** Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
  - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4)** The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5)** A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6)** In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.