

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2018

Public Authority: Department of Health and Social Care (DHSC)

Address: 39 Victoria St
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant made four requests to DHSC for information relating to an 'efficiency' meeting from June 2015, information relating to four First Tier Tribunal cases, information relating to a meeting between PS(H) and Simon Stevens dated 23 September 2014 and information relating to DHSC Twitter accounts. The DHSC refused to comply with the requests under section 14(1) FOIA as it considers them to be vexatious.
2. The Commissioner's decision is that DHSC correctly applied section 14(1) FOIA to the requests.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 31 March, 7 and 11 April 2017 the complainant requested information of the following description:

FOI-1081395 – 31 March 2017

"HEE have stated that:

I can confirm that both Professor Cumming and Sir Keith Pearson have met with Lord Prior on a number of occasions. Diary records indicate one meeting during the period specified between Prof. Cumming and Lord Prior specifically relating to "efficiency" in June 2015.

I would like to see any information you hold from 2015/2016 relating to meetings between Lord Prior and Prof Cumming/Keith Pearson of HEE - this includes meeting minutes and correspondence relating to these meetings. In particular I would like to see the minutes fro the 'efficiency' meeting from June 2015."

FOI-1081396 – 7 April 2017

*"I would like to request all the internal correspondence you hold relating to the following GRC 1st Tier Tribunal cases:
(obviously I am aware certain elements of this correspondence will be subject to legal privilege and I would fully expect this component to be redacted)
EA/2016/0140
EA/2016/0141 and 145
EA/2016/0196"*

FOI-1081982 – 11 April 2017

*"Many thanks for your release of information in which it states: PS(H) to discuss this with Simon Stevens (meeting provisionally scheduled for the 23rd Sept
Can I see any minutes/correspondence you hold relating to this meeting that was provisionally scheduled on 23rd Sept 2014 (between NHS England and PS(H))?"*

FOI-1082288 - 11 April 2017

*"I would like to request some information under the FOIA.
As regards these Twitter accounts - @DHgovuk and @dhpressoffice
May I ask how many users on Twitter have been muted and blocked by each account? May I also see lists of all those who have been muted and blocked by each account.
This is easy information to obtain from the 'settings' menu on Twitter"*

5. On 3 May 2017 the DHSC responded. It refused to comply with the requests as it considers them to be vexatious under section 14(1) FOIA. The complainant requested an internal review on 3 May 2017. The DHSC sent the outcome of its internal review on 17 August 2017. It upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 18 August 2017 to complain about the response he had received.
7. The Commissioner has considered whether the DHSC correctly applied section 14(1) FOIA to the four requests.

Reasons for decision

Section 14

8. Section 14 of FOIA states that a public authority is not obliged to comply with a request for information if it is vexatious.
9. The Commissioner's guidance¹ on the application of section 14(1) FOIA, refers to an Upper Tribunal decision² which establishes the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious.
10. The guidance suggests that the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear, the Commissioner considers that public authorities should weigh the impact on the authority and balance this against the purpose and value of the request. Where relevant, public authorities will need to take into account wider factors such as the background and history of the request.
11. The DHSC said that the complainant considers that these four requests are unrelated to each other. The DHSC said that in its Guidance the ICO considers that:

"A request which would not normally be regarded as vexatious in isolation may assume that quality once considered in context. An example of this would be where an individual is placing a significant strain on an authority's resources by submitting a long and frequent series of requests, and the most recent request, although not obviously vexatious in itself, is contributing to that aggregated burden."
12. The DHSC said that it considered and took into account the context and background of previous FOI requests the complainant had submitted to DHSC (prior to the four requests that are the subject of this Notice) and noted there is a clear theme that ran across these requests. The theme of the complainant's requests related to DHSC's policy on seven day NHS services and the negotiations regarding junior doctor contracts. In its response to the complainant of 3 May 2017, DHSC stated that:

¹http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

² *Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (AAC) (28 January 2013)*

"You have repeatedly submitted requests for the same or similar information, and information on the same broad topic. The Department considers that these requests are made in the hope of discovering information which would support an entrenched view that you hold regarding discussions surrounding the Review Body on Doctors' and Dentists' Remuneration, junior doctors and seven-day services."

13. The DHSC said that in its internal review response, it looked at the complainant's four requests that are the subject of this Notice and although the complainant claimed they were unrelated, the DHSC considers that there can be no other reasonable explanation for the complainant to submit further requests, other than that they are related to his entrenched view regarding seven day services and junior doctors' contracts. Therefore it considers that these four requests were related to the complainant's broader subject of interest which concerned the Review Body on Doctors' and Dentists' Remuneration, junior doctors and seven-day services.
14. The DHSC confirmed that during the twelve months prior to these four requests, it has logged 26 FOI requests from the complainant relating to this subject matter. All 26 requests were dealt with under the provisions of the FOIA, of which the DHSC conducted an internal review of 15 cases and 7 complaints were investigated by the ICO. It said that each of these required the resources and time of several members of staff of varying grades.
15. The Commissioner considers that considering the subject matter of the preceding 26 requests made by the complainant, it is highly likely that the most recent four in some way relate to the complainant's broader subject of interest of the Review Body on Doctors' and Dentists' Remuneration, junior doctors and seven-day services and to discover information which would feed into the complainant's views in this area.
16. The DHSC went on that this subject matter was covered in the complainant's appeal which was heard before the First Tier Tribunal (FTT) on 6 and 7 March 2017 (EA/2016/0140, EA/2016/0141, EA/2016/0144, EA/2016/0183). The FTT passed its judgement which dismissed all appeals, which the DHSC considers further diminishes any public interest arguments relevant to these further requests to discover information on this subject. It therefore considers that this matter has been fully dealt with. It went on that during the hearing, the FTT considered at great length the source of the 6,000 weekend hospital mortality figure which was attributed to the lack of seven-day NHS services by the Secretary of State in a speech on 16 July 2015.
17. The DHSC said that the FTT was fully satisfied that the 6,000 figure was provided directly to the Secretary of State during a discussion he had with Professor Sir Bruce Keogh, Medical Director of NHS England and

that no records of that discussion exist. In addition, with regard to a separate complaint made to the ICO regarding an FOI request covering the same subject matter (reference FS50665254), the Commissioner stated in her decision notice that she is satisfied that the information was only provided to DHSC after it had been provided to the Secretary of State directly from Professor Sir Bruce Keogh. This communication was provided to DHSC by NHS England after the Secretary of State's speech. A separate 6,700 weekend hospital mortality figure was also dealt with in the FTT; the judgement stated: "the fact that the estimate arrived at by Deloitte for weekend deaths was 6,700 does not mean that its work was more likely than not to have been the source of the figure given in the Secretary of State's King's Fund speech." It argued that this further diminishes any serious purpose, value or objective justification for a request which raises repeat issues.

18. It went on that the ICO and DHSC have become party to a further FTT appeal of the ICO's decision notice FS50655951 which has been brought forward by the complainant (EA/2017/0227). In her decision notice, the Commissioner upheld DHSC's decision to withhold sections of a meeting note regarding a previous DHSC minister's meeting with Ian Cumming, Chief Executive of Health Education England (HEE). In his grounds for appeal the complainant alleges that HEE has threatened NHS trusts by removing funding if they go against the proposed government's junior doctor contract imposition. This matter will be considered by the FTT in due course, however, it said that the appeal further demonstrates the vexatious nature of the complainant's inappropriate attempts to use FOIA as a means to discovering information which would support an entrenched view on a subject matter which has already been dealt with extensively by DHSC, the ICO and the FTT.
19. As explained above the DHSC considers that the complainant's more recent four requests also highly likely to relate to his entrenched views regarding seven day services and junior doctor contracts. It argued that what adds further weight to this argument is that in one of the four requests, the complainant requested internal documents related to cases EA/2016/0140 and EA/2016/0141 which were heard before the FTT and dealt precisely with this subject matter.
20. It went on that in addition to this, if DHSC were to have complied with the specific part of this request for internal documents related to the FTT hearings, then it would have been grossly oppressive in terms of the burden, resources and time demanded by such compliance. A simple key word search of the FTT hearing case reference numbers in the DHSC FOI team's electronic files returned 11,421 documents, each of which would have needed to be reviewed individually to check whether they were within the scope of his request and reviewed for any sensitive information and to determine if any exemptions apply. This was a search of the FOI team's files only and did not take into account documents

within individual staff email accounts. Neither did it take into account documents held within the files and email accounts of the relevant policy teams involved in the FTT hearings. This demonstrates how disproportionate compliance with the requests would have been and the level of disruption and distress it would cause, which it argued clearly cannot be justified. DHSC could not reasonably be expected to comply, particularly given the nature, frequency and apparent purpose of the requests.

21. In terms of the 26 previous FOIA requests dealt with, the DHSC said that using the figures established by a costing exercise undertaken by the Ministry of Justice in 2012, it estimated the burden on DHSC in the last twelve months to be as follows:

26 initial requests at an average processing cost of £183 per request = £4,758

15 Internal Reviews at an average processing cost of £374 per review = £5,610

7 ICO cases at an average cost of £874 per case = £6,118

Total: £16,486

22. In summary, the DHSC considers the frequency and nature of the complainant's previous requests was excessively burdensome which was demonstrated above by the level of resources required for compliance. It considers this to be a disproportionate strain on DHSC which would clearly divert finite resources from answering legitimate requests. This would be manifestly unjustified and an inappropriate use of a formal procedure.
23. In this case the Commissioner considers that it is important to consider the wider course of dealings. As explained above the Commissioner does consider that due to the subject matter of the preceding requests, it is highly likely that these four requests were made as a form of fishing exercise to endeavour to uncover further information which may feed into the complainant's views on this matter. This is due to the wide nature of some of these requests and the burden they would create when only some of the information would be useful or relevant to the complainant's likely purpose.
24. The Commissioner considers that there is sufficient evidence to suggest answering these requests would just lead to further requests being made.
25. The Commissioner also considers that that the DHSC has provided evidence of the burden that has been put upon its resources in answering the complainant's previous 26 requests and in relation to one of the four requests the burden that complying with it would cause. The

Commissioner does therefore consider that complying with these four requests would impose a disproportionate burden upon DHSC resources.

26. The Commissioner also considers that given the number of requests made by the complainant to DHSC surrounding this subject area, or in an attempt to uncover information that may be related, demonstrates an unjustified persistence on behalf of the complainant. This is particularly so given the FTT's findings in relation to the complainant's appeals it has already considered which the DHSC has discussed in its submission and the fact that there are further hearings scheduled.
27. Whilst the Commissioner does consider that complying with these four requests would impose a significant burden upon the DHSC she has gone on to consider the purpose and value behind the requests to determine whether this level of burden could be justified.
28. The Commissioner cannot dismiss the serious purpose and value behind the requests given they are highly likely to have been made to locate information relevant to the Review Body on Doctors' and Dentists' Remuneration, junior doctors and seven-day services which is of significant public interest. However given the number of requests already made, some of which have already been heard by the FTT and some which are scheduled for upcoming hearings, the serious purpose or value behind requesting further information about the hearings or wider requests designed to uncover information that may be relevant to this subject matter is somewhat diminished.
29. Given the significant burden of complying with the preceding 26 FOIA requests on this subject matter within a twelve month period, the wide nature and volume of information that would be relevant to the more recent four requests and the complainant's unjustified persistence it would not be proportionate for DHSC to comply. Despite there being some serious purpose or value behind the requests, given the indirect link of some of those requests to the complainant's subject matter of concern, this cannot justify the burden complying would impose.
30. In this case given the context and history to the requests the Commissioner does consider that these requests are vexatious under section 14(1) FOIA.

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@hmcts.gsi.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

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF