

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

### **Decision notice**

**Date:** 3 June 2021

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

### **Decision (including any steps ordered)**

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1. The complainant has requested from the Department of Health and Social Care (DHSC) information about who it supplied personal protective equipment (PPE) to, the dates concerned, and the numbers per item for March 2020. The DHSC stated that it held the information but cited section 12(1) FOIA – that the cost of compliance would exceed the appropriate limit. It later transpired that the DHSC did not in fact hold this information and the DHSC withdrew its reliance on section 12.
2. The Commissioner's decision is that the DHSC has breached section 1(1)(a) of the FOIA as it indicated it held the requested information but later concluded that it did not.
3. The Commissioner does not require the DHSC to take any further steps.

## Request and response

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4. On 15 April 2020 the complainant made the following request for information under the FOIA -

*"Please kindly provide a breakdown of who you supplied PPE to by date, the type of PPE it was (such as disposable aprons, disposable gloves, fluid resistant face masks, surgical mask with integrated visor, full face shield/visor) and the count of each of those items for the month of March 2020.*

*Please output in the following fields: Date; Destination; PPE type; Count*

*For example... 01.03.2020; Princess Grace Hospital, London; fluid resistant face masks; 1032 01.03.2020; Princess Grace Hospital, London; disposable gloves; 1032*

*We're assuming you're keeping a record of what you've sent to where."*

5. The DHSC provided a refusal notice on 4 May 2020, citing section 12 of the FOIA. However, the DHSC gave some figures outside of the FOIA and some advice about narrowing the request by suggesting that the complainant focus on specific hospitals or geographic areas.
6. On the same day the complainant narrowed the request to "Northumberland". However, the requester and other individuals apparently acting together made 94 requests for information in total, breaking down the original request into geographic area but covering March/April/May 2020.
7. On 1 June 2020 the DHSC aggregated these requests and explained that as there were 94 of these requests in total, it was applying section 12 to them. The DHSC suggested that the complainant could confine her requests to one or two.
8. The complainant subsequently made a request for an internal review on 3 June 2020 on the basis that the DHSC had grouped the 94 requests together but that she argued that they were entitled to create separate FOI requests for each geographical area as she had been advised in the refusal notice.
9. On 18 June 2020 the DHSC provided an internal review in which it maintained its original position and explained that all the 94 requests

had been aggregated and were being refused under section 12 as had been set out on 1 June 2020. This response stated that any further requests would not be logged or responded to.

10. The complainant wrote back to the DHSC on the same day arguing that asking for the information in the way it had outlined would mean that it took 2880 days to obtain the information for each month requested.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 18 June 2020 to complain about the way her request for information had been handled. She stated that NHS staff had been gagged from speaking out about shortages of PPE and had been told to reuse PPE meant for single use and wear bin liners. For this reason she wanted to know if staff had been provided with sufficient PPE.
12. On 23 October 2020, after the Commissioner began her investigation, the complainant asked when an FOI request could be made to the DHSC asking for part of the information. The complainant wanted to know if she could obtain information for one area where staff had reportedly died from COVID-19 due to having insufficient access to PPE and the PPE records for that location over a few weeks. However, she did not want this to affect her existing complaint.
13. On the same day the complainant asked the Commissioner whether, if it was established that a crime was committed, that would outweigh the citing of section 12.
14. The Commissioner wrote back and stated that the legislation said that the same request could not be made within 60 consecutive days of the last request by the same person or persons acting in pursuance of a campaign. She also suggested that whether a "crime" had been committed was for the police to decide and that section 12 does not carry a public interest test.
15. On 27 October 2020 the DHSC responded to the Commissioner's investigation letter to say that it had no capacity to deal with her queries due to the COVID-19 pandemic. The DHSC stated that the matter had been thoroughly investigated at the time and that some information had been provided on a discretionary basis.
16. On 29 October 2020 in light of the ongoing pandemic the Commissioner agreed to pause this complaint until the New Year.

17. The complainant wrote to the Commissioner on the same day to explain that she had put in a request on 26 October 2020 to the DHSC for Bolton's information for March 2020:

"Desired output:  
Date supplied  
Name of hospital/health centre, Postcode  
Type of PPE  
Quantity of item

For example...

01.03.2020; The Royal Bolton Hospital; BL4 0JR ; fluid resistant face masks; 1032

01.03.2020; The Royal Bolton Hospital; BL4 0JR; disposable gloves; 1032"

18. The DHSC responded to this request by stating that, whilst it did hold some information on PPE deliveries, it did not hold the requested information in the format requested. The DHSC provided advice and assistance by suggesting that the information might be held by NHS Supply Chain Coordination Ltd.
19. On 7 December 2020 the complainant confirmed that she wished to continue her complaint but focus on whether she should have been informed that the information she had requested on 15 April 2020 was 'not held' and given advice and assistance accordingly, rather than the DHSC having aggregated the 94 requests that had been made.
20. On 18 January 2021, in the light of the response to the complainant's Bolton request, the Commissioner wrote to the DHSC and asked the following questions regarding its response to the 15 April 2020 request:

*"Does the DHSC hold the information requested by the complainant?  
If so, can you briefly explain the response regarding the Bolton request?"*

*"If the DHSC is maintaining section 12 for this request, are you now able to provide the Commissioner with a response to her section 12 questions?"*

21. The DHSC responded on 27 January 2021 to explain that it had sent these queries to its PPE briefing team but could not provide a date when a reply would be forthcoming due to the crisis.
22. The Commissioner received another holding email from the DHSC on 22 February 2021.

23. Despite chasing a response on 1 April 2021, the DHSC sent another holding email on 12 April 2021 and again on 20 May 2021.
24. On 21 May 2021 the DHSC responded to say that, after significant searches, it did not hold the requested information and accepted that it had cited section 12 incorrectly. The DHSC confirmed that it was no longer maintaining section 12 with regard to the request.
25. The Commissioner considers the scope of the case to be the procedural issues relating to section 1 that led from the DHSC's incorrect citing of section 12.

## **Reasons for decision**

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### **Section 1 - right of access to information held by public authorities**

26. Section 1(1) of the 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 or her."*

27. As the complainant has accepted that the DHSC does not hold this information, the Commissioner has not required the DHSC to respond to the questions she would normally ask to determine whether, on the balance of probability, the information is held or not held.
28. The Commissioner would like to note that, had the DHSC held the requested information, it would have been entitled to cite section 12 in light of the scope of the original request and the attempt by the complainant to elicit the information via multiple narrower requests apparently in concert with other individuals. Although she understands this action, the Commissioner would like to make clear that section 12 exists for a reason and is designed to prevent an excessive drain on a public authority's limited resources.

29. However, in failing to confirm to the complainant that it did not hold the requested information by the completion of its internal review, the Commissioner finds that the DHSC breached section 1(1)(a) FOIA.

### **Other matters**

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30. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.
31. Nevertheless, the DHSC had several occasions when it should have considered whether it actually held the requested information. In a sense the complainant uncovered the lack of joined up thinking by submitting a later request that led to a different response from the DHSC – that the information was not held.
32. It then took four months for the Commissioner to establish that the information that is the subject of this complaint was in fact not held and, despite her comments in paragraph 30, she feels that this should have been established much earlier on.

**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,  
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)

34. 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.

35. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**