

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2021

Public Authority: Parliamentary and Health Service Ombudsman
Address: Citygate
47-51 Mosley Street
Manchester
M2 3HQ

Decision (including any steps ordered)

1. The complainant submitted two requests to the Parliamentary and Health Service Ombudsman (PHSO) for its "*report into complaints against government departments for 2018/19.*" The PHSO refused to provide the information as it considered it to be exempt from disclosure under section 22(1) of the FOIA (information intended for future publication).
2. The Commissioner is satisfied that the PHSO is entitled to rely on section 22(1) of the FOIA to refuse to disclose the information and that, at the time of each request, the balance of the public interest favoured maintaining the exemption.
3. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA as the PHSO failed to respond to the complainant's second request within the statutory time limits.
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

The first request

5. On 10 August 2019, the complainant wrote to the PHSO via the WhatDoTheyKnow website and made the following request for information:

"Can you please release your report into complaints against government departments for 2018/19."

6. The PHSO responded on 23 August 2019, stating that it was withholding the requested information under the exemption provided by section 22(1) of the FOIA, on the basis that it was intending to publish the information at a later date.
7. The complainant wrote to the PHSO again on 27 August 2019, asking whether the requested information would be released before an Open Meeting in October. The PHSO responded to the complainant on 16 September 2019 and advised that the information would be published at the end of the year but would not be published before the Open Meeting.
8. The complainant wrote to the PHSO again on 15 January 2020, asking where the data was and followed up with an internal review request on 22 January 2020.
9. The PHSO responded to the complainant on 29 January 2020, refusing to provide the information under section 22(1) of the FOIA.
10. On 8 February 2020, the complainant wrote to the PHSO stating:

"I really do not understand why PACAC influences the release date for PHSP data on parliamentary complaints. Can you explain why you hold this data back? In April we will be into a new financial year so this data has been available to PHSO for many months.

Is it the case that PHSO do not release the parliamentary complaint data until after the PACAC meeting - which would then avoid proper scrutiny of the way in which PHSO has held government bodies to account?"

11. The Commissioner understands that the PHSO dealt with the complainant's correspondence of 8 February 2020 as an internal review request and responded to it via the WhatDoTheyKnow page of the complainant's follow up request (see below) on 4 March 2020. The PHSO upheld its original decision to refuse this request under section 22(1) of the FOIA.

The second request

12. On 25 January 2020, the complainant wrote to the PHSO via the WhatDoTheyKnow website and requested information in the following terms:

"I asked to see the report on parliamentary complaints handled by PHSO for 2018/19 back in August 2019.

[WhatDoTheyKnow link redacted]

I was told they would be released by the end of the year.

We are now in January 2020 and as far as I can see they are still not released.

Can you please release this report or direct me to the place where I can find this data in the public domain."

13. The PHSO responded on 4 March 2020, again withholding the requested information under the exemption provided by section 22(1) of the FOIA, on the basis that it was still intending to publish the information at a later date.

Scope of the case

14. The complainant contacted the Commissioner on 3 February 2020 to complain about the way her requests for information had been handled.
15. The complainant is concerned about whether the PHSO acted appropriately by refusing to release the requested information until after it was possible to use this data to demonstrate an alleged weakness in its performance.
16. The Commissioner notes that the complainant did not ask the PHSO to carry out an internal review in relation to the second request for information. The Commissioner has discretion to accept a complaint for full investigation without an internal review and she exercised her discretion in this case. This is because the response to the internal review for the first request and the initial response to the second request were provided at the same time. The Commissioner therefore considered that there would be no benefit in asking the complainant to start the internal review process for the second request in this case.
17. During the Commissioner's investigation, the PHSO published the report on its website on 10 November 2020. It emailed the complainant on 11 November 2020, advising that the requested information is now available and provided her with the link to the information.
18. The Commissioner wrote to the complainant on 19 January 2021, outlining the PHSO's response to her queries and providing a preliminary view that it was highly likely that the Commissioner would uphold the

PHSO's decision to rely on section 22 to withhold the requested information.

19. The complainant responded to the Commissioner on 20 January 2021, raising a number of points in support of her belief that it was not "reasonable in all the circumstances" for the information to have been withheld at the time of her request and advised that she wished to pursue the matter further.
20. The Commissioner responded to the complainant on 10 February 2021 and advised that whilst the points raised had been noted, it remained the Commissioner's position that it was highly likely that the Commissioner would uphold the PHSO's reliance on section 22.
21. The complainant responded to the Commissioner on 10 February 2021, stating that she did not accept the Commissioner's findings.
22. The Commissioner therefore wrote to both the complainant and the PHSO on 15 February 2021, advising that she was proceeding to a formal decision notice.
23. In view of the above, the Commissioner considers that the scope of this decision is to consider whether the PHSO was entitled to rely on section 22(1) to withhold the requested report at the time of the complainant's two requests for it.

Reasons for decision

Section 22 – intended for future publication

24. Section 22 of the FOIA states that:

Information is exempt information if —

- a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- b) the information was already held with a view to such publication at the time when the request for information was made, and
- c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

25. Therefore, in order for section 22(1) to be engaged, a public authority has to demonstrate that each of the three criteria set out above are met.

Did the PHSO hold the information at the time of the requests?

26. The PHSO has explained that although the requested information was held at the time of the request, it was not held in the format in which it is published. It stated that the information is formatted for publication and any personal data and identities are removed prior to the requested information being published.
27. The Commissioner is therefore satisfied that, at the time of the requests, the PHSO did hold the requested information.

Did the PHSO intend to publish the information at some date in the future, whether determined or not?

28. It is important to note that although the exemption under section 22 requires a public authority to be holding the information in question with a view to its publication at the time of the request, the exemption does not require a set publication date to be in place. The date of publication does not need to be definite for the exemption to apply.
29. In its submission to the Commissioner, the PHSO explained that the legislation that governs its work does not require it to publish the requested information. However, it explained that the requested information is published every year as part of its commitments to transparency and making statistical information relating to its performance public.
30. The PHSO stated that the publication date itself is flexible but the commitment to publish is not, and that it does aim to publish the information towards the end of the calendar year in which the previous business year ended.
31. The PHSO informed the Commissioner that it published the report on its website on 10 November 2020.
32. The PHSO advised that the scheduled release of the report at the end of 2019 was pushed back into the first quarter of 2020 due to the December 2019 General Election. It went on to explain that the publication of the report was further delayed due to emergency preparations required to facilitate the closure of the office due to the Covid-19 pandemic.
33. Based on the PHSO's submission, the Commissioner is satisfied that the PHSO did, at the time it received both requests, have a settled intention

to publish the report. Furthermore, the Commissioner notes that the information has now been published. The PHSO's ability to publish the report according to its originally intended schedule was clearly affected by external factors beyond its control, in particular the December 2019 General Election and the Covid-19 pandemic. The Commissioner does not consider this to invalidate the PHSO's intention to publish the information at some point in the future.

34. It is important to emphasise that the Commissioner's role is limited to considering the application of any exemptions at the time of the requests, in this case August 2019 and January 2020. The Commissioner does not dispute the PHSO's view that the General Election and the impact of the Covid-19 pandemic clearly hampered its intention to publish the report according to its originally intended schedule.
35. However, whilst these factors are relevant in explaining why the PHSO did not publish the report as originally intended, they are not relevant to her consideration of applicability of the exemption. Instead, the PHSO's application of the exemption must be considered on the basis of the situation at the time the requests were received (i.e. before the PHSO was aware of the external factors that would subsequently affect the publication of the information as originally intended).

In all the circumstances of the requests, was it reasonable to withhold the information prior to publication?

36. With regard to whether it was reasonable to withhold the report at the time of both of the requests, the PHSO has explained that although the requested information was held at that time, it was not held in the format in which it is published. The PHSO explained that the information is formatted for publication and any personal data and identities are removed prior to the requested information being published.
37. As explained earlier, the Commissioner wrote to the complainant on 19 January 2021 outlining the PHSO's response and providing a preliminary view that it was highly likely that she would uphold the PHSO's decision to withhold the information requested under the exemption provided by section 22(1) of the FOIA. The complainant responded to the Commissioner, providing the following points with respect to this criterion of the exemption:
 - i. *"Is it the opinion of ICO, protectors of public data access, that a delay of over 12 months is reasonable for the release of this data?"*

- ii. That the release of an excel chart which contained personal data and identities and which was not removed until brought to the attention of PACAC is reasonable?*
 - iii. That PHSO omitted to inform you of this as part of your investigation into this complaint?*
 - iv. That PHSO give as an explanation the importance of supplying 'context' then release two versions of the data which contain virtually no context?*
 - v. That the delay in releasing this data meant there was no PACAC scrutiny of the 0.6% uphold figures for 2018/19, which is detrimental to the public interest?"*
38. In this case, the complainant's follow up points mainly relate to the delays in the report being published.
39. The Commissioner must make clear that her decision is in relation to whether the PHSO was entitled to rely on the exemption under section 22(1) of the FOIA at the time of the complainant's requests i.e. on 10 August 2019 and 25 January 2020.
40. It is clear from the PHSO's response that, on the date it received the complainant's requests, it had a clear intention to publish the requested information at a future date in line with its normal publication. As stated above, it has now published the information.
41. The section 22 exemption does not require a public authority to have a set publication date. The public authority just has to have decided that it will publish the information at some time in the future for the exemption to be engaged.
42. In relation to the complainant's second follow up point, the complainant explained to the Commissioner that the PHSO released an excel chart in March 2020 which contained no contextual information to inform the public, and that the PHSO had not removed the personal data from searchable files within the document. The Commissioner understands that this information was released in error. The Commissioner explained to the complainant that any personal data breach reported to her is investigated under data protection legislation by her Personal Data Breach team. In any event, as the complainant's requests were made prior to this incident, it would not have any bearing on whether the PHSO could rely on the section 22 exemption at the time of the requests (i.e. on 10 August 2019 and 25 January 2020).
43. The Commissioner understands that the requested information is published with the PHSO's report to the House of Commons "Public

Administration and Constitutional Affairs Committee" (PACAC) and that this is an established process that it has done in previous years.

44. The PHSO has explained that it withheld the information prior to publication because the information was not held in the format requested, but that it had a planned programme to publish the report as the requested information is published annually. The Commissioner considers this is a sensible approach, in line with accepted practices and fair to all concerned. The Commissioner also noted the complainant's concern that the normal release schedule means that the information cannot be scrutinised by the PACAC. However, the Commissioner's understanding is that the information is provided directly to the PACAC before it is published, so it would normally be subject to the PACAC's scrutiny.
45. The Commissioner accepts that, at the time of the requests, it was reasonable in all the circumstances to withhold the information prior to the publication given that the information was not held in the format requested, but that the PHSO had a planned programme to publish the report as the requested information is published annually.
46. Section 22(1) is therefore engaged in relation to both requests.

Public interest test

47. The exemption at section 22(1) is qualified by a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure at the time of the request.

Public interest arguments in favour of disclosing the requested information

48. The PHSO recognises that information relating to the performance of a public authority is clearly of legitimate interest to the public, as it provides a valuable insight into the PHSO's expenditure of public money and the government bodies it investigates. The PHSO stated that this information should be disclosed to the public to ensure transparency. The PHSO has also argued that the information was held at the time of the request and it has previously disclosed similar information.

Public interest arguments in favour of maintaining the exemption

49. The PHSO has argued that, at the time of the requests, the information was not held in a format that facilitated disclosure and that it would need to have been extracted from its case management system. All personal data would need to have been removed and prepared for disclosure to the public. It went on to explain that the information would

then need to be analysed and reviewed by the PHSO as, before it releases such information, it is important that it fully understands what it is publishing. It is fed back into the organisation for peer review so it can respond accordingly to any questions raised by Parliament and the public.

50. The PHSO also argued that releasing the information before the intended publication would prevent it from being able to provide context around the information and may cause confusion. It stated that the lack of context would reduce any public interest benefit.
51. The PHSO has explained that the requests were for a copy of 'the report', but at the time of the requests the information was not in a report format and releasing the information would be inconsistent with its previous approach to the publication of such information. The PHSO confirmed that, at the time of the requests, the report was being prepared for publication.

Balance of the public interest arguments

52. The Commissioner considers that there is a clear public interest in the work of public bodies being transparent and open to scrutiny.
53. The Commissioner also considers that there is a public interest in allowing public bodies to account for their work within their yearly annual report rather than collating this information at various other points during the year.
54. On balance, the Commissioner considers that the PHSO is sufficiently held to account by the production of its annual report and that the public interest lies with allowing the PHSO to withhold the information in the circumstances so that the requested information could be integrated into the report and published in line with its planned publication process.
55. In view of the above, the Commissioner has concluded that the public interest favours maintaining the exemption in relation to both requests.

Procedural matters

Section 10 – time for compliance

56. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, by no later than 20 working days from receipt.

57. The Commissioner notes that, from receipt of the complainant's second request, the PHSO took 28 working days to respond to the request for information. The Commissioner has therefore recorded a breach of section 10 of the FOIA against the PHSO as a result.

Right of appeal

58. 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

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

59. 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.
60. 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

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