

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2021

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

Decision (including any steps ordered)

1. The complainant requested from the Department of Health and Social Care ("DHSC") information related to the polling on public opinion regarding the Covid-19 pandemic. The DHSC refused to provide the information requested, citing section 22(1) of FOIA as it stated that it intended to publish this information in the future.
2. The Commissioner's decision is that DHSC has incorrectly relied on section 22(1) on this occasion.
3. The Commissioner requires DHSC to take the following steps to ensure compliance with FOIA:
 - disclose the requested information to the complainant.
4. DHSC must take these steps 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 April 2020, the complainant wrote to DHSC and requested information in the following terms:

"Can you publish the weekly polling that you are undertaking on public attitudes to Covid-19 please?"

As referenced in the Scientific Advisory Group on Emergencies (Behavioural) note here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874289/13-spi-b-insights-on-public-gatherings-1.pdf "

6. DHSC responded on 21 May 2020, confirming that it held the information requested. However, DHSC refused to provide the complainant with the requested information stating that *"This information is intended for publication on the GOV.UK website at a future date."* It cited section 22 of FOIA as the basis for its refusal to comply with the complainant's request.
7. The complainant wrote back to DHSC on 22 May 2020 and requested an internal review of the handling of his request.
8. DHSC provided the complainant with the outcome of its internal review on 23 June 2020. It upheld its position about the application section 22 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 29 June 2020 to complain about the way his request for information had been handled.
10. The Commissioner has focussed her investigation on determining whether DHSC correctly applied section 22 of FOIA in its response to the request for information.

Reasons for decision

Section 22 Information intended for future publication

11. Section 22(1) of 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)."*

12. In order to determine whether section 22(1) of FOIA is engaged the Commissioner has therefore considered the following questions:

- When the complainant submitted the request, was the information held and did DHSC intend the information to be published at some date – determined or not - in the future?

Was the information held at the time of the request and was there an intention to publish it at a future date?

13. The DHSC's position is that the information was held at the date of the request with a view for it to be published at a future date.

14. In its response to the complainant, dated 21 May 2020, DHSC told him:

"DHSC holds this information. However, we are withholding it under Section 22(1) of the FOIA, which states that public bodies are not obliged to disclose information that is intended for future publication."

15. In the outcome of its internal review, the DHSC added that it *"has not yet determined the date on which the information will be published but it fully intends to do so."*

16. During the course of her investigation, the Commissioner contacted the DHSC for an explanation of its position. DHSC stated that *"some of the requested information is now in the public domain via work with academics."* It explained that DHSC had a contract with a scholar from King's College London to analyse data relevant to the request and that as a result some information relevant to the request would be disclosed through peer reviewed academic articles.

17. DHSC told the Commissioner:

"The first of these is available on a pre-print server, but has yet to be peer reviewed or published by the BMJ (the outlet the paper was submitted to) and is not intended for public consumption at this point."

The Commissioner's view

18. The Commissioner considered the original formulation of the complainant's request which asked for *the "weekly polling that you [DHSC] are undertaking on public attitudes to Covid-19"*. She considers

that from an objective reading of the complainant's request, it appears that he sought the actual weekly poll results.

19. The Commissioner notes that the DHSC's response to the complainant and its communication with the Commissioner, suggests that the information requested will be processed and/or analysed and published in the form of academic articles. From the description provided by DHSC it is also not clear whether the information disclosed through the articles will amount to *all* the information held by DHSC that is within the scope of the complainant's request.

20. In her section 22 guidance¹, the Commissioner advises that section 22(1) will apply only where the specific information that has been requested and that the public authority holds is intended for future publication:

"A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.

The information that the public authority intends to be published must be the specific information the applicant has requested."

21. As discussed above, the Commissioner has not been persuaded that DHSC had a settled intention to publish the information exactly as it was requested. On the basis of the submissions from DHSC, it is not clear that there was a settled intention at the time of the request to publish all of the in-scope information it held. Instead, it appears that only some of this information would be published, along with information or commentary related to the request. This is not sufficient to engage section 22(1).

22. Consequently, the Commissioner finds that section 22(1) is not engaged in this case. Because she finds section 22(1) is not engaged, it has not been necessary to consider the public interest test associated with this exemption.

23. At paragraph 3 above, DHSC is now required to disclose the requested information.

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

Right of appeal

24. 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

25. 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.
26. 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

Ben Tomes
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