

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 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 information from the Department of Health and Social Care ("the DHSC") about a 'blog' published by the government, rebutting the contents of an article published in the Sunday Times. The DHSC confirmed that information was held, but refused the request under section 12(1) of the FOIA (exceeds appropriate cost).
2. The Commissioner's decision is that the DHSC has failed to demonstrate that section 12(1) of the FOIA is engaged.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request to the complainant, which does not rely on section 12(1) of the FOIA.
4. The DHSC must take this step 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 24 April 2020, the complainant wrote to the DHSC and requested information in the following terms:

"Please provide a copy of all messages to and from members of the departmental press team, of rank senior media relations officers and above, and ministers of the department concerning:

- *Drafting comment in response to the Sunday Times Insight story of 19th April: "Coronavirus: 38 days when Britain sleepwalked into disaster".*
 - *Drafting the rebuttal article*
<https://healthmedia.blog.gov.uk/2020/04/19/response-to-sunday-times-insight-article/>
 - *Any subsequent discussion of the article. If this part of the request risks exceeding the cost limit, please just provide a copy of all emails sent or received by these parties that contains the following link: <https://www.thetimes.co.uk/article/coronavirus-38-days-when-britain-sleepwalked-into-disaster-hq3b9tlgh>"*
6. On 7 July 2020, the DHSC responded and refused the request, citing section 12(1) of the FOIA. It stated: *"we would be required to search an extensive volume of files to establish whether they held information relevant to your request. DHSC officials have conducted searches of the information the Department holds in relation to this FOI request, and have found a number of emails across numerous different email chains that would need to be reviewed to identify the full extent of the information relevant to your request"*. It stated that the complainant could consider refining his request.
7. Following an internal review, the DHSC wrote to the complainant on 27 August 2020. It upheld its position.

Scope of the case

8. The complainant contacted the Commissioner on 1 September 2020 to complain about the way his request for information had been handled.
9. The Commissioner wrote a letter of investigation to the DHSC on 1 March 2021 asking for a detailed explanation of its position. The DHSC responded on 23 July 2021, providing further details and upholding its position.
10. This notice considers whether the DHSC was correct to refuse the request under section 12(1) of the FOIA.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate limit

11. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
12. The “appropriate limit” is set in the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (“the Fees Regulations”) at £600 for central government departments, including the DHSC.
13. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) sets the “appropriate limit” at 24 hours of staff time for the DHSC.
14. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
15. Section 12 of the FOIA makes it clear that a public authority has only to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation.
16. However, following the approach of the First-tier Tribunal in *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004, 30 October 2007), the Commissioner expects any estimate to be sensible, realistic, and supported by cogent evidence.
17. The DHSC has argued that the cost of carrying out the activities covered by the Fees Regulations, and set out above, would exceed the limit of £600. Its position is that section 12(1) therefore applied, and that it was not obliged to comply with the request.

18. The DHSC explained: "*The team has narrowed the search of emails that could be within scope of the request by using keywords 'Sunday Times'. As the request was specifically asking for messages from and to 'senior media relations officers' we established that there were 10 email accounts that would need to be searched. In a sampling exercise, using the keywords as above, 53 emails were found on 1 email account. This would equate to approximately 530 emails if each account mirrored those figures. This count is without any searches of Ministers emails or messages, so numbers would be significantly greater to search those. The team calculated that it would take 5 minutes to check each email to see if information held was within scope of the request and to review whether information could be released and that no exemptions would apply. This time would not include any redactions*".
19. The Commissioner therefore understands that the DHSC's estimate is based on the time it would take to examine an anticipated 530 emails in the email folders of ten individuals on the senior press team, and that it therefore calculated as follows: 5 minutes x 530 emails = 2650 minutes (44.2 hours). She also understands that the DHSC anticipates finding more relevant emails in Ministers' email accounts.
20. The Commissioner considers that it is not unreasonable to expect each member of the press team to hold a similar number of emails in their email folders, and for more to be held by certain ministers.
21. However, the Commissioner does not accept that it is reasonable to state that each email would need to be considered for five minutes, for the purposes of locating, retrieving and extracting information falling within the scope of the request.
22. The framing of the request is for "*messages... concerning*" the article and the rebuttal, and subsequent discussion. The request is not for information on a particular subject matter that would be need to be extracted from emails; it is for the messages themselves. In the Commissioner's view, this limits the need to extract information.
23. The Commissioner also considers that, although she notes that the DHSC referred in correspondence with the complainant to "*numerous different email chains*", many of the 53 emails already identified would contain duplication and/or be part of a chain. These would take less time to review for relevance.
24. The Commissioner notes that the activity cited by the DHSC "*to review whether the information could be released and that no exemptions would apply*" is not a permitted activity that may be taken into account by a public authority considering whether to apply section 12, as set out in the Fees Regulations, and in paragraph 14, above. The permitted

activities relate to the locating and gathering of relevant information prior to consideration by the public authority, and not to considering whether or not it can be disclosed.

25. The Commissioner also notes that, while the DHSC stated to her that it carried out a sampling exercise, it has only described carrying out searches of press officers' email folders, and then estimating the time it "*would take*" to locate relevant information (paragraph 18, above). The DHSC has not provided any evidence that it then considered a representative sample of those emails, to see if they contained relevant information (to establish how long this would take), and instead relied on an estimate of five minutes each.
26. In conclusion, the Commissioner is not persuaded that it would take in excess of 24 hours to gather together emails from the press officers and relevant ministers that contained the key term "Sunday Times", from the relevant short time period, and consider them for relevance to the matter of the rebuttal blog.
27. As she is not persuaded that the DHSC has demonstrated that complying with the request would exceed the appropriate cost limit, she orders the DHSC to issue a fresh response to the complainant which does not rely on section 12(1) of the FOIA.

Right of appeal

28. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

29. 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.
30. 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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