

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2021

Public Authority: Public Health England
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant requested information about previous pandemic preparedness exercises. Public Health England ("PHE") initially refused to provide any information and relied on section 24 of the FOIA (national security) in order to do so. By the point of this notice, PHE had disclosed the majority of the requested information but still wished to rely on section 24 to withhold the remainder.
2. The Commissioner's decision is that PHE has failed to demonstrate that section 24 is engaged and is thus not entitled to rely on that exemption.
3. The Commissioner requires PHE to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, a copy of the withheld information. PHE may only continue to withhold that which it has identified to the Commissioner as comprising personal data.
4. PHE 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 9 February 2021, the complainant requested information of the following description:

"First request: Please tell me how many UK pandemic / epidemic simulation exercises were carried out with Public Health England (PHE)'s participation between 1 January 2015 and 31 December 2019 which modelled responses to outbreaks of infectious diseases at national or regional level.

"Second request: For each exercise as defined in my first request, please tell me (a) the operational name of the exercise, (b) the infectious disease being modelled, (c) the month and year of the exercise, and (d) whether Public Health England holds a copy of the main report summarising the findings of the exercise...

"Third request: Please send me copies of the main reports held by Public Health England which summarise the findings of Exercise Cygnet and Exercise Typhon."

6. On 9 March 2021, PHE responded. It confirmed that it held information within the scope of all three requests, but it was withholding the information within the scope of the first and second request and relying on section 24 of the FOIA (national security) to do so. In respect of the third request, it relied on section 21 to withhold the Exercise Cygnet report – because it was already in the public domain. In respect of Exercise Typhon, it withheld the requested information – relying on section 24 of the FOIA to do so.
7. The complainant requested an internal review on 6 April 2021. PHE sent the outcome of its internal review on 19 May 2021. It now provided the information it had previously withheld in respect of request one and request two. In respect of request three, it confirmed that it held no other information relating to Exercise Cygnet but continued to rely on section 24 of the FOIA to withhold the report on Exercise Typhon.

Scope of the case

8. The complainant first contacted the Commissioner on 17 March 2021 to complain about the way his request for information had been handled. At that point, he had yet to seek an internal review. Once the internal review had been completed, the complainant asked the Commissioner to accept the complaint and expedite its consideration.

9. Mindful of the importance of pandemic preparedness-related information, the Commissioner agreed to expedite the complaint and wrote to PHE on 24 May 2021. She asked PHE to explain why it had applied the exemption and to provide her with a copy of the withheld information.
10. Having sought (and been granted) an extension by the Commissioner, PHE decided to issue a fresh response to the complainant on 6 July 2021. To its credit, it disclosed the majority of the report, but withheld a small amount of personal data. Noting that it was still partially relying on section 24, PHE also informed the complainant that it had:

"removed references to PHE emergency response processes and plans containing sensitive operational details, the release of which may have implications on PHE's ability to respond to security incidents."
11. The Commissioner wrote to the complainant on 7 July 2021, noting that he had now received the vast majority of the report and asking him whether he was now prepared to withdraw his complaint. The complainant asked the Commissioner to proceed with her investigation as he was sceptical of PHE's use of the section 24 exemption. He also queried whether PHE had identified all relevant information – though he later drew back from that stance. The complainant was not interested in the personal information.
12. Consequently, the Commissioner wrote to PHE again on 13 July 2021, noting that her investigation remained open. She asked PHE to provide a response to her initial investigation letter of 24 May (although now focusing on the remaining withheld information) and to provide an unredacted copy of the report.
13. PHE responded to the Commissioner on 27 July 2021. It provided a short submission and confirmed that it had accurately identified the information within scope. However, no copy of the withheld information was provided and no explanation was provided for the omission.
14. The Commissioner wrote to PHE on 28 July, noting that she had not received a copy of the withheld information and asking for it to be provided at the earliest opportunity. PHE acknowledged the correspondence but did not provide the information.
15. On 17 August 2021, with no sign of the withheld information, the Commissioner served an Information Notice on PHE, requiring it to provide her with a copy of the report within 30 days. PHE finally provided the report on 6 September 2021.

16. The Commissioner considers that the scope of her investigation is to determine whether the remaining withheld information engages section 24 of the FOIA and, if it does, whether the balance of the public interest would favour disclosure or maintaining the exemption.

Reasons for decision

17. Section 24 of the FOIA states that:

- (1) *Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.*
- (2) *The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.*
- (3) *A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.*
- (4) *A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.*

18. The FOIA offers no definition of what "national security" means, but the Tribunal in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045) provided the following guidance:

- "national security" means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK ; and

- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
19. Section 24 also states that information will only be exempt where withholding it is "required" for the purposes of protecting national security. In *Philip Kalman v Information Commissioner & the Department for Transport* (EA/2009/0111), the Tribunal adopted the Commissioner's reasoning that the word "required" in this context means "reasonably necessary". It is not sufficient for the information merely to relate to national security.
20. The Commissioner's guidance explains that:
- "Safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent... We also recognise that terrorists can be highly motivated and may go to great lengths to gather intelligence. This means there may be grounds for withholding seemingly harmless information on the basis that it may assist terrorists when pieced together with other information they may obtain."*
21. Despite the findings of this notice, in order to not prematurely disclose the withheld information the Commissioner can only describe that information in oblique terms. The complainant has already been provided with a redacted version of the report, the only material that is being withheld (aside from the personal data) is a single reference to a particular activity ("the Activity") and several references to what the Commissioner will describe as "the Policy" it is the actual names of the Activity and the Policy that have been redacted.
22. In explaining why references to the Activity and the Policy must be withheld, PHE stated that:
- "its disclosure could lead to heightened risk of exposure to attacks from those seeking to destabilise the Government and the UK in general, as well as potential attackers gaining an increased knowledge of the organisation's vulnerabilities, which could ultimately compromise the safety of the UK public. PHE also considers that the disclosure of this information could impede or prevent PHE from performing its functions effectively in the case of an emergency response."*

The Commissioner's view

23. In the Commissioner's view, such perfunctory submissions are rarely likely to demonstrate that an exemption applies and do not do so in the circumstances of this case.

24. Given the compelling importance of safeguarding national security, the Commissioner treats arguments in favour of section 24 with considerable respect and does not disregard them lightly.
25. That being said, given the importance of the exemption and the principles it protects, the Commissioner expects a public authority relying on such an exemption to be able to identify what it is about the specific withheld information that would be useful to malign individuals and how it might be used for malign purposes.
26. PHE's submissions are highly generic and give no indication of what it is that individuals would learn about PHE's capabilities or how that might reasonably be used to undermine public safety.
27. Furthermore, the Commissioner simply does not accept the withheld information contains "sensitive operational details", on the contrary, compared to what it has already disclosed, the withheld information is highly generic. The title of the Policy does give an indication of what its broad objectives are, but the Commissioner considers that there is nothing specific that can be linked to the Policy and she considers that the public would expect Government bodies to have a policy by this or similar name.
28. Whilst PHE did not specifically suggest this in its submissions, given the importance of safeguarding national security, the Commissioner considered herself whether, in matching the name of the Policy with the lessons learned in the Typhon report (which is not possible in the redacted version), a person could learn anything of significance about the Policy's weaknesses. She concludes that this would not be the case.
29. The lessons learned are, once again, generic. Whilst they do contain some references to organisational structures, they are not specific. Statements such as "Information and guidance...needs to be consistent throughout" do not represent some unique and penetrating insight into operational matters. In any case, the information was four years old at the point PHE responded to the request and relates to the situation in 2017, not 2021. Any weaknesses should, by now, have been addressed. The disclosed information does not indicate what specific improvements were made.
30. In the Commissioner's view, that alone would be sufficient to demonstrate that the exemption was not engaged. However, she also made some cursory checks to determine what (if any) information was already in the public domain.
31. Some very basic searches revealed that both the Activity and the Policy have already been referenced, by name, both in information that PHE

has already disclosed and in publicly available documents. The Commissioner therefore considers that the public at large and the complainant in particular are already aware of the existence of the Activity and the Policy and would learn very little more about either from disclosure of the withheld information.

32. The Commissioner is therefore satisfied that section 24 is not engaged in relation to this request and there is thus no need for her to consider the balance of the public interest.

Procedural Matters

33. Section 10 of the FOIA states that a public authority must disclose non-exempt information "promptly and in any event not later than the twentieth working day following the date of receipt."
34. PHE disclosed information outside of the 20 working day timeframe and, as noted above, at the point of this notice, had still not disclosed all the information it was obliged to disclose.
35. The Commissioner therefore concludes that PHE has breached section 10 of the FOIA in its handling of the request.

Other matters

36. The Commissioner is conscious that the pandemic has created considerable burdens for many public authorities and that this has impacted on their handling of information requests. For bodies like PHE, this effect is likely to be particularly significant.
37. Nevertheless, the Commissioner is obliged to record, not for the first time, some poor basic request-handling practice on behalf of PHE.
38. When considering whether information is exempt – particularly when considering whether a prejudice-based exemption would apply – a public authority should conduct basic checks to determine what relevant information is already in the public domain – not least because a public authority can rely on section 21 if the requested information is already available elsewhere.
39. The Commissioner is unlikely to accept arguments envisaging prejudice arising from the disclosure of information that has already been published – unless the public authority can put forward convincing reasons as to why the information being withheld is different to that already available.

Right of appeal

40. 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

41. 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.
42. 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

Roger Cawthorne
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