

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2022

Public Authority: Department of Health & Social Care (DHSC)
1st Floor
39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested correspondence between Matt Hancock and David Cameron.
2. The DHSC explained that it could not confirm whether or not the requested information was held, citing section 12(2) of FOIA (cost of compliance exceeds appropriate limit).
3. The Commissioner's decision is that the DHSC has failed to demonstrate that section 12(2) is engaged.
4. The Commissioner requires the DHSC to take the following steps:
 - Issue a fresh response to the requests, that do not rely upon section 12(2) of FOIA.
5. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 12 April 2021 the complainant requested:

"Please disclose any correspondence between Matt Hancock and David Cameron concerning the government's approach to genomics sequencing with specific but by no means exclusive consideration given to the role of Illumina in helping the government in the period 01/07/2019 to the present day.

Specifically, please conduct a search of Matt Hancock's personal phone, which is not exempt from disclosure under the FOIA if, as we understand, it was used to discuss government business."

7. On 19 April 2021 the complainant also requested:

"Please disclose all correspondence between Matt Hancock and David Cameron in the period 01/07/2019 to the present day.

Specifically, please conduct a search of Matt Hancock's personal phone, which is not exempt from disclosure under the FOIA if, as we understand, it was used to discuss government business.

Some examples of subjects that that would fall into the category of government business include the payment app Earnd, the genomics sequencing company Illumina and all ventures proposed by the financial company Greensill Capital."

8. On 19 May 2021 the DHSC responded and confirmed that the requests had been aggregated. It disclosed information, with redactions made under section 40(2) (personal information) of FOIA.
9. The DHSC confirmed that other information was being withheld under section 35(1)(a) (government policy) of FOIA because it 'will feed into policy development via the conclusions of the Boardman Review.'¹
10. The DHSC provided its internal review on 6 September 2021 and upheld its original position.

¹ [Findings of the Boardman review into pandemic procurement - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100222/Findings_of_the_Boardman_review_into_pandemic_procurement_-_GOV.UK_(www.gov.uk).pdf)

Scope of the case

11. The complainant contacted the Commissioner on 27 July 2021 to complain about the way that their requests for information had been handled.
12. The complainant had two concerns. Firstly, that the DHSC might have withheld the personal data of either David Cameron or Matt Hancock in the redactions it had made under section 40(2). The complainant made it clear that they would be happy for the personal data of any other third party to be withheld.
13. Secondly, the complainant was concerned that the government had disclosed communications between Michael Gove and David Cameron after the announcement of the Boardman Review.² Therefore, the DHSC's position was inconsistent.
14. On 13 January 2022 the Commissioner contacted the DHSC and drew its attention to the complainant's concerns.
15. On 7 June 2022 the DHSC wrote to the complainant directly and explained that it was releasing all information that fell within the scope of the request. Again, redactions were made under section 40(2).
16. However, the complainant still had concerns that the DHSC might have withheld the personal data of either David Cameron or Matt Hancock in the redactions it had made under section 40(2).
17. The complainant also expressed concerns that no WhatsApps or text messages had been disclosed in response to their requests. The complainant noted that their requests specifically requested that searches were conducted on Matt Hancock's personal phone.
18. Therefore the Commissioner returned to the DHSC and asked it questions about the possibility that official information, that fell within the scope of the requests, may be held in non-corporate communication channels.
19. On 11 August 2022 the DHSC wrote to the Commissioner and confirmed, "as part of this review, it has come to light that none of the documents released technically fell into scope; that is, none of the documents were directly between the two parties as had been requested, although the narratives contained within them were about the subject matter named by the complainant who may have found

² [Communications with David Cameron - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/communications-with-david-cameron)

them of some interest." The Commissioner notes that this change in position has not been confirmed to the complainant which he would have expected.

20. The Commissioner did not receive unredacted copies of the information that had been disclosed in response to the requests until 11 August 2022. Therefore, he had no way of verifying whether the information fell within scope or not.
21. However, he is in agreement with the DHSC that, since none of the information has been exchanged between David Cameron or Matt Hancock, it does not fall within the scope of the requests. Therefore, he won't consider the DHSC's application of section 40(2) any further.
22. On 11 August 2022 the DHSC also confirmed to both the Commissioner and the complainant that it would exceed the appropriate cost limit to ascertain whether any information that actually fell within the scope of the request was held in any non-corporate communication channels.
23. Therefore, the scope of the Commissioner's investigation is to determine whether the DHSC is entitled to apply section 12(2).

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

24. 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 limit.
25. Section 12(2) states that, if a public authority estimates that it would exceed the appropriate limit to confirm whether or not the requested information is held it does not have to deal with the substance of the request.
26. When considering if section 12 applies, a public authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations')³. These are set out at Regulation 4(3) and are:
 - (a) determining whether it holds the information,

³ [The Freedom of Information and Data Protection \(Appropriate Limit and Fees\) Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.”
27. When considering section 12, public authorities should use a flat rate of £25 per hour. This is even the case if a public authority is employing external contractors. This is confirmed in the Commissioner’s guidance⁴ and in Regulation 4(4) of the Regulations.
28. This rate works out at 24 hours work, or £600, for central government department such as the DHSC and 18 hours work, or £450, for all other public authorities.
29. The DHSC has explained to the Commissioner, ‘private channels of communication (e.g. WhatsApp messages) for the Secretary of State (SofS) for the period in question are held by a third party on behalf of the department, and to access the information works out extremely costly.’
30. The DHSC has elaborated that ‘It has been estimated that identifying relevant data linked to a request will take a minimum of 3 hours work. Additionally, to refine a data set to specific time periods and custodians, it has been estimated to take a minimum of 6 hours and finally, it would take a further 6 hours to identify and extract the requisite information. DHSC would be charged £150 excl. VAT per hour by the third-party company, totalling £2,250, which exceeds the cost limit.’

The Commissioner’s view

31. Any estimate that a public authority provides must be realistic and based on cogent evidence. The Commissioner has no idea where the DHSC has got the estimate of 15 hours from because it has given no further information about the third party in question or its systems.
32. Furthermore, the DHSC has based its estimation of the figure of ‘£150 exl VAT per hour.’ To reiterate, the ‘appropriate limit’ as prescribed by the Regulations is based on the charge of £25 per hour.

⁴ [costs of compliance exceeds appropriate limit.pdf \(ico.org.uk\)](#)

33. The Commissioner's guidance⁵ explicitly states 'A public authority should note that even if it uses contract or external staff to carry out some or all of the permitted activities, it can only include their time at the rate of £25 per hour irrespective of the actual cost charged or incurred.'
34. The appropriate limit, for the purposes of section 12, is defined by the Regulations and, since the DHSC has disregarded the rate laid out in the Regulations, it follows that section 12(2) cannot apply.
35. Therefore the Commissioner considers that the DHSC has failed to demonstrate that section 12(2) is engaged and he requires the DHSC to take the steps outlined in paragraph 4 of this notice.

Other matters

36. In July 2021, the Commissioner received complaints about Ministers and other government officials using private communication channels, including personal emails and WhatsApp, to conduct official business. Many of these complaints related to the DHSC.
37. The Commissioner at the time, Elizabeth Denham, announced an investigation into the DHSC which looked at the use of private correspondence channels by Ministers and other DHSC staff.
38. At the outset of the investigation, and within the report, the Commissioner emphasises that the use of private platforms does not, in itself, breach freedom of information rules. However, the Commissioner stressed that where public authorities use private platforms, they should have sufficient controls in place to ensure that information can be retrieved easily when requested.
39. The Commissioner understands that the DHSC's Records Management policy prohibits the use of private communication channels for work purposes, other than in exceptional circumstances agreed by the DHSC's Information and Security Team. During this investigation the DHSC confirmed to the Commissioner that it is not its practice for private communication channels to be used and, even during the pandemic, Ministers and staff were expected to comply with the Records Management Policy.
40. However, the DHSC has also assured the Commissioner that 'When officials are in office it is standard practice to search correspondence

⁵ [costs of compliance exceeds appropriate limit.pdf \(ico.org.uk\)](#)

channels and personal devices.' Again, the use of private communication channels does not, in itself, breach freedom of information rules. Though it might, as the above suggests, represent a failure to comply with the DHSC's Records Management Policy.

41. The DHSC went on to explain that it reviewed the audit trail in relation to the requests 'but we unfortunately cannot find evidence that the Secretary of State's (SofS) personal device was checked. To be clear we are not confirming that it was not checked, but equally we cannot confirm that it was checked.'
42. The DHSC explained that the member of staff who originally handled the requests has now left the department and a second member of staff confirmed that they did not reach out to the Secretary of State personally but 'official SofS email accounts by the SofS's Private Secretary and Correspondence Manager' were checked.
43. On 22 July 2022 the Commissioner published a report titled 'Behind the screens – maintaining government transparency and data security in the age of messaging apps⁶⁶.' The report discussed the outcome of the Commissioner's investigation.

⁶⁶ [Behind the screens: ICO calls for review into use of private email and messaging apps within government | ICO](#)

Right of appeal

44. 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

45. 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.
46. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF