# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** 5 December 2022

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

## Decision (including any steps ordered)

1. The complainant has requested information from the Department of Health and Social Care (DHSC) about communications between Matt Hancock and another individual during a specified timeframe. The DHSC provided some information but withheld other information under section 40(2), section 43(2) and section 35(1)(d) of FOIA. During the Commissioner's investigation the DHSC withdrew its reliance on section 43(2) and provided the information and the complainant accepted the application of section 35(1)(d). During the Commissioner's investigation, the DHSC also cited section 14(1) regarding WhatsApp messages.

2. The Commissioner's decision is that the DHSC has not demonstrated that complying with the request in terms of the WhatsApp messages would impose a grossly oppressive burden and consequently it is not entitled to rely on section 14(1). However, he finds that the DHSC was correct in citing section 40(2).

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Carry out the relevant searches and, having done so, provide a response to the complainant that does not rely on section 14(1), noting the Commissioner's position on section 12 as set out later in this decision.

4. 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**

5. On 23 February 2021 the complainant made the following request for information from the DHSC:

> "Dear FOI/EIR Team I would like to request the following information under the Freedom of Information Act and the Environmental Information Regulations (EIRs).
>
> (i) Please note that I am only interested in that correspondence and communications generated between 1 March 2020 and 1 December 2020
>
> (ii) Please note that the reference to written correspondence and communications in the questions below should include all traditional forms of correspondence such as letters memos and faxes, all emails irrespective of whether they were sent through private or official accounts and all messages sent through encrypted messaging services including but not limited to WhatsApp.
>
> (iii) It is likely that some of this correspondence and communication will relate to [name redacted]'s company [name redacted] and services that [name redacted] and or his company provided in relation to the fight against Covid-19. I should stress, however, that I am interested in all correspondence and communication irrespective of the subject matter.
>
> (iv) Please note that I am only interested in communications and correspondence which involves the two named individuals and not their private offices acting on their behalf [names and identifiable personal data redacted].
>
> Please note that the Environmental Information Regulations cover information relating to the 'the state of human health and safety and conditions of human life.'
>
> 1....During the aforementioned period did [name redacted] write to and communicate with Matt Hancock?
>
> 2....If the answer to question one is yes can you please provide a copy of this written correspondence and communication.
>
> 3...During the aforementioned period did Matt Hancock write to or communicate with [name redacted]?
>
> 4...If the answer to question three is yes can you please provide a copy of this correspondence and communication.

> 5...During the aforementioned period did the two men speak to each other on the telephone or via any video communication system including but not limited to Zoom. If the answer is yes, can you, please state the date when these conversations/meetings took place. In the case of each conversation/meeting can you state whether it was a phone conversation or a Zoom meeting or similar. In the case of each conversation/meeting can you state the duration of the conversation. In the case of each conversation/meeting can you provide a recording of the actual conversation (s)/ meeting. If no recording exists, can you, please provide a transcript of the conversation (s) /meeting or any notes compiled in relation to the conversation or meeting. Please do provide recordings and transcripts even if other individuals joined Mr Hancock and [name redacted] in these meetings/conversations.
>
> 6...If information relevant to this request has been destroyed can you please provide the following details. In the case of each piece of destroyed correspondence and communication can you state when it was destroyed and why. In the case of each piece of destroyed documentation and communication can you please provide details of author, recipient and date generated. In the case of each destroyed piece of correspondence and communication can you provide a brief outline of its contents. if destroyed documentation of any kind continues to be held in another form, can you please provide a copy of that destroyed correspondence and communication."

6. The complainant received no response to his request and complained to the Commissioner who issued a decision notice IC-103500-W8P5 on 15 June 2021 requiring the DHSC to issue a substantive response.

7. The DHSC subsequently responded to the complainant on 18 June 2021. In its response the DHSC provide some redacted information and withheld other information under section 35(1)(d), section 40(2) and section 43(2) of FOIA.

8. The complainant requested an internal review on 27 June 2021 because they were not content with the response. They queried the redactions made, and stated that they believed that more information was held.

9. The DHSC provided an internal review on 30 September 2021 in which it maintained its original position.

## Scope of the case

10. The complainant contacted the Commissioner on 3 August 2021 to complain about the way their request for information had been handled.

11. The Commissioner sent his investigation letter to the DHSC on 13 April 2022.

12. The DHSC should have responded by 16 May 2022 but asked for an extension until 30 May 2022. The Commissioner agreed to this extension on the basis that he would need a response by then.

13. On 26 May 2022 the DHSC suggested that it would require longer to respond.

14. The Commissioner wrote back to the DHSC on 27 May 2022 stressing that 13 June 2022 was the longest response time acceptable.

15. On 13 June 2022 the DHSC emailed the Commissioner, stating that it was waiting for clearance and would be unable to respond.

16. The Commissioner chased a response on 28 June 2022. On the same day the DHSC acknowledged the delay but was still unable to respond.

17. Despite updates on 29 June and 14 July 2022 , the DHSC was unable to provide a response.

18. On 20 July 2022 the DHSC told the Commissioner that it hoped to provide a response early the following week.

19. The Commissioner contacted the DHSC on 26 and 27 July 2022 when he did not receive a response. DHSC then requested a further extension.

20. On 29 July 2022 the DHSC provided reasons why it was, as yet, unable to respond.

21. The Commissioner telephoned the DHSC on 1 August 2022 to discuss the progress of the complaint and the unacceptable delays. The DHSC said that some information that it had withheld under section 43(2) would be released shortly with suitable redactions for personal data. However, it had not considered attachments to the emails it was providing and they remained to be considered.

22. The DHSC did release the information it had previously been withholding under section 43(2) on 3 August 2022 because it no longer believed it to be in the public interest to withhold it. Three attachments were withheld under section 40(2) and three attachments remained under consideration. Four attachments were disclosed with redaction for personal data (section 40(2)).

23. The DHSC also stated the following to the complainant:

> "For your information, to undertake a further review into the former Secretary of State's private channels of communication (e.g. WhatsApp messages) would result in a section 12(2) refusal. It may help if I explain that the WhatsApp messages are not held by DHSC. These are held by a third party, and to undertake an audit of the content, and locate messages about specific conversations would exceed the cost limit. Our process to select information for permanent preservation involves an initial review to appraise the content, which happens at eight years after creation, followed by a second review at fifteen years."

24. This was followed by five holding emails over the next month from the DHSC when the Commissioner chased a further response.

25. The DHSC finally copied in the Commissioner to a further response to him on 15 September 2022 when it disclosed the three attachments it had been considering with redaction for names and contact details.

26. On 16 September 2022 the Commissioner asked the DHSC to provide the three attachments that had been withheld under section 40(2) as he made the assumption that they contained more than just names and contact details. He also asked for confirmation that a generic email inbox was what had been withheld under section 35(1)(d). The Commissioner also questioned the DHSC's reference to section 12(2) with regard to why WhatsApp messages could not be searched and sent a link from the ICO's website for clarification Behind the screens: ICO calls for review into use of private email and messaging apps within government | ICO. This was followed up on 20 September 2022 with further questions regarding WhatsApp and searches that had been carried out.

27. On 23 September 2022 the DHSC acknowledged this email and explained that it had received a recent decision notice[1] that meant that it was now citing section 14, instead of section 12, regarding WhatsApp messages. The Commissioner asked for the three remaining attachments that had been entirely withheld under section 40(2) FOIA. These were provided later.

28. The DHSC sent its final response to the Commissioner on 4 November 2022 in which it provided its argument for citing section 14(1) to the requested information. It also confirmed that its citing of section 35(1)(d) (the operation of a ministerial office) was purely in respect of a generic email address.

[1] ic-120427-m3h5.pdf (ico.org.uk)

29. The complainant subsequently confimed that they would not continue their complaint regarding section 35(1)(d) of FOIA on the strength of this.

30. The Commissioner therefore considers the scope of this case to be the DHSC's citing of section 40(2)(personal information) to either withhold entirely or redact information, and the DHSC's citing of section 14 to the WhatsApp messages.

## Reasons for decision

### Section 14(1) – vexatious requests

31. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.

32. The word "vexatious" is not defined in FOIA. However, as the Commissioner's guidance on section 14(1)[2] states, it is established that section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

33. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.

34. However, the ICO recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.

35. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), Dransfield v Information Commissioner [2012] UKUT 440 AAC, (28 January 2013). Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.

36. Dransfield established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

[2] https://ico.org.uk/for-organisations/dealing-with-vexatious-requests-section-14/

37. The four broad themes considered by the Upper Tribunal in Dransfield were:

    - the burden (on the public authority and its staff);
    - the motive (of the requester);
    - the value or serious purpose (of the request); and
    - any harassment or distress (of and to staff).

38. The DHSC cited section 14 because of the burden it felt searching the WhatsApp messages imposed on it and not for any other reason. In order to reach a decision in this matter, the Commissioner also asked questions about the searches that had been carried out that were fundamental to the citing of section 14(1) in this instance.

39. The DHSC explained that it had carried out searches in official Secretary of State email accounts. These were conducted by the Private Secretary and the Correspondence Manager. The Secretary of State was also asked to carry out searches on their personal device. There is no record of this search which was likely to have been requested verbally. Further searches were conducted as part of the Commissioner's investigation with the DHSC's Records team and no further information has been found. The search terms were provided to the Commissioner.

40. By way of context, the DHSC explained that, if a non-corporate communication channel is used in what it describes as "exceptional circumstances", the officials concerned are responsible for ensuring that any information or communications regarding policy/decision-making are captured into the DHSC's systems by copying, forwarding, by screenshot or exporting. The alternative is a separate message, note or document replicating or recording the substance of the original communication created on the DHSC system.

41. The DHSC is confident therefore that searches would have captured any information that was recorded on a non-corporate communication channel "within the DHSC environment". Information copied over from WhatsApp would not necessarily be a screenshot in the format of the app. The DHSC referred the Commissioner to page seven of the Commissioner's Behind the Screens report where it stated that there was clear evidence that ministers regularly copied information to government accounts to maintain a record of events.

42. The DHSC then moved on from context to the complainant's view that it holds more information, specifically in WhatsApp searches. It argues that the only further searches that could be carried out are in relation to Information Notices (INs) the Commissioner issued in July 2021[3]. The messages are stored by a third party due to the technical capabilities it holds. This service pertains only to WhatsApp messages that were provided to the Commissioner "following the IN that was placed as a consequence of the Behind the Screens report" and does not apply to all WhatsApp messages.

43. The DHSC therefore refused a further search by virtue of section 14(1) FOIA, considering the request to be vexatious. It contends that the request is vexatious because it is burdensome and would cause a disproportionate or unjustified level of disruption. This is due to searches it would require a third party to undertake at a substantial expense to the DHSC as it does not store the information itself.

44. In order to substantiate this view, the DHSC provided a quote from the third party. The quote was its fee for identifying relevant data; refining the dataset(s) to specific time periods and custodians, and; conducting data analysis to extract only relevant government associated communication. This would take 15 hours at a cost of £2,250 (excluding VAT). In other words, £150 per hour excluding VAT. The fees limit for section 12 is £25 per hour. The Commissioner understands that the quote is for one search term.

45. In order to comply with the Commissioner's legal notice, the DHSC engaged a specialist service as it does not have the technology required to support compliance with the information notices. This is because the information is unstructured and therefore requires manual processing. By manual it means an individual has to read each piece of data. The quote provided is for a 'single "simple request"'. The cost could be higher, depending on the complexity of the request and with VAT included, increasing the financial burden. The search may also prove unfruitful but the cost remains.

46. The DHSC supports its burdensome argument by quoting from the Upper Tribunal's (UT) decision Cabinet Office v Information Commissioner & Ashton [2018] UKUT 208 (AAC)[4]. It explained that '"the First Tier Tribunal did not accept the Cabinet Office's position that burden alone can be a reason to invoke section 14, reaching the

[3] FOI enforcement notices, information notices and practice recommendations | ICO

[4] GIA_2782_2017-00.pdf (publishing.service.gov.uk)

conclusion that "where a clear and substantial public interest in the request has been established, S14 cannot be invoked simply on the grounds of resources".' The UT disagreed,

> '…referencing CP v Information Commissioner [2016] UKUT 427 (AAC), which also addresses the expected counter-argument that DHSC may face - that the public interest in this request outweighs the burden on DHSC of conducting the aforementioned searches:
>
> "The law is thus absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument." (Paragraph 27).'

47. The DHSC acknowledges that the example refers to resources when viewed as staff time but that the same principle can be applied to monetary costs that the DHSC incurs. It argues that spending a "substantial amount of taxpayer's money on a speculative search for information that may or may-not be held does not represent a responsible use of public funds". For that reason the request is an unjustified burden. Further searches would be "purely speculative" and "an inappropriate use of public funds", though it acknowledges that there is public interest in the subject.

**The Commissioner's view**

48. Is the DHSC entitled to cite section 14(1) for refusing to search the information in the WhatsApp messages which could fall within scope, on the basis that searching for that information will place a significant financial burden on the authority, making the request vexatious?

49. In Dransfield at paragraph 10, the UT explained the purpose of the disentitlement under section 14 is to "protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA".

50. Case law says that on using section 14 for reasons of burden alone, in Cabinet Office vs Information Commissioner and Ashton [2018] UKUT 208 (AAC), the UT said that,

> "[I]n some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested" (paragraph 27).

51. In order to be able to rely on section 14, the authority must be able to first demonstrate that the request meets the relevant high threshold for vexatiousness.

52. This was made clear by the Court of Appeal in Dransfield, where Lady Justice Arden explained at paragraph 72, " I would wish to qualify that aim [of section 14] as one only to be realised if the high standard set by vexatiousness is satisfied".

53. In Soh v Information Commissioner and Imperial College London [2016] UKUT 249 AAC at paragraph 92, the UT interpreted this as meaning that

> "the issue of protection of the resources of the authority can be a material factor in determining whether a request is vexatious. However, she [Justice Arden] is emphasising the high hurdle to be crossed before a finding that a request is vexatious can be based on such a factor."

54. In the context of a single burdensome request, this means the authority needs to make a holistic assessment which takes into account all the relevant circumstances specific to the case and consider them objectively in the relevant context. Amongst the relevant circumstances, the authority can take into account the way in which it chose to store the relevant information and the cost retrieving it would entail. This is consistent with the approach taken in the context of section 12.

55. The Commissioner would expect the DHSC to have considered the following in order to make an holistic assessment when citing section 14(1):

- The amount of information asked for and the extent to which this would constitute a disproportionate use of FOIA in the sense of a "manifestly unjustified, inappropriate or improper use of a formal procedure" (Lee v Information Commissioner and King's College Cambridge EA/2012/0015[5] as approved by the UT in Dransfield at paragraph 27);

- The extent to which the request has value or a serious purpose – the higher the public interest served by the request, the higher the threshold for vexatiousness would be. This consideration would not apply in the context of section 12 where the authority is entitled to disregard public interest

[5] IN THE UPPER TRIBUNAL (tribunals.gov.uk)

considerations if it is satisfied that the cost of compliance exceeds the appropriate limit;

- The likelihood that the information to be searched matches the description of the requested information;

- The likelihood that the information contains exempt information – the authority would need to be able to substantiate any such claims if asked by the Commissioner;

- Any advice and assistance they have provided to the applicant to help them make a less burdensome request. As explained by the UT in Ms McInerney v Information Commissioner and Department for Education [2015] UKUT 0047 (ACC) (29 January 2015), the fact that a public authority considers a request to be vexatious does not mean that they are "entitled to ignore section 16". (paragraph 56)

56. It is the Commissioner's conclusion that, when refusing a request on grounds of the (financial) burden that complying with the request would impose, the authority should look at applying section 12 in the first instance. In this case, the Commissioner acknowledges that he had previously told the DHSC that it could not rely on section 12 regarding the WhatsApp messages because the DHSC had ignored the restrictions of the hourly rate as set out in the fees regulations. He also acknowledges that, in theory, it is possible for an authority to rely on section 14(1) when the main or only ground for refusing the request as vexatious is the burden that responding to the request places on the resources of the authority.

57. The authority can take into account the way in which it chose to store the relevant information and the cost retrieving it would entail but this must be weighed and considered with other relevant factors as set out in the bullet points in paragraph 55, to demonstrate that the request constitutes a disproportionate use of FOIA. The Commissioner does not accept that the DHSC did conduct a holistic objective assessment of the request in order that it could assess its vexatiousness objectively. He considers that the DHSC was overly reliant on the cost that searching the remainder of the information would place on it.

58. In conclusion, there is a high threshold to be met and the Commissioner's view is that section 14 should not be used as a way to sidestep section 12 and the Fees Regulations 2004. His view is that the DHSC has turned to section 14(1) because it had been unable to use section 12 in this instance. Accepting the DHSC's reliance here would set a precedent that risks making the fees regulations redundant.

59. The DHSC has also not demonstrated how it meaningfully engaged with the applicant to provide advice and assistance.

**Section 40 personal information**

60. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

61. In this case the relevant condition is contained in section 40(3A)(a)[6]. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

62. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

63. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

64. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

65. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

66. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

67. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

[6] As amended by Schedule 19 Paragraph 58(3) DPA

68. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to several data subjects. The names and contact details of the data subjects is clearly information that both relates to and identifies those concerned. The DHSC has recently provided three items that were entirely withheld which consist of information that is not just the names and contact details of internal and external staff. The DHSC has stated that they relate to information and statements shared by non-DHSC staff. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

69. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

70. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

71. Article 5(1)(a) of the GDPR states that:

> "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

72. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

73. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

74. The Commissioner has also identified some limited amount of special category data in the withheld information. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

75. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

76. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

77. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

78. He has then moved on to consider the majority of the withheld personal data that is not special category.

**Lawful processing: Article 6(1)(f) of the GDPR**

79. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

> "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"[7].

80. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

i) **Legitimate interest test**: Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test**: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test**: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

81. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

**Legitimate interests**

[7] Article 6(1) goes on to state that:-
"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

82. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

83. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

84. The Commissioner considers that the complainant has a legitimate interest in this information which they believe to have wider societal benefits.

**Is disclosure necessary?**

85. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

86. From the point of view of the complainant who does not know the content of the withheld information, disclosure is necessary. However in widening the request beyond its immediate focus (the communications between Matt Hancock and a third party) the request has drawn in some random information that happened to be received within the specified timeframe and so fell within scope. It seems that the complainant intended to extend their request in a catch-all manner which might be considered to lessen the legitimate interest.

87. Nevertheless, the Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims stated.

**Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

88. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

89. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

90. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

91. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

92. The Commissioner notes that the DHSC has disclosed emails between Matt Hancock and the named individual. In respect of the withholding of names, email addresses and telephone numbers of other individuals unnamed in the request, the DHSC argues that this information is personal data that should not be disclosed as it relates to internal and external individuals. As regards the remaining personal data, the DHSC has stated that (in respect of the three withheld items) it is unable to contact the individuals to ask for their consent to share the withheld information as it was passed on to them by someone external to the DHSC. The DHSC is unable to assess any assurances these individuals may have been given with regard to their information. The DHSC argues that some of the data is very personal and it is unlikely that the data subjects wrote it expecting it to be shared or end up in the public domain. Having considered the withheld personal information, the Commissioner's view is that disclosing it would cause damage or distress to the individuals concerned which outweighs any legitimate interests in transparency and accountability.

93. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

94. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

**The Commissioner's view**

95. The Commissioner has therefore decided that the DHSC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

**Section 17 – refusal of request**

96. Section 17(1) provides that if a public authority wishes to refuse a request, it must issue a refusal notice within 20 working days, citing the relevant exemption(s).

97. DHSC breached section 17 of FOIA as it failed to issue its refusal notice within 20 working days of receiving the request.

**Other matters**

98. The Commissioner has already issued a decision notice noting a breach of section 10 in IC-103500-W8P5. However, he also notes that further information was released by the DHSC after the time for compliance.

99. Section 47 of FOIA places an obligation on the Information Commissioner to promote good practice by public authorities, including in relation to the provisions of the section 45[8] and section 46[9] Code of Practice.

100. In this case, DHSC said that it engaged a specialist service in order to extract the relevant information required to comply with the information notices issued to it in July 2021 and provide the information to the ICO.

101. DHSC also stated that it has a clear policy in place advising officials in the case of non-corporate communication channels.

102. The Commissioner accepts that he may not have the full picture and it is possible that there is a perfectly reasonable explanation as to why DHSC

[8] CoP FOI Code of Practice - Minor Amendments 20180926 .pdf (publishing.service.gov.uk)

[9] Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 (publishing.service.gov.uk)

left the information with the third party. On the face of it though, this shows poor record management which does not accord with the provisions of the section 46 Code of Practice nor with DHSC's own policies and procedures on record management.

103. After hiring the specialist service in order to extract the relevant information to comply with the information notices, DHSC should have followed its own procedure and ensured the creation of a relevant audit trail or local record on its systems.

104. This would have allowed DHSC to regain control over the information, thereby avoiding the need to engage the specialist service every time the authority needs access to the information, including in order to comply with statutory obligations under FOIA.

105. Finally, the Commissioner is concerned by the DHSC's poor engagement with him during this investigation. Though he appreciates the constraints on the DHSC, he expects better engagement in future or he will need to take a firmer approach.

## Right of appeal

106. 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

107. 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.

108. 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 .....**

**Janine Gregory**
**Senior Case Officer**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**