

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 August 2022

**Public Authority:** UK Health Security Agency  
(Executive Agency of the Department of Health and Social Care)

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### **Decision (including any steps ordered)**

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1. The complainant requested copies of internal correspondence relating to a previous appeal he'd made to the Information Rights Tribunal along with any review or assessment of the appeal outcome. The UK Health Security Agency ("UKHSA") stated that it did not hold some of the information and refused the remainder of the request as vexatious.
2. The Commissioner's decision is that UKHSA has failed to demonstrate that the request was vexatious and consequently was not entitled to rely on section 14(1) of FOIA to refuse it.
3. The Commissioner requires UKHSA to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response, to parts 1 and 2 of the request that does not rely on section 14(1) of FOIA.
4. UKHSA 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.

## Background

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5. This request was originally made to Public Health England (PHE), an executive agency of the Department of Health and Social Care (DHSC). PHE was abolished in 2021 with its health protection functions being transferred to the newly created UKHSA – which is the body that dealt with the complaint. The Commissioner notes that neither body is a public authority in its own right and that, throughout, the public authority ultimately responsible for the request has been the DHSC. However, for the purposes of consistency, the Commissioner has referred to UKHSA as the body which dealt with both the request and complaint.
6. In 2017, the complainant in this case made two requests to PHE seeking information relating to the 2015 Ebola outbreak in west Africa. Dissatisfied with the response received, he complained to the Commissioner.
7. The Commissioner issued two decision notices (FS50713226<sup>1</sup> and FS50715751<sup>2</sup>) in which he found multiple failures, by PHE to identify information relevant to the request. The Commissioner was also extremely critical of the quality of PHE's engagement with his investigation. The complainant appealed that decision to the First Tier Tribunal.
8. The Tribunal promulgated its decision on 25 May 2021. It allowed the complainant's appeal in part and located further information that PHE had previously failed to identify. The Tribunal, like the Commissioner was particularly critical of the manner in which PHE had engaged with the complainant and the Commissioner, commenting that:

“we cannot leave this case without passing comment on PHE's behaviour in response to [the complainant]'s requests and the Commissioner's many communications. We have quoted from the [Commissioner's decision] at some length because it tells an extraordinary and disturbing story of a woeful failure on the part of a substantial public authority to live up to its obligations in relation to freedom of information. It is hard to see its conduct, towards [the

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259867/fs50713226.pdf>

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2260132/fs50715751.pdf>

complainant] and the Commissioner, as anything other than contemptuous. If that perception is unfounded, it might be thought that the only other explanation lies in a most unhealthy combination of operational incompetence and inadequate leadership. **We profoundly hope that PHE will make learning lessons and improving its systems and practices a high priority.** What happened here should never be repeated.” [emphasis added]

## Request and response

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9. On 27 May 2021, the complainant wrote to PHE and requested information in the following terms:

“I would like the following documents held by PHE since the 1st November 2018 until today regarding the tribunal appeal reference EA/2018/0262V:

- [1] all of your internal communications/correspondence relating to this appeal
  - [2] all the correspondence of PHE with other bodies relating to this appeal, apart from correspondence with its lawyers
  - [3] all documents outlining actions that PHE has taken, or plans to take, in order to learn lessons from the mistakes outlined in the judgment to the appeal and to improve its systems and practices in that regard.”
10. PHE responded on 23 July 2021. It denied holding information within the scope of element [3] and refused the remainder of the request as vexatious.
11. Following an internal review PHE wrote to the complainant on 24 August 2021. It upheld its original response.

## Scope of the case

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12. The complainant contacted the Commissioner on 30 August 2021 to complain about the way his request for information had been handled.
13. UKHSA provided its submission, explaining why it considered the request to be vexatious, on 21 July 2022. Alongside its submission, it had also identified two documents that appeared to constitute UKHSA’s review of the Tribunal outcome – although they appeared to post-date the request.

14. The Commissioner contacted the complainant and asked if he would be prepared to withdraw his complaint if UKHSA would disclose these documents to him. The complainant was not opposed to this, but wished to see the documents before he would consider withdrawing.
15. The Commissioner therefore contacted UKHSA on 11 August 2022 to ask if it would be prepared to disclose the documents it had identified. He asked for a response, either way by 18 August 2022. The Commissioner has, at the date of this notice, received no response (or even acknowledgement) from UKHSA and, given the age of the complaint, he considers that a decision notice is now appropriate.
16. The Commissioner considers that the scope of his investigation is to determine whether the request was vexatious.

### **Reasons for decision**

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17. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

18. Section 14 of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

19. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.
20. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
21. Dransfield also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the

requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).

22. The Commissioner has published guidance on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
23. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: "The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies".
24. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
25. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

### **UKHSA's position**

26. UKHSA maintained its stance that the request was vexatious. It argued that disclosing the requested information would be tantamount to re-opening a Tribunal case that had already been decided. Such an action would be an inappropriate use of the FOIA process.
27. In addition, UKHSA argued that much of the information would be covered by legal professional privilege or would engage section 36 of FOIA (prejudice to the effective conduct of public affairs).

### **The complainant's position**

28. The complainant (who is a journalist) argued that he wanted the information because he wished to write a news article on the way his original request had been handled.

## **The Commissioner's view**

29. In the Commissioner's view, a public authority must meet a high hurdle if it is to be relieved of its obligation to provide information (or even determine what relevant information it holds) – which is the effect of section 14(1) of FOIA. In his view, UKHSA has not demonstrated that that high hurdle is met.
30. The Commissioner notes the implication of UKHSA's argument: that this is a private concern of the complainant, unworthy of any significant diversion of resources. As a general rule, he agrees that it is inappropriate to use the FOIA to re-open, re-argue and re-litigate matters that have already been decided.
31. However, each case must turn on its own individual facts and the Commissioner must consider whether there are exceptional circumstances that would justify a departure from usual practice. In his view, there are exceptional circumstances.
32. It is highly unusual for a public authority to be subject to the sort of scathing criticism from a Tribunal judge that is set out at paragraph 8 of this notice. That comment followed on from criticism from the Commissioner in the two decision notices identified at paragraph 7. When a judge accuses a public authority of being, at best, incompetent and, at worst, contemptuous, there is a strong public interest in understanding what went wrong and why.
33. The Commissioner accepts that, due to the nature of the Tribunal process, it is likely that at least some of the information that UKHSA holds will be subject to legal professional privilege. However, UKHSA has given no indication of how much information it holds within the scope of the request and therefore the Commissioner is unable to reach any conclusion as to the diversion of resources that would be required to separate out such information or the value of the residual information once that process has been completed.
34. It is far from clear to the Commissioner that he would conclude that, even if section 36 were engaged, the balance of the public interest would favour maintaining that exemption – given the Tribunal's comments. He is therefore not satisfied that it is reasonable for UKHSA to have regard to the burden of filtering out such information – although, once again, it is not clear how much information that exemption would cover. If UKSHA wishes to maintain that section 36 applies, it will have the opportunity to defend that position.
35. Finally, the Commissioner notes that some of this information would be the complainant's own personal data. It is not clear whether UKHSA has

considered this request as a Subject Access Request. Issuing a fresh response gives UKHSA the opportunity to do so.

36. The Commissioner does not consider that UKHSA has demonstrated that the request is vexatious and hence UKHSA is not entitled to rely on this exemption.
37. It will be for UKHSA to determine, in the first instance, whether the documents it drew to the Commissioner's attention on 21 July 2022 fall within the scope of the original request.

### **Other matters**

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38. Whilst he cannot compel it to do so as part of a FOIA decision notice, the Commissioner would strongly recommend that UKHSA also consider the request under SAR and respond in accordance with its data protection obligations.

## Right of appeal

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39. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**