

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2022

Public Authority: The 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 (DHSC) relating to SARS and the National Risk Register. The DHSC refused to comply with the request citing section 12(1) (cost limit) of the FOIA.
2. The Commissioner's decision is that the DHSC was entitled to refuse to comply with the request in accordance with section 12(1) of the FOIA. He also finds that the DHSC met its obligations under section 16(1) of the FOIA to offer advice and assistance.
3. The Commissioner does not require the DHSC to take any steps.

Request and response

4. On 19 July 2021, the complainant wrote to the DHSC and requested information in the following terms:

“The National Risk Register (NRR) published by the Cabinet Office in 2008 states that:

‘New and Emerging Infectious Diseases 2 `2.40 The Department of Health has developed a contingency plan for dealing with SARS and this would provide the basis for dealing with any future outbreaks should the disease re-emerge. This builds on our generic responses to outbreaks of infectious diseases and the specific lessons learned during the SARS outbreak’. (My emphasis)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969213/20210310_2008-NRR-Title-Page_UPDATED-merged-1-2.pdf p.15

The assertion that the Department of Health has developed a contingency plan for dealing with SARS is also reiterated in the NRR for 2010, paragraph 2.14,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/211853/nationalriskregister-2010.pdf: the NRR for 2012 at paragraph 3.16,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/211858/CO_NationalRiskRegister_2012_acc.pdf and the NRR for 2015 at para 2.10.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/419549/20150331_2015-NRR-WA_Final.pdf.

There is however no mention of SARS in the NRR for 2017. Indeed, in the ‘Human Diseases, what are the risks?’ Section of the 2017 NRR it is stated that:

‘The likelihood of an emerging infectious disease spreading within the UK is assessed to be lower than that of a flu pandemic’.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644968/UK_National_Risk_Register_2017.pdf p.34

However SARS-CoV-2 (Covid-19), a new and emerging disease, has damaged the health of the citizens of this country on a cataclysmic scale with over 128,000 people dying through being infected. As a result the statement in the 2017 NRR, quoted

above, can be seen to have been wrong. Therefore would you please send me copies of all electronic and paper records that discuss the reasons for the Department of Health drawing that erroneous conclusion?"

5. The DHSC responded on 16 August 2021. It informed the complainant that it was aggregating the request with another request submitted to the DHSC by the complainant on the 19 July 2021. The DHSC stated that it was refusing to comply with both requests and cited section 12(1) (cost limit) of the FOIA as its basis for doing so.
6. On 23 August 2021, the complainant wrote to the DHSC to request an internal review.
7. Following an internal review, the DHSC wrote to the complainant on 8 November 2021. It stated that it was incorrect to aggregate the request with the complainant's second request as while the two requests are for similar information, the information is not so similar that the requests can be merged.
8. The DHSC however, maintained its reliance on section 12(1) of the FOIA to refuse to comply with the request. The DHSC stated that even when the request is not aggregated with another, it considers that the cost of complying with the request would exceed the cost limit.

Scope of the case

9. The complainant contacted the Commissioner on 13 November 2021 to complain about the way their request for information had been handled.
10. The scope of this case and the following analysis is to determine if the DHSC has correctly cited section 12(1) of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(1) of the 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 public authorities such as 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) effectively imposes a time limit of 24 hours 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. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/00041*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
16. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.
17. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

The DHSC's position

18. As is the practice in a case in which the public authority has cited the cost limit under section 12(1) of the FOIA, the Commissioner asked the DHSC to provide a detailed explanation of its estimate of the time and cost of responding to the request.

19. In its submissions to the Commissioner, the DHSC maintained its reliance on section 12(1) of the FOIA and offered an explanation for how it had calculated that the request exceeded the cost limit.
20. The DHSC explained that as information within the scope of the request is likely to be held electronically it carried out a search of its electronic records for information within the scope of the request.
21. The DHSC conducted its search using the search terms "SARS" and "plan". It also conducted a search for risk registers using the search terms "National risk Register" or "NRR". The searches returned a total of 753 files.
22. The DHSC estimated that if it were to take 5 minutes to review each file and determine whether it fell within the scope of the request, in total it would take 62.75 hours to comply with the request (753 files x 5 minutes = 62.75 hours). Therefore, the DHSC calculated that the cost of complying with request would be £1,593.75.

The Commissioner's position

23. The Commissioner considers the DHSC's estimate of 5 minutes to review each file for information within the scope of the request to be reasonable. Even if the DHSC was to take only 2 minutes to review each file, the cost of complying with the request would still be in excess of the cost limit.
24. The Commissioner's decision is that the DHSC estimated reasonably that the cost of complying with the request would exceed the appropriate limit. Therefore, the DHSC was correct to apply section 12(1) of the FOIA to the request.

Section 16 – advice and assistance

25. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

26. In its initial response to the request the DHSC stated that it was unable to advise the complainant on how they could narrow the scope of their request to bring it within the cost limit. In its internal review response, the DHSC clarified that it was unable to advise the complainant how to narrow the scope of their request due to the wide ranging nature of the request.
27. In its submissions to the Commissioner, the DHSC explained that whilst it is unable to provide the complainant with advice on how to refine their request, it directed the complainant to published information on pandemic influenza and high consequence infectious diseases.
28. The Commissioner accepts that the DHSC is unable to provide the complainant with advice on how to narrow the scope of their request to bring it within the cost limit due to the broad nature of the request. He is therefore satisfied that the DHSC met its obligations under section 16(1) of the FOIA.

Right of appeal

29. 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

30. 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.
31. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF