

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

### **Decision notice**

**Date:** 30 August 2022

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

**Address:** InformationRights@UKHSA.gov.uk

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

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1. The complainant has requested information relating to Department of Health and Social Care (DHSC) 'Performance Update' documents.
2. The Commissioner's decision is that UK Health Security Agency (UKHSA) has not demonstrated that complying with the request would impose a grossly oppressive burden, and therefore is not entitled to rely on section 14(1) to withhold the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information subject to any redactions of personal data.
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 the Act and may be dealt with as a contempt of court.

### **Background**

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5. On 14 September 2020, the complainant wrote to DHSC and requested information in the following terms:

"I am writing to request the following information under the Freedom of Information Act 2000:

All DHSC "Performance Update" documents (in relation to COVID-19 testing) that exist at the time of processing this request"

6. DHSC sought clarification of the request on 6 October 2020, and the complainant provided this the same day stating:

'DHSC "Performance Update" documents (in relation to COVID-19 testing)', I was referring to documents in the same series as the one photographed below (image taken from tweet by Gabriel Pogrund - [https://twitter.com/Gabriel\\_Pogrund/status/1305047753983225858](https://twitter.com/Gabriel_Pogrund/status/1305047753983225858)):

7. DHSC responded on 3 November 2020 and cited section 35(3) FOIA to refuse to confirm nor deny whether it held any information relating to the request, as this would in itself, disclose exempt information.
8. The complainant contacted the Commissioner and a decision notice was issued on 1 December 2021 (DN IC-73121-Q0J5<sup>1</sup>). DHSC subsequently confirmed that information within the scope of the request was held, but refused to provide it citing section 35(1)(a) as its basis for doing so.
9. The complainant remained dissatisfied with this response and contacted the Commissioner again. Due to the protracted nature of the case, the Commissioner exercised his discretion and accepted the case without an internal review.
10. This request was originally made to DHSC, however, during the course of the Commissioner's investigation, UKSHA was created and responsibility for this information was transferred from DHSC to UKSHA. This case was officially transferred to UKSHA on 20 May 2022.
11. The Commissioner notes that UKSHA is not a public authority in its own right and that, throughout, the public authority ultimately responsible for the request has been DHSC. However, for the purposes of consistency, the Commissioner has referred to UKSHA as the body which dealt with both the request and complaint.
12. On 20 June 2022 UKSHA contacted the Commissioner to request an extension to the deadline for its response. As UKSHA had only recently been created and had no previous knowledge of the request, the Commissioner granted an extension until 6 July 2022.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019200/ic-73121-q0j5.pdf>

13. UKSHA contacted the Commissioner again on 6 July 2022 requesting a further extension until 15 July 2022, which the Commissioner agreed. It provided its submissions on 13 July 2022 and cited section 12 FOIA.
14. Having considered UKSHA's submission, the Commissioner sought further information to support its position on 10 August 2022. UKSHA provided its further submission on 24 August 2022 and withdrew reliance on section 12 and cited section 14(1) FOIA instead.
15. UKSHA has not provided a formal response to the complainant in this case and has only been in correspondence with the Commissioner.

### **Scope of the case**

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16. The Commissioner therefore considers the scope of this case to be to determine if UKSHA is entitled to rely on section 14(1) FOIA to withhold the requested information.

### **Reasons for decision**

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#### **Section 14 (1) – vexatious requests**

17. The Commissioner considers that a request can be vexatious for two reasons: firstly if the request is patently unreasonable and secondly where compliance with the request would incur a grossly oppressive burden on the public authority in terms of the costs or the diversion of resources. In this case, UKSHA has relied upon the latter.
18. Section 14(1) of FOIA 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.
19. 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.
20. Most people exercise their right of access responsibly. However, a few may misuse or abuse FOIA by submitting requests which are intended to be annoying, disruptive or which have a disproportionate impact on a public authority.
21. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the leading case on section 14(1), Information Commissioner vs Devon

County Council & Dransfield [2012] UKUT 440 (ACC), (28 January 2013).

22. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield (GIA/3037/2011). The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
23. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering 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.
24. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed 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).
25. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
26. Where relevant, public authorities need to take into account wider factors such as the background and history of the request.

## **UKSHA's position**

27. In its initial response to the Commissioner UKSHA stated that having reviewed the withheld material, it saw the rationale at the time for the positions stated by DHSC. However, it had identified 246 separate files, totalling over 900 pages, within scope of this request.
28. It explained that these files are held as attachments to daily update emails on COVID-19 testing. Therefore, to satisfy this request in full, each individual file would need to be extracted from a separate email, then reviewed and collated, in order to be released.
29. UKHSA estimated that to do so would constitute in excess of 24 hours' work which would exceed the cost limit set out in section 12(1) FOIA. It further commented that it recognised that time spent redacting is not ordinarily taken into consideration in determining that the cost limit is exceeded, however, it wished to use this as further support for its position, that to fulfil this request in full would entail a voluminous, disproportionate amount of work when considering the contents of the relevant material. UKHSA provided the Commissioner 15 files as a representative sample of the material within scope of this request.
30. The Commissioner wrote to UKSHA on 10 August 2022 advising that, based on its submission the only time/cost incurred would be to print the 900 pages identified and consider redactions. As it had already noted, the time taken to consider and redact information cannot be included in any cost calculation and it is highly unlikely to take a significant time to print the information out and therefore section 12 would not apply.
31. The Commissioner further advised that if UKSHA believed that responding would impose a disproportionate burden then it should consider if section 14(1) is applicable. He provided a link to his guidance on the exemption and asked UKSHA a number of questions to evidence its position.
32. UKSHA provided its further submission on 24 August 2022 in which it amended its position and cited section 14(1) on the basis that it would impose a grossly oppressive burden on the public authority.

## **The detrimental impact of complying with the request.**

33. As outlined in its previous response, UKHSA identified that it holds 246 separate files, comprising a total of over 900 pages, within scope of this request. To fulfil this request in full would therefore require extracting, redacting and reviewing an additional 231 files, totalling over 800 pages.

34. UKSHA explained that each individual file is held as an attachment to a separate email, from which it would need to be extracted and saved to a folder on a computer drive. It would then be required to redact, apply protections (locking PDF) to, and review each document (peer-review) in preparation for release. UKSHA has used the time spent redacting and preparing the previous batch of 15 files for sharing with the ICO as a sampling exercise, and concludes that it takes an average of 7 minutes per file to extract, redact and prepare each file for release.
35. UKSHA therefore estimates that it would take approximately 1617 minutes, or nearly 27 hours, to comply with this request in full.
36. It further explained the process for extraction and redaction is as follows:
  - Open the email that the file is attached to (all the emails are saved in a folder on our secure shared drive);
  - Open attachment and save it to the secure shared drive;
  - Apply redactions to document;
  - Apply protections to PDF (locking PDF).
  - When all documents have been redacted, another member of the team checks the redactions on all the documents.

### **Purpose or value of the request**

37. UKSHA is of the view that, considering the information available in the public domain on COVID-19 testing, the contents of these documents would add minimal value to understanding the situation around COVID-19 testing from April to October 2020. Daily figures on testing are publicly available on the UK Coronavirus Dashboard for that time period at UK, national, regional and Local Authority level. This data includes, but is not limited to, the number of tests conducted, and the number of positive tests reported.
38. Data on testing has also been published on GOV.UK throughout the course of the pandemic. Furthermore, the files within scope of this request range from 10 to 15 months old and are reflective of the situation around testing at a particular period in time during the Government's response to the COVID-19 pandemic.
39. The data contained within these documents is not representative of the current number of COVID-19 tests being taken or processed, nor representative of current testing capacity. UKSHA does not consider that this information would provide any insight into the present situation

around COVID-19 testing, or UKHSA's or the Government's current or ongoing work which relates to COVID-19.

40. UKHSA has not considered any additional background information in its application of Section 14(1) for this request.

### **The Commissioner's position**

41. The Commissioner's guidance considers that the key question a public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

42. When considering this issue, the Upper Tribunal in Dransfield asked itself: "Does the request have a value or serious purpose in terms of there being an objective public interest in the information sought?" (paragraph 38).

43. In his guidance, the Commissioner recognises:

"The public interest can encompass a wide range of values and principles relating to what is in the best interests of society, including, but not limited to:

- holding public authorities to account for their performance;
- understanding their decisions;
- transparency; and
- ensuring justice."

44. UKSHA has argued that disclosing the requested information will not aid the public in understanding the current Covid-19 situation. The Commissioner acknowledges that may be true, however had the information been disclosed at the time of the request in September 2020, it may well have assisted the public in understanding the testing capacity and Government work relating to Covid-19.

45. The Commissioner expects central government departments to absorb a higher level of disruption and cost to comply with a request than a small public authority such as a parish council.

46. UKSHA appear to have provided a hybrid response of section 12 and section 14 in order to include the time spent considering and applying redactions and the Commissioner is not persuaded that 27 hours work would constitute an oppressive burden.

47. The Commissioner therefore finds that UKSHA is not entitled to rely on section 14 in order to withhold the requested information.

48. As UKSHA has acknowledged that, with the passage of time it does not consider section 35 is applicable, and the Commissioner's previous advice regarding section 12, it should now disclose the requested information.

## **Other matters**

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49. The Commissioner acknowledges that as a new public authority, UKSHA would be in the process of creating new systems and procedures for its day-to-day activities. Nevertheless, it appears to him that there was a lack of planning and foresight by UKSHA in understanding all its legal obligations.
50. It also appears that there has been a lack of training for staff regarding its obligations under FOIA. This is demonstrated by the details provided above, in particular, that UKSHA has not considered the complaint in the circumstances of the time when the request was made.
51. The Commissioner recommends that UKSHA refers to the link below to carry out a 'self-assessment' and where necessary ensure any gaps in knowledge and/or training are identified, steps are implemented to address this.  
<https://ico.org.uk/for-organisations/foi-self-assessment-toolkit/>
52. UKSHA should note that this should be considered across the organisation.

## Right of appeal

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53. 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)

54. 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.
55. 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

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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