

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2022

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

Decision (including any steps ordered)

1. The complainant has requested the DHSC to disclose the 80 business responses it received to the "Total Online Restriction of Adverts for Products High in Fat, Salt and Sugar" consultation which took place in the Autumn of 2020. The DHSC refused to comply with the request in accordance with section 14 of FOIA.
2. The Commissioner's decision is that the DHSC is entitled to refuse to comply with the request in accordance with section 14 of FOIA. He does not require any further action to be taken.

Request and response

3. On 17 October 2021, the complainant wrote to the DHSC and requested information in the following terms:

"I would like to make a Freedom of Information request for a partial set of responses submitted to this "Total Online Restriction of Adverts for Products High in Fat, Salt and Sugar" consultation which took place in the Autumn of 2020.

I would like to see responses submitted from the 3% of submissions originating from businesses. Your webpage states that there were "a total of 80 which included advertising, broadcasters, food manufacturers and retailers, out of home food providers and online platforms."

4. The DHSC responded on 15 November 2021. It refused to comply with the request, citing section 14 of FOIA.
5. The complainant requested an internal review on 16 November 2021.
6. The DHSC carried out an internal review and notified the complainant of its findings on 29 March 2022. It upheld its application of section 14 of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 5 April 2022 to complain about the way their request for information had been handled.
8. The Commissioner has received additional submissions from the DHSC and he is satisfied that section 14 of FOIA applies. The following section will now explained why.

Reasons for decision

9. Section 14 of FOIA can be applied when compliance would impose a grossly oppressive burden on the public authority in terms of cost and resources, which outweighs any value or serious purpose the request may have. The public authority needs to demonstrate that the request covers a substantial volume of information, the information itself contains withheld information and it cannot be easily isolated because it is scattered throughout the requested material.
10. The DHSC said that the request covers 80 business responses to the consultation in 2020. Some came through via email and some came through on line. From those that came through via email, the DHSC worked out 54 were submitted with attachments. The average length of email consultation responses is 16 pages, the range is 1 to 205 pages and the median is 8.5 pages. It used the median for its estimates for both email and on line submissions.
11. It confirmed that from the email responses, 13 explicitly marked their submission as confidential and around 50% said upfront on submission that they require the DHSC to consult them first before they disclose any information. It stated that this is very likely to be similar for the submissions submitted on line too. The DHSC explained further that even for those that did not explicitly mark their submission as confidential or say upfront that they required prior consultation on potential disclosure, it would still need to go through the responses to

see if there is any confidential information and consult with the businesses. This is because in such consultation exercises, businesses are asked to be open, free and frank about their position so they can get the very best out of the exercise. Therefore sensitive and commercial information is inevitably shared with them. It also said that it would have to consult as well to maintain its ongoing relationships with such businesses. Going ahead and disclosing information without consultation would damage its relationships with those businesses.

12. The DHSC advised that in total, from all responses, there is 1108 pages to consider, review and redact. It considered three options:
 - 1) Only disclose the ones not marked as confidential. But it would still need to review the responses itself and redact personal data and any sensitive commercial information under sections 40 and 43 of FOIA. Consult with the businesses themselves and DCMS as they are party to the consultation. It conservatively estimated that this option would take 50 hours and this option would not cover all the information which falls within the scope of the request.
 - 2) Getting the businesses themselves to submit redacted versions for disclosure. But as DHSC is the public authority responsible for complying with the request and the final decision on disclosure rests with it, it would also need to review the redactions made. Conservatively it estimated that this would take 62 hours.
 - 3) Disclosure of all 80 responses after the DHSC has reviewed, redacted and consulted on all pages. Conservatively, it estimated this option would take 68 hours.
13. It explained further that it would take 24 minutes to convert on line submissions into word and then it would take (very conservatively) 3 minutes per page to redact any withheld information, for this to be double checked and clearance obtained and consult with the business and DCMS. 3 minutes over 1108 pages would take just over 55 hours.
14. It concluded that based on the large amount of information the request covers and the exempt information throughout the requested information itself, it would be overly burdensome on DHSC, in terms of time and resources, to comply with the request, redact and disclose the consultation responses. Particularly as it has already published a summary of those responses and their rationale for the public to see. The DHSC advised that it has considered three separate options in order to establish whether it would be reasonable to comply with the request and they are all very time consuming and costly.

15. The DHSC shared a couple of submissions with the Commissioner to demonstrate the length of responses and the work that would be required to redact exempt information prior to disclosure.
16. The Commissioner is satisfied that compliance would place a grossly oppressive burden on the DHSC in terms of time and resources. It has considered three different ways of trying to comply; all three would take a significant amount of time. The Commissioner considers the DHSC's estimate of three minutes per page to consider, redact and consult is very conservative. He considers that it would actually take the DHSC a little longer per page than quoted. Even at five minutes, the Commissioner would consider this to be on the conservative side.
17. It is noted that the DHSC has published the outcome of the consultation and a summary of the responses it received. Therefore he cannot agree that the serious purpose and value behind this request outweighs the significant burden compliance would cause. Publishing the outcome of the consultation and a summary of responses goes some way to meeting the value and purpose behind this request. The complainant is also free to make a fresh request to the DHSC for a smaller number of responses.
18. For the above reasons the Commissioner is satisfied that section 14 of FOIA applies.

Other matters

19. The section 45 code of practice recommends public authorities to carry out internal reviews within 20 working days of receipt. It is permitted to take up to 40 working days, but this additional time should only be used for those requests that are particularly voluminous or complex. The DHSC is reminded of the requirements of the code and of the importance of carrying out internal reviews in a timely manner.

Right of appeal

20. 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

21. 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.
22. 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

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