

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2022

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

Decision (including any steps ordered)

1. The complainant requested a copy of a Severe Acute Respiratory Syndrome (SARS) contingency plan. The Department of Health and Social Care ("the DHSC") disclosed a document, but the complainant considered that additional information was likely to be held.
2. The Commissioner's decision is that, on the balance of probabilities, the DHSC has disclosed the information it holds relevant to the request. However, in failing to disclose the information within 20 working days, the DHSC breached section 10 of the FOIA.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 18 March 2021, the complainant wrote to the DHSC and, quoting from the National Risk Register, requested information in the following terms:

"New and Emerging Infectious Diseases

'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'.

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

"Therefore would you please email me a copy of the Severe Acute Respiratory Syndrome (SARS) contingency plan developed by the Department of Health following 2003 SARS outbreak because I cannot find any trace of it on the internet."

5. On 12 July 2021, the DHSC responded. It provided some information.
6. The complainant requested an internal review on 19 July 2021 as he considered that the DHSC held further information within the scope of the request. The DHSC sent the outcome of its internal review on 8 October 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 11 October 2021 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the DHSC held any further information within the scope of the request.

Reasons for decision

Section 1 (Held/Not Held)

9. 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.*
10. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally,

he will consider any reason why it is inherently likely or unlikely that information is not held.

11. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

12. The complainant argued that the document he had been provided with was inconsistent with the description in the National Risk Register and with published government guidelines.
13. He noted that the document that had been provided to him was clearly watermarked as "DRAFT" and that this suggested that a further (or final) copy of the document must exist – otherwise the "plan" would not be a plan at all.
14. The complainant pointed to the guidance on contingency planning issued by the Cabinet Office in 2004 which he said required such plans to be "fully developed" and "validated."
15. Finally, the complainant indicated that he considered that there was a link between the Government's SARS contingency planning and its response to the recent Covid-19 pandemic. By failing to plan adequately for SARS, he argued, the UK had made itself unprepared for the Covid-19 pandemic.

The DHSC's position

16. The DHSC explained to the Commissioner that it was satisfied that the document that it had provided to the complainant was the most recent version of the document and had validated this with searches.
17. The DHSC further explained that:

"This question suggests that the applicant is not raising an issue of transparency but is instead querying the processes of the department and why a document that is near final might retain a notation of 'draft' until the point of publication.

"In planning for emergencies such as infectious disease outbreaks it is sometimes the case that plans are developed in response to an event and subsequently not required because circumstances change. Alternatively, and more usually, those plans might be developed in advance of an event then 'left on the shelf' until needed. In the case of the latter this is with the understanding that

they may be subject to finalising details when more about the specific pathogen and response requirements are known. Though these plans are often marked 'draft' this may only be because their publication, or dissemination internally, has not occurred. It is because of this, mindful of our duty to be helpful, that we also directed the applicant to those parts of guidance that had been published at the time."

18. Despite this, the DHSC assured the Commissioner that it had carried out further electronic searches based on the title of the document it had already identified – to see whether further versions existed. It also searched internal correspondence to see whether any submissions had been put forward to ministers. These searches had not identified any information other than that already provided.
19. The DHSC could not entirely rule out the possibility that further information had once existed but had since been deleted, but it considered this was very unlikely given its retention policies.

The Commissioner's view

20. The Commissioner's view is that it is more likely than not that the DHSC has provided all the information it holds within the scope of the complainant's request.
21. It is not the Commissioner's role to determine whether the quality of the information a public authority holds in recorded form is fit for purpose. Nor is it his responsibility to determine whether further information ought to be held. His role is simply to determine whether, on the balance of probabilities, the public authority has provided all the information it holds in recorded form.
22. In this instance the DHSC has explained why the labelling on the document does not support an assumption that further information would be held – although the Commissioner notes that this explanation could have been provided, by the DHSC, in its internal review – and has backed up the theoretical argument with practical searches to identify information.
23. The Commissioner has looked carefully at the passage from the Cabinet Office guidance that the complainant has draw attention to. The full paragraph reads:

"[Lead Government Departments] will be required to incorporate assurance on contingency planning within the annual assurance and risk control mechanisms presently being developed within the Central Government corporate governance regime. Senior officials will need assurance that the processes used to develop contingency

*plans and to determine both the planning process and plan content are adequate and that some level of validation (testing) has been carried out. Assurances will necessarily be obtained from a variety of sources within the LGD, its stakeholders and other appropriate reviewers. This should be reflected in the Department's Statement on Internal Control (SIC) where this is a sufficiently material aspect of the Department's risk and control profile. The Department will therefore need to ensure that it has appropriate review and assurance mechanisms in place."*¹

24. The Commissioner does not see the above paragraph as indicating that further information is held. The guidance appears to suggest that it is the process used to develop the plans and determine their content that requires validation rather than the actual individual plans themselves.
25. In any case, the Commissioner is aware from previous complaints that the Government does indeed carry out pandemic preparedness exercises based on a variety of different generic viruses.² For example, Exercise Cygnus in October 2016 enabled the Government to test plans for a "influenza-type" pandemic.³ Such exercises would provide some degree of "validation" for existing plans.
26. Only four cases of SARS were ever reported in the UK and there has been no confirmed case of the disease anywhere in the world since 2004. It is therefore not surprising that the DHSC has perhaps not devoted as much time to developing its specific response to SARS as it has done to other infectious diseases which have been more prevalent since 2004.
27. Whilst the document disclosed to the complainant may be labelled as "draft" that does not necessarily mean that its contents could not be brought into use quickly in the event they were needed.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61355/lead-government-departments-role.pdf

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4018473/ic-94466-q1v8.pdf>

³ <https://www.gov.uk/government/publications/uk-pandemic-preparedness/annex-a-about-exercise-cygnus>

28. The Commissioner is therefore satisfied, on the balance of probabilities, that the DHSC holds no further information beyond that which has already been disclosed.

Procedural matters

29. Section 10 of the FOIA states that a public authority must comply with its duty under section 1(1) of FOIA and communicate all non-exempt information "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
30. The complainant's request was submitted in March 2021 but was not answered until July 2021 – some four months later. Whilst recognising the pressures that the DHSC was then and continues to be under, the Commissioner still considers such a delay to be extremely poor.

Other matters

31. Whilst there is no statutory time limit for carrying out an internal review, the Commissioner considers that they should normally be completed within 20 working days and should never take longer than 40 working days.
32. In this case, the DHSC, despite having taken four months to respond to the request, took a further three months to complete its internal review. The Commissioner once again considers this to be poor practice.

Right of appeal

33. 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

34. 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.
35. 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
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