

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 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 emails sent and received by Professor Sir Chris Whitty regarding herd immunity. 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 25 October 2020, the complainant wrote to the DHSC and requested information in the following terms:

“Thank you for your response to my request [reference redacted] explaining that there were 1300 emails that matched my request, and so would exceed the cost limit. I would therefore, on your advice, like to alter my request to make it more narrow:

Please provide every email sent or received by Prof Chris Whitty (CMO) between [sic] during March 2020 that contain the phrase 'herd immunity' in either the text or the subject. This includes attachments. If any information is redacted under any exemption, please give some indication of the quantity of material removed. I am hoping this restriction to one month only will make the request fall within the limit.”

5. The DHSC responded on 26 January 2021 and refused to provide the requested information citing section 14(1) (vexatious request) as its basis for doing so.
6. Following an internal review, the DHSC wrote to the complainant on 23 February 2021. The DHSC maintained its reliance on section 14(1) of the FOIA.
7. On 20 March 2021, the complainant wrote to the Commissioner to complain about the way their request had been handled.
8. Following an investigation, the Commissioner determined that the DHSC was not entitled to rely on section 14(1) of the FOIA to refuse to comply with the request. On 2 September 2021, the Commissioner issued the DHSC with a Decision Notice which ordered the DHSC to issue the complainant with a fresh response to their request which did not rely on section 14(1) of the FOIA.
9. The DHSC provided the complainant with a fresh response to their request on 7 October 2021. It refused to provide the requested information citing section 12(1) of the FOIA as its basis for doing so.

Scope of the case

10. The complainant contacted the Commissioner on 7 October 2021 to complain about the way their request for information had been handled.

11. 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

12. 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.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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

19. 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.
20. 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.
21. The DHSC explained that it had conducted a search of Professor Sir Chris Whitty's email account for information within the scope of the request using the search term 'herd immunity'. This returned a total of 123 emails which may be relevant to the request.
22. The DHSC explained that as many of the emails contain a large number of attachments such as scientific and academic papers, the DHSC would need to review each attachment to determine whether it fell within the scope of the request. The DHSC would then need to retrieve and extract the relevant information from that attachment.
23. The DHSC confirmed that it had carried out a sampling exercise of 10 emails to determine how long it would take to review the 123 emails and their attachments.
24. Based on its sampling exercise, the DHSC concluded that on average, each email contains six attachments with the maximum number of attachments being 11 and the minimum being zero.
25. The DHSC explained that if it were assume that each email contained only four attachments rather six, it would still have to review 615 documents for information within the scope of the request (123 emails + 496 attachments = 615 documents to review).
26. The DHSC calculated that if it were to take three minutes to review each of the 615 documents for information within the scope of the request, the cost of complying with the request would exceed the appropriate limit. The DHSC explained that it considers its estimate of 3 minutes to review each document to be conservative.

The Commissioner's position

27. The Commissioner considers the DHSC's estimate of 3 minutes to review each document for information within the scope of the request to be reasonable.
28. The Commissioner has calculated that if the DHSC was to take 3 minute to review each document, in total it would take the DHSC 30.75 hours to comply with the request (615 documents x 3 minutes = 30.75 hours). Therefore, the cost complying with the request would be in excess of the cost limit.
29. 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

30. 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).
31. The DHSC advised the complainant that they could reduce the scope of their request to bring it within the cost limit. The DHSC suggested to the complainant that they could narrow the scope of their request by reducing the time period of their request. Specifically, the DHSC suggested limiting the request to 'a day's snapshot of the time range previously requested'.
32. The Commissioner considers that this was an appropriate response in the circumstances. He is therefore satisfied that the DHSC met its obligations under section 16(1) of the FOIA.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-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: 0300 1234504

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

Ben Tomes
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