

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2021

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information about disclosure logs. The Department of Health and Social Care ('DHSC') has advised that it does not hold the requested information.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, DHSC does not hold the information the complainant has requested in the two parts of his request and has complied with section 1(1)(a) of the FOIA.
3. The Commissioner does not require DHSC to take any remedial steps.

Request and response

4. A disclosure log indicates information that a public authority has provided in response to requests for information. On 30 December 2019 the complainant wrote to DHSC and requested information in the following terms:

"Dear DHSC FOI - I was directed to the Gov.Uk website to search Department of Health & Social Care's past FOI releases, having initially clicked the DHSC's website button: 'Check our previous releases to see if we've already answered your question.' The Gov.uk web site address is below, together with a screen shot of the results.

You will see there are 38 releases, with the last entry being; 'DH FOI Releases: 2015 Freedom of Information (FOI) releases for requests

received in 2015'. Accordingly, I'd be grateful to know if you have such disclosure logs for any or all of 2016, 2017, 2018 and 2019 years, together with such information that Department may hold that would explain the Department's change in practice from enabling the public to check for past releases to not doing so...

https://www.gov.uk/search/transparency-and-freedom-of-information-releases?content_store_document_type%5B%5D=foi_release&organizations%5B%5D=department-of-health-and-social-care&order=updated-newest"

5. On 2 January 2020 DHSC responded. DHSC advised that the FOIA did not oblige it to maintain and update disclosure logs. DHSC went on to discuss publication schemes and the information it does publish on its website.
6. Following an internal review DHSC wrote to the complainant on 13 February 2020. It confirmed that it considered that the response the complainant received to his FOI request was compliant with the requirements of the FOIA. DHSC advised that it understood that, due to time restraints and staffing issues, a decision had been made to suspend publishing FOI disclosure logs.

Scope of the case

7. The complainant contacted the Commissioner on 10 February 2020 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on whether, on the balance of probabilities, DHSC holds information relevant to the complainant's request.

Reasons for decision

Section 1 – general right of access to information held by public authorities

9. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to them if it is held and is not exempt information.
10. The complainant told the Commissioner that he considers it is reasonable to assume DHSC holds the "building blocks" of disclosure

logs. He considers there would be no new or complex work involved in extracting the information to enable him to check on the subject matter of past releases and disclosing this to him.

11. Regarding the reference to 'change in practice' in his request, the Commissioner asked the complainant what recorded information he was expecting to receive in response to that element. The complainant was not able to be specific but discussed DHSC's re-organisation in response to government austerity measures, which it had alluded to in its correspondence to him. The complainant considered there may be information held in, for example, briefings and implementation plans that explains why the change in practice with disclosure logs occurred.
12. The Commissioner put these points to DHSC in her initial correspondence to it.
13. In DHSC's initial submission to the Commissioner, it confirmed that it does not collate the information in the way the complainant has requested. It said that "all FOIs" are held on a central system and are not currently published on DHSC's website. The last publications on the website were in 2015.
14. DHSC went on to confirm that its searches for any information relevant to the complainant's request were in line with the Commissioner's guidance on carrying out searches. It carried out electronic searches for any information using the search term 'publishing FOI responses'. No information was identified.
15. As it had advised the complainant, DHSC told the Commissioner that due to time restraints and capacity issues, a decision had been made to suspend publishing FOI disclosure logs. DHSC confirmed that no information was ever kept about this decision.
16. DHSC noted that the Commissioner recommends that public authorities, including Government departments, maintain and update disclosure logs on their websites as good practice. However, it is not a requirement under the FOIA. DHSC says that since it received the complainant's request, it has not been in a position to review the decision to suspend publishing the disclosure log, due to the ongoing workloads since the start of the COVID-19 pandemic.

The Commissioner's conclusion

17. The first part of the complainant's request is for disclosure logs for the years 2016 to 2019.

18. The complainant has suggested that DHSC holds the 'building blocks' for the disclosure logs for the years 2016-2019 ie that it must hold the requests it received in those years which it could collate into disclosure logs and now release. DHSC must, in effect, hold that information.
19. The matter of 'building blocks' is discussed from paragraph 11 in the Commissioner's guidance on determining whether information is held¹. To summarise, it is the Commissioner's position that the level of skill and judgement required to answer a request will determine whether information is held. If answering the request involves exercising sophisticated judgement, the information will not be held. But if only a reasonable level of judgement is required to identify the relevant building blocks, or manipulate those blocks, the information will be held.
20. DHSC's initial submission did not address this matter. Following further questioning by the Commissioner, DHSC explained that previously, there was a degree of judgement needed when publishing the disclosure logs. DHSC told the Commissioner that it had previously used a set of criteria when judging whether to include an FOI request in its disclosure log, but it had been unable to locate that criteria at this time. That is unfortunate but the Commissioner accepts that DHSC did not previously publish every FOI request it received and therefore must have exercised judgement on which request to summarise and publish. DHSC may have taken account, for example, of a request's perceived wider interest, relevance to a current situation, or importance. However, the fact is that, on the basis of its previous process DHSC would need to review all the requests it received during 2016-2019 and make a judgement on each one whether or not to include that request in a disclosure log. It is not the case that DHSC would simply have to lift *all* the requests it received during that period and summarise them all in disclosure logs for each of the four years.
21. Had the latter been the case, the Commissioner would consider that DHSC holds the information the complainant has requested. But the Commissioner considers that the degree of judgement needed to make a decision on each request is sophisticated enough such that DHSC cannot be said to hold the information as a whole. This is because DHSC would need to review each request, compare it against its existing (or new) criteria for publication, decide whether it meets that criteria, decide whether it should be included in the disclosure log and perhaps consult with officers or other bodies about publishing the request (and potentially the response to the request). To confirm, in the

¹ https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

Commissioner's view DHSC cannot therefore be said to hold the information requested in the first part of the request.

22. The second part of the request is for information on the decision DHSC made to suspend the disclosure logs in 2015. The Commissioner has considered DHSC's explanation and the search that it has carried out, both of which she considers to have been reasonable. With regard to the search term it used, using the search term 'disclosure log' may have been more appropriate. However, on its website DHSC does not call its FOI releases a 'disclosure log'; the webpage is headed "Transparency and freedom of information releases". The term 'disclosure log' does not appear to be a term that DHSC uses and so, in the Commissioner's view, it was reasonable not to include that term in its electronic searches.
23. The Commissioner notes that four and a half years had elapsed since publication of disclosure logs was suspended, after June 2015, and the complainant's request at the end of 2019. Had relevant information about the decision to suspend the disclosure logs ever been held – and the Commissioner sees no reason to doubt DHSC's position that no information *had* ever been held – it is possible for that information to have been destroyed in line with DHSC's retention schedule in the intervening period. In addition, the Commissioner considers that it is a reasonable conjecture that the decision to suspend publication of disclosure logs – which, in the scheme of things, is not a decision of great significance – may have been discussed and made verbally between DHSC staff and was not recorded.
24. To summarise, the Commissioner has decided that, on the balance of probabilities, DHSC does not hold information within the scope of either of the two elements of the complainant's request and has complied with section 1(1)(a) of the FOIA.

Other matters

25. As discussed, the Commissioner has decided that DHSC does not hold the 'building blocks' to answer the first part of the complainant's request and therefore does not hold that information.

26. However, had she found the information to be held in the Commissioner's view it is likely that there would be a cost/time association involved in complying with the request that could engage section 12 of the FOIA. Section 12 can be applied when the cost of complying with a request exceeds the appropriate limit. This is because of the volume of requests involved – likely to be well over 1,000 across the four years requested – how DHSC holds the requests in its IT system and the time needed to review and summarise each request.
27. With regard to the complainant's point at paragraph 10, the Commissioner observes that the fact she has found that DHSC does not hold disclosure logs for 2016 to 2019 does not prevent the complainant from requesting information from DHSC. If there is specific information on a topic about which the complainant is actively interested, then he has the option of submitting a request to DHSC for that information.
28. Finally, as DHSC has noted, publishing a disclosure log is not a requirement of the FOIA, but it is a matter of good practice. When it is in a position to do so, the Commissioner hopes that DHSC will restore publishing to its disclosure log, which it suspended in 2015.

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: 0203 936 8963
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

Cressida Woodall
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