

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 October 2017

Public Authority: The Parliamentary and Health Service
Ombudsman

Address: Millbank Tower
Millbank
London SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested information relating to the diary of Dame Julie Mellor, former Ombudsman of Parliamentary and Health Service Ombudsman (PHSO).
2. The Commissioner's decision is that PHSO has breached section 10 of the FOIA by failing to respond to the request within the statutory timescale
3. The Commissioner also finds that PHSO has not complied with its obligations under section 1 (right of access). The Commissioner also finds PHSO is in breach of section 10 of the FOIA (time for compliance)
 - PHSO should now review the information provided to the Commissioner and provide a fresh response to the complainant.
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.

Request and response

5. On 10 December 2016 the complainant requested the following information via WDTK:

"I would like to read the schedule of appointments from Dame Julie's diary -

- 1. Past: From 27 February 2014 to present date.*
- 2. Future: Any scheduled from date of this request, until April 1 2017.*

NB Clarification of request:

Response should follow on from the PHSO response to this request:

<https://www.whatdotheyknow.com/request/1...>

With diary details specified:

Date, place, person/persons and reason for the appointment.

Example:

17 October 2013

Keith Vaz MP, Derby Gate (case discussion).

Request Title/summary within scope.

I am writing to make an open government request for all the information to which I am entitled under the Freedom of Information Act 2000.

Please send me recorded information, which includes information held on computers, in emails and in printed or handwritten documents as well as images, video and audio recordings.

If this request is too wide or unclear, and you require a clarification, I would be grateful if you could contact me as I understand that under the Act, you are required to advise and assist requesters. (Section 16/ Regulation 9).

If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees.

If any of this information is already in the public domain, please can you direct me to it, with page references and URLs if necessary.

Please confirm or deny whether the requested information is held (section (Section 1(1)(a) and consider whether information should be provided under section 1(1)(b), or whether it is subject to an exemption in Part II of the Act. If the release of any of this information is prohibited on the grounds of breach of confidence, I ask that you supply me with copies of the confidentiality agreement and remind you that information should not be treated as confidential if such an agreement has not been signed.

I request that the response be provided to me as electronic copies, via WDTK.

The information should be immediately readable - and, as a freedom of Information request, not put in a PDF or any closed form, which some readers may not be able to access.

I understand that you are required to respond to my request within the 20 working days after you receive this letter. I would be grateful if you could confirm in writing that you have received this request.

*Please consider the ICO's Decision on the provision original documents on file, rather than newly written letters of response.
<https://ico.org.uk/media/action-weve-tak...>*

This request does not require a letter, drafted by the External Affairs department, or any other written input by reputational defence employees - and purporting to be the response to a FOIA request.

6. The PHSO acknowledged the request on the same day.
7. On 13 January 2017 the complainant contacted PHSO again as she had not yet received a response and requested an internal review.
8. On 7 March 2017 PHSO responded to the internal review request and acknowledged that it failed to comply with section 1 of the FOIA by not providing a response. It further explained that the information was 'in the final stages of extraction' and would be provided as soon as possible.
9. On 8 March 2017 the complainant wrote to PHSO stating:

"I fully realise that you written have already [sic] breached the time limit as set out by the FOIA, as evidenced above.

However, your 'review' response gives no reason for the breach.

Therefore :
 1. *Are you stating that the information exists ...and that you are refusing to provide it?*
 2. *Or that it doesn't exist ...and that you can't provide it?"*
10. PHSO responded the same day and advised that the information requested did exist and was in the final stages of preparation.
11. The complainant then wrote to the Commissioner, also on 8 March, to complain about the time taken to respond to her request.

12. The Commissioner contacted the PHSO on 27 March 2017 to remind it of its responsibilities and attached a copy of the request. However, in the meantime PHSO provided a response to the request on 15 March 2017.

13. The complainant wrote to PHSO on 15 March 2017 stating:

"Thank you but some of these are not original data entries.

For instance this describes what happened, rather than it being a diary entry....

PHSO hosted a workshop which was attended by representatives from Action Against Medical Negligence, Care Quality Commission, Citizens Advice Bureau, Department of Health, East Kent Hospitals, General Medical Council, Healthwatch England, Ideas4Use, Local Government Association, Local Government Ombudsman, Macmillan/Richmond Group, National Care Association, National Care Forum, National Voices, NHS England, Patients Association, Royal College of Physicians, SEAP, Trust Development Authority, VoiceAbility and Which?

Please produce unedited original data - as per FOIA."

14. The Commissioner wrote to PHSO again on 27 March 2017 advising that the complainant considered that it had only provided a partial response and that she required 'unedited documents of original data'.

15. On 4 April 2017 the PHSO wrote to the Commissioner explaining that it considered that request was not the same as the original request as the complainant now requested 'unedited documents of original data'.

16. It confirmed that the information was held and the information previously provided to the complainant was extracted from the Ombudsman's Outlook calendar.

17. PHSO maintained that the original request did not ask for the original diary entries and in fact explicitly asked the request to follow on from a previous request, to which it responded similarly by providing dates and descriptions.

18. On 12 April 2017 PHSO wrote to the complainant advising it was treating this as a new request. It confirmed that it held the data but that it was unable to provide it stating:

"Under section 11(1) of the FOIA we are obliged to provide information in the form or format that a requester states so long as it is reasonably practicable for us to give effect to that preference. We consider that it is not reasonably practicable for us to provide Dame Julie's unedited calendar entries from 2014 to 2017. This is because the information is held in Microsoft Outlook calendar and we would have to take

screenshots of each week of entries from 2014 until 2017. We would then have to remove any information on the calendar that contains the personal data of Dame Julie or other members of staff. As you may already know, section 40(2) of FOIA precludes the disclosure of personal information where disclosure would breach the Data Protection Act 1998 (DPA). The DPA governs personal data and defines it as any information likely to lead to the identification of a living individual.

Any appointments in the calendar that do not relate to Dame Julie's work life would be considered personal, and therefore exempt from FOIA. In addition any entries in the calendar that relate to other PHSO staff (e.g. leave or other absences) would also be exempt from disclosure under FOI."

19. The complainant contacted the Commissioner on 18 April 2017 and stated:

"The PHSO has not complied with the request for original redacted documents. At first, it didn't bother to reply to the request at all.

It then provided rewritten and retrospective material - which did not exist at the time of the request. Requests are dated and cannot be made for future data, which does not exist at the time of request. However, future appointments are included - as the data already exists on file."

20. On 8 July 2017 the complainant contacted the Commissioner again stating:

"I'm still waiting for the original documents as requested - and not edited re-written highlights"

Scope of the case

21. On 22 August 2017 the Commissioner wrote to the complainant stating that she considered that the complaint was 'frivolous' as it appeared that the information had been provided. The Commissioner also reminded her that under the FOIA a requestor is not necessarily entitled to the documents themselves but only the information contained in those documents.
22. However, in further correspondence the complainant maintained that she had not been provided with the information she requested.
23. The Commissioner therefore contacted PHSO again for further details about how they had dealt with the request. She considers the scope of this case to be to determine if PHSO has provided the information requested on 10 December 2016 to the complainant.

Reasons for decision

24. Section 1(1) of the FOIA says that anyone making a request for information to a public authority is entitled to (a) be informed whether the public authority holds information specified in the request and (b) if so, to have that information communicated to them.

25. The Commissioner has scrutinised the correspondence provided from both parties and the wording of the original request.

26. There is no statement in that request that specifies the information requested is for original documents, only

I would like to read the schedule of appointments from Dame Julie's diary -

1. Past: From 27 February 2014 to present date.

2. Future: Any scheduled from date of this request, until April 1 2017

27. The FOIA allows requests to be made to public authorities for information it holds, but this does not necessarily mean access to original documents, only the information they contain.

28. Following the Commissioner's further enquiries PHSO provided her with a spreadsheet of information it had compiled in order to provide its original response.

29. The Commissioner has reviewed this spreadsheet and notes that it contains multiple entries relating to Dame Julie's professional life that have not been included in the information provided to the complainant.

30. The original requests of 10 December 2016 clearly requests the schedule of appointments, that is, for those diary entries, which relate to appointments (meetings), as they were actually recorded in the diary at the time of the request, even if they are then extracted from the rest of the information in the diary.

31. Therefore PHSO's response providing a summary of what actually happened at the meeting would not be acceptable.

32. It is the Commissioner's view that the complainant's letter of 15 March is not a new request. The complainant is simply making the point that she does not want descriptions of what the meeting was about, but the original description of that meeting as recorded in the diary. This being so, she is simply insisting the PHSO meets its obligations under the FOIA to provide the information that existed at the time of the request.

33. The Commissioner therefore finds that PHSO has not complied with its obligations under section 1 of the FOIA. PHSO has failed to provide the information that was actually held at the time of the request, in respect of at least some of the diary entries, and instead provided the retrospective descriptions of the meetings. In addition it has failed to (2) consider all the relevant diary entries, for example, none of the entries from February 2014 have been provided and only eight from April 2014.
34. PHSO should now review the information provided to the Commissioner and provide a further response to the complainant.

Section 10 – time for compliance

35. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
36. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. From the information provided to the Commissioner it is evident that the PHSO did not respond to the complainant within the statutory timeframe in respect of this request.
37. The Commissioner finds that PHSO did not deal with the request for information in accordance with the FOIA and therefore is in breach of section 10(1) of the FOIA.

Other matters

38. The complainant has also raised concerns about her complaint to the Commissioner initially being dismissed as 'frivolous' under section 50(2)(c) of the FOIA.
39. Section 50(2)(c) of the FOIA states:
*"On receiving an application under this section, the Commissioner shall make a decision unless it **appears** to her -*
 - (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,*
 - (b) that there has been undue delay in making the application,*
 - (c) that the application is frivolous or vexatious*
 - (d) that the application has been withdrawn or abandoned."*

40. The ICO considers that a complaint may be thought of as frivolous if it has no serious intent, or is considered unworthy of serious treatment.
41. The Commissioner received further information from the complainant about the reasons for her complaint. Although the motivation for the request is genuine the Commissioner does not consider that her initial response was incorrect as it appeared PHSO had provided the information requested, albeit in breach of section 10.
42. The ICO will take into account both the complainant's apparent purpose and the effect of handling the complaint, whether or not intended. It is not necessary to demonstrate both intent and effect in order for Section 50(2)(c) to be applicable; if the effect alone is unwarranted that may be sufficient reason to justify treating a complaint as frivolous or vexatious.
43. However, after being in possession of further facts of the case, the Commissioner acknowledges that she had incorrectly deemed the complaint frivolous.

Right of appeal

44. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF