Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **7 March 2019**

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

Decision (including any steps ordered)

1. The complainant has requested information on the guidance that was available to general practitioners in 2009 and which related to working with service users who had suffered sexual abuse in 2009. The Department of Health & Social Care (DHSC) originally refused the request under section 21 of the FOIA on the basis that the information was already available to the public and provided links to where the information was available on the internet. The complainant was not satisfied that the DHSC had properly considered all the information that was likely to be held. During the course of the Commissioner's investigation the DHSC changed its position and refused the request under section 12 on the basis that the cost of compliance would exceed the appropriate limit.

2. The Commissioner's decision is that the DHSC is entitled to rely on section 12 to refuse to confirm whether it holds any information relevant to the request. However it has failed to comply with section 17(5) in that it did not provide a refusal notice citing its reliance on section 12 within twenty working days of receiving the request. It has also failed to fulfil its duty under section 16 to provide advice and assistance to help the complainant make a refined request.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - To properly consider what advice and assistance it could provide to the complainant in order to assist him make a refined request. If it

is possible to provide such advice and assistance, the DHSC is required to do so.

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 6 February 2017 the complainant requested information of the following description:

> "1) I am requesting a copy of information you hold which gave guidance to General Practitioners on working with service users, in 2009, who have experienced or are experiencing Sexual abuse or Sexual violence or Sexual harassment.
>
> 2) I am requesting a copy of information you hold which gave guidance to healthcare professionals on working with service users, in 2009, who have experienced or are experiencing Sexual abuse or Sexual violence or Sexual harassment.
>
> 3) I am requesting a copy of publications you hold which superseded the document detailed below and which were available in 2009 for:-
>
> A) General Practitioners to use.
>
> B) Health care professionals to use.
>
> Title: Responding to domestic abuse: a handbook for health professionals
>
> Author: Department of Health Publication Date December 2005
>
> ROCR Ref: Gateway Ref: 5802"

6. On 6 March 2017 the DHSC responded. It confirmed that the department held the requested information. The DHSC explained that the information was already in the public domain that therefore the information was exempt under section 21 of the FOIA. The DHSC went on to provide the complainant with links to where three documents had been published on the website of The National Archives.

7. On 18 April 2017 the complainant asked the DHSC to clarify which publication related to which specific limb of the request. He also queried

whether the DHSC held any additional information falling within the scope of the request.

8. On 15 May 2017 the department responded by stating that each of the three publications applied equally to each element of the request. It also provided the complainant with links to a further seven documents. One of these was a link to what the DHSC explained was an updated version of the document referred to in part 3 of the request. This was published via a generic government website, www.gov.uk. Three other documents were also linked to via the same website. The remaining documents were linked to via the websites of other organisations, for example NHS England.

9. On 25 June 2017 the complainant asked the DHSC to carry out an internal review of its handling of the request. The DHSC provided the outcome of the review on 22 March 2018. It apologised for the delay in providing the response, but ultimately the department upheld its application of section 21 to the request.

10. During the course of the Commissioner's investigation the DHSC wrote to the complainant on 18 February 2019 and advised him that it was no longer relying on section 21. Instead the DHSC now considered it was unable to confirm or deny whether the requested information was held. It expanded on this by explaining that this meant it was unable to confirm or deny that the DHSC held, in either hard copy or electronic format, the information published at each of the URL addresses it previously provided in its responses of 6 March 2018 and 15 May 2018.

Scope of the case

11. The complainant contacted the Commissioner on 21 June 2018 to complain about the way his request for information had been handled. He raised a number of issues. He argued that the DHSC had failed, within twenty working days, to confirm whether it held all the information specified in his request, to provide him with all the information it held, and issue a valid refusal notice. He also argued that the grounds for refusing his complaint were invalid. Finally he complained about the length of time the DHSC had taken to complete its internal review.

12. Due to the change in the DHSC's position, ie its late reliance on section 12, the Commissioner considers that the matters to be decided are whether the DHSC is entitled to rely on section 12 to refuse the request, If the Commissioner finds the DHSC is entitled to rely on section 12 the Commissioner will also consider whether it complied with its obligations under section 16 to provide advice and assistance. The Commissioner

will also consider whether the DHSC issued a valid refusal notice in accordance with section 17.

13. Since there is no statutory obligation to provide an internal review, the Commissioner will consider the length of time the DHSC took to provide such a review under 'Other Matters'.

Reasons for decision

Section 12 – appropriate limit

14. Section 12(1) of the FOIA states that a public authority is not required to comply with a request for information if the public authority estimates that the cost of doing so would exceed the appropriate limit. However under section 12(2) a public authority is still obliged to confirm whether it holds the requested information unless this alone would exceed the appropriate limit.

15. In this case the DHSC is claiming that even confirming whether the information is held would exceed the appropriate limit.

16. The appropriate limit is a cost limit established by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244, commonly known as the Fees Regulations. For central government departments such as the DHSC the appropriate limit is set at £600. Where the costs of compliance relate to staff time, a public authority is only allowed to charge £25 per hour. Therefore an appropriate limit of £600 equates to 24 hours of staff time.

17. Furthermore a public authority is limited in respect of what activities it can take into account when estimating whether the appropriate limit would be exceeded. Under regulation 4(3) of the fees Regulations a public authority is only allowed to take account of the following activities:

    - determining whether the information is held,
    - locating the information, or a document containing it,
    - retrieving information, or a document containing it, and
    - extracting the information from a document.

18. The Commissioner notes that none of the documents to which the DHSC had provided links to were actually published on its own website. The Commissioner therefore asked the DHSC to clarify whether the information which it had directed the complainant to, specifically the information linked to in its correspondence of 15 May 2017, had actually

been held by the DHSC at the time the request was received and, if so, why these had not been provided to the complainant when the DHSC first responded to the request on 6 March 2017. This prompted the DHSC to revisit its handling of the request and, presumably when attempting to locate any of the documents to which the complainant had been directed, it had cause to revise its position and ultimately to rely on section 12 as a basis for refusing to confirm whether it held any relevant information.

19. It explained that the official who had originally dealt with the request had since left the department and that therefore it was unable to explain the reasoning behind its original response to the complainant of 6 March 2017, or why that response did not include the links provided on 15 May 2017.

20. It appears likely to the Commissioner that in an attempt to assist the complainant the DHSC provided links to documents it had identified as being available online and which it thought would be of interest to the complainant. The Commissioner would not wish to discourage a public authority from directing a complainant to where it is aware information which it believes may be of interest to an applicant is available. However volunteering to highlight the availability of such information does not remove a public authority's obligations under section 1 of the FOIA to determine what information it holds itself and, where it can do so within the appropriate limit, to consider whether that information can be disclosed. It is certainly not appropriate to present the links it has discovered as being links to information which it holds, which is what happened in this case. The complainant was entitled to be informed whether the DHSC held any of the information he had requested, subject of course to other provisions within the FOIA such as the application of the appropriate limit. The Commissioner notes that the DHSC has apologised to the complainant for its responses of 6 March 2017 and 15 May 2017 and its original application of section 21.

21. Moving on, the Commissioner accepts the position ultimately adopted by the DHSC during her investigation that the fact the DHSC provided links to information published on line by other parties does not mean that the DHSC necessarily holds copies of those documents. In other words, the fact that those links were provided does not contradict the DHSC's final position that it cannot determine whether the DHSC itself holds information relevant to the request.

22. As the request seeks information that was available to general practitioners in 2009 the DHSC explained that it would have to search what it described as its 'legacy records' held by the Departmental Records Office in order to identify any guidance that was current at that time. The Commissioner queried what it meant by 'legacy records' and why it needed to search these records, as opposed to simply asking the

relevant policy area to search their records. The DHSC responded by explaining that since 2009 the department had been restructured at least a couple of times, including a major one in 2013. It is understood that as a consequence the directorate in which the policy team that would have been responsible for the issues to which the request relates no longer exists. The DHSC said that there was no continuity between the policy team that would have taken the lead in developing relevant guidance back in 2009 and the team now responsible. In addition the DHSC explained that policy development requires a collaborative approach involving the input of many areas within the department. There has also been a high turnover of staff within the different policy areas. As a consequence the DHSC could not be confident that a more focussed search for information relevant to the request would identify all, or any, of the information it held. It was, the DHSC claims, therefore necessary to conduct a thorough search of these centrally held legacy files.

23. The DHSC's Record Team ran searches of its electronic databases using the following keywords:

- Domestic violence
- Sexual violence
- Abuse
- Sexual assault referral centre
- Child Sexual abuse
- Working together
- Child safeguarding

24. The Commissioner considers these keywords would allow a comprehensive search of the legacy files. These searches returned the following results:

- Domestic violence - 10,080 documents
- Sexual violence – 10,001 documents
- Abuse – 10,369 documents
- Sexual assault referral centre – 1,287 documents
- Child Sexual abuse – 1,400 documents
- Working together – 10,417 documents

- Child safeguarding – 4259 documents

This gives a total of around 47,000 documents

25. The DHSC considers this total to be the minimum number of records that would have to be searched. This is because the search program can only return a maximum of around 10,000 records. As three of the search terms appear to have exceeded that limit, the DHSC considers that there would have to be a second search of other data bases using those same terms to complete a thorough search of all the legacy files.

26. The DHSC has also pointed out that the figure of 47,000 relates to the number of documents found containing the search terms; it does not give any indication of the length of those documents.

27. Although the DHSC does not appear to have carried out any sampling exercise of how long it would take to locate the documents and determine whether an individual document is relevant to the request, the Commissioner does not consider this necessary in this case. If it is accepted that a minimum of 47,000 documents need to be checked, the DHSC would need to be able check around 33 documents a minute in order to go through all the documents concerned. The Commissioner does not consider this possible. Regarding the length of individual documents, the Commissioner does not consider this greatly affects the amount of time necessary, as it is likely to be apparent in most cases from title pages and introductory pages whether the document is relevant guidance.

28. Before accepting the DHSC's estimate that the appropriate limit would be exceeded, the Commissioner considered it prudent to check that there were not more efficient means of searching for relevant information. She therefore asked the DHSC whether it would be possible to focus the search by using terms such as 'guidance on domestic abuse'. In response the DHSC advised the Commissioner that at the time guidance was being developed there was no capability to record metadata about the type of document being created and that therefore it was not possible to refine the search in the way suggested.

29. The Commissioner also asked the DHSC whether it would be possible to limit searches to just the policy areas of former structures which would have some responsibility for producing guidance relevant to the request in 2009. However because of what it described as staff churn (which the Commissioner understands to mean the movement of staff from one policy or business area to another within the department) and because of the collaborative nature of developing guidance, which spreads the involvement in guidance production throughout its various teams, the DHSC was adamant that in order to be confident that it had searched all

possible locations where information may be held, it would not be sufficient to just search the files of the primary team.

30. The Commissioner asked the DHSC about the age range of information held in the legacy files and whether there was any sensible way of refining the search so as to capture only those documents that were current in 2009, or at least to exclude older documents that had already been superseded by 2009. The DHSC advised the Commissioner that all electronic data was stored in an electronic document management system known internally as MEDS. The searches that returned the figure of 47,000 documents was already limited to those documents created between 2007 and 2009. The Commissioner accepts that this would be a reasonable time range to use.

31. To ensure obvious leads had not been overlooked, the Commissioner asked the DHSC to check whether any of the guidance concerning sexual abuse that is currently being used originates from 2009. The DHSC has confirmed that none of it does.

32. Initially the Commissioner's investigation concerned the DHSC's use of section 21 (information already available to the applicant) and the complainant's argument that the DHSC held additional information. Therefore at the outset of her investigation the Commissioner asked the complainant to set out his grounds for believing additional information was held. In response the complainant provided the Commissioner with a number of examples of how the DHSC had handled previous requests he had made. He considered the responses that had been provided to these previous requests had often been misleading and were characterised by long delays in providing responses and carrying out internal reviews. In essence, due to what the complainant considered to be the very poor level of engagement he had experienced he appears to have lost faith in the DHSC's ability to properly handle information requests, or to provide accurate responses. Although the issues raised by the complainant in respect to previous requests are not matters for this decision notice, the Commissioner does recognise the complainant's frustration. However this is not itself evidence that the DHSC holds information relevant to his request.

33. In light of the explanations provided to the Commissioner by the DHSC, as set out above, the Commissioner finds that in order to determine whether it holds the requested information with any confidence, the DHSC would need to go through the 47,000 records its searches have identified as being potentially relevant to the request. To do so would take longer than 24 hours and at £25 per hour for staff time, this would exceed the appropriate limit of £600. The DHSC is entitled to refuse to confirm or deny whether it holds the requested information under section 12.

Section 16 - advice and assistance

34. Section 16 provides that a public authority is under a duty to provide advice and assistance, so far as it is reasonable to expect the authority to do so, to persons who have made a request. In accordance with the code of practice produced under section 45 of the FOIA, a public authority should provide advice and assistance to an applicant who has had their request refused under section 12 to,

> "… help them reframe or refocus their request with a view to bringing it within the costs limit."

35. The advice provided to the complainant by the DHSC when informing him of its application of section 12 on 18 February 2019 was limited. It simply said it was not clear whether the request was intended to cover current guidance, historic guidance, or any guidance ever issued by an arms' length body. It went on to invite the complainant to clarify his request.

36. The Commissioner does not consider this fulfils the DHSC's duty under section 16. She notes that it is clear that the request seeks guidance that was available in 2009. Furthermore the DHSC has already established that none of, its own, current guidance was available in 2009. It is therefore questionable what value there is in asking the complainant to clarify whether he is seeking current guidance.

37. The DHSC is required to consider what advice it could provide to the complainant which would help him refine his request so that searches for the information are likely to return a limited number of documents which could then be gone through within the cost limit. For example there would be no point in asking the complainant whether he wished to exclude guidance produce by third parties, if this would not impact on the number of records that would be returned from a search using the key words identified in paragraph 23 above.

38. The Commissioner finds it necessary to emphasise that it is the DHSC which knows and understands how it holds the information and how that information can be searched. It is therefore the DHSC's duty to consider whether there are means by which the complainant could meaningfully narrow the scope of his request so that there is a reasonable prospect that relevant information could be located within the cost limit. Although again emphasising the responsibility of the DHSC to use its knowledge of its own records management, the Commissioner would suggest that it considers the likelihood that focussing searches on, what the DHSC has described as, the 'primary team' responsible for guidance in this area, would identify at least some information that would be of interest to the complainant. The DHSC may also have some sense of the impact of

limiting the search terms used, for example, it may be that guidance containing the term 'sexual assault centre' is also likely to contain other search terms used such as 'abuse' or 'sexual violence'. The DHSC are the experts in respect of the information they hold and the Commissioner expects the DHSC to adopt an intelligent approach to determining whether there is a reasonable prospect of a narrowed request locating relevant information and, if there is, to explain the options available to the complainant.

Section 1 - duty to confirm whether the requested information is held and if so, subject to other provisions, to communicate that information.

39. Section 1(1)(a) – states that any person making a request is entitled to be informed in writing whether the public authority holds that information and, under section 1(1)(b), if it is held, to have that information communicated to them. This is of course subject to other provisions within the FOIA.

40. The complainant raised a number of issues when he first made his complaint to the Commissioner. At that time the DHSC had confirmed it held information relevant to his request, but issued a refusal notice stating the information was exempt under section 21 – information already available to the complainant. Amongst the complainant's concerns were that the DHSC had failed, within twenty working days, to confirm that the information was held and that, as he believed additional information was held, that the DHSC had failed to provide all the information he was entitled to.

41. However as the Commissioner has found the DHSC is entitled to rely on section 12, it follows that the DHSC is not required to either inform the complainant whether it holds the requested information, or to communicate that information to him.

42. The Commissioner does not uphold this element of the complaint. However she will go on to look at whether the DHSC complied with its obligation to provide the complainant with a valid refusal notice in accordance with section 17.

Section 17 – refusal notice.

43. Section 17(5) provides that where a public authority is relying on section 12 to refuse a request, it must, within the time for complying with section 1(1), issue the applicant with a notice informing them that complying with the request would exceed the appropriate limit.

44. The reference to the time for complying with section 1(1) is in effect the twenty working days following the receipt of a request in which a public authority has to respond to a request.

45. Although the DHSC did issue a refusal notice on the twentieth working day following its receipt of the request, that notice was in respect of the DHSC's use of section 21 – information already available to the complainant. The DHSC did not issue a refusal notice informing the complainant that it was refusing to confirm whether it held any of the requested information under section 12 – appropriate limit, until 18 February 2019; that is over two years after the request was made on 6 February 2017. This is a very clear breach of the DHSC's obligations under section 17(5).

46. The failure can be traced back to the DHSC's failure to be clear in how it initially handled the request. The DHSC may have been trying to assist the complainant by providing him with links to where information that may be of interests to him was published on third party websites. But in trying to assist the complainant in this way, it failed to properly turn its mind to what information it held itself. It therefore failed to meet its obligations under the FOIA. As previously stated, the Commissioner would not wish to discourage a public authority from trying to assist an applicant beyond its responsibilities under the FOIA, but this should not be at the cost of properly considering its statutory obligations.

47. The DHSC has breached section 17(5) of the FOIA by failing to issue an appropriate refusal notice within twenty working days of the request being received.

Other matters

48. Although not forming part of the formal decision notice the Commissioner uses 'Others Matters' to address issues that have become apparent as a result of a complaint or her investigation of that complaint and which are causes for concern.

49. The complainant has raised concerns over the length of time that the DHSC took to complete its internal review of how it handled his request. There is no statutory requirement for public authorities to have an internal review process but clearly there is an expectation that central government departments such as the DHSC have such a process. The purpose of the review is to provide the public authority with an opportunity to reconsider its handling of a request and where necessary to remedy any failings with how it initially dealt with the request. This in turn should provide a chance for the complainant to have any concerns they may have resolved in a swift and efficient manner without the need to make a formal complaint to the Commissioner. This can provide confidence amongst the public that a public authority takes its responsibilities under the FOIA seriously.

50. The complainant requested an internal review on 25 June 2017. It was not until the 22 March 2018 that the DHSC provided him with the outcome of the review; that is nearly nine months later. The Commissioner considers that an internal review should generally only take twenty working days to complete and in no circumstances take longer than forty working days. This is in line with the best practice set out in the section 45 code of practice.

51. Clearly the length of time the DHSC took to complete the review far exceeds the best practice set out in the code of practice and the time scales detailed in the Commissioner's own guidance. This frustrated the complainant and could only serve to undermine his confidence in the DHSC's ability to handle requests appropriately.

52. It is also disappointing that despite the length of time the DHSC took to conduct the internal review, it failed to recognise that its initial response was inaccurate and to properly consider what information it held itself and whether it could locate any information within the appropriate limit. It is also disappointing that even now the Commissioner is not satisfied that the DHSC has properly considered what advice and assistance could be offered to the complainant in order to allow him to make a refined request. In the event that the DHSC does not provide adequate advice and assistance until the deadline for complying with this notice, it will have taken around two years and two months for the complainant to be placed in the position he should have been in within six and a half months after making his request (ie a maximum of forty working days from when he requested an internal review on 25 June 2017).

53. The Commissioner recommends that the DHSC should examine what steps it can take to ensure it greatly improves its capacity to deal with internal reviews in an efficient manner and should certainly aim to complete them within twenty working days and only take forty working days in the most complex cases.

54. Finally the Commissioner also wishes to express her disappointment in the length of time the DHSC took to respond to her enquiries during the investigation. From her initial letter to the DHSC asking it to revisit the request and provide its final position in respect of the request, the DHSC took nearly four months to respond. The Commissioner therefore finds it necessary to remind the DHSC that it should deal with the Commissioner's enquiries in a timely manner.

Right of appeal

55. 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

56. 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.

57. 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

Rob Mechan
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