Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **10 October 2019**

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 on promotions, staff pay and grading and posts at the Department of Health and Social Care (DHSC). The DHSC refused to respond to this request on the basis of section 14(1) of the FOIA.

2. The Commissioner's decision is that section 14 does not apply to this request.

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

    - To issue a fresh response to the complainant in accordance with its obligations under the FOIA which does not rely on section 14(1).

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 2 February 2018 made two requests to the DHSC. The first of these requests (FOI-1118056) was for the following information:

    "I am requesting the following information under Freedom of Information Act.

1) *What is the total number of staff in receipt of 'additional pay allowance, broken down by directorate to date?*

2) *Are there any other allowances that staff are getting and if so what are they?*

3) *What is the total number of staff in receipt of 'market pay supplement', broken down by directorate to date?"*

6. The second request (FOI-1118057) sent to the DHSC on the same date was as follows:

"I am requesting the following information under Freedom of Information Act.

1) *How may FOI requests have Department of Health received in last 5 years (total per year)?*

2) *How many FOI requests/cases have been responded to before 20 working days, referring to question 1 (total per year for last 5 years)?*

3) *How many FOI requests/cases have been responded to after 20 working days, referring to question 1 (total per year for last 5 years)?*

4) *How many requests for an internal review have been received in last 5 years (total per year)?*

5) *How many requests/cases for an Internal Review have been responded to before 20 working days, referring to question 4 (total per year for last 5 years)?*

6) *How many requests/cases for an Internal Review have been responded to after 20 working days, referring to question 4 (total per year for last 5 years)?*

7) *How many requests/cases for an Internal Review have exceeded 40 working days, referring to question 4 (total per year for last 5 years)?*

8) *How many FOI requests have had section 40(2) quoted in last 5 years (total per year for last 5 years)?"*

7. A third information request was sent on 5 February 2018 (FOI-118535) for the following information:

"Subject: FOI-1113489 Referring to your e-mail sent today. The year in question is 2017, apologies for this omission. Question 1. How many

staff have been promoted from 1st February to date, broken down by grade and month?"

8. This was a clarification of a previous request (FOI-113489) which was for the following information:

   1) "How many staff have been promoted from 1st February to date, broken down by grade and month?

   2) Can you send me a list of all Information Technology posts broken down by grade and what posts are deemed to be 'Specialist?'

   3) When did pay scales change (minimum/maximum for grades and regions) and were Department of Health recognised unions consulted about pay scale changes?"

9. The DHSC responded on 2 March 2018 and refused each of the requests on the basis of section 14(1) with the explanation that the complainant had submitted requests for the same or similar information on the subject of DHSC staff recruitment, promotions and pay. The DHSC considered that complying with the requests would be a disproportionate strain on its resources and would be unjustified.

10. The complainant requested an internal review on 30 April 2018. He disputed that the first two requests were vexatious as he stated he had not previously requested information on statistics or performance of FOI requests or requested information on allowances. For the later request the complainant confirmed he had provided the requested clarification and expressed dissatisfaction that the DHSC had not responded to the other parts of this request in the meantime.

11. The DHSC provided its internal review response on 15 February 2019. The DHSC stated it was no longer refusing the requests under section 14 but now considered the request(s) should be refused under section 12 as it would exceed the cost limit to comply. The DHSC pointed to the numbered request 5, 6 and 7 of request FOI-1118057 as exceeding the cost limit to comply with on its own.

12. DHSC stated it had aggregated all of the requests from FOI-118057 and all of the requests from FOI-118056 and FOI-118535 and therefore all requests were being refused on the basis of section 12.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

14. During the course of the Commissioner's investigation she raised concerns about the decision of the DHSC to aggregate all of the requests to apply section 12 and refuse to provide the information. The Commissioner acknowledged that the requests were all from the same person but questioned whether it was fair to say that the requests were all for the same or similar information.

15. The DHSC reconsidered each of the requests and concluded that all three of the requests should not have been aggregated. However, it maintained that two of the requests should continue to be aggregated (FOI-1118056 and FOI-118535) and stated it considered these should be refused under the provisions of section 14(1) of the FOIA as complying with these requests would cause an unjustified level of disruption to the work of the DHSC.

16. The Commissioner considers the scope of this investigation to be to determine if the DHSC can aggregate these two requests and whether the DHSC can rely on the provisions of section 14(1) to refuse to provide the requested information. For the remaining information request (FOI-118057) the Commissioner has issued a separate decision notice (FS50879431).

Reasons for decision

Section 14 – vexatious requests

17. Section 14 of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."

18. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the *"manifestly unjustified, inappropriate or improper use of a formal procedure"*. The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

19. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

20. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: *"…adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."* (paragraph 45).

21. The Commissioner has published guidance on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious. Her guidance can be accessed here:

    https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf

22. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies"*.

23. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.

24. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: *"In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."*

25. The DHSC considers that the requests can be aggregated as it is allowed under section 5(2) of the FOI and Data Protection (Appropriate Limit and Fees) Regulations 2004. This section allows for two or more requests for information made by one person on the same or similar subject to be aggregated.

26. However, section 4(1) makes it clear that the Regulations apply only in cases where the cost of complying with a relevant request would exceed the appropriate limit. This refers to section 12 of the FOIA and the Commissioner does not consider that requests can be aggregated when

considering section 14. That being said, previous requests can be taken into account when considering if there is any pattern of persistent behaviour or undue burden but the requests cannot be aggregated and considered as one. For this reason the Commissioner is focused in this decision notice on only one of the requests refused under section 14 – the request relating to pay, staff promotions and specialist roles (FOI-118535) which was made to the DHSC on 5 February 2018.

27. A separate decision notice (FS50879429) has been issued relating to the other request refused under section 14 (FOI-1118056).

28. The DHSC has stated that the amount of time and resources it would need to expend in order to answer this request would be disproportionate to the matter being pursued given there appears to be little public interest in releasing the information.

29. In addition to this, the DHSC states the complainant has repeatedly submitted requests for the same or similar information on the topic of staff recruitment, promotions and pay and the requests are being made in the hope of discovering information which will support a view the complainant holds about the DHSC.

30. In terms of the volume of requests made; the DHSC states that ten requests for similar information regarding DHSC recruitment, promotions and pay/allowances were made in 2017 and a further 17 requests were made between 2012 and 2017. The DHSC therefore argues that taking into account the context and background of the previous requests it would be a disproportionate strain on the DHSC to comply with the request. Complying would divert finite resources from delivering mainstream services or answering other information requests and the DHSC states would be an unjustified and inappropriate use of a formal procedure.

31. The Commissioner notes that this request was a clarification of a previous request (FOI-113489) and the clarification came from the complainant not including the date when initially making the request. The request itself is in three parts and asks for number of staff promoted within a specific timescale, a list of IT jobs broken down by grade and when pay scales changed.

32. The Commissioner does not consider that this request in itself would seem particularly onerous or difficult to comply with and the DHSC is no longer seeking to rely on section 12 in relation to this request, implying that it acknowledges the time needed to respond would not be excessive. Therefore the Commissioner is left to consider whether the request, as one of several received on this subject, demonstrates any of the other characteristics of a vexatious request.

33. The Commissioner does not consider there is any evidence to suggest that the request is a fishing expedition or that a scattergun approach is being taken. The request is clearly worded and it is obvious from its wording what information is required and, once the clarification was received, over what time period. The complainant has an interest in the staffing of the DHSC. As a public body it is not unreasonable that members of the public would have some interest in knowing how a government department is staffed and to understand pay scales so as to scrutinise how public money is being spent.

34. The DHSC has produced no evidence to demonstrate that this request will cause a disproportionate or unjustified level of disruption, irritation or distress. There is no evidence of previous requests and correspondence having this cumulative effect over time and although the DHSC has said that responding to the request would be burdensome and a distraction from core business it has provided no evidence to support this.

35. The Commissioner notes the complainant made ten requests in 2017 but it is not clear if these were all on the same or similar subjects or were clarifications of earlier requests as new reference numbers appear to be assigned to each refined request. Regardless of this, this does not seem to be a particularly voluminous number of requests over the course of a year.

36. For the above reasons, the Commissioner has determined that section 14 of the FOIA is engaged in this case.

Other matters

37. The Commissioner notes that the DHSC took from 30 April 2018 to 15 February 2019 to complete the internal review process. Such delays are excessive and unacceptable. The section 45 code of practice recommends that public authorities complete the internal review process and notify the complainant of its finding within 20 working days, and certainly no later than 40 working days from receipt.

38. The Commissioner would therefore like to remind the DHSC of the requirements and importance of the code and the need to ensure that future internal review requests are processed in a timely manner.

Right of appeal

39. 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

40. 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.

41. 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 .....

Jill Hulley
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