

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 February 2020

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to guidance on uniforms and workwear. The Department of Health and Social Care (DHSC) says it is not obliged to comply with the request under section 12(1) of the FOIA, as it would exceed the appropriate cost and time limit to do so.
2. The Commissioner's decision is that the DHSC is not obliged to comply with the request under section 12(1). However, she is not satisfied that DHSC met its obligation under section 16 to offer advice and assistance. The Commissioner does not require the public authority to take any steps.

#### Request and response

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3. On 25 July 2019 the complainant made the following request for information under the FOIA:

*'In 2010 the Department of Health produced guidance on uniforms and workwear, a copy of which is attached for ease of reference. The document mentions, in the introduction, comments and feedback that were received before the document was produced.*

*What I require is to have the guidance and advice which was given to the Department before the document was issued. In particular I require any legal advice that was given about the Equality Act and Human Rights Act implications of the policy.'*

4. On 21 August 2019 DHSC responded. It could neither confirm or deny that it held the information and to comply with the request as currently framed would exceed the cost limit of £600 as set out in Section 12 of FOIA.
5. On 5 September 2019 the complainant requested an internal review. DHSC sent the outcome of its internal review on 4 October 2019 upholding its original position.

## Scope of the case

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6. On 15 October 2019, the complainant contacted the Information Commissioner to complain about the way the request for information had been handled. He argued:

*'What I was after was the background material and evidence that was used when the guidance was produced, and in particular I asked for the legal guidance that was received about the Equality Act implications of the guidance. The point is that the guidance requires NHS staff to undertake clinical work "bare below the elbows" and this causes difficulty for some staff members with particular religious or cultural beliefs.*

*It is important to understand that this guidance is in regular use in NHS hospitals, the implementation of the guidance is a live issue in infection control and also a live issue from the disciplinary point of view.'*

7. The Commissioner's investigation has focussed on whether DHSC correctly applied section 12 to the request. She has also considered whether DHSC met its obligation to offer advice and assistance, under section 16.

## Reasons for decision

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### Section 12 – cost exceeds the appropriate limit

8. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to:
  - either comply with the request in its entirety, or
  - confirm or deny whether the requested information is held.
9. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request;

24 hours work in accordance with the appropriate limit of £600 set out above, which is the limit applicable to DHSC.

10. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:

- determining whether it holds the information;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and
- extracting the information from a document containing it.

11. 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.

**Would the cost of compliance exceed the appropriate limit?**

12. As is the practice in a case such as this, the Commissioner asked DHSC to confirm if the information is held, and if so, to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.

13. In its submission to the Commissioner DHSC stated that:

*'The NHS Estates Policy and Development MEDs database contains a file relating to the guidance referenced by the requestor. Looking through the four volumes within that file, there does not appear to be anything relating to legal advice or anything about the Equality and Human Rights Act based on the title of the documents. Each document would need to be checked to see if it contains information within the scope of the request.'*

14. DHSC explained that the *'four volumes contain a total of 397 documents, 177 of which contain attachments. Assuming each of these is just one attachment, a minimum of 574 documents would need to be checked.'*

15. In response to the Commissioner's questions, DHSC provided an estimate: *'Based on a realistic estimate of an average of three minutes being spent to identify whether information in these files are within the scope of the request, it would take a minimum of 28 hours at a cost of £717.50 to identify and extract the requested information.'*

16. DHSC confirmed that the estimate is based on the quickest method of gathering the requested information: searching the 574 documents held

in the Department's records within the file titled '*PET/002/004/001 volumes 1-4: Patient Environment - Cleanliness - Uniform and Laundry Review - Uniform & Workwear - Development of Revised Guidance.*'

17. It is clear to the Commissioner that DHSC holds relevant files on the information requested but notes that the complainant has made it clear that he is particularly interested in '*legal guidance that was received about the Equality Act implications of the guidance.*'
18. Given the specific information requested, the Commissioner accepts that DHSC would take more than the 24 hour limit to respond to the request as phrased. She is therefore satisfied that DHSC is correct to apply section 12(1) to the request.

### **Section 16(1) – The duty to provide advice and assistance**

19. 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 practice (the "code")<sup>1</sup> in providing advice and assistance, it will have complied with section 16(1).
20. During the internal review DHSC advised the complainant that '*I apologise that we are unable to provide assistance on how you can refine your request, as we are unable to determine whether the requested information is held without searching through a large number of files and exceeding the cost limit.*'
21. The Commissioner is not satisfied that DHSC met its obligation under section 16 to offer advice and assistance.
22. However, in its submissions to the Commissioner DHSC stated that it had further considered the request: '*if he were to refine it by stating that he requires only "the legal advice that was given about the Equality Act and Human Rights Act implications of the policy" rather than all "guidance and advice which was given to the Department before the document was issued", we may be able to answer his request. However, we cannot guarantee that a refined request would fall within the FOIA cost limit, or that other exemptions will not apply (including Section 42 (Legal professional privilege)).*'

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<sup>1</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

## Other matters

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23. Although they do not form part of this decision notice, the Commissioner would draw DHSC's attention to the following points.
24. Although DHSC responded to the complainant within the time limits, the Commissioner is disappointed that DHSC failed to respond to this FOIA request as fully as possible as soon as possible.
25. It is not within the remit of the Commissioner to comment on whether DHSC was previously aware of the named file within The NHS Estates Policy and Development MEDs database but the Commissioner reminds DHSC that adequate searches must be made at every stage of the FOIA process. Given the explicit phrasing of the request DHSC should have found this file at an earlier stage and the complainant could have had the opportunity of a refined request at an earlier stage. This might have prevented the need for the complaint to be brought to the Commissioner.
26. In the future, the Commissioner would remind DHSC to consider each FOIA request very carefully so that all possible information that is potentially within the scope of the request is identified and considered at the time of the first response to the complainant.

## Right of appeal

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27. If 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](mailto:grc@justice.gov.uk).

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

28. 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.

29. 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**