

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 November 2021

**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 the Covid-19 action plan and actions taken during January 2020. The Department for Health and Social Care ("the DHSC") relied on section 12 of the FOIA to refuse the request as it estimated that the cost of complying would exceed the appropriate limit.
2. The Commissioner's decision is that the DHSC was entitled to rely on section 12 of the FOIA to refuse the request. However, as the DHSC failed to issue its refusal notice within 20 working days, it breached section 17(5) of the FOIA.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 16 February 2021, the complainant wrote to the DHSC and requested information in the following terms:  
*"From files and records please kindly provide documents showing your Covid-19 action plan/action taken against Covid-19 by your department from 1st January 2020 to 31st January 2020."*
5. The DHSC finally responded on 17 June 2021. It refused the request and relied on section 12 of the FOIA in order to do so.
6. Following an internal review the DHSC wrote to the complainant on 24 August 2021. It upheld its original position.

## Scope of the case

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7. The complainant first contacted the Commissioner on 20 April 2021 to complain about the way her request for information had been handled. At that point, the DHSC had yet to respond to the request and the Commissioner's intervention was necessary.
8. When the complainant contacted the Commissioner again on 17 August 2021 to note that the DHSC had still not completed its internal review, the Commissioner exercised her discretion and accepted the complaint without waiting for the DHSC to complete its review.
9. The complainant has pointed to the strong public interest in understanding what actions the DHSC took prior to the first recorded Covid-19 case in the UK. The Commissioner agrees that there will be a strong public interest – but this is not something which she is entitled to consider as part of a section 12 investigation.
10. The Commissioner considers that the scope of her investigation is to determine whether the DHSC has reasonably estimated that the cost of complying with the request would exceed the appropriate limit.

## Reasons for decision

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### Section 12 – Cost of compliance exceeds appropriate limit

11. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

12. Section 12 of the FOIA states that:

- (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless*

*the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*

13. The "Appropriate Limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") and is set at £600 for a public authority such as the DHSC. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 24 hours.
14. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:
  - (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
15. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence"<sup>1</sup>. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

#### *The DHSC's response*

16. The DHSC explained that, prior to 3 March 2020, it did not have a formal action plan to deal with Covid-19. It accepted that it did hold information on actions that it had taken but these were not held in a single document or single series of documents. Therefore, in order to identify all the information it held that would fall within the scope of the request, it would need to trawl through a vast number of documents in order to determine what was and wasn't relevant.

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<sup>1</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

17. The DHSC confirmed that it had carried out a sampling exercise to establish the breadth of the material that might potentially fall within the scope. It had searched the mailboxes of its Covid-19 Single Point of Contact, Operational Response Centre and of its Director of Emergency Health and Protection, against eight keywords. These keywords included terms such as "Coronavirus", "Virus", "Wuhan", "China" and "Outbreak."
18. This search had yielded a total of 24,357 emails alone. However the DHSC estimated (based on its sample) that just over a third of those emails would also contain at least one attachment – adding a minimum of 8,000 additional documents to be reviewed.
19. The DHSC accepted that a high proportion of these emails and documents would be duplicated (ie. because they contained more than one keyword or were sent to more than one of the three mailboxes) however the sheer volume of information would require a considerable amount of time to sift.
20. In addition, the DHSC noted that it had considered a further nine search terms which might yield additional information. These included acronyms such as "NERVTAG" and "SAGE" as well as words such as "analysis" and "vaccine." A total of 2,948 such emails had been identified in either the Single Point of Contact or Operational Response Centre mailboxes – although again, these may have been emails already identified as potentially falling within scope.
21. Finally, whilst the DHSC noted that all relevant emails should have been copied to one of the three mailboxes identified above, there remained a realistic possibility that some had not. It noted that, in order to ensure that it had all relevant information, there were a further 49 mail boxes that it would need to search.
22. Added to around 45 minutes to design and run the search and taking a central estimate of 3 minutes to review each email, the DHSC therefore estimated that complying with the request would comfortably exceed the appropriate limit.

*The Commissioner's view*

23. Whilst the DHSC may have over-estimated the cost of complying with the request, the Commissioner nevertheless considers that the cost would exceed the appropriate limit – probably by a substantial margin.
24. It is clear from the DHSC's submission that it has focused on the "actions taken" element of the request rather than the "action plan" element. The complainant has focused, in her correspondence on the "plan" element and, had the DHSC confirmed explicitly, at an earlier

stage, that it did not hold such a document, this request might have been resolved earlier and more amicably.

25. Nevertheless, the Commissioner is required to consider the request as it was submitted – and the wording of the request sought details of action taken. The DHSC was entitled to take account of time spent searching for information about the actions it had taken – and it is searching for this information that causes the request to exceed the appropriate limit.
26. Turning to the DHSC's estimate, the Commissioner is not clear why the DHSC would need to carry out separate searches for each keyword. Most modern search functions allow for the use of Boolean Operators (such as "OR", "AND" and "NOT") so that emails or documents can be searched for documents that contain any of several keywords, or multiple keywords within the same document. Performing a search in this way should slim down the amount of potentially relevant correspondence considerably, as the sampling exercise appeared to involve a lot of double-counting of emails.
27. The Commissioner is also aware that there may be electronic tools available to identify duplicated correspondence between the three main mailboxes and eliminate from the search.
28. Nevertheless, even if the amount of duplicated correspondence can be removed altogether (and this activity would still itself involve some time), the Commissioner recognises that there will still be a substantial amount of information that will require sifting to determine whether or not it falls within the scope of the request.
29. The Commissioner notes that the DHSC has stated that the Single Point of Contact mailbox includes 2,250 emails – including 556 that contain attachments – that contain the word "Coronavirus."
30. If the request were limited to these emails alone, in order to comply with the request without exceeding the cost limit, the DHSC would need to review 94 emails per hour – or spend 40 seconds per email. Whilst some emails could be easily discarded, others would require more detailed consideration.
31. The Commissioner considers that 40 seconds per email is (at best) at the very low end of the range of feasibility. However, the request is not limited to this set of emails alone – meaning that the central estimate would need to be reduced further still (and probably by a considerable margin) in order to deal with all the potentially relevant information without exceeding the cost limit. Therefore even if 40 seconds per email were feasible, it would not be sufficient to consider all the information within scope.

32. The Commissioner is therefore satisfied that the request would exceed the cost limit – and by a substantial margin. She thus accepts that the DHSC was entitled to refuse the request.

*Section 16 – Advice and assistance*

33. The Commissioner notes that the DHSC suggested to the complainant that she might wish to narrow the timeframe of her request or focus on a particular area of its response. In the circumstances, the Commissioner considers that this was reasonable advice and assistance and thus the DHSC complied with its section 16 obligation – although, as she has already pointed out, it would have been helpful if the DHSC could also have stated that it did not have a central action plan.

**Procedural Matters**

34. Section 17(5) of the FOIA states that:

*A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.*

35. The Commissioner notes that the DHSC did not rely on section 12 to refuse the request until June 2021 – some four months after the request had been submitted. Whilst she notes the particular and extraordinary pressures on the DHSC during this period, she is nevertheless obliged to record a breach of section 17 of the FOIA in responding to the request.

## Right of appeal

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36. 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](mailto:grc@justice.gov.uk)

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

37. 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.
38. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**