

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2022

Public Authority: Department of Health & Social Care (DHSC)

Address: 1st Floor North
39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested summary reports relating to a consultation on changes to the Human Medicines Regulations.
2. The DHSC refused to comply with the request, citing section 14(1) (vexatious requests), based on the grossly oppressive burden that complying with the request would impose.
3. The Commissioner's decision is that the DHSC is entitled to rely upon section 14(1) to refuse to comply with the request.
4. However, in applying section 14(1) outside the time for compliance, the DHSC has breached section 17.
5. The Commissioner does not require the DHSC to take any further steps.

Request and response

6. On 10 November 2020 the complainant requested the following information:

"Please provide copy of the summary report generated from the recent consultation regarding vaccinations, that was published on gov.uk and received 191,740 responses, including 3,700 email responses. The extent of information required, which I assume would be in the report (or at least in the executive summary), being the sum numbers for those responses for (in favour) and those responses against (not in

favour) in relation to the question set if these are in the report and the executive summary of public consensus or objection to the proposals, conclusions/recommendations.”

7. The Commissioner understands that the consultation in question relates to changes made to the Human Medicines Regulations, in order to support the rollout of the Covid-19 and flu vaccines.¹
8. On 2 June 2021 the DHSC responded and refused to provide the requested information, citing section 36(2)(c) (the effective conduct of public affairs).
9. The complainant requested an internal review on 6 August 2021. On 11 October 2021 the DHSC upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 21 June 2021 to complain about the way that their request for information had been handled.
11. During this investigation, the DHSC confirmed that it did not hold a single summary report for the consultation in question. It clarified that it held 166 summary reports.
12. It is not for the complainant to know if the DHSC holds single, or multiple, summary reports in response to a specific consultation. Even so, the Commissioner advised the complainant, with the DHSC's change of position in mind, to submit a revised request.
13. The complainant did not wish to do so and, since the Commissioner is satisfied that the 166 reports would fall within the scope of the request, he pursued the complaint.
14. Once it had established that it held 166 summary reports, and not a single summary report, the DHSC changed its position. It confirmed that it was no longer relying upon section 36(2)(c) to withhold the requested information but section 14(1).

¹ [Government response: consultation on changes to the Human Medicines Regulations to support the rollout of COVID-19 and flu vaccines - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/government-response-consultation-on-changes-to-the-human-medicines-regulations-to-support-the-rollout-of-covid-19-and-flu-vaccines)

15. Therefore, the Commissioner considers the scope of his investigation is to determine if the DHSC is entitled to rely upon section 14(1) as a basis for refusing to comply with the request.

Reasons for decision

Section 14 (1) – vexatious requests

16. Section 12 of FOIA provides an exemption from the duty to comply with a request where doing so would exceed the appropriate limit.² This is £600 for a central government department and such as the DHSC. This equates to 24 hours of work at approximately £25 per hour. This limit is laid down by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.³
17. The following activities may be taken into account to determine whether compliance with a request would exceed the appropriate limit:
- determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
18. The Commissioner's guidance states 'An authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information.'
19. For such circumstances a public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.
20. The Commissioner considers the threshold for such a refusal to be high and he considers it appropriate where:

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

³ <https://www.legislation.gov.uk/uksi/2004/3244/regulation/3/made>

- The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
21. In circumstances where a public authority wishes to apply section 14(1) based on the grossly oppressive burden that compliance with a request would cause, it must balance the impact of the request against its purpose and value to determine whether the effect on the authority would be disproportionate.
 22. In order to assist the Commissioner in his investigation, the DHSC has provided three of the 166 summary reports, as a sample of the withheld information.
 23. The DHSC has explained that 'the largest reports are over 200 pages and the samples provided are shorter.' The Commissioner notes that the average length of the sample reports is 30 pages.
 24. The DHSC has explained to the Commissioner that 'for the three sample reports provided we estimate that it took one hour 30 minutes to review each report and indicate where redactions would be needed. The DHSC has elaborated that 'If we were to apply this to all of the reports, it would take 249 hours to review all of the reports.'
 25. Even though it hasn't specified this, the DHSC appear to have conducted the following calculation to reach its estimate:

$$90 \text{ minutes (time taken to review one report)} \times 166 \text{ reports} = 14,940 \text{ minutes or } 249 \text{ hours.}$$
 26. The DHSC has clarified that the above represents a conservative estimate, since the largest reports are over 200 pages and the samples provided are shorter.
 27. The DHSC has also advised that 'In addition, we would need to account for time for the redactions to be completed, which we feel when applied would equate to more than an additional 80 hours.' This brings the DHSC's total estimate for compliance to 329 hours.
 28. The Commissioner is sceptical of the DHSC's claim that it would need an additional 80 hours to finalise redactions to all 166 reports. The DHSC hasn't explained how much extra time it needed, on top of the 90 minutes it took to review a sample report, to apply the redactions. Therefore the Commissioner has no idea where this figure of 80 hours has come from.

29. The DHSC has, however, indicated what exemptions it believes would apply to the withheld information: section 21 (information accessible to applicant by other means), section 35 (government policy), section 36 (prejudice to the effective conduct of public affairs), section 38 (health and safety), section 40 (personal information), section 43 (commercial interests) and section 22a (research information.)
30. It has also explained why each of the above exemptions would apply and has helpfully highlighted the information exempt under section 36, section 21, section 40 and section 38 within the samples.
31. In relation to section 35, the DHSC has confirmed 'the Government is intending on holding another consultation on these regulations in the future.' The DHSC has confirmed that, 'releasing the summary report information would, or would be likely to, inhibit the free and frank provision of advice, and exchange of views, by emergency planners in the departments and agencies working to prepare for outbreaks or pandemics.'
32. The DHSC hasn't indicated what information, within the samples, it is withholding under section 35. It appears that the DHSC wishes to withhold all 166 reports under section 35.
33. To the Commissioner, it cannot be grossly oppressive to exempt all withheld information, even if it is voluminous, under a single exemption such as section 35. Therefore, he has discounted the DHSC's argument in relation to section 35.
34. Whether the DHSC is entitled to withhold the requested information under section 35 is not the scope of the Commissioner's investigation. To reiterate, the scope of the Commissioner's investigation in this case is to determine whether it would be grossly oppressive for the DHSC to review and prepare the information for disclosure, including the consideration and applications of any redactions.
35. The Commissioner also notes that section 35 and section 36 are mutually exclusive. What this means is, if any part of section 35 is engaged, section 36 cannot apply.
36. Section 35 and section 36 protect many of the same interests. The DHSC has explained that 'the consultation was circulated amongst 'anti-vax' groups. Many of their responses contain mis and dis-information about vaccines, the Covid-19 pandemic, and the Government Response. Publication of these responses is, in our view, likely to prejudice the conduct of public affairs by negatively impacting public use of health services and confidence in the Government's pandemic response.'
37. The DHSC goes onto explain that, were it to disclose the opinions of those individuals and groups opposed to the Covid-19 vaccination, this

would risk damaging the uptake for the upcoming Autumn/Winter Covid-19 vaccinations. It is important to remember that, at the time that the request was made, the vaccine rollout had just begun.

38. Within the sample reports, the most prominent exemption is section 36 which works in a slightly different way to other exemptions within FOIA. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would prejudice the effective conduct of public affairs.
39. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP for the exemption to be applied appropriately. Furthermore, the opinion does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
40. As part of his investigation, the Commissioner has looked at the information that the DHSC has marked for redaction. He is satisfied that the samples do contain personal information, information that, according to the QP, may prejudice the effective conduct of public affairs, research information and information that is available to the applicant by other means, for example, weekly national statistics that have been reported during the pandemic and are available online and research undertaken by the British Medical Journal.
41. Furthermore, the Commissioner also notes that section 22a and section 43, whilst not highlighted within the sample reports, are highlighted by the DHSC as exemptions that it would need to consider.
42. The DHSC has explained that 'To understand which information is required to be redacted, the reports have to be individually read line-by-line to understand what the responses contain and what information could be released.'
43. The Commissioner notes that some of the information collected as part of the consultation was done so using free text boxes. Therefore, the DHSC won't be able to use a find and replace function to easily extract the information.

The Commissioner's view

44. In this instance, the Commissioner is satisfied that the DHSC is entitled to refuse to comply with the request, citing section 14(1) as its basis for doing so.
45. The Commissioner is certainly satisfied that the complainant has requested an large volume of information and that the DHSC would need

to consider several exemptions in the event that it complied with request in full. The Commissioner is also satisfied that the exempt information is scattered throughout the information and is not easily isolated.

46. However, when considering the application of section 14(1), where compliance with the request would impose a grossly oppressive burden, the Commissioner expects the public authority to provide clear evidence to substantiate its claim and the Commissioner has doubts about the estimated compliance of 329 hours.
47. The Commissioner agrees with the DHSC that the only way to review all 166 reports would be manually, to read through each report line by line, to identify what information could be disclosed and what information would require redacting.
48. However, looking at the three sample reports the Commissioner does not agree that it would take 90 minutes to review each document and indicate where exemptions apply. For example, each summary report contains a large number of references to information already in the public domain which, by virtue of the fact that it is already in the public domain, is unlikely to require redacting.
49. Furthermore, each sample report starts with the same information. Firstly, there are bar charts which represent where in the UK the responses came from and whether the consulted party represents the NHS or another healthcare profession. Then there is a lexicon bar chart which separates key words, included in the consultation responses, into the following categories: word count, dictionary count, reduced words, multi-use words and single-use words. Then there is another bar chart which represents the topic areas that the consultation covered.
50. None of the above information needs considering for exemption and, since it is present on the three sample reports, it is likely to be present on the remaining 163.
51. Therefore, the Commissioner is not convinced by the DHSC's estimate that to review one summary report would take 90 minutes. Having looked at the sample reports, the Commissioner considers that 30 minutes is more appropriate. The Commissioner has therefore carried out his own estimate below:

30 minutes (time taken to review one report) x 166 reports = 4,980 minutes or 83 hours.
52. The above calculation represents the DHSC taking one minute to review each page of a report. It is a significant reduction from the estimate provided by the DHSC and yet is still grossly above the 24 hour limit.

53. The Commissioner doesn't know how many pages in total the withheld information represents. Therefore, he can't calculate based on his estimate of a minute per page how long it would take to review all 166 reports.
54. However since the DHSC has explained that the samples represent the shorter of the reports, and that the longest exceeds 200 pages, the Commissioner's estimate of 83 hours is likely to represent a conservative amount.
55. This figure also doesn't take into account the extra time that the DHSC requires to finalise redactions. Whilst the Commissioner is sceptical of the DHSC's claim that it would need a further 80 hours to finalise redactions to the reports, he doesn't consider it necessary to scrutinise the DHSC's calculations any further, given that, even if the DHSC managed to review each page in 30 seconds, it would still take 41.5 hours to consider redactions, double the limit prescribed.
56. Returning to paragraph 21, even if it is established that compliance with a request would impose a grossly oppressive burden, the public authority must still balance the impact of the request against its purpose and value to determine if the request is vexatious or not.
57. The DHSC has emphasised that 'release of the information would most definitely result in a grossly oppressive, financial, and administrative burden on the department.'
58. However, the DHSC has also expressed concerns that release of the summary reports, which contain the opinions, beliefs and concerns of those opposed to the Covid-19 vaccination, and vaccinations in general, could also create panic or concern amongst the public. The DHSC has explained that it would take 'an unquantifiable amount of time' to handle or appease such concerns. The DHSC is concerned that disclosure of such opinions, right before the rollout of the vaccination programme, would lead to an increase of contacts to the departments, by various mediums, all of which would distract the DHSC from the vaccine rollout.
59. Throughout the pandemic there has been a discourse between those who support the Covid-19 vaccine and those who do not. Disclosure of the requested information would not, to the Commissioner, promote ideas that are not already out there. However, it might sway those who were undecided about the vaccine in one direction or the other. In a similar vein, the DHSC is concerned that the disclosure of medically inaccurate claims or opinions could have an adverse effect on the uptake of the Covid-19 vaccination and, by extension, public health. This would create more work for the DHSC.

60. However, the Commissioner must always consider the disruption, irritation or distress compliance would impose at the time that the request was made against any value that the request represents.
61. The Commissioner recognises the concerns that individuals, and certain groups, may have regarding the Covid-19 vaccination, or vaccinations in general. He recognises that disclosure, and compliance with the request, would shed more light on such concerns and the extent to which they informed the consultation.
62. However, at the time that the request was made the DHSC had already placed into the public domain⁴ information about the changes made to the Human Medicines Regulations , why these changes were made and how these changes supported the vaccine rollout.
63. The DHSC also acknowledged that 'many of the responses to the consultation raised issues around safety, risks, possible side effects and harm as a result of receiving a temporarily authorised unlicensed vaccine.' The DHSC addressed the concerns about the safety, risks, possible side effects and harm as a result of receiving the vaccine.
64. To the Commissioner, the overall content of the summary reports are already represented in the public domain and the arguments expressed by anti-vaccination groups within the summary reports are available, and in the public domain, for anyone to see. With this in mind, the Commissioner does not consider that the value or purpose in the requested information outweighs the burden compliance with the request would impose upon the public authority.

Section 17 – Refusal of request

65. Section 17 requires that where a public authority is relying upon a claim that section 12 or 14 applies to a request, a notice is issued stating that fact within 20 working days.
66. In this case the DHSC only introduced its reliance on section 14(1) to the Commissioner when this matter was put before him as a complaint; significantly outside the time for compliance. On this basis the Commissioner finds a breach of section 17.

⁴ [Government response: consultation on changes to the Human Medicines Regulations to support the rollout of COVID-19 and flu vaccines - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/government-response-consultation-on-changes-to-the-human-medicines-regulations-to-support-the-rollout-of-covid-19-and-flu-vaccines)

Other matters

67. The Commissioner understands that the complainant submitted a request to the DHSC on 13 October 2020. This request asked for:

“Please provide full disclosure copy of the results of the recent consultation published on gov.uk including consultees responses to the originally included on-line question set (summary of each question, number of those responses for (in favour) and those responses against (not in favour) and summary of the emailed responses, received, quantity and content.”
68. The DHSC responded to this request on 5 November 2020 and advised the complainant that it was applying section 12 (cost of compliance exceeds appropriate limit). The DHSC advised the complainant to revise their request.
69. The complainant did and submitted their request of 10 November 2020, which is the subject of this notice.
70. The complainant has expressed concern to the Commissioner, on more than one occasion, that the scope of this investigation does not include the DHSC’s previous application of section 12.
71. The Commissioner has explained that, at the point that the complainant submitted a revised request to the DHSC, rather than requesting an internal review, the complainant accepted the DHSC’s application of section 12.
72. Therefore, the only matter before the Commissioner is the DHSC’s position in relation to the request made on 10 November 2020 and the only information that falls within the scope of this request is the summary reports.

Right of appeal

73. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

74. 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.

75. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF