

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2022

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 ministerial correspondence with Steve Brine MP about particular companies and information associated with any meetings with Steve Brine MP about those same companies. The final position of the Department of Health and Social Care (DHSC) is to refuse the request under section 12(2) of FOIA, which concerns the cost of complying with section 1(1)(a).
2. The Commissioner's decision is as follows:
 - DHSC is not entitled to rely on section 12(2) of FOIA to refuse the request but is entitled to rely on section 12(1). DHSC failed to comply adequately with its duty under section 16(1) of FOIA to provide advice and assistance to the complainant.
3. The Commissioner requires DHSC to take the following step to ensure compliance with the legislation:
 - DHSC should provide the complainant with reasonable assistance to see if the request can be refined so that it remains meaningful for the complainant but can be complied with within the appropriate limit.
4. DHSC must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 8 November 2021 the complainant wrote to DHSC and requested information in the following terms:

"1) Please provide a copy of all correspondence (sent and received) between ministers of your department and Steve Brine MP concerning

- Remedium Partners
- Microlink PC
- Sigma Pharmaceuticals

Please include emails, texts, WhatsApp messages or messages on equivalent platforms such as Signal, internal work instant messages such as on Slack, Teams or Gchat, and a list of and minutes of any calls.

Please also list the titles of attachments to emails or messages within the scope of this request.

2) Please provide a record of all meetings between ministers of your department and Steve Brine MP relating to the above companies, including that held on 10th February.

Please provide

- A list of these meetings, including topics.
- A copy of the minutes recorded of these meetings
- A copy of civil service briefings prepared ahead of these meetings for the minister concerned.
- A list of the titles of any documents considered at these meetings.

Please provide information held from 25 March 2019 to date."

6. DHSC responded on 9 November 2021 (its ref: FOI-1372544). It refused the request under section 12(2) of FOIA.

7. On 9 November 2021 the complainant refined their request as follows:

"Thanks for your response. I note you state in your response that: 'In this instance to determine if all the information requested is held we would be required to searched manual/electronic systems, interrogate relevant database/statistics and speak to the relevant policy officials.'

I am happy for this request to be limited to electronically held records only.

It seems highly unlikely that this request would now fall outside the cost limit, given it would effectively be a search of a limited number of electronic ministerial and private office staff inboxes for emails, and then a search of ministerial diaries for any relevant meetings, from which responsive records relating to the meetings could be located in the appropriate electronic departmental folder.

In any case, under your duty to provide advice and assistance under the act, please also provide a copy of the detailed cost calculation workings (i.e. how many emails responsive to this request have been located) that were conducted by FOI officers in estimating the cost of compliance for this request, to allow you to estimate that it would cost more than the FOIA limit to provide a response.

Given the very clear public interest in full disclosure of this information, I look forward to a substantive response without unreasonable delay.”

8. As a result of the Commissioner’s decision in IC-150951-L7R6, on 22 February 2022 DHSC provided a response to the refined request of 9 November 2021 (its reference: FOI-1372744). DHSC disclosed one document relating to ‘HC-One’, with personal data redacted under section 40(2) of FOIA.
9. The complainant requested an internal review on 22 February 2022. They noted that DHSC appeared to have sent information associated with an organisation not referred to in their request. They then reproduced their original request of 8 November 2021 and advised that they had refined this request on 9 November 2021. The complainant asked DHSC to confirm that it had searched for information within scope of their “original request” and also noted that DHSC did not appear to have addressed the element of their request that concerns particular meetings.
10. DHSC responded on 12 July 2022. It had categorised the request for an internal review as a new request and gave it the reference: FOI-1395150. DHSC again relied on section 12. It explained that WhatsApp messages are stored by a third party and elaborated on the cost implications involved in accessing files that are stored at the third-party site. DHSC released some relevant information “on a discretionary basis” that it felt was in scope of the request – email correspondence – with personal data again redacted.

Scope of the case

11. The complainant contacted the Commissioner on 22 February 2022 to complain about the way their request for information had been handled.
12. As a result of the complaint to the Commissioner, DHSC wrote to the complainant again on 23 September 2022. It advised it had reconsidered its position and was now relying on section 14(1) of FOIA to refuse the request as vexatious.
13. However, in its submission to the Commissioner of 4 November 2022, DHSC's position appeared to be that it is relying on section 12(2) with regard to "request" reference FOI-1395150 but that if the complainant were to request only messages held by a third party (eg WhatsApp messages) section 14(1) would be engaged.
14. In a telephone conversation with the Commissioner on 15 November 2022 and correspondence dated 21 November 2022, DHSC clarified that its final position is that it is relying on section 12(2) to refuse the complainant's refined request of 9 November 2021.
15. The Commissioner has noted that, in their request, the complainant refers to a meeting on 10 February [2021]. From information published online, the Commissioner understands this to have been a public webinar that Steve Brine MP hosted with Sigma Pharmaceuticals. Nadhim Zahawi MP, the then Minister for COVID Vaccine Deployment, gave an address in that webinar. The webinar was subsequently the subject of a parliamentary question in December 2021 which was answered in February 2022 to the effect that the Department did not hold any minute of the webinar. Correspondence between Steve Brine MP and the Advisory Committee on Business Appointments about the webinar has also subsequently been published.
16. It appears to the Commissioner that DHSC must therefore be able to confirm that at least one meeting between Steve Brine MP and a DHSC minister took place between March 2019 and November 2021 and it was also able to confirm that it held no recorded information from that meeting.
17. The Commissioner's investigation has therefore focussed on whether DHSC can rely on section 12(1) of FOIA to refuse to comply with the complainant's request of 9 November 2021, rather than section 12(2). For clarity, he will give this request DHSC's reference FOI-13951550. He will treat DHSC's response of 12 July 2022 as an internal review of its response of 22 February 2022 and not a response to any new request. The Commissioner's considerations will however, through necessity, involve considering DHSC handling of the requests of both 8 and 9 November 2021.

Reasons for decision

Section 12 – cost exceeds the appropriate limit

18. Section 1(1)(a) of FOIA places an obligation on a public authority to confirm whether it holds information that has been requested.
19. Under section 12(2) a public authority is not obliged to comply with section 1(1)(a) if the cost of doing so would itself exceed the appropriate limit. DHSC has stated that it is relying on section 12(2) but, as has been discussed, the Commissioner has noted that it has confirmed that it does not hold certain recorded information about one relevant meeting that occurred. In the Commissioner's view, DHSC cannot therefore rely on section 12(2).
20. However, under section 12(1) a public authority is not obliged to comply with a request if the cost of complying with it exceeds the appropriate limit. The Commissioner considers it is this exemption that is relevant in this case and he is now considering the extent of the information held, not its existence
21. 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 make a notional charge of 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. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
22. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the applicant refine the request so that it can be dealt with under the appropriate limit, in line with section 16(1) of FOIA.
23. In its conversation with the Commissioner on 15 November 2022 DHSC said that by referring to their "original request" in their request for an internal review, the complainant had reverted back to their original request of 8 November 2021. As such, DHSC confirmed it considered section 12(2) was engaged. But DHSC said that even if by "original

request" the complainant had meant the refined request of 9 November 2021, section 12 was still engaged.

24. DHSC also said that it considered that when the complainant reproduced their 8 November 2021 wording in their request for a review, it had interpreted the quoted timeframe "25 March 2019 to date" as referring to "25 March 2019 to 22 February 2022" (the date of their request for an internal review). However, DHSC subsequently agreed with the Commissioner that the timeframe for the request is as stated in the original request ie 25 March 2019 to 9 November 2021.
25. The Commissioner has considered the complainant's request for a review. When considered in the round, the Commissioner's view is that a reasonable interpretation of this correspondence is that the complainant was referring to their refined request of 9 November 2021. While they had reproduced the original request of 8 November 2021, they had noted that this had subsequently been refined to just electronically held correspondence and information about meetings. This is why the Commissioner is going to consider whether DHSC is entitled to rely on section 12(1) with regard to the refined request of 9 November 2021 – reference FOI-1395150.
26. DHSC said in its submission that the complainant's correspondence with it made the situation complex. The Commissioner disagrees. It appears to him that it is DHSC that has unnecessarily made the situation more complicated and confused than it needed to be. For absolute clarity, the request the Commissioner is considering is the request of 9 November 2021 for electronic correspondence between Steve Brine MP and DHSC ministers about particular companies, and electronic information associated with any meetings between Steve Brine MP and DHSC ministers about those same companies, for the period 25 March 2019 to 9 November 2021.
27. In its initial submission to the Commissioner, DHSC presented what the Commissioner considers to be a confused position about its response to FOI-1395150. DHSC said:
 - That it had interpreted "The response from [the complainant] as a repeated request of FOI-1372544" with the dates extended to the present day.
 - That the request should have been refused under section 12(2) and that at the time of the request it had focussed on the part of the request relating to WhatsApp messages.
 - The submission advises that DHSC has changed its position to rely on section 14(1) because of the financial burden involved in identifying any relevant WhatsApp messages.

28. However, as discussed elsewhere in this notice, DHSC subsequently confirmed in a conversation and in writing that it was, in fact, relying on section 12(2) in respect of the request of 9 November 2021 with the original timeframe. The Commissioner is now considering the application of section 12(1). DHSC's submission does not discuss section 12 in relation to the request of 9 November but does discuss its reliance on section 12 in respect of the request of 8 November 2021 – its reference FOI-1372544. DHSC said that in its response to this request, on 9 November 2021, it had advised the complainant that to determine if all the information requested (ie further relevant information) is held it would have to search manual/electronic systems, interrogate relevant database/statistics and speak to the relevant policy officials.
29. DHSC noted that the second part of the request is for details of any meetings held between ministers and Steve Brine. This included agendas, minutes, briefings and any other documents in relation to each meeting.
30. DHSC explained in its submission that ministerial offices do not store meeting information centrally. Therefore, all diaries would need to be searched initially to find any [further] meetings. If any meetings were found, policy teams would then need to be contacted and asked to search for any information in relation to these meetings (if any was held).
31. DHSC calculated that searches would need to be made of 17 ministerial diaries for any information held about relevant meetings. This is because the request would include meetings with any of the 17 individuals who held ministerial offices at the DHSC during that timeframe. The period for these searches would be 25 March 2019 to 9 November 2021 (32 months). As a number of these diaries would be within legacy files, DHSC calculated that to retrieve them all and review them would take a minimum of 34 hours (two hours per diary for retrieving and searching for meetings). In addition, depending on the results of the reviews, the policy team would need to carry out searches for the specific documents related to the meetings. DHSC said it cannot quantify that time, because it did not know how many [further] meetings took place without reviewing all diaries.
32. The above explanation concerned the request of 8 November 2021 but as noted, in its 21 November 2022 correspondence DHSC clarified that the diaries referred to are electronic diaries and so the searches described are also relevant to the 9 November 2021 request that is the focus here.
33. DHSC has advised that to first identify if any of its [other] ministers had had a meeting with Steve Brine MP over the 32 month period in question it would need to search the 17 ministerial diaries. It has advised that,

including "retrieving" diaries and searching for relevant meetings, it would take 34 hours to do this.

The Commissioner's conclusion

34. The request in this case has two parts: electronic correspondence between Steve Brine MP and DHSC ministers about particular companies over a 32 month period, and electronic information about any meetings Steve Brine MP may have had with those ministers about those companies over the same period. The Commissioner is considering whether it would exceed the appropriate time limit to comply with this request.
35. The timeframe in question is March 2019 to November 2021. This takes in the COVID-19 pandemic and a period of churn for DHSC when, changes to the Department, ministers, the organisation and personnel would have weakened its corporate knowledge. Taking into account also that the request is for correspondence **and** meeting information, that 17 ministers are within scope of the request and the relatively long time covered by the request, the Commissioner can accept that it would not be straightforward for DHSC to comply with the request.
36. Considering the first part of the request for correspondence and considering only email correspondence at this point, given the movement of ministers in and out of the Department over the period in question, the Commissioner accepts that at least proportion of the 17 email accounts in scope would first need to be restored because a former minister had left the Department. The email account of a former minister during the period of the request is likely hold a significant amount of correspondence; as such, there would be time implication in restoring such an email account.
37. Both restored and active ministerial email accounts would then need to be searched. It may be possible to conduct an electronic search using a search term such as 'Steve Brine' fairly quickly. However, any correspondence with Steve Brine that was retrieved would then need to be reviewed to see if the companies referred to in the request were discussed.
38. Furthermore, the above considers email correspondence only. The complainant has also requested any text messages, messages on WhatsApp or equivalent platforms, internal work instant messages such as Teams and a list and minutes of any telephone calls. There would be a further time implication (and/or potentially a cost/burden implication) associated with searching these communication channels.
39. The request is also for information associated with any [further] meetings between 17 DHSC ministers and Steve Brine MP over the 32 month period. As with some of the email accounts (and for the same

reason) at least a proportion of the relevant ministerial diaries would need to be restored; what DHSC has described as “retrieved”. The Commissioner understands that, based on the system(s) DHSC uses, restoring an electronic diary/calendar is not an instantaneous process and that there would be a time implication involved.

40. As with the email correspondence, both active and retrieved diaries would then need to be reviewed to identify any [further] meetings with Steve Brine MP noted in the calendars. DHSC has estimated that the process of retrieving and searching 17 ministerial diaries would take 34 hours. And if any such meetings were identified in the diaries, DHSC policy teams would then need to carry out searches for any information associated with those meetings. But clearly, if no other meetings were identified, no further searches would be necessary.
41. The Commissioner does not consider that DHSC has presented a compelling case to support its position that it would take two hours to retrieve and search each of 17 ministerial diaries, because its submission on that matter lacks detail. However, even if its estimate is reduced to one hour per diary, when combined with the work necessary to identify any other information relevant to the request for correspondence, the Commissioner will accept that it would take DHSC more than 24 hours to carry out the work necessary to comply with the request in its entirety. The Commissioner’s decision is therefore that DHSC is entitled to rely on section 12(1) of FOIA.

Section 16 – advice and assistance

42. Section 16(1) of FOIA obliges a public authority to provide an applicant with advice and assistance, where it is reasonable to do so.
43. The complainant’s request of 9 November 2021 was a version of their request of 8 November 2021, refined to just electronically held information. Once it was clear that complying with the request was still unlikely to be possible within the appropriate limit, in the Commissioner’s view DHSC could have considered how the request might be further refined and advised the complainant accordingly. For example it may be the case that DHSC could comply with a request for meeting information only and/or over a shortened timescale and/or between Steve Brine MP and specific ministers, rather than all 17 ministers. A request refined to that degree may no longer be useful for the complainant but it is for DHSC to establish that with them. As such, the Commissioner finds that DHSC did not adequately address the duty under section 16(1) on this occasion.

44. The Commissioner will observe here that complying with a request does not necessarily mean that all or any relevant information a public authority holds will be disclosed; the authority may be entitled to withhold any identified information under a different exemption.

Right of appeal

45. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
SK9 5AF