

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 March 2022

**Public Authority:** DHSC  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to Covid tests outside of hospital for Ministers and family.
2. The Commissioner's decision is that Department of Health and Social Care (DHSC) has correctly cited section 12(1) in response to the request.
3. The Commissioner does not require DHSC to take any steps as a result of this decision notice.

#### Request and response

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4. On 17 April 2020, the complainant wrote to DHSC and requested information in the following terms:  
  
"Covid Tests Outside of Hospital for Ministers and Family This as a FOI request for all information held, including any communications or requests relating to acquiring or requests for Covid tests for: - Ministers (including Ministers of other government departments) - Family Members of Ministers (including Ministers of other government departments) Whilst I appreciate the sensitivity of this information potentially being personal information. Where any information is not in the public domain I would be more than happy to accept the redaction of employee, family member names or identifiable information if applicable."

5. DHSC responded on 11 September 2020 and refused to confirm or deny whether the information was held citing section 40(5B)(a)(i). Following a complaint to the Commissioner, a decision notice was issued on 14 May 2021 ordering DHSC to provide a fresh response without reliance on section 40(5B)(a)(i).
6. A fresh response was provided on 9 June 2021 in which DHSC again refused to provide the requested information, citing section 12(1) FOIA as its basis for doing so.
7. Due to the protracted nature of this complaint, the Commissioner exercised his discretion and accepted the case without any further internal review.

### **Scope of the case**

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8. The Commissioner considers the scope of this case to be to determine if DHSC has correctly cited section 12(1) FOIA in response to the request.

### **Reasons for decision**

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#### **Section 12 – cost of compliance**

9. Section 1(1) of 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.”
10. Section 12(1) FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Fees Regulations’) at £600 for public authorities such as DHSC.
12. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the public authority.
13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in

carrying out the following permitted activities in complying with the request:

- 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.
14. 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.
  15. 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*<sup>1</sup> EA/2007/0004, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”.
  16. 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.
  17. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.

### **DHSC's position**

18. DHSC confirmed it interpreted the request to provide any recorded information held by DHSC regarding testing of the 117 Ministers in Government.
19. DHSC stated there is no question it holds information relating to testing, but information on testing for Minister's families' specifically, is less clear. However, it maintained the section 12 exemption applies due to the inclusion of 'testing' in the request.
20. It explained that testing is a vast subject, and is discussed in various guises: pre- and post- departure testing; end of isolation testing; testing in educational settings; testing for health care workers; workplace

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

testing; the logistics for, supply of, and demand on testing; testing capabilities; mobile testing units, etc.

21. DHSC further explained that during the period in question there were six ministerial offices within DHSC, with an average of two inboxes associated to each, meaning 12 inboxes would need to be searched to respond to this request.
22. The majority of information private offices deal with is shared by email, so DHSC carried out a sampling exercise in one of these inboxes to gauge how much information would need to be reviewed.
23. In its original sampling exercise, it used 'testing', 'family', and 'ministers' as search terms. Its sampling search returned over 700 pieces of correspondence. Whilst this number felt small (given how vast 'testing' is as a subject), it used the figure to calculate its estimate, which was well over the section 12 threshold.
24. DHSC stated the length of time required to move results to a place they could be interrogated is unknown and based on a number of factors, although it did not elaborate further. Nevertheless, even without details of what this entails it is clear to the Commissioner from the estimate that follows, that this is not required in order to make a decision.
25. In addition to that length of time, and working on the conservative assumption that each document would take an average of four minutes to review, DHSC calculated:

$12 \text{ (inboxes associated with ministers)} \times 700 \text{ (from sampling exercise)} = 8,400 \text{ (documents to review)}$ .

$8,400 \text{ (documents to review)} \times 4 \text{ (minutes)} = 33,600 \text{ minutes to review documents} = 560 \text{ hours}$

26. DHSC carried out a further sampling exercise following correspondence from the Commissioner, and the results are as follows:

For one inbox, it used the search terms "lateral flow", "PCR" and "family".

This brought the results down to 409. So, averaging those emails for 12 inboxes, the time would still exceed. In addition, it could not confirm its searches would have been entirely accurate and some emails may have been missed by reducing the search to those terms.

$409 \times 12 = 1636 \text{ documents} \times 4 \text{ mins} = 6544 \text{ mins} = 109 \text{ hours}$

### **The Commissioner's decision**

27. Whilst the DHSC may have over-estimated the time of reviewing the documents retrieved, the Commissioner considers that when included with the time taken to actually retrieve them, the cost would only increase further. Based on a reduced estimate of 2 minutes per document it would still significantly exceed the appropriate limit. The Commissioner therefore accepts that DHSC was entitled to refuse the request.

## Right of appeal

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28. 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)

29. 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.
30. 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

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