

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2021

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 copies of minutes, agendas and briefing notes for the High Priority Appraisals Team meetings from the Department of Health and Social Care (DHSC).
2. The DHSC confirmed that it does not hold any information that falls within the scope of the request.
3. The Commissioner is satisfied that, on the balance of probabilities, the DHSC does not hold any information that falls within the scope of the request.
4. The Commissioner does not require the DHSC to take any further steps.
5. However, in failing to comply with section 1(1) within 20 working days, and in applying inappropriately the extension allowed by section 10(3), the DHSC has breached both section 10(1) and section 10(3) (time for compliance with request) of the FOIA.

Request and response

6. On 25 November 2020, the complainant wrote to the DHSC and requested information in the following terms:
"I wish to see all minutes, agendas and briefing notes for the High Priority Appraisals Team meetings."
7. The DHSC responded on the same day, acknowledging the request.
8. The DHSC provided updates to the complainant on 22 December 2020, 25 January 2021, 22 February 2021 and 22 March 2021. The DHSC continuously advised the complainant that *'the Department's consideration of the balance of the public interest with regards to your request is still not yet complete and requires further time to complete in line with Section 10(3) of the FOI Act.'*
9. On 21 April 2021 the DHSC confirmed to the complainant that it did not hold any information that fell within the scope of the request.
10. Following an internal review the DHSC wrote to the complainant on 20 May 2021. It maintained its position.

Scope of the case

11. The complainant contacted the Commissioner on 21 May 2021 to complain about the way that their request had been handled.
12. The Commissioner therefore considers the scope of his investigation to be to determine whether, on the balance of probabilities, the DHSC is correct when it says it does not hold any information that falls within the scope of the request.

Reasons for decision

Section 1 (General right of access to information held by public authorities)

13. 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."

14. In this case, the complainant disputes the DHSC's position that it does not hold any minutes, agendas or briefing notes for the High Priority Appraisals Team meetings.
15. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request at the time that the request was received.
16. In order to reach his determination, the Commissioner asked the DHSC to provide detailed explanations as to why the requested information was not held at the time that the request was received. The Commissioner also asked the DHSC to explain the searches it had undertaken to locate any information that would fall within the scope of this request and to explain why these searches would have been likely to locate all of the information in scope.

The DHSC's position

17. The DHSC has explained that the Government set up a Parallel Supply Chain in order to secure personal protective equipment (PPE) quickly and effectively in response to the pandemic. This Parallel Supply Chain brought together over 400 staff from various government departments, including the DHSC, NHS England and NHS Improvement, NHS Supply Chain, NHS representatives, the Ministry of Defence and other government departments. Most of the Parallel Supply Chain's work was coordinated through the Cabinet Office.
18. The Commissioner understands that a High Priority Mailbox for personal protective equipment (PPE) was set up by the Cabinet Office at a time when many suppliers and individuals were passing on offers of support to their local MPs. The DHSC has explained that *'the mailbox allowed MPs, Ministers and senior officials to direct those offers to a dedicated location'* and all offers were triaged by a member of the High Priority Appraisal Team.
19. The DHSC has explained that *'Because the High Priority mailbox was the most obvious place to conduct a search for 'minutes', 'agendas' and 'briefing notes' for the High Priority appraisals team, DHSC consulted with colleagues at the Cabinet Office who then conducted a search through this mailbox using these keywords; this resulted in constructing the answer which was sent to the applicant.'*

20. The DHSC explained to the complainant on 21 April 2021 that the High Priority Appraisal Team's *'meetings were either held (a) as required, in which case a specific issue was discussed (i.e. which did not require a formal agenda) or (b) there was a daily 'stand-up' meeting which did not require formal minuting or a briefing paper/note.'*
21. Returning to section 1(1), the complainant's request was made to the DHSC and not the Cabinet Office. In its submission to the Commissioner the DHSC has stated *'We acknowledge now that this search was not in adherence with the FOIA guidelines in that this request was directed to this department – DHSC – and searches should have been conducted only on information held by DHSC. At the time of the request and the answer supplied, the High Priority lane mailbox was not held by the department.'*
22. When the Commissioner wrote to the DHSC to outline the scope of his investigation he explained that, if inadequate searches were done at the time, the DHSC should rectify this and explain to the Commissioner what it had done.
23. The DHSC has confirmed that subsequently the senior procurement official within the DHSC, involved in PPE procurement at the time, has searched their inbox for information that would fall within the scope of the request.
24. They conducted the following keyword searches: 'High Priority Appraisals Team', 'High Priority Lane', 'HPL' and 'VIP lane.' Each keyword search yielded over 1000 results. The official then conducted keyword searches for 'HPL Minutes', 'HPL Agenda', 'VIP Minutes', 'VIP agenda', 'briefing note & HPL' and 'briefing note & VIP'. Each keyword search yielded zero results.

The Commissioner's view

25. The Commissioner is mindful of the DHSC's position as outlined in paragraph 20 which seems to confirm that the High Priority Appraisal team meetings were not recorded via agendas, briefing notes or minutes. It is not the role of the Commissioner to comment on whether or not this is appropriate; it is solely the Commissioner's task to ascertain, on the balance of probabilities, whether the DHSC holds any information that falls within the scope of the request.
26. The DHSC has explained to the Commissioner that *'It is also worth noting as part of the legal process for the Judicial Reviews which have been brought against the department for the awarding of some of these PPE contracts, the department have had to find information on the High Priority Lane. The senior procurement official does not recall any information sweeps by the legal teams picking up on any of the search*

terms we have used. If they had, we would have had to explain this in court.'

27. With the above in mind, the Commissioner is satisfied that, on the balance of probabilities, the DHSC does not hold any information that falls within the scope of the complainant's request.

Section 10 (Time for compliance with the request)

28. Section 10 of the FOIA states that:

"(1)...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the receipt of the request."

"(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

29. Section 10(3) allows a public authority to extend the 20 working day timeframe up to a 'reasonable' time if it requires more time to determine whether or not the balance of the public interest lies in maintaining a qualified exemption.
30. When the Commissioner wrote to the DHSC to outline the scope of this investigation, he enquired as to why it took five months to confirm to the complainant that no information was held in relation to the request, despite confirming that the DHSC required more time to balance the competing public interest arguments.
31. In response to this, the DHSC has explained that it was '*liaising with the Cabinet Office on how best to provide a reply to this in terms of the most appropriate searches, which delayed a response. But the department accepts that it incorrectly applied the public interest test as a reason for delaying a response as this was applied more to the general scope of the request as opposed to individual documents.*'

The Commissioner's view

32. It is clear to the Commissioner that the DHSC has breached section 10(1) in this instance. The request was made on 25 November 2020 and the DHSC's substantive response was provided on 21 April 2021. Even then, this response was based on what information the Cabinet Office, and not the DHSC, held.
33. Furthermore, the DHSC also inappropriately cited the exemption that section 10(3) allows. This extension allows a public authority more time to conduct a public interest test. A public authority cannot conduct a public interest test if it does not hold any information that would fall within the scope of the request.

Right of appeal

34. 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

35. 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.
36. 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
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