

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2022

Public Authority: Health and Safety Executive
Address: Redgrave Court
Bootle
Merseyside
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested information about facemasks. The above public authority ("the public authority") relied on section 14(1) of FOIA to refuse the request.
2. The Commissioner's decision is that the public authority was entitled to rely on section 14(1) of FOIA to refuse the request. However, as it failed to issue its refusal notice within 20 working days, the public authority breached section 17(5) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 3 April 2022 the complainant wrote to the public authority and requested information in the following terms:
 1. "Disclosure of any correspondence between HSE (HQ or regional offices) and NHSE (central or regional teams) concerning the use of FFP 2 or 3 (or equivalently graded masks such as but not exclusively N95 and N99) for NHS staff. In particular, any information concerning the use without fit testing and the groups of staff that should have access to such masks and why.
 2. Any risk/benefit assessment that has been conducted on FFP 2 or 3 (or equivalently graded masks such as but not exclusively N95 and N99) masks for the use without fit testing for NHS staff.

3. Any legal position that has been established for the use of FFP 2 or 3 (or equivalently graded masks such as but not exclusively N95 and N99) masks with and without fit testing for NHS staff.
 4. The evidence underlying the formal advice on which NHS staff should be using FFP2 and 3 (or equivalently graded masks such as but not exclusively N95 and N99) masks.
 5. The formal position of HSE on the nature of SARS-CoV-1 in terms of its transmission pathways (e.g. whether it is airborne or mainly droplets), the evidence base for this and when the formal position was last reviewed.”
5. The public authority failed to respond to the request and the Commissioner was required to issue a decision notice, compelling a response. When the public authority finally did respond, on 2 August 2022, it refused the request as vexatious – a position it maintained at internal review.

Reasons for decision

6. Section 14(1) allows a public authority to refuse a request that would impose a grossly oppressive burden if it attempted to comply.
7. In its original refusal notice, the public authority set out a reasoned argument as to why complying with the request (and with element [1] in particular) would impose a substantial burden.
8. When seeking an internal review, the complainant argued that:

“As for the reasons for refusing to answer my questions, I accept that they apply in part to question 1 though I did not ask for identifiable information which could have been retracted. However, I cannot accept that they apply to questions 2-5....It also does not require you to identify exempt information. The reasons you have therefore provided can only be seen as an excuse for still not having attended to the actual request (which I know from the correspondents with your colleagues had come for signoff many months ago). I therefore request an internal review in the first instance and an answer to questions 2-5.”
9. The Commissioner considers that the public authority was entitled to deal with the request as a whole and, if one element of that request (or the combined impact of complying with all five elements) would impose a grossly oppressive burden, it was entitled to refuse the entire request.

The fact that the public authority, in this case, took an unreasonable amount of time to refuse the request (which is dealt with further below) does not prevent it from relying on section 14.

10. As it appears to be common ground between all parties (and the Commissioner agrees) that the public authority is entitled to rely on section 14(1) to refuse element [1] of the request because of its broad scope and the likelihood that exempt information (such as names in email trails) will need to be removed prior to the documents' disclosure. However, if the public authority is entitled to rely refuse part of the request, the public authority is entitled to refuse the request in its entirety.
11. If the complainant wishes to refine his request to exclude element [1], it is open to him to do so.

Procedural Matters

12. The Commissioner is satisfied that the HSE discharged its section 16 duty to provide advice and assistance because it indicated which of the elements of the request was burdensome. Section 16 is not meant to be an onerous requirement and the PA's response should have been sufficient to allow the complainant to submit a refined request that would not be unduly burdensome.
13. The Commissioner finds that the public authority breached section 17(5) of FOIA as it failed to issue a refusal notice, citing section 14, within 20 working days.

Other matters

14. The Commissioner notes that, despite having taken an unreasonable amount of time to refuse the request, it took the HSE in excess of 50 working days to complete an internal review. Whilst there is no statutory time limit for completing such an internal review, the Commissioner considers this to be poor practice.

Right of appeal

15. 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

16. 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.
17. 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
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Wycliffe House
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