

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 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 information from the Department of Health and Social Care (DHSC) relating to news articles published in The Times. The DHSC refused to disclose the requested information, citing section 12(1) of FOIA as a basis for non-disclosure, however it later changed its position and stated that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the DHSC does not hold the requested information.
3. The Commissioner also considers that the DHSC has breached sections 1 and 10 of FOIA as it did not state initially within 20 working days that it did not hold the requested information.

Request and response

4. On 25 January 2020, the complainant wrote to the DHSC and requested information in the following terms:

"On Saturday 16th November 2019 several health news articles were published in The Times newspaper on pages 5 and 33 including two written by journalist Harry Shukman. The Secretary of State was quoted as follows: "Matt Hancock, the Health Secretary, asked the chief medical officer to request an immediate investigation adding, "behaviour like

this has no place in the NHS. Vaccines save lives - the science is beyond doubt. Anyone who claims otherwise is wilfully risking lives."

- 1) What information does the Secretary of State [SoS] and/or the Department of Health [DHSC] hold regarding these newspaper articles and specifically information passing between the SoS, DHSC, the Chief Medical Officer [CMO] and The Times and/or Harry Shukman in relation to these articles; The period concerned is from 1 January 2019 to the day prior to your response.
- 2) How much is the cost of providing copies of the information and complying with this request;
- 3) Please supply copies of all documents held unless the limits for FOI requests are exceeded;
- 4) If the cost exceeds the limits, which main documents can the NHSE supply within the limits;
- 5) If the limits are exceeded please supply the documents identified under 4) above; Documents in electronic form by email will be acceptable.
- 6) By main documents I mean - in order of preference: -
 - documents to and from the Secretary of State's Office;
 - documents to and from the Chief Medical Officer;
 - documents to and from the relevant press officer(s) and/or press office(s) - other documents. This request is not seeking copies of documents in the public domain."
5. On 24 February the DHSC responded to the complainant, stating that compliance with the request as it stood would go over the cost limit as set out in the FOIA at section 12(1). The DHSC offered the complainant the opportunity to narrow or refine his request.
6. On the same date the complainant wrote to the DHSC to seek its advice on the best way in which to narrow or refine his request for information. On 31 March 2020 the DHSC responded to that letter suggesting that the request be narrowed to within a specific timeframe, or that the complainant could identify a keyword which the DHSC could use to search. The DHSC also asked the complainant to clarify whether his request referred only to direct contact between the DHSC and The Times/Harry Shukman.

7. On 28 April 2020 the complainant sought an internal review of the DHSC's handling of his request. The result of that internal review was provided to him on 17 June 2020. The reviewer upheld the original decision.
8. After having received correspondence from the complainant, the Commissioner wrote to the DHSC on 15 October 2020 seeking its detailed submissions as to its application of section 12(1) of the FOIA to the complainant's request.
9. Having not received a substantive response from the DHSC, the Commissioner issued an Information Notice on 1 September 2021, ordering the DHSC to provide its detailed submissions within 30 calendar days.
10. On 1 October 2021 the DHSC wrote to the complainant stating that, after reviewing and carrying out further searches, it did not hold any information within the scope of the complainant's request and therefore section 12(1) no longer applied.
11. The complainant did not consider this response to be satisfactory, therefore he requested that the Commissioner continue his investigation.
12. The Commissioner wrote to the DHSC on 4 November 2021, requesting the DHSC's detailed submissions as to why it did not hold the requested information. The DHSC provided those submissions on 19 January 2022.

Scope of the case

13. The complainant first contacted the Commissioner on 28 July 2020 to complain about the way his request for information had been handled.
14. The Commissioner has considered the DHSC's handling of the complainant's request, in particular whether, on the balance of probabilities, it holds the requested information.

Reasons for decision

Section 1 – Determining whether further information is held

15. Section 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.”

16. In this case, the complainant disputes the DHSC’s position that it does not hold the information sought in his information request of 25 January 2020.
17. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant’s request.
18. The Commissioner will consider the complainant’s evidence and arguments. He will also consider the actions taken by the DHSC to check whether the information is held and any other reasons offered by the DHSC to explain why the information was not held. In addition, he will consider any reason why it is inherently likely or unlikely that the requested information is not held.
19. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
20. As part of his investigation, the Commissioner wrote to the DHSC requesting its submissions in respect of a number of questions relating to the complainant’s view that it should hold the requested information. The Commissioner’s questions were focused on the DHSC’s endeavours in searching for the requested information, and whether any information falling within the scope of the requests was deleted or destroyed.
21. The DHSC stated that searches carried out within relevant email accounts in Private Office, CMO Office and the Press Office. In addition to these searches, the legacy team carried out extensive searches. Specific searches were made for ‘Shukman’ and then separate keywords in relation to the Times article: “dangerous talk”, “anti-vax gp”, “parents

pay £15", "busting the myths". Nothing was found within scope, or any information which would be similar to that requested.

22. The DHSC also informed the Commissioner that, if the information were to be held, it would be held electronically across e-mail accounts and would not have been saved in any files or folders.
23. The DHSC confirmed that, as the requested information was never held by it, it had not been deleted or destroyed. It also stated that it would have no business purpose or statutory requirement to hold the requested information.

The Commissioner's Conclusion

24. The Commissioner has examined the submissions of both parties. He has considered the searches performed by the DHSC and its explanations as to why the information requested could not be located.
25. The Commissioner's role is to make a decision based on whether on the balance of probabilities relevant recorded information was held by the DHSC.
26. The Commissioner appreciates that the complainant considers that the DHSC should hold the requested information. However, it is not for the Commissioner to judge whether information should be held, but to decide on the balance of probabilities whether it actually is held.
27. In the absence of evidence to the contrary, the Commissioner is satisfied that the DHSC has provided plausible and convincing explanations that it has carried out the necessary steps to conclude whether it held the information requested by the complainant. Therefore, the Commissioner concludes that, on the balance of probabilities, the requested information is not held by the DHSC.

Procedural matters

28. Section 10 of FOIA requires a public authority to state whether or not it holds requested information within 20 working days of receiving a request.
29. In this case, during the Commissioner's investigation, the DHSC changed its position from applying section 12(1) to stating that it did not hold the requested information. As this should have been communicated to the complainant under section 1 of FOIA within 20 working days of his request (by the timeframe specified in section 10 of FOIA), the Commissioner has recorded a breach of sections 1 and 10 of FOIA.

Other matters

30. The Commissioner notes that the DHSC only provided its substantive response to the Commissioner (requested on 15 October 2020) on 1 October 2021 on foot of an Information Notice being served. As it had changed its position, the Commissioner on 4 November 2021 asked for its substantive answers to his queries in order to determine on the balance of probabilities whether it held the requested information. The DHSC responded on 19 January 2022. Whilst he notes the particular and extraordinary pressures on the DHSC during the period of the pandemic, after having 'paused' the case for over a year in order to allow for this, the Commissioner considers the DHSC's delayed response to be poor practice and trusts that it will engage more promptly with him in the future.

Right of appeal

31. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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SK9 5AF