

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 August 2019

**Public Authority:** Public Health England  
**Address:** Wellington House  
133-155 Waterloo Road  
London  
SE1 8UG

### **Decision (including any steps ordered)**

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1. The complainant has requested information about advice given by Public Health England (PHE) regarding the Wiltshire novichok poisonings. PHE answered the questions asked and stated that information would be exempt on the basis of section 24, 40 and 42. On review, it later amended its position to state that in fact no recorded information was held.
2. The Commissioner's decision is that, on the balance of probabilities, PHE does not hold any recorded information relevant to the request. PHE has therefore complied with its obligations under section 1(1) of the FOIA.

### **Request and response**

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3. On 16 December 2018 the complainant made a request to PHE about the Wiltshire novichok poisonings in the following terms:

*"Please could you tell me why the advice you gave on Novichok is so far detached from the advice given by the OPCW.*

*Eg*

*PHE: There is only a low risk to the public authority*

*OPCW: It is extremely dangerous in tiny doses*

*And*

*PHE "This Stuff" (Novichok) presents its symptoms (through skin contact) between 3 (minimum) and 12 hours. The minimum 3 hours is for contact with a very high quantity.*

*OPCW: Symptoms will appear through skin contact (Nerve agents in general) between 20 and 30 minutes."*

4. PHE responded on 8 January 2019. PHE explained that both statements were correct but answered different questions. The PHE explained that the PHE statement gave an upper limit to the time within which symptoms might appear after exposure to the lowest dose likely to still be able to give clinical symptoms and the upper limit to the time within which symptoms are likely to arise after exposure to a quantity likely to cause severe clinical harm. The OPCW statement referred to the average time likely to be taken for symptoms to appear where exposure to a high dose has occurred.
5. The complainant requested an internal review of this response on 13 January 2019. The complainant did not consider the response from PHE explained why the advice was different. He stated he now wanted to know the information PHE had on the particular novichok concerned and the toxicological properties it possesses that allowed the advice that was given to be given. The complainant specifically asked:

*"For clarity I now want to know the information PHE has on the particular Novichok concerned and the toxicological properties it possess that allow you to give the advice you do. I want to see the data that you base your advice on*

*I would also like you to explain why you only give upper average time limits (what ever that means), for the poison to take effect and not lower time limits. And please explain why PHE advice does not make it perfectly clear that your advice now neglects lower limits for large and small doses. That was not the advice PHE gave in July, please explain why the advice has changed."*

6. PHE responded on 25 March 2019 and stated that the advice was based upon the review of the injuries sustained by persons affected in the incident, information from the police investigation and a review of the toxicological properties of similar chemicals. PHE stated that this information formed part of an ongoing police investigation and was therefore exempt from disclosure on the basis of section 24 of the FOIA, section 40 where the information was personal data and section 42 for legal advice.
7. In terms of the question asked as to why only upper average time limits were given; PHE explained that no information was held to answer this

question but it did clarify that upper limits are more useful for clinical staff to use.

8. Regarding the point about the statements made in a public meeting differing from the initial advice, PHE explained the statement was not inconsistent with its more general published summary.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 26 March 2019 to complain about the way his request for information had been handled.
10. The Commissioner initially wrote to PHE to establish what information was held and to ascertain the basis for the use of the section 24, 40 and 42 exemptions.
11. PHE reconsidered the request and concluded that there were some errors in its responses. Consequently, PHE wrote to the complainant again on 10 June 2019 to clarify its position.
12. PHE informed the complainant that the original question asked (why the advice given on novichok was so far detached from the advice given by the OPCW) should have been dealt with as 'normal course of business' but in any event it maintained the explanations provided were sufficient to answer the question.
13. For the follow up questions asked in the request for internal review, the PHE considered these should have been treated as a new information request but regardless of this point PHE considered that the response provided was misleading as in fact there was no information held by PHE which would answer the questions asked about the apparent differing advice given and the data this was based on.
14. The Commissioner considers the follow up questions asked are new information requests and this is the focus of this decision notice as this is the response that has been raised as a complaint with the Commissioner.
15. The Commissioner wrote to the complainant about this and the complainant asked the Commissioner to provide a decision notice setting out her view as to whether PHE had complied with the FOIA.

### **Reasons for decision**

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16. Section (1) of the FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.
17. In response to the Commissioner's questions PHE clarified that it does not hold the requested information.
18. In correspondence with the Commissioner the complainant has reiterated that the PHE stated that novichok symptoms in humans on skin contact present between a minimum of 3 hours and 12 hours. The Organisation for the Prohibition of Chemical Weapons (OPCW) states that nerve agents cause symptoms when contacted through the skin in 20 to 30 minutes.
19. The complainant's concerns about the PHE response stem from the fact that the PHE when first responding to his questions stated that what he had quoted was not their advice, despite the public statement made by a PHE director at a meeting in Amesbury. The complainant has gone to state that the later responses from PHE seem to suggest their initial advice was correct.
20. In scenarios where there is some dispute between a public authority stating that recorded information was not held at the time of the request and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First – Tier Tribunal decisions, e.g., *Bromley v the Information Commissioner* and the Environment Agency (EA/2006/0072) – applies the civil standard of the balance of probabilities. The Commissioner will consider the complainant's evidence and argument(s) and also the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held.
21. The Commissioner must emphasise her role is not to comment on the accuracy of information or statements made. She is tasked with ensuring that public authorities comply with their obligations under the legislation and in this case her investigation is limited to determining if there is recorded information held by PHE which should have been provided to the complainant to answer his request.
22. Explanations have been given by PHE to the complainant to explain the reasons why it may appear differing advice have been given and this, in the Commissioner's view, is sufficient to answer the request given the way it was phrased. The further questions asked to see the data the advice was based on and PHE have explained to the Commissioner that they have access to other agencies databases but due to the sensitivity

of information this information remains *in situ* and is not held by the PHE. PHE can access information from these databases to inform its advice but it is never held by PHE.

23. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is to do with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
24. Whilst appreciating the complainant's frustration that PHE states it does not hold any recorded information in response to the questions asked, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ (EA2006/0085)*, that the FOIA:  
  
"...does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".
25. Having considered PHE's response the Commissioner is satisfied that on the balance of probabilities PHE does not hold the requested information and there would be no benefit gained from asking PHE to conduct searches for information which they have clearly stated they do not hold and where those explanations seem reasonable.
26. The Commissioner therefore considers that Public Health England complied with its obligations under section 1(1) of the FOIA.

## 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: 0300 1234504

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 .....**

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