

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2020

Public Authority: Department of Health and Social Care

Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant requested a copy of a report into Operation Cygnus. The Department of Health and Social Care ("the DHSC") had failed to respond at the date of this notice.
2. The Commissioner's decision is that, based on the evidence provided, the complainant's original request was not valid, however he did make a valid request at a later date. In the circumstances, the Commissioner considers that the DHSC has failed to complete its considerations on the balance of the public interest within a reasonable timeframe and has therefore breached section 17(3) of the FOIA. The Commissioner also considers that, based on the available evidence, the DHSC breached its section 16 duty because it failed to clarify the request in writing.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation.
 - Either provide a copy of the information or issue a refusal notice that complies with section 17 of the FOIA.
4. The DHSC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The following chronology is based on the evidence supplied to the Commissioner by the complainant.
6. Prior to 15 May 2020, the complainant informed the Commissioner that he had left several voicemails with the Cabinet Office asking for the report into Operation Cygnus.
7. The Cabinet Office appears to have referred these voicemails to the DHSC, as the complainant received a generic response from the DHSC's ministerial enquiries team on 15 May 2020, directing him to various publicly available information sources regarding Covid-19.
8. The complainant responded to this correspondence on 15 May 2020. In an email titled "Freedom of Information Request - Operation Cygnus", he stated:

"To Whom It May Concern,

"My request is highly important in the significant public interest. The ICO has been made it very clear that you should be ensuring transparency requirements are still met, even if slightly delayed, and they will be enforcing failures to ensure these requirements are met.

"Please also note, that this is a publication that should already have been met under the ICO Model Publication Scheme, with relevant Definitions outlined here:

https://ico.org.uk/media/for-organisations/documents/1246/definition_document_for_government_departments.pdf

"I look forward to you ensuring the FOI request is dealt with in appropriate timescales or that you can direct me to where the information is already published."

9. The DHSC issued a response to the complainant on 13 July 2020. Although it referred to a request having been made on 21 April 2020, the "request" quoted was identical to the text set out above. In response to the request, the DHSC set out that it considered that section 35 of the FOIA (formulation of government policy) would apply to some or all of the requested information and that it required additional time to consider the balance of the public interest in respect of that exemption. The DHSC noted that it planned to respond by 10 August 2020.

10. Dissatisfied with this response, the complainant wrote again to the DHSC emphasising what he considered to be the strong public interest in publishing the report. He stated that:

"You initially wrote to me on 15th June requesting a further 20 days to consider the public interest in publishing the Operation Cygnus Report.

"You gave now written to me again on the last day of the 20 day period requesting a further 20 days to consider the public interest in publishing the Report, with no further information provided.

"There is a clear and demonstrable public interest in publishing the full Report given it relates to prior preparations for an ongoing national public health emergency. This is unarguable.

"I therefore request that you now publish in full the Operation Cygnus report without further delay, as there is no legal justification preventing its release."

11. On 10 August 2020, the DHSC issued a further response, noting that it had still not completed its public interest considerations and would need until 9 September 2020 to do so. It had still not issued a response at the date of this notice.

Scope of the case

12. The complainant first contacted the Commissioner on 20 July 2020 to complain about the lack of response from the DHSC.
13. Given that the DHSC clearly considered that the complainant had made a valid request, the Commissioner wrote to the DHSC on 20 August 2020. She noted her own guidance that an extension in excess of an additional 20 working days could only be reasonable in the most exceptional of circumstances and that any such extension should be fully justified. Given that the DHSC had set itself a deadline of 9 September 2020 to respond, the Commissioner informed the DHSC that, should it fail to meet this revised deadline, a decision notice would follow.
14. The DHSC responded to say that the impact of Covid-19 was causing severe delays to some of its FOIA responses and that it could not be certain when it would be in a position to respond.
15. The complainant contacted the Commissioner again on 6 September 2020, noting that the DHSC had issued a further holding response, extending the deadline for completing its public interest test

considerations until 6 October 2020. He asked the Commissioner to issue a decision notice addressing the matter.

16. In the course of preparing the initial decision notice, the Commissioner reviewed the "request" quoted in the DHSC's correspondence and noted that it did not appear to meet the criteria of section 8 of the FOIA. She asked the complainant to provide an original copy of his request.
17. The complainant provided the Commissioner with a copy of the email he had sent on 15 May 2020 and an explanation of the previous interactions.
18. Having considered the evidence the complainant supplied, the Commissioner did not consider that the correspondence of 15 May 2020 met the criteria to be a valid request because it did not describe the particular information he was seeking. She asked the complainant to provide any correspondence in which he had specifically sought disclosure of the report. In the absence of further evidence she considered that she could only consider him to have made a request on 14 July 2020 – the earliest point at which he had specifically requested the report in writing.
19. The complainant did not provide any further information and asked the Commissioner for a decision notice. When the Commissioner further explained that she would only be considering the reasonableness of the time taken by the DHSC since it had received a valid request, the complainant responded to say:

"It is clear from my email below that I made the request in writing by at least 15th May 2020 - when responding to the case number that the DHSC themselves created.

"I have no idea where you have come up with July from - you seem to be wanting to protect the DHSC in this matter when they are clearly just delaying completion of their legal duty. As far as I am aware the DHSC have not even questioned the original date of the request, and so this is something you seem to have manufactured yourself.

"Can I respectfully suggest you just get on with complying with your own statutory duty to regulate and enforce the FOI Act."

20. The Commissioner considered whether it would be reasonable to ask the DHSC to provide her with any additional correspondence relevant to the request – in particular any correspondence it had received, from the complainant, dated 21 April 2020. She considered that it would not. The responsibility for providing the necessary evidence lies with the complainant. Adding to the DHSC's burden would be unfair in normal

times (and would also delay the issuing of the decision notice further) but, when the DHSC's responses do not indicate that any further significant correspondence would emerge and when the department is co-ordinating a national response to a pandemic, it would be particularly unreasonable.

21. The Commissioner therefore stresses that she has made this decision on the basis of the evidence provided.
22. The scope of the Commissioner's analysis in this notice is therefore to determine:
 - a. Did the DHSC receive a valid request?
 - b. If the original request was invalid, did the DHSC discharge its duty to clarify the request?
 - c. Bearing in mind the date of receipt, has the DHSC had a reasonable amount of time in which to consider the balance of the public interest?

Reasons for decision

A. Did the DHSC receive a valid request?

23. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
 - (b) states the name of the applicant and an address for correspondence, and*
 - (c) describes the information requested.*
24. Having reviewed the complainant's correspondence of 15 May 2020, the Commissioner does not consider that it constituted a valid request because it does not "describe" the information being sought.
25. Whilst the email references Operation Cygnus, it contains no further reference which would enable the DHSC to identify which information, related to Operation Cygnus, the complainant is interested in. The correspondence does not meet the criteria set out in section 8(1)(c) of the FOIA.

26. Equally, whilst the Commissioner is happy to accept that the complainant did attempt to request the information by phone, she cannot consider this to be a valid request made to the DHSC as, not only were these requests not made in writing (thus not satisfying the criteria of section 8(1)(a) of the FOIA), they were also made to a different public authority.
27. The DHSC's responses always quoted the complainant's correspondence of 15 May 2020 (although the responses also refer to the request having been made on 21 April 2020) and therefore it would appear that the DHSC considered this email in the context of voicemails seeking the report. However, the Commissioner still does not consider that the complainant's correspondence describes the information sought and it is therefore not a valid request.
28. However, the Commissioner has gone on to consider the complainant's correspondence of 14 July 2020, in which he sought disclosure of a specific report in respect of Operation Cygnus. The Commissioner considers this to be a request which is both in writing and which describes the information sought. It is therefore a valid request for the purposes of section 8 of the FOIA.
29. The Commissioner gave the complainant numerous opportunities to provide her with evidence demonstrating that he had submitted a valid request at an earlier date. Whilst he referred to earlier correspondence, he did not provide any.
30. On the balance of probabilities, the Commissioner does not therefore consider that the DHSC actually received a valid request for information until 14 July 2020.

B. Did the DHSC discharge its duty to clarify the request?

31. Section 16 of the FOIA places a duty on a public authority to provide "reasonable" advice and assistance to those making and wishing to make information requests. A public authority will have complied with its section 16 duty where it has followed the Code of Practice issued under Section 45 of the FOIA.
32. The Code of Practice requires a public authority to seek clarification of requests which are unclear or which are capable of multiple objective readings.
33. As discussed above, the complainant's correspondence of 15 May 2020 was not, in itself a valid request for information. However, based on the available evidence, it would appear that the DHSC treated it as a valid request (and identified the relevant information) in the context of the complainant's earlier voicemails.

34. Whilst the requirement of section 8(1)(c) of the FOIA is unequivocal that a request must be made in writing, the Commissioner considers that public authorities should be pragmatic and helpful when dealing with individuals attempting to request information verbally. In most cases it would be sufficient for the public authority to send an email setting out the information it believed the requestor wanted, so that the requestor could agree the scope. However, a request cannot be valid unless a definitive version, in writing, has been agreed by the complainant.
35. Whilst it is entirely understandable, given the prevailing circumstances of the time, that the DHSC overlooked this small but necessary step, the Commissioner must still, based on the evidence provided record a breach of the legislation. Had the complainant not, entirely inadvertently, subsequently made a request which was valid, he might have been unable to ask the Commissioner for a formal decision.
36. The Commissioner therefore finds that, in failing to obtain a clarification, of the request, in writing, the DHSC failed to provide reasonable advice and assistance to the complainant and therefore failed to comply with its section 16 duty.

C. Has the DHSC had a reasonable amount of time in which to consider the balance of the public interest?

37. Section 10 of the FOIA states that responses to requests made under the Act must be provided "promptly and in any event not later than the twentieth working day following the date of receipt."
38. Section 10(3) of the Act states that, where a public authority is considering the balance of public interest, it can extend the 20 working day deadline "until such time as is reasonable in the circumstances."
39. Under Section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to justify the time taken fully.
40. In responding to the Commissioner's correspondence, the DHSC noted that:

"DHSC has been awaiting Ministerial opinion on a submission provided. As you will probably be aware, this relates to leaked material and is extremely sensitive. We are unable to respond until the Secretary of State for Health and Social Care is satisfied and,

understandably, are not able to determine when this will be. We would certainly consider this to be an exceptional circumstance under which the Department would continue to PIT extend until a Ministerial verdict on our submission is granted."

41. Given that she has determined that the DHSC did not receive a valid request until 14 July 2020, the Commissioner notes that, at the date of this decision notice, the DHSC has only had 47 working days in which to respond to the request. That is only 7 working days outside of the additional 20 working days the Commissioner would normally consider to be reasonable.
42. In determining whether such an extension is "reasonable in the circumstances", the Commissioner notes that, despite only having received a valid request in July, the DHSC has been working on this matter since at least May. As the Commissioner is confident that the DHSC has identified the correct information, she considers that this earlier period of time must also be taken into consideration when considering whether the DHSC has had a reasonable timeframe.
43. Equally, as she has noted above, the DHSC bears the brunt of the responsibility for not obtaining a written clarification of the complainant's request. She therefore considers that it would be unfair to the complainant to allow the DHSC's failure to discharge its duties to provide an advantage.
44. The Covid-19 pandemic has had an impact on almost every public authority but, given its remit, the DHSC has been significantly affected. The DHSC has a vital role in leading England's response to the pandemic – and, given the ongoing challenges, this would qualify as exceptional circumstances which would justify an extension in excess of 20 working days.
45. However, the Commissioner also notes that the DHSC's justification for extending the timeframe was because it wished to have its response signed off by the Secretary of State for Health. Whilst this is understandable, the Commissioner notes that there is no requirement, either within the FOIA generally, or in respect of the specific exemption cited, which requires the Secretary of State to approve any response personally.
46. The Commissioner does not wish to discourage government departments from seeking ministerial approval for responses to FOIA requests – particularly when there are particular political sensitivities involved. However, government departments do need to ensure that such consultations do not have the effect of delaying responses to

requests unduly. They should also consider whether ministerial input would be most appropriate at the response or the internal review stage.

47. In this particular case, the Commissioner recognises that the Secretary of State is likely to have had more immediate priorities, since May, than approving responses to FOIA requests. Equally, with the numbers of infections beginning to climb once again, the Commissioner considers that this response is unlikely to climb to the top of the Secretary of State's priority list at any time in the immediate future. It is difficult for the Commissioner to see why circumstances would be any different in a month or even two months' time.
48. Equally and whilst there would be specific extenuating circumstances in this particular case, on a broader level, the Commissioner has concerns about the principle of linking the reasonableness of the time required for a government department to respond to requests made under the FOIA and the availability (or willingness) of its ministers to approve the responses personally.
49. Ministers are inherently busy people who must constantly balance competing priorities. If the Commissioner were to agree that it was reasonable for a public authority to defer its response to a request until such times as approving the response were to rise to the top of its ministers' priority list, it would risk giving ministers the power to place an indefinite hold on inconvenient requests. It is not difficult to imagine a minister continuing to cite more urgent priorities to avoid answering a request they found inconvenient. This would amount to an effective ministerial "pocket veto" and would frustrate the purpose of the legislation.
50. In all the circumstances, the Commissioner considers that she can take account of the time the DHSC has spent considering the balance of the public interest both before and after 14 July 2020. Whilst she is sympathetic to the burden currently placed on all public authorities, particularly the DHSC, she maintains that the response to this request cannot continue to be deferred indefinitely.
51. The Commissioner therefore considers that the DHSC has now had a reasonable amount of time in which to complete its public interest considerations and respond to the request. She therefore finds that the DHSC has breached section 17(3) of the FOIA.

Right of appeal

52. 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

53. 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.
54. 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

Phillip Angell
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