

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 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 from the Department of Health and Social Care ("DHSC") information relating to "Exercise Cygnus". By the date of this notice, the DHSC had not issued a substantive response to this request.
2. The Commissioner's decision is that the DHSC has failed to complete its deliberations on the balance of the public interest within a reasonable time and has therefore breached section 17(3) of the FOIA.
3. The Commissioner requires the DHSC to take the following step to ensure compliance with the legislation.
 - Having confirmed that information is held within the scope of the request: either disclose the requested information or issue a refusal notice in accordance with the requirements of section 17 of the FOIA.
4. The DHSC must take this step 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. On 29 March 2020, the complainant wrote to the DHSC via the What Do They Know website and requested information in the following terms:

"It has been reported in today's Guardian newspaper (Damian Carrington 29.3.20 "UK strategy to address pandemic threat 'not properly implemented'") that some three and a half years ago in October 2016 the NHS failed a three day government 'test' of its ability to handle a pandemic (called 'Exercise Cygnus'). It was also reported that this information concerning the failure was never made public. My FOI concerns this test and why it was not published: subsequent

- 1. What was the outcome of 'Exercise Cygnus' and did the NHS in any sense 'fail' in the test of its ability to handle a pandemic?*
 - 2. When did the government learn of this result and by what manner?*
 - 3. Was any evaluation report or briefing note etc. produced in respect to this finding? If so:*
 - a. What report(s) or documents were produced?*
 - b. Who were the authors (please provide names and intuitional affiliations)?*
 - c. When were their findings delivered?*
 - d. Please provide copies of all reports or briefing notes etc. pertaining to 'Exercise Cygnus'.*
 - 4. Whose decision was it not to make the findings of 'Exercise Cygnus' public? (please provide name, job title and organisation/ government department)*
 - 5. What was the reason for this decision?*
 - 6. Whose decision was it not to publish any reports or briefing notes in respect of 'Exercise Cygnus'? (please provide name, job title and organisation/ government department).*
 - 7. What was the reason for this decision?*
 - 8. Was there any plans to publish this information at a later date?*
 - 9. If so, what date?*
 - 10. What was the explanation for delaying publication of this information?"*
6. The DHSC wrote to the complainant on 30 March 2020 to acknowledge his request.
7. The DHSC wrote to the complainant again on 29 April 2020 and stated that it was extending the time to respond to the request in order to

complete the public interest test in line with section 10(3) of the FOIA. It stated that it was currently assessing the public interest test in relation to section 35(1)(a) of the FOIA (the formulation or development of government policy). The DHSC stated that it intended to respond in full by 29 May 2020.

8. The DHSC reiterated that it was considering the public interest test in several subsequent holding emails it sent to the complainant. These emails were dated 29 May 2020, 26 June 2020, 24 July 2020, 21 August 2020, 21 September 2020 and 19 October 2020.

Scope of the case

9. The complainant contacted the Commissioner on 31 May 2020 to complain about the delay in the DHSC's consideration of the public interest test.
10. The Commissioner contacted the DHSC on 13 July 2020 reminding it of its responsibilities and asking it to provide a substantive response to the complainant within 10 working days.
11. The DHSC responded to the Commissioner on the same day and stated that it was considering the public interest and was working on its response to this request but could not guarantee that it would be able to issue a response within 10 working days.
12. The Commissioner also contacted the complainant on 13 July 2020 to explain that the DHSC had been given 10 working days from 13 July 2020 within which to provide a response to their request.
13. The complainant contacted the Commissioner on 20 October 2020 to inform her that the DHSC had still not responded to his request.
14. The complainant has provided evidence that he has received an acknowledgement from the DHSC but, by the date of this notice, had not received a substantive response to his information request.
15. The scope of this notice and the following analysis is to consider whether the DHSC has complied with its obligations in relation to section 17 of the FOIA.

Reasons for decision

16. 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.”

17. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *“not later than the twentieth working day following the date of receipt”*.
18. Section 17(3) of the FOIA states that where a public authority is relying on a qualified exemption, it can have a “reasonable” extension of time to consider the public interest in maintaining the exemption or disclosing the information.
19. Although the FOIA does not define what constitutes a reasonable time, 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. This means that the total time spent dealing with the request should not exceed 40 working days, unless there are exceptional circumstances. A public authority would need to fully justify any extension beyond 40 working days.
20. In this case, the total time taken by the DHSC to respond to this request has exceeded 40 working days. The Commissioner does not consider there to be any exceptional circumstances and finds that, by failing to complete its deliberations on the public interest test within a reasonable timeframe, the DHSC has not complied with section 17(3).
21. The DHSC is now required to finalise its public interest considerations under section 17(3) of the FOIA and respond to the complainant.

Other Matters

22. The Commissioner notes that as at today's date, the DHSC have had over six months within which to issue a response to this request. While the Commissioner has adopted a flexible and pragmatic approach to public authorities during the Covid19 pandemic, she considers that the DHSC has had ample time to respond to this request.

Right of appeal

23. 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

24. 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.
25. 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

Ben Tomes
Team Manager
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