

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2023

Public Authority: Health and Safety Executive

Address: Redgrave Court
Merton Road
Bootle
Merseyside
L20 7HS

Decision (including any steps ordered)

1. The complainant requested information relating to the use of face masks by NHS staff. By the date of this notice the Health and Safety Executive (HSE) had not issued a substantive response to this request.
2. The Commissioner's decision is that the HSE has breached section 10(1) of FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days.
3. The Commissioner requires the HSE to take the following step to ensure compliance with the legislation.
 - The HSE must provide a substantive response to the request in accordance with its obligations under FOIA.
4. The HSE 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 FOIA and may be dealt with as a contempt of court

Request and response

5. On 3 January 2023, the complainant wrote to the HSE and requested information in the following terms:

"I would like to make the following Freedom of Information request under the FOI Act 2000:

1) 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 in 2019, 2020, 2021, and 2022 if there are differences.

2) 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 in 2019, 2020, 2021, and 2022 if there are differences.

3) 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 in 2019, 2020, 2021, and 2022 if there are differences.

4) The formal position of the HSE on the nature of SARS-CoV-2 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 and how the advice was changed (if at all)."

6. The HSE acknowledged the request on 3 January 2023. To date, a substantive response has not been issued.

Reasons for decision

7. Section 1(1) of 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."

8. Section 10(1) of 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".
9. On 31 March 2023 the Commissioner wrote to the HSE, reminding it of its responsibilities and asking it to provide a substantive response to the complainant's request within 10 working days.
10. Despite this intervention the HSE has failed to respond to the complainant.
11. From the evidence provided to the Commissioner in this case, it is clear that the HSE did not deal with the request for information in accordance with FOIA. The Commissioner finds that the HSE has breached section 10(1) by failing to respond to the request within 20 working days and it is now required to respond to the request in accordance with FOIA.

Right of appeal

12. 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

13. 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.
14. 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

Michael Lea
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