

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2024

Public Authority: Department of Health Northern Ireland
Address: Castle Buildings
Stormont
Belfast
BT4 3SQ

Decision (including any steps ordered)

1. The complainant requested from Department of Health Northern Ireland (DoH) information relating to "individual briefings". DoH stated that to comply with the request would exceed the cost limit and therefore, applied section 12(1) (cost of compliance) of FOIA to the request.
2. The Commissioner's decision is that DoH was entitled to rely on section 12(1) of FOIA to refuse the request. However, the Commissioner finds that DoH did not provide advice and assistance, and therefore failed to meet its obligations under section 16(1) of FOIA.
3. The Commissioner requires DoH to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with appropriate advice and assistance to help them submit a request falling within the appropriate limit, or explain why the request cannot be meaningfully refined.
4. DoH must take these steps within 30 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.

Background information

5. DoH provided the Commissioner with background information about requests previously submitted by the complainant. DoH reported that it had received a number of similar requests (approximately over 20) in regard to the Department's handling of the Covid pandemic.
6. In order to provide context to the complainant's current complaint, DoH informed the Commissioner that it received a request on 3 December 2023 and DoH responded to this on 8 January 2024. The request related to "a question and answer session in the Northern Ireland Assembly" in December 2021. DoH responded to the request and cited section 21 (information accessible by other means) of FOIA.
7. DoH said a further request was received from the complainant on 9 January 2024, but it was not handled under FOIA as it was not deemed a request for recorded information. DoH therefore passed it to the Department's Private office to be answered by them as a correspondence case. On 24 January 2024 a response was issued to the complainant.
8. DoH confirmed that the complainant subsequently submitted a further FOI request to DoH on 31 January 2024.

Request and response

9. On 31 January 2024 the complainant wrote to DoH and requested information in the following terms:

"How often did the Department of Health under Robin Swann invite ministers to "individual briefings" on any matter pertaining to Covid and what were these matters?"
10. On 2 February 2024 DoH responded and stated the information is not held by the Department.
11. On 7 February 2024 the complainant asked DoH for an internal review, he said he was seeking further clarification on its answer. On 20 February 2024 he followed this request with a further query.
12. On 21 February 2024 DoH repeated its response stating the information was not held, and indicated that any search to compile the information would exceed the reasonable limits as set out under section 12 of FOIA.

13. On the same day, the complainant said he continued to seek a review of the response. He amended his original request and suggested

"Minister Swann be consulted on his recollection of events."
14. On 25 February 2024 DoH provided its review response. It noted that the request for review and follow up was of a conversational nature, which was not within the scope of FOIA. DoH also disregarded the complainant's suggestion about Minister Swann, and said this is not information held by the DoH. It maintained its original position to rely on section 12 of FOIA with regard to searches of the departmental records for the information requested.

Reasons for decision

15. This reasoning covers why DoH was entitled to rely on section 12(1) of FOIA to refuse to comply with the request. It will also cover the breach recorded under section 16 of FOIA.

Section 12 – cost of compliance

16. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit".
17. The appropriate limit for section 12 purposes is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations).
18. The Fees Regulations state the appropriate cost limit is £600 for central government. The appropriate limit for DoH is therefore £600. The Fees Regulations also specify the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for DoH.
19. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.

20. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate.
21. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

DoH’s position

22. By way of explanation, DoH replied to the complainant and said it should have made it clear it did not hold the information “in a way that was easily obtained”. DoH also explained to him that it does not have to create new information or find the answer to a question, if it is not recorded in an easily accessible format. DoH said, to attempt to compile a response to the complainant’s original request by searching through its records to check there was any relative information, would exceed the cost limit under section 12 of FOIA.
23. In its internal review, DoH said it interpreted the request as:

“Did the Department hold the information requested, or could it be easily obtained from the official records held by the Department.”
24. Having concluded searches of the departmental records, DoH stated it was satisfied the information the complainant was seeking – the number of times Minister Swann invited Executive colleagues to individual briefings, was not routinely recorded. DoH also said, information could not easily be compiled without extensive review of a large amount of correspondence. It reiterated its previous response to the request, that it could not easily compile the information as it would exceed the reasonable limits set out in section 12 of FOIA.
25. DoH informed the Commissioner that Minister’s Private Office conducted an initial search of the Electronic Document Record Management System (EDRMS) on 22 February 2024. It searched for Ministerial correspondence between 1 January 2020 and 31 December 2022 – the period Minister Swann was in post, and used four search terms:

“Ministerial AND invitation”, “Minister AND Covid”, “Invite AND Covid”, and “Individual AND Briefing”.

26. DoH stated these searches returned in excess of 7800 potential documents, and that they would have to be reviewed to ascertain if they contained any relevant information. DoH determined this would far exceed the £600 limit it can refuse to comply with a request.
27. DoH provided the Commissioner with a table which detailed an estimate of the time to determine whether relevant information is held and the time taken to locate, retrieve and provide the information falling within the scope of this request. The total time it would take to search for the information, DoH stated it would be 130 hours 12 minutes:

Title searched	Period Searched	Number of records	Time it would take to search
Ministerial invitation	01/01/2020-31/12/2022	16	16 x 1 minute = 16 minutes
Minister Covid	01/01/2020-31/12/2022	7710	7710 x 1 = 128 hours 30 minutes
Invite Covid	01/01/2020-31/12/2022	86	86 x 1 = 1 hour 26 minutes
Individual Briefing	01/01/2020-31/12/2022	0	
TOTAL			130 hours 12 minutes

28. DoH reported to the Commissioner that over a number of years, the complainant has conducted a continued campaign against the Department's handling of the Covid pandemic. It stated it had placed a significant burden on the Department in responding to the complainant, but DoH sought to reply to his requests as best they could. DoH said the nature of the requests makes it difficult for the Department to formulate proper responses in keeping with FOIA. DoH also said, "attempts to communicate with the complainant further, does not always yield a clearer picture of what he requires."
29. DoH considered its responses were a genuine attempt to explain to the complainant what the Minister had implied in his NI Assembly statement. Also, the responses were an attempt to indicate to the complainant, the enormous task in searching for any relevant documents that would prove or disprove what the complainant thought the Department had in response.

30. DoH referred to the complainant's question (internal review request) regarding information not held by DoH, in which he asked "why would this be?" and DoH said this "reworded request" it considered took the request outside the remit of FOIA when the complainant asked it to approach the Minister for his "recollections".
31. DoH said the complainant's further correspondence again sought questions outside of FOIA i.e. that the legislation would allow the Department to seek the then ex-Minister's recollection.

The complainant's argument

32. The complainant considered the DoH had misrepresented his request for information (point 13 of this notice). He emphasised his request to the Commissioner and argued that DoH responded to a request that he did not make. With regard to DoH and its interpretation (point 24) of what was being asked, the complainant argued that Departments could have communicated with each other, or with the Ministers or Officials concerned.
33. The complainant made it clear he was dissatisfied with DoH's response that contacting the Minister concerned to gather the information requested, was outside the scope of FOIA.
34. The complainant expressed a further concern and said; "Inviting Ministers to 'individual briefings' to see evidence is for me quite concerning..." he referred to his correspondence with Department officials and argued that "the answers I received don't explain his unusual behaviour." The complainant said he would like the DoH to contact the Minister of Health and ask him "to answer the two easily answered questions in my FOI request."

The Commissioner's position

35. The Commissioner accepts DoH's estimated time it would take to search for the information requested, and is satisfied with its explanations. He acknowledges that the potential documents returned from these searches, would have to be extensively reviewed to determine whether they contained information falling within scope of the request. The Commissioner also accepts DoH's explanation that the information is not held in an easily accessible format. He considers it would clearly exceed the appropriate limit to attempt to comply with this request.
36. Having considered the estimate provided by DoH, the Commissioner finds that it is realistic and reasonable. Therefore, the Commissioner's decision is DoH was not obliged to comply with the request and that it was entitled to rely on section 12(1) of FOIA in this case.

Section 16 – advice and assistance

37. Section 16(1) of FOIA states that a public authority is required to provide advice and assistance to any individual making an information request, so far as it would be reasonable to expect it to do so.
38. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 Code of Practice¹, in providing advice and assistance, it will have complied with section 16(1) of FOIA.
39. The section 45 FOIA Code of Practice states that a public authority's advice and assistance obligation will be triggered when it relies on section 12 to refuse a request. In those circumstances, the public authority should either suggest ways in which the requester could refine their request so as to bring it within the cost limit, or explain that the request cannot be meaningfully refined.
40. In this case, DoH did not provide the complainant with any advice and assistance, or explain why it is unable to do so. The Commissioner therefore finds that DoH did not comply with its obligations under section 16 (1) of FOIA.

¹<https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Deirdre Collins
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