

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

### **Decision notice**

**Date:** 1 June 2017

**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 experiments carried out on animals at Public Health England's Porton Down laboratory during 2014 and 2015. Public Health England (PHE) is withholding the information under section 22 of the FOIA as it says it intends to publish it in the future.
2. The Commissioner's decision is that the withheld information does not engage the exemption under section 22(1).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the requested information to the complainant or issue a fresh response that does not rely on section 22 of the FOIA.
4. The public authority 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

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5. On 24 May 2016, the complainant wrote to PHE and requested information in the following terms:
  - 1) *What was the total number of experiments carried out on animals during 2014 and 2015 at Public Health England at Porton Down?*
  - 2) *Please provide a list of all species used for all experiments carried out on animals during 2014 and 2015 at Public Health England at Porton Down.*
  - 3) *What was the total number of animals used for all experiments carried out during 2014 and 2015 at Public Health England at Porton Down?*
  - 4) *Please provide a breakdown of how many of each species of animals were used and for what purpose the experiments were carried out.*
6. PHE responded on 15 June 2016. It said it did not hold information falling within the scope of the requests. PHE provided the complainant with a web link to where it said related information is published.
7. Following an internal review PHE wrote to the complainant on 26 July 2016. It acknowledged that the information to which it had directed the complainant is broader than that which she had requested. PHE advised that if the complainant was to broaden the focus of her request to encompass all scientific experiments associated with animals carried out by PHE, then PHE would withhold this information under section 38(1)(b) of the FOIA on the grounds that disclosure would, or would be likely to, endanger its staff.
8. PHE said that the public interest in PHE protecting its staff outweighs the public interest in being open and transparent, in this case.
9. PHE's response and internal review response were not clear. During the Commissioner's investigation, PHE confirmed that it does hold the requested information.
10. PHE also revised its position. Although it considers it had correctly applied section 38 to the information at internal review, PHE now maintains that the requested information is exempt under section 22 of the FOIA because it intends to publish the information in the future. The Commissioner advised PHE to communicate its new position to the complainant.

## Scope of the case

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11. The complainant contacted the Commissioner on 19 September 2016 to complain about the way her request for information had been handled.
12. The Commissioner's investigation has focussed on whether PHE has correctly applied section 22(1) to the information the complainant has requested.

## Reasons for decision

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13. Section 22(1) of the FOIA says that information is exempt information if:
  - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)
  - (b) the information was already held with a view to such publication at the time when the request for information was made, and
  - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
14. Section 22(1) is subject to the public interest test; that is if the Commissioner finds that the exemption is engaged, she must consider whether, despite finding it exempt information under section 22(1), there is a greater public interest in disclosing the information or whether the public interest favours maintaining the exemption.
15. In order to determine whether section 22(1) is engaged the Commissioner generally considers the following questions:
  - When the complainant submitted the request, did the authority intend to publish the information at some date in the future?
  - If so, had the authority determined this date when the request was submitted?
  - In all the circumstances of the case, was it 'reasonable' for the authority to withhold the information until some future date (whether determined or not)?

*When the complainant submitted the request, did PHE intend to publish the information at some date in the future?*

16. The Commissioner notes that in its response to the complainant of 15 June 2016, and its internal review of 26 July 2016, PHE made no reference to any intention to publish the requested information in the future.
17. In its submission to the Commissioner, however, PHE has referred to a '*Concordat on Openness in Animal Research*'. It has explained that this Concordat was launched in 2014 and was initially signed by more than 70 organisations. These included key partners for PHE such as Oxford and Cambridge Universities, University College London and the London School of Hygiene and Tropical Medicine. Today that number has grown to 107 organisations and among other signatories are GSK, Pirbright Institute, Wellcome Trust and the Medical Research Council.
18. Signatories agree to be more open about their use of animals in research and to abide by the following four commitments: to be clear about when, how and why they use animals in research; to enhance their communications with the media and the public about their research using animals; to be proactive in providing opportunities for the public to find out about research using animals; and to report on progress annually and to share their experiences.
19. All signatories agree that they will work to fulfil the four commitments, initiating projects and strategies that are relevant and appropriate to their organisations to be more open about their use of animals in research. The signatories will be asked to report on their progress in taking these steps.
20. PHE has confirmed that, at present, it is not a signatory to the Concordat and does not supply detailed information in reply to questions about its animal research. In response to requests made under the FOIA, PHE has until now relied on the section 38 (health and safety) exemption and other supporting exemptions.
21. PHE has told the Commissioner that, prior to receiving the request on 24 May 2016, its relevant project management board had, however, agreed, in principle, to sign the Concordat. It argues that by virtue of it signing the Concordat, PHE would publish the specific information.
22. PHE has provided to the Commissioner a Management Committee Paper dated 15 December 2016 (which concerns PHE's approach to signing the Concordat), and an email from its Chief Executive dated 19 December 2016 in which Duncan Selbie states (of the Concordat): "*I'm sure we should sign this...*". (The Commissioner notes that both documents post-

date the complainant's request.) PHE says this material is evidence of PHE's clear intention to sign the Concordat which in turn commits PHE to undertake a range of openness and transparency initiatives concerning scientific animal experimentation.

22. Although PHE appears to have agreed, in principle, to sign the *Concordat on Openness in Animal Research*, the Commissioner notes that at the point it received the request in May 2016, PHE had not done so, and has not done so at the date of this notice.

*If so, had PHE determined this date when the request was submitted?*

23. PHE says that, in line with the Commissioner's guidance on section 22, the information will be published once other actions have been completed. It has noted that the application of section 22 does not require that a set publication date is in place. PHE is yet to complete a review of the steps to take place prior to the signing, and the subsequent timings. It has told the Commissioner that the request has been useful in focussing its attention on considering what those steps are that it needs to take prior to publication (by virtue of signing the Concordat).
24. PHE is correct in stating that section 22 does not require that a publication date is in place at the time an authority receives request. No publication date is in place in this case.

*In all the circumstances of the case, was it 'reasonable' for PHE to withhold the information until some future date (whether determined or not)?*

25. The Commissioner's guidance on section 22 advises that before applying the public interest test, a public authority must first determine whether or not it is reasonable, in all the circumstances, to withhold the information. When doing so, a public authority should first consider whether or not it is: sensible; in line with accepted practices; and fair to all concerned. A public authority may also wish to give thought to whether it is the right decision to manage the availability of the information by planning and controlling its publication and whether the timetable properly requires internal or limited consideration of the information prior to its public release.
26. PHE's submission to the Commissioner does not discreetly discuss the issue of whether withholding the information would be reasonable in all the circumstances. It has broadly considered the points in paragraph 25 as part of a discussion of the public interest arguments.
27. PHE says that it has reached the view that, on balance, the public interest is better served by withholding the requested information under

section 22(1) at this time. It took the following factors into account during its assessment of the balance of the public interest.

28. Internally, there is mixed awareness of its animal research within PHE. It is likely the subject will be increasingly raised as more members of staff become aware of a planned co-location of its staff and services.
29. Before signing the Concordat, PHE says it is important to consider how staff members working in the animal research facilities are engaged and what communications need to be prepared to coincide with the signing. Given that the decision to publish the information in question, through the signing of the Concordat, will potentially impact on all staff, PHE says it needs to plan and deliver a series of awareness raising initiatives and that the impact (of publication) should not be underestimated.
30. PHE has given as an example a small number of staff who will choose to seek alternative employment as a direct consequence of the publication. Specifically, those for whom any form of testing in animals is unacceptable and those working in animal research facilities may feel a heightened sense of risk to abuse from those opposing the work.
31. PHE also says it must prepare for some media interest which will be generated through PHE's publication of the information specified in the request.

*The Commissioner's conclusion*

32. In her section 22 guidance, the Commissioner advises that the intention to publish must pre-date the request. This means that a public authority cannot, when it receives a request, attempt to give itself more time to provide the information by deciding to publish it in the future rather than provide it within the statutory time limit for answering a request.
33. The Commissioner also advises that a general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.
34. The information that the public authority intends to be published must be the specific information the applicant has requested.
35. The Commissioner has considered whether, at the time of the request, PHE had the settled intention to publish the specific information the complainant has requested, at some future date.
36. PHE has argued that it had the settled intention to publish the information because, presumably at the time of the request, its relevant Board had agreed, in principle, to sign up to the *Concordat on Openness*

*on Animal Research*. PHE equates signing the Concordat with having the settled intention to publish the requested information.

37. However, some two years after it was launched, and at the time of the request, PHE had not signed the Concordat. PHE says it had agreed to sign the Concordat, in principle. Agreeing in principle to sign the Concordat is not the same as having signed the Concordat.
38. Had PHE signed the Concordat at the time of the request, this may have strengthened its argument that it intended to publish particular information. However, having the settled intention to be a signatory to the Concordat appears to the Commissioner to be one step removed from having the settled intention to publish the requested information. Without the Concordat having been signed, the Commissioner therefore does not accept that PHE can be said to have had the settled intention to pro-actively publish particular information at the point it received the request.
39. And even if PHE had signed the Concordat, it would also need to demonstrate that it had the settled intention to publish the *specific* information that has been requested in the complainant's four requests.
40. PHE has referred the Commissioner to the second of the Concordat's four commitments: *to enhance communications about animal research*. It has told the Commissioner that that the specific information the complainant has requested will feature within a publicly accessible disclosure log, in line with this commitment. The Commissioner does not consider this to be sufficiently robust evidence of a commitment to publish the information in question. She would have expected to see, for example, a proposed disclosure log – such as would perhaps have been discussed at a meeting - that included the requested information.
41. Because PHE is not currently a signatory to the *Concordat on Openness on Animal Research* and in the absence of compelling evidence to support its position that, at the time of the request, it intended to publish the specific information that has been requested, the Commissioner is not persuaded that PHE had the settled intention to publish the requested information at the time it was requested. She has also taken into consideration that PHE did not refer to this exemption in its original response or review response to the complainant and, indeed, initially told the complainant that it did not hold the information.
42. Regarding the reasonableness of withholding the information in all the circumstances of the case, the Commissioner notes PHE's argument that, to prepare for signing the Concordat, which has associated sensitivities, PHE would first need to prepare its staff. Again, this



argument concerns the signing of the Concordat, from which flows the resulting commitment to pro-actively publish information.

43. As discussed above, the Commissioner considers this is a separate, albeit related, matter to whether it is reasonable in all circumstances to withhold the specific information requested until it is published at some future date. As above, the Commissioner has not been persuaded that PHE had the settled intention to publish this specific information at the time it received the request.
44. The Commissioner has therefore found that section 22 cannot be applied to the information in this case. Because she finds that the information does not engage the section 22 exemption, it has not been necessary to consider the public interest test associated with this exemption.



## Right of appeal

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45. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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