

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2019

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. In multi-part requests, the complainant has requested information from the Parliamentary and Health Service Ombudsman (PHSO) about the external review process associated with its handling of service complaints. PHSO released some information, relied on section 21(1) of the FOIA (information accessible to the applicant by other means) with regard to parts of the requests and confirmed it does not hold some of the requested information.
2. The Commissioner's decision is as follows:
 - PHSO correctly applied section 21(1) to some information it holds but incorrectly applied it to other information.
 - PHSO breached section 1(1) and section 10(1) with regard to information it has now identified that falls within the scope of parts of request 1 and request 3 of 6 June 2018, and request 1a of 20 July 2018.
 - On the balance of probabilities, PHSO holds no further relevant information and complied with section 1(1) with regard to the remaining parts of the complainant's requests.

3. The Commissioner requires PHSO to take the following step to ensure compliance with the legislation:
 - If it has not already done so, and if it is not exempt information, release to the complainant the further relevant information it has identified, which is discussed at paragraphs 38 and 42, with any personal data redacted as appropriate.
4. PHSO 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 6 June 2018 the complainant wrote to PHSO and requested information in the following terms:

"1) The reason why the PHSO has removed the external review process they originally had in place for dealing with individual complaints and decisions and why this is not made clear on the PHSO website

- *How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na [sic] automatic right to the review of a decision the ombudsman service may have got wrong.*
- *How the current system the PHSO have in place for dealing with complaints by means of their Customer Care Team can reassure dissatisfied users of the service that the review of their complaints and the decisions they reach are fair and unbiased.*

2) How many external reviewers were originally employed by the PHSO, whether they could be considered truly impartial and independent knowing they were hired under a contract with the PHSO, and whether the number they employed was sufficient to deal with the high volume of complaints the PHSO failed to resolve where the service user requested an external review of their complaint.

Because questions three, four and five relate to a specific complaint the PHSO have on record and was ongoing at a time when an external review process was in place, meaningful answers are required to each of the following questions:-

3) What criteria did a complaint have to meet in order for the PHSO to carry out an external review and whether the PHSO could be considered to breach the principles of good complaint handling by refusing to carry out an external review of a complaint where the service user had provided evidence of maladministration in the way the PHSO handled their complaint and found their requests for an external review had been ignored.

4) Whether the PHSO consider they have an obligation to carry out an external review of longstanding complaints where the ombudsman service has failed to provide remedy, accountability or resolution to a complaint over the space of more than 5 years and where the service user has had continuing need to complain to the PHSO about their handling of the complaint and raised questions the PHSO has largely failed to answer.

5) Whether the PHSO recognise the need for an unbiased external review process in light of the criticisms they have received from various bodies as an ombudsman service that is unfit for purpose in dealing with complaints fairly, openly and transparently - and why as part of their strategy to deliver an exemplary ombudsman service and to allay concerns of bias by its users there are no future plans for an external review process to address this imbalance.

6) In view of the improvements the PHSO intend to make to the service over the course of the next 3 years because their objectives highlight many of the flaws and deficiencies with the service they provide and have been criticised for, an answer is sought as to whether the PHSO recognise the negative impact those flaws and deficiencies would have had on their findings and decisions on past complaints and whether they intend to revisit and reassess complaints they have failed to resolve where the service user has had continuing need to raise concerns with the PHSO about their decisions and complaint handling processes."

6. PHSO responded on 13 July 2018. First it explained that the FOIA only covers information held in recorded form.
7. PHSO addressed question 1 and provided the complainant with links to where information about its (former) Customer Care Team, the review process and its policies and procedures are published. PHSO explained that because this information is already accessible to the complainant it is exempt from release under section 21(1) of the FOIA.
8. PHSO indicated that to comply with question 2 would exceed the appropriate cost limit and so it was not required to comply with this request under section 12(1).

9. PHSO said it does not hold information in recorded form within the scope of question 3. It provided some general information.
10. PHSO said it had already addressed questions 4, 5 and 6 in a response to a previous request from the complainant in which it had explained that the FOIA does not oblige it to provide opinions or explanations.
11. On 20 July 2018 the complainant wrote to PHSO as follows:

"1) The reason why the FOI Office were previously unable to answer parts of this question in the detail they have currently provided.

a) How the removal of an external review process and reliance on the Customer Care Team to handle reviews can avoid the potential for bias with their judgement and on the decisions they reach on complaints.

b) How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na [sic] automatic right to the review of a decision the ombudsman service may have got wrong

2) Please clarify why a record of the number of external reviewers originally employed by the PHSO either in the past year or from the period 2010 to 2016 is not easily accessible without a manual review of your reports and records as the reason you provide in answering this question effectively disallows the service user from obtaining full disclosure of the information they have requested and prevents them from obtaining resolution to their queries.

3) Following the removal of the external review process what process does the PHSO currently have in place for dealing with complaints about the Customer Care Team when they have failed to apply the principles of good complaint handling and the service user provides evidence of maladministration in the way they have handled their complaint which they subsequently ignore.

N.B. Because questions 4, 5 & 6 highlight some of the serious flaws and deficiencies with the Parliamentary and Health Service Ombudsman and its functioning, if the Guiding Principles of the PHSO are claimed to be openness and transparency It should not preclude the FOI office from answering these questions as sufficient recorded information no doubt exists between the PHSO and bodies who are highly critical of the service namely:- the Patient's Association, pressure group PHSO the Facts and the PASC to enable your office to answer these questions. On that basis I seek meaningful answers to those questions which have been necessary to repeat.

- 4) Whether the PHSO consider they have an obligation to carry out an external review of longstanding complaints where the ombudsman service has failed to provide remedy, accountability or resolution to a complaint over the space of more than 5 years and where the service user has had continuing need to complain to the PHSO about their handling of the complaint and raised questions the PHSO has largely failed to answer.*
- 5) Whether the PHSO recognise the need for an unbiased external review process in light of the criticisms they have received from various bodies as an ombudsman service that is unfit for purpose in dealing with complaints fairly, openly and transparently - and why as part of their strategy to deliver an exemplary ombudsman service and to allay concerns of bias by its users there are no future plans for an external review process to address this imbalance.*
- 6) In view of the improvements the PHSO intend to make to the service over the course of the next 3 years because their objectives highlight many of the flaws and deficiencies with the service they provide and have been criticised for, an answer is sought as to whether the PHSO recognise the negative impact those flaws and deficiencies would have had on their findings and decisions on past complaints and whether they intend to revisit and reassess complaints they have failed to resolve where the service user has had continuing need to raise concerns with the PHSO about their decisions and complaint handling processes.*
- 7) Please explain how the PHSO Guidance on Financial Remedy aims to compensate complainants for the frustration and distress caused by the ombudsman service when it has failed to provide justice, remedy, accountability nor resolution for the service user owing to the known flaws and inadequacies with the service.*
- 8) In light of the criticisms the PHSO has received for being an ombudsman service that is unfit for purposing dealing with complaints fairly, openly and transparently -- Please explain how the PHSO can assure service users that their complaints have been dealt with properly and in accordance with those principles."*
12. PHSO categorised this correspondence as a request for an internal review of its response of 13 July 2018 and it provided a review on 4 September 2018. The review incorporated its response to the above request and the request of 6 June 2018, as follows:
13. With regard to its response to questions 1 and 2 of the request submitted on 6 June 2018, PHSO confirmed that it is relying on section

21 with regard to some information. It confirmed that it originally had three external reviewers.

14. With regard to question 3, 4, 5 and 6 PHSO confirmed that it holds no relevant recorded information.
15. With regard to the complainant's further questions of 20 July 2018, PHSO responded as follows:
16. With regard to question 1, PHSO confirmed that the requests were similar but not the same and that it had provided the complainant with links to relevant information. PHSO confirmed it holds no recorded information falling within the scope of a) and b).
17. With regard to question 2 PHSO withdrew its reliance on section 12(1), complied with this request and released relevant information.
18. In response to question 3 PHSO provided a link to where Customer Care guidance is published and confirmed that this information is therefore exempt under section 21(1) of the FOIA.
19. PHO confirmed it holds no recorded information falling within the scope of questions 4, 5, 6 and 8. It provided an explanation with regard to question 7.

Scope of the case

20. The complainant contacted the Commissioner on 2 October 2018 to complain about the way his request for information had been handled.
21. Having confirmed the scope of his request with the complainant, the Commissioner has first considered whether part of request 1 (6 June 2018) and request 3 (20 July 2018) engage section 21(1) of the FOIA.
22. The Commissioner has then considered whether PHSO holds recorded information falling within the scope of part of request 1, requests 3, 4, 5 and 6 (6 June 2018) and requests 1a, 1b, 4, 5, 6 and 8 (20 July 2018).

Reasons for decision

Section 21 – information accessible to the applicant by other means

23. Under section 21(1) of the FOIA information which is reasonably accessible to an applicant otherwise than under section 1 is exempt information.
24. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
25. The relevant requests of 6 June and 20 July 2018 to which PHSO has applied section 21 are as follows:

"1) The reason why the PHSO has removed the external review process they originally had in place for dealing with individual complaints and decisions and why this is not made clear on the PHSO website

- *How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na [sic] automatic right to the review of a decision the ombudsman service may have got wrong.*

- *How the current system the PHSO have in place for dealing with complaints by means of their Customer Care Team can reassure dissatisfied users of the service that the review of their complaints and the decisions they reach are fair and unbiased."*

"3) Following the removal of the external review process what process dies the PHSO currently have in place for dealing with complaints about the Customer Care Team when they have failed to apply the principles of good complaint handling and the service user provides evidence of maladministration in the way they have handled their complaint which they subsequently ignore."

26. With regard to question 1, in its response of 13 July 2018, PHSO explained that as part of changes it made to its ways of working it had introduced a Customer Care Team (CCT) which would consider and address complaints about its service and decisions. It said that PHSO stopped using external reviewers in 2017 and that changes were made to the review process as it was felt that the CCT would be better placed

to handle Reviews. It noted that PHSO had not relied exclusively on external reviewers in any case.

27. PHSO said that information about the changes to PHSO, its ways of working including the introduction of the CCT and its function were made available on its website and included guidance on the review request process. It provided the complainant with a link to where information about the CCT and review process is published. PHSO explained that the CCT adhered to particular policies and procedures and also provided a link to where its Service Model and Service Charter is published.
28. Question 1 is for the reason PHSO stopped using the external review process, how it justifies this (first bullet point) and how users can be reassured that the CCT will make fair and balanced decisions (second bullet point).
29. In its submission to the Commissioner, PHSO has advised that, on reconsideration, it considers that the first bullet is a request for an opinion and that it is not obliged to provide an opinion under the FOIA if relevant information is not held; suggesting that PHSO's position is that it does not hold information falling within the scope of the first bullet point.
30. The Commissioner has accessed the published information that PHSO provided the complainant with links to. As it advised the complainant, this information details its current review/complaints process, its Service Model and Service Charter. The Service Model lists the policies and procedures that PHSO uses to assess and investigate complaints and the Service Charter explains what users can expect from PHSO when they ask it to look into a complaint.
31. With regard to the second bullet point, the Commissioner considers that the above published information broadly addresses that request; that this information is already accessible to the complainant and that PHSO can therefore rely on section 21(1) with regard to that element of the request. The Commissioner does not consider that the published information addresses question 1 or the first bullet point and she therefore finds that PHSO cannot rely on section 21(1) with regard to these parts. She has considered whether PHSO holds information relevant to these elements in her Section 1 analysis.
32. Question 3 is for what process PHSO currently has in place for dealing with complaints following the removal of the external review process. In its response of 4 September 2018, PHSO provided the complainant with a link to what it described as its Customer Care Guidance; it is a document called 'Service Model Policy and Guidance: Customer Care

Guidance 4.0.' It details the role of the Customer Care Team (as it was referred to at that time) and how the CCT should deal with complaints. The Commissioner is satisfied that this information is accessible to the complainant and that, along with the published information on its current review process, Service Model and Service Charter, it addresses question 3. The Commissioner therefore finds that PHSO can rely on section 21(1) with regard to question 3.

Section 1 – general right of access to information held by public authorities

33. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled a) to be told if the authority holds the information and b) to have information communicated to him or her if it is held and is not exempt information.
34. Section 10(1) of the FOIA obliges an authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
35. With regards to the requests of 6 June 2018, these were as follows:

"1) The reason why the PHSO has removed the external review process they originally had in place for dealing with individual complaints and decisions and why this is not made clear on the PHSO website

- *How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na [sic] automatic right to the review of a decision the ombudsman service may have got wrong...*

3) What criteria did a complaint have to meet in order for the PHSO to carry out an external review and whether the PHSO could be considered to breach the principles of good complaint handling by refusing to carry out an external review of a complaint where the service user had provided evidence of maladministration in the way the PHSO handled their complaint and found their requests for an external review had been ignored

4) Whether the PHSO consider they have an obligation to carry out an external review of longstanding complaints where the ombudsman service has failed to provide remedy, accountability or resolution to a complaint over the space of more than 5 years and where the service user has had continuing need to complain to the PHSO about their handling of the complaint and raised questions the PHSO has largely failed to answer.

5) Whether the PHSO recognise the need for an unbiased external review process in light of the criticisms they have received from various bodies as an ombudsman service that is unfit for purpose in dealing with complaints fairly, openly and transparently - and why as part of their strategy to deliver an exemplary ombudsman service and to allay concerns of bias by its users there are no future plans for an external review process to address this imbalance.

6) In view of the improvements the PHSO intend to make to the service over the course of the next 3 years because their objectives highlight many of the flaws and deficiencies with the service they provide and have been criticised for, an answer is sought as to whether the PHSO recognise the negative impact those flaws and deficiencies would have had on their findings and decisions on past complaints and whether they intend to revisit and reassess complaints they have failed to resolve where the service user has had continuing need to raise concerns with the PHSO about their decisions and complaint handling processes."

36. With regard to question 1 and the first bullet point, in its response to the complainant PHSO had said that information *had been* published on its website about the changes to PHSO, its ways of working including the introduction of the CCT and its function, and guidance on the review request process.
37. If held, this information might broadly address the complainant's request for the reason/justification for the changes PHSO had made to its external review process. This particular information is not published on PHSO's website any longer and the Commissioner approached PHSO to see if it still holds a copy of the information that had been published.
38. PHSO made further enquiries with its Governance Team and identified information that it acknowledges falls within the scope of question 1 and the first bullet point: an External Review Quality Committee Paper and the minute from a Quality Committee meeting. PHSO confirmed it had been unable to locate any further relevant information. The Commissioner finds that PHSO breached section 1(1) and section 10(1) of the FOIA with regard to this information; it did not confirm it holds this information or communicate it to the complainant within 20 working days.
39. In its submission to the Commissioner, PHSO has argued that questions 3, 4, 5 and 6 are requests for opinion and not for recorded information. It says it contacted relevant officers for their recollection and that no recorded information is held. It confirmed that it carried out searches for relevant information with its Operations Manager – Review and Feedback Team (previously CCT), Assistant Director of Strategy and

Partnerships and the Senior Change and Delivery Officer. PHSO's view is that there is no requirement under FOIA to provide an opinion or answer general questions if information is not held.

40. The Commissioner agrees with PHSO that, apart from one element, these four requests read as requests for opinion; an opinion on whether PHSO could be considered to be in breach of particular principles, on whether PHSO considers it has a particular obligation, on whether PHSO recognises a particular need and on whether PHSO recognises a particular negative impact. The Commissioner has noted that PHSO has nonetheless approached relevant officers for their recollection and has carried out searches with senior staff. No relevant recorded information was identified and the Commissioner accepts that, on the balance of probabilities and given the particular nature of the requests, PHSO does not hold recorded information falling within the scope of requests 4, 5 and 6 and part of request 3.
41. Request 3 includes a request for "What criteria did a complaint have to meet in order for the PHSO to carry out an external review..." The Commissioner queried PHSO's response to this part with PHSO – she considered that it might be the case that PHSO could hold recorded information that addresses this part of request 3.
42. Having approached its Governance Team again, PHSO identified a Review Guidance document that was in place at the time and which details criteria for reviews. The Commissioner understands that PHSO considers that this information broadly addresses request 3. PHSO has explained that the Guidance document is the criteria for all reviews and does not detail separately what criteria a complaint had to meet in order for PHSO to carry out an external review, except when joint working with the Local Government Ombudsman. It advised that removing the external review function has not changed its actual process in terms of what it reviews and says that PHSO's Review and Feedback Team (formerly CCT) still regularly upholds reviews and reaches impartial decisions.
43. As with the information at paragraph 38, the Commissioner finds that PHSO breached section 1(1) and section 10(1) of the FOIA with regard to this information; it did not confirm it holds this information or communicate it to the complainant within 20 working days.
44. With regard to the requests of 20 July 2018, these were as follows:
"1) The reason why the FOI Office were previously unable to answer parts of this question in the detail they have currently provided.

a) How the removal of an external review process and reliance on the Customer Care Team to handle reviews can avoid the potential for bias with their judgement and on the decisions they reach on complaints.

b) How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na automatic right to the review of a decision the ombudsman service may have got wrong...

...4) Whether the PHSO consider they have an obligation to carry out an external review of longstanding complaints where the ombudsman service has failed to provide remedy, accountability or resolution to a complaint over the space of more than 5 years and where the service user has had continuing need to complain to the PHSO about their handling of the complaint and raised questions the PHSO has largely failed to answer.

5) Whether the PHSO recognise the need for an unbiased external review process in light of the criticisms they have received from various bodies as an ombudsman service that is unfit for purpose in dealing with complaints fairly, openly and transparently - and why as part of their strategy to deliver an exemplary ombudsman service and to allay concerns of bias by its users there are no future plans for an external review process to address this imbalance.

6) In view of the improvements the PHSO intend to make to the service over the course of the next 3 years because their objectives highlight many of the flaws and deficiencies with the service they provide and have been criticised for, an answer is sought as to whether the PHSO recognise the negative impact those flaws and deficiencies would have had on their findings and decisions on past complaints and whether they intend to revisit and reassess complaints they have failed to resolve where the service user has had continuing need to raise concerns with the PHSO about their decisions and complaint handling processes...

...8) In light of the criticisms the PHSO has received for being an ombudsman service that is unfit for purposing dealing with complaints fairly, openly and transparently -- Please explain how the PHSO can assure service users that their complaints have been dealt with properly and in accordance with those principles."

45. Requests 1b, 4, 5 and 6 of 20 July 2018 are repeats of requests 1 (first bullet), 4, 5 and 6 of 6 June 2018 and these have been dealt with above.

46. With regard to the remaining requests - 1, 1a) and 8 - in its submission PHSO has re-stated that the FOIA concerns information held in recorded form. It argues that if it does not hold relevant recorded information the FOIA does not oblige it to provide unrecorded opinions or thoughts in response to a request or question.
47. The Commissioner does not agree that request 1 is for an opinion, as such, it is for an explanation. But in order to release relevant information to the complainant, between 13 July 2018 and 20 July 2018 PHSO would need to have considered whether or not it had answered all of the parts of the 6 June 2018 request, identified why it had been unable to answer any parts and recorded this information. This is not a scenario that the Commissioner considers is likely to have taken place. She is therefore satisfied that PHSO does not hold recorded information falling within the scope of request 1.
48. However, she considers that it is less immediately clear that PHSO would not hold information falling within the scope of part 1a). She considered that it might be the case that PHSO could hold recorded information that would address this part, such as meeting minutes or a briefing paper. She approached PHSO for further information about its response to this part of the request.
49. PHSO explained that the information it has identified at paragraph 38 also addresses part 1a of the 20 July 2018 request, and that it has identified no further relevant information.
50. The Commissioner considers that request 8 does read as a request for an explanation. However, she again notes that PHSO carried out searches for any relevant information with senior staff and asked staff for their recollection as to whether PHSO might hold relevant information. The searches and discussion did not identify relevant information. As with the requests of 6 June 2018 therefore, given the particular nature of request 8, the Commissioner is satisfied on the balance of probabilities that PHSO does not hold information in recorded form that would address it.
51. The Commissioner has carefully considered all the relevant parts of the complainant's requests, PHSO's response and its submissions to her. On the balance of probabilities she is satisfied that PHSO holds no further information that is relevant to the complainant's requests and that, once it has released the additional information it has now identified, it will have fully complied with section 1(1) 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@hmcts.gsi.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

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