

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

### **Decision notice**

**Date:** 10 October 2019

**Public Authority:** Department of Health and Social Care  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

### **Decision (including any steps ordered)**

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1. The complainant has requested information on allowances paid to staff at the Department of Health and Social Care. The DHSC refused to respond to this request on the basis of section 12 of the FOIA.
2. The Commissioner's decision is that section 12 has been correctly applied in this case and the DHSC does not need to take any further steps. The Commissioner also finds the DHSC has provided advice and assistance to meet its obligations under section 16 of the FOIA.

### **Request and response**

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3. On 2 February 2018 the complainant made two requests to the DHSC. The first of these requests (FOI-1118056) was for the following information:

*"I am requesting the following information under Freedom of Information Act.*

- 1) What is the total number of staff in receipt of 'additional pay allowance, broken down by directorate to date?*
- 2) Are there any other allowances that staff are getting and if so what are they?*
- 3) What is the total number of staff in receipt of 'market pay supplement', broken down by directorate to date?"*

4. The second request (FOI-1118057) sent to the DHSC on the same date was as follows:

*"I am requesting the following information under Freedom of Information Act.*

- 1) How many FOI requests have Department of Health received in last 5 years (total per year)?*
- 2) How many FOI requests/cases have been responded to before 20 working days, referring to question 1 (total per year for last 5 years)?*
- 3) How many FOI requests/cases have been responded to after 20 working days, referring to question 1 (total per year for last 5 years)?*
- 4) How many requests for an internal review have been received in last 5 years (total per year)?*
- 5) How many requests/cases for an Internal Review have been responded to before 20 working days, referring to question 4 (total per year for last 5 years)?*
- 6) How many requests/cases for an Internal Review have been responded to after 20 working days, referring to question 4 (total per year for last 5 years)?*
- 7) How many requests/cases for an Internal Review have exceeded 40 working days, referring to question 4 (total per year for last 5 years)?*
- 8) How many FOI requests have had section 40(2) quoted in last 5 years (total per year for last 5 years)?"*

5. A third information request was sent on 5 February 2018 (FOI-118535) for the following information:

*"Subject: FOI-1113489 Referring to your e-mail sent today. The year in question is 2017, apologies for this omission. Question 1. How many staff have been promoted from 1<sup>st</sup> February to date, broken down by grade and month?"*

6. This was a clarification of a previous request (FOI-113489) which was for the following information:

- 1) "How many staff have been promoted from 1<sup>st</sup> February to date, broken down by grade and month?"*

- 2) *Can you send me a list of all Information Technology posts broken down by grade and what posts are deemed to be 'Specialist?'*
- 3) *When did pay scales change (minimum/maximum for grades and regions) and were Department of Health recognised unions consulted about pay scale changes?"*
7. The DHSC responded on 2 March 2018 and refused each of the requests on the basis of section 14(1) with the explanation that the complainant had submitted requests for the same or similar information on the subject of DHSC staff recruitment, promotions and pay. The DHSC considered that complying with the requests would be a disproportionate strain on its resources and would be unjustified.
8. The complainant requested an internal review on 30 April 2018. He disputed that the first two requests were vexatious as he stated he had not previously requested information on statistics or performance of FOI requests or requested information on allowances. For the later request the complainant confirmed he had provided the requested clarification and expressed dissatisfaction that the DHSC had not responded to the other parts of this request in the meantime.
9. The DHSC provided its internal review response on 15 February 2019. The DHSC stated it was no longer refusing the requests under section 14 but now considered the request(s) should be refused under section 12 as it would exceed the cost limit to comply. The DHSC pointed to the numbered request 5, 6 and 7 of request FOI-1118057 as exceeding the cost limit to comply with on its own.
10. DHSC stated it had aggregated all of the requests from FOI-118057 and all of the requests from FOI-118056 and FOI-118535 and therefore all requests were being refused on the basis of section 12.

### **Scope of the case**

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11. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation she raised concerns about the decision of the DHSC to aggregate all of the requests to apply section 12 and refuse to provide the information. The Commissioner acknowledged that the requests were all from the same person but questioned whether it was fair to say that the requests were all for the same or similar information.

13. The DHSC reconsidered each of the requests and concluded that all three of the requests should not have been aggregated. However, it maintained that two of the requests should continue to be aggregated (FOI-1118056 and FOI-118535) and stated it considered these should be refused under the provisions of section 14(1) of the FOIA as complying with these requests would cause an unjustified level of disruption to the work of the DHSC. These requests have been considered in separate decision notices (FS50798366 and FS50879429).
14. The Commissioner considers the scope of this investigation to be to determine if the DHSC has correctly refused the request FOI-118057 on the basis of section 12.

## **Reasons for decision**

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### **Section 12 – cost of compliance exceeds the appropriate limit**

15. Section 12(1) of the FOIA allows a public authority to refuse to comply with a request for information if it estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
16. The appropriate limit is set in the Fees Regulations at £600 for government departments.
17. The Fees Regulations also specify that a cost estimate must be calculated at the rate of £25 per hour of staff time.
18. In estimating whether complying with a request would exceed the appropriate limit, the Fees Regulations state that a public authority may only take into account the costs it reasonably expects to incur in:
  - determining whether it holds the information;
  - 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.
19. The four activities are sequential, covering the information retrieval process of the public authority.
20. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only a reasonable estimate is

required. The Tribunal has previously said<sup>1</sup> that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence". The Commissioner considers that a realistic estimate is one based on the time it would take to obtain the requested information from the relevant records or files as they existed at the time of the request, or up to the date for statutory compliance with the request.

### *Aggregation of requests*

21. Multiple questions within a single item of correspondence are considered to be separate requests for the purpose of section 12. In the present case, this means that there are several requests to be considered. However, where requests relate to the same overarching theme, a public authority may aggregate two or more separate requests in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.

22. In the Commissioner's guidance<sup>2</sup> on exceeding the cost limits, she explains that:

*"Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.*

*A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested".*

23. The Fees Regulations' wording of "relate, to any extent, to the same or similar information" makes clear that the requested information does not need to be closely linked to be aggregated, only that the requests can be linked.

24. Having reviewed the wording of the complainant's request, the Commissioner is satisfied that there is an overarching theme. This is because the individual questions all refer to information about the

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<sup>1</sup> Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007)

<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)

DHSC's freedom of information request handling. Therefore, the DHSC was entitled to aggregate the costs of dealing with each question.

*Would compliance with the request exceed the appropriate cost limit?*

25. The DHSC declined to comply with the request because it estimated that doing so would exceed the appropriate limit.
26. Section 12(1) requires a public authority to estimate the cost of compliance with a request, rather than to formulate an exact calculation. The question for the Commissioner to determine is therefore whether the cost estimate by the DHSC was reasonable. If it was, then section 12(1) of the FOIA was engaged and the DHSC was not obliged to comply with the request.
27. The DHSC explained that requests 5, 6 and 7 alone would exceed the cost limit. These requests were for the number of requests for internal review (IR) responded to before 20 working days, the number of IRs responded to after 20 working days, the number of IRs that exceeded 40 working days, as totals per year for the last five years.
28. The DHSC stated that the information requested in these requests is not held in one accessible file or document and in order to locate and identify the requested information it would be required to search and review a large number of folders and documents.
29. Responses to internal reviews are held within the DHSC's electronic records and document management systems. They are not stored on a case management system that allows the extraction of management information. Individual internal review responses would need to be examined to determine when the response was issued so that the DHSC could provide the number of responses issued within 20 working days and how many exceeded 20 and 40 working days.
30. During the requested time period of February 2013 to February 2018 the DHSC's FOI team used two electronic records management systems to store internal review responses. A shared drive was used to file and store internal review responses up until January 2017. The DHSC therefore states it would need to search this shared drive to find and examine the internal review responses from February 2013 to January 2017.
31. In April 2013 the DHSC states it introduced an online records management system known as IWS. This system holds internal review responses from April 2013 to date and would also need to be checked to ensure internal review responses held within IWS folders are also checked to give the requested information.

32. The DHSC identified that the FOI shared drive contained 321 individual documents that would need to be reviewed to determine if they are within the scope of the request. In addition to this, the FOI shared drive also contains 497 potentially relevant folders and files, each of which would need to be reviewed to determine if they contain in scope information. The DHSC acknowledges it does not know how many documents are contained in each of the 497 folders/files.
33. The DHSC has also identified that IWS contains 300 folders and files that would need to be reviewed to ascertain if they contain documents within the scope of the request.
34. As such the DHSC has concluded a minimum of 797 electronic folders across the FOI shared drive and IWS would need to be searched to locate and extract the requested information, in addition to the 321 individual documents on the FOI shared drive. The DHSC considers it would require two minutes per file to conduct this search and ascertain if any documents in the file are relevant to the request and extract the relevant information i.e. work out if the IR exceeded 20 or 40 working days or was responded to in time. Based on this the DHSC estimates it would take over 25 hours and cost £664.17 to locate and extract information to answer requests 5, 6 and 7.
35. The DHSC states that it does not know how many documents are contained in each of the 797 folders it cannot estimate how many total documents would need to be reviewed. The estimate given is therefore a minimal figure based on searching online files and folders.
36. It is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit. On that point, the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)<sup>3</sup> has commented that the FOIA:

*"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".*

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<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>



37. With that point in mind, the Commissioner considers the cost estimate provided to her by the DHSC to be cogent, particularly as the estimate relates to only time needed to answer requests 5, 6 and 7 and does not take into account any additional time required to answer the other requests in the correspondence.
38. The Commissioner accepts that if IR responses have been stored in several different areas over the time period specified in the request then this will create some additional difficulties in locating and extracting the relevant information. Whilst the estimated cost is reasonably close to the cost limit of £600 and may well be reduced depending on the number of documents in each file or folder searched, when factoring in the additional time needed to respond to the remaining requests it seems reasonable to accept that this would still exceed the appropriate cost limit.
39. As already stated, the DHSC declined to comply with the whole of the request on the basis that compliance with part of it would exceed the appropriate limit. The Commissioner is satisfied that it was entitled to take this approach.
40. Her guidance makes it clear that where a public authority believes it could comply with some, but not all, of a request without exceeding the appropriate limit, it should nevertheless refrain from complying with just part of the request. Instead, the request in its entirety should be refused and the requester given appropriate advice and assistance as to how they might submit a refined version, which may be complied with without exceeding the appropriate limit.
41. Taking all the above into account, the Commissioner considers that the DHSC has demonstrated that its cost estimate was reasonable and thus that it was not required to comply with the request by virtue of the provisions of section 12(1) of the FOIA.

## **Section 16 – advice and assistance**

42. Section 16(1) of the FOIA provides that -

*"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."*

43. In order to comply with this duty, a public authority should advise the requester as to how their request could be refined to bring it within the appropriate cost limit.



44. The DHSC, in its internal review response, advised the complainant if he were to narrow his request to a shorter time frame then the DHSC may be able to consider this but could not guarantee that section 12 or any other exemption would not apply.
45. The Commissioner finds the advice the DHSC offered to the complainant to be sufficient to meet its obligations under section 16 of the FOIA.

## **Other matters**

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46. The Commissioner notes that the DHSC took from 30 April 2018 to 15 February 2019 to complete the internal review process. Such delays are excessive and unacceptable. The section 45 code of practice recommends that public authorities complete the internal review process and notify the complainant of its finding within 20 working days, and certainly no later than 40 working days from receipt.
47. The Commissioner would therefore like to remind the DHSC of the requirements and importance of the code and the need to ensure that future internal review requests are processed in a timely manner.
48. In addition to this, given the information requested in this case relates to the response times for internal reviews and the Commissioner has accepted the DHSC's explanations that locating and extracting this information would exceed the appropriate cost limit; the Commissioner is concerned that the DHSC is not able to readily access statistics and figures on internal review response times especially given the noted issues with these responses as set out in paragraph 46. The Commissioner expects the DHSC to take steps to ensure this information can be more easily accessible in the future to ensure that the DHSC is monitoring its compliance with the code of practice.

## **Right of appeal**

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

50. 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.
51. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**