

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 2021

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

Decision (including any steps ordered)

1. The complainant requested information from the Department of Health and Social Care ("the DHSC") about the number of people being tested for Covid-19. The DHSC relied on section 22 of the FOIA – information intended for future publication – to refuse the request.
2. The Commissioner is not satisfied that the DHSC intended to publish the requested information. She therefore finds that section 22 is not engaged, and upholds the complaint.
3. Since the complainant is satisfied that related information has subsequently been published, the Commissioner does not require the DHSC to take any steps.

Request and response

4. On 8 June 2020, the complainant wrote to the DHSC and requested information in the following terms:

"Please provide your best available estimate for the number of people tested each day for COVID-19 since you stopped providing these figures on 23rd of May. I am aware that there may be some uncertainty in these figures, but it is important that the public see the best estimates you have available".

5. The DHSC responded on 3 July 2020. It stated that the information was being withheld under section 22 of the FOIA – information intended for

future publication. It also explained that it could provide a link to some published information "*outside of the FOIA and on a discretionary basis*", but, somewhat confusingly, referred to section 21 of the FOIA – information accessible by other means – in providing the link.

6. Following an internal review, the DHSC wrote to the complainant on 30 July 2020. It stated that in its view the information had been correctly withheld under section 22.

Scope of the case and background

7. The complainant contacted the Commissioner on 30 July 2020 to complain about the way his request for information had been handled.
8. By way of background, he referred to the government's widely-reported target of 100,000 Covid-19 tests being carried out per day by the end of April 2020, in the UK. On 30 April 2020, the government stated it had met this target. However, there was some dispute in the media as to what data the government was relying on.
9. The complainant stated that, by the date of his request, information about the number of people being tested daily was not being published. At that date, other information was being published relating to Covid-19 testing, which was the information that the DHSC provided him with a link to "*outside the scope of the FOIA*". The complainant considered that the information being published related to the number of testing kits being sent out, and not to the number of people actually being tested. The complainant pointed out that it was being reported in the media at that time that the number of testing kits being sent out far exceeded the number of tests actually being taken, and it was not possible to deduce how many individuals were being tested daily for Covid-19, nor whether the government had met its target.
10. The complainant subsequently confirmed, in early September 2020, that the information he had requested had still not been provided to him, nor had it yet been published.
11. The Commissioner contacted the complainant at the end of November 2020 about the scope of the investigation, and to ask whether he considered that the requested information had now been published, since this might be of relevance to her considerations.
12. The complainant advised the Commissioner that he was aware that the government was, by then, publishing information that more closely resembled what he had requested; that is, it was publishing daily Covid-19 test results. He was satisfied that this correlated broadly with the

information he had requested (the best available estimate of the number of people being tested each day), and he confirmed that he no longer required the DHSC to provide him with the information he had requested. However, he wished the Commissioner to proceed with the investigation as he considered the DHSC had been wrong to rely on section 22 at the date of his request.

13. This notice covers whether the DHSC was entitled to withhold the requested information, at the date of the request, under section 22 of the FOIA.

Reasons for decision

Section 22 – information intended for future publication

14. Section 22(1) of the FOIA states that information is exempt 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).
15. It is a qualified exemption and so, if it is engaged, it is subject to the public interest test.
16. In this case, the DHSC stated to the complainant only that the requested information was held, and that it would be published "very shortly". The Commissioner wrote to the DHSC in December 2020 to ask if it wished to expand on its position, in support of its reliance on the exemption, but it did not provide any further arguments or explanations.
17. For section 22(1) to be engaged, it is essential that the public authority intended to publish the specific information that was requested. It must also be reasonable in all the circumstances of the case to withhold the information until the intended publication date.
18. The Commissioner has considered the wording of the request: the DHSC's "*best available estimate for the number of people tested each day for COVID-19 since... 23rd of May*", which would have covered the period from 23 May 2020 to 8 June 2020.

19. Data published subsequently, as the complainant has noted, shows the number of tests being carried out each day, but with the accompanying note that multiple tests per person may be included in the data.
20. The Commissioner notes that the request refers to a "*best estimate*" of the number of people tested. The DHSC has not provided any evidence that it intended to publish a "*best estimate*" and the Commissioner is not persuaded that the DHSC intended to publish the specific requested information at any point.
21. The Commissioner finds that the exemption is not engaged. However, since the complainant has confirmed that he does not now require the estimates to be provided, she does not require the DHSC to take any steps.

Other matters

22. The Commissioner notes that the DHSC may have failed to give proper consideration to the precise scope of the request, and may have relied on the fact that it would be publishing some form of testing data in the future. As she has noted in previous decisions, she advises the DHSC to consider the scope of any requests for information carefully.

Right of appeal

23. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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

Ben Tomes
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