

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

### **Decision notice**

**Date:** 2 September 2021

**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 emails sent and received by the Chief Medical Officer, during March 2020, that contain the phrase 'herd immunity'. This includes attachments. The Department of Health and Social Care ('DHSC') has refused the request which it considers to be a vexatious request under section 14(1) of the FOIA.
2. The Commissioner's decision is that DHSC has failed to demonstrate on what grounds section 14(1) is engaged and therefore is not entitled to rely on the exemption.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation:
  - Issue a fresh response to the request which does not rely upon section 14(1).
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 25 October 2020, the complainant wrote to the DHSC and requested information in the following terms:

*"Please provide every email sent or received by Prof Chris Whitty (CMO) between [sic] during March 2020 that contain the phrase 'herd immunity' in either the text or the subject. This includes attachments. If*

*any information is redacted under any exemption, please give some indication of the quantity of material removed."*

6. On 26 January 2021 the DHSC responded and refused to provide the requested information. It cited section 14 of the FOIA (vexatious requests) as its basis for doing so, explaining that compliance with the request would be burdensome to the point of causing disproportionate or unjustified disruption to the DHSC.
7. Following an internal review the DHSC wrote to the complainant on 23 February 2021, upholding its original position.
8. The Commissioner understands that the complainant made a previous request for the same information, spanning a three-month time period. This request was refused by the DHSC, citing section 12 (cost exceeds appropriate limit) of the FOIA. This refusal prompted the complainant to make the above request for information.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 20 March 2021 to complain about the way that their request for information had been handled.
10. The Commissioner therefore considers the scope of her investigation to be to determine if the DHSC is entitled to rely upon section 14(1) as a basis for refusing to comply with the request.

### **Reasons for decision**

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#### **Section 14 (1) – vexatious requests**

11. The Commissioner considers that a request can be vexatious for two reasons: firstly if the request is patently unreasonable and secondly where compliance with the request would incur a grossly oppressive burden on the public authority in terms of the costs or the diversion of resources. The DHSC has relied upon the latter theme in its submission to the Commissioner.

12. Section 12 of the FOIA provides an exemption from the duty to comply with a request where doing so would exceed the appropriate limit.<sup>1</sup> This is £600 for a central government department such as the DHSC. This equates to 24 hours of work at approximately £25 per hour. This limit is laid down by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.<sup>2</sup>
13. The following activities may be considered to determine whether compliance with a request would exceed the appropriate limit:
  - 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.
14. The Commissioner's guidance '*Cost of compliance exceeds appropriate limit*' states<sup>3</sup>, '*An authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information.*'
15. For such circumstances a public authority may apply section 14(1) of the FOIA which provides an exemption from the duty to comply with a request if the request is vexatious.
16. The Commissioner's guidance '*Dealing with vexatious requests*'<sup>4</sup> states that a public authority '*may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.*'
17. The Commissioner considers the threshold for such a refusal to be high and she considers it appropriate where:
  - The requester has asked for a substantial volume of information *and*

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<sup>1</sup> [costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/foia-guidance/costs-of-compliance-exceeds-appropriate-limit.pdf)

<sup>2</sup> [The Freedom of Information and Data Protection \(Appropriate Limit and Fees\) Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2004/1000/contents/part-1/section-12)

<sup>3</sup> [costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/foia-guidance/costs-of-compliance-exceeds-appropriate-limit.pdf)

<sup>4</sup> [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/foia-guidance/dealing-with-vexatious-requests.pdf)

- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO *and*
  - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
18. The term 'vexatious' is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that 'vexatious' could be defined as the 'manifestly unjustified, inappropriate or improper use of a formal procedure'. The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
19. The Dransfield case also considered four broad issues: the burden imposed by the request (on the public authority and its staff), the motive of the requester, the value or serious purpose of the request and harassment or distress of and to staff. A public authority may take these factors into account when considering if a request for information is excessive.
20. The Dransfield definition confirms that it is important to consider proportionality and justification of any request before deciding it is vexatious.
21. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: *'If the authority is unsure whether it has sufficient grounds to refuse the request, then the key question it should consider is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually mean weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request.'*

#### *The complainant's position*

22. The Commissioner notes that it does not fall upon the complainant to explain why the request is not vexatious; rather the burden falls upon the DHSC to explain why the request is vexatious. However, the complainant has outlined their position to the Commissioner; *'The request concerned the government's strategy for the pandemic, at a time where it was not as clear as it could be that the government's strategy was co-ordinated.'*
23. The complainant highlighted the public interest in the requested information *'given the pandemic response is one of the biggest national events in several generations, and there were (and still are) questions over what the government's original strategy early on in the pandemic was.'*

### *The DHSC's position*

24. The DHSC has explained that it would need to review the information to make suitable redactions. However, it has not specified what exemptions it has identified.
25. The DHSC has confirmed that *'Responding to this FOI would involve an administrator reviewing approximately 85 email chains; around half of which have an average of six attachments...That equates to an administrator checking 337 documents which would take around 6mins each to check.'*
26. The DHSC has gone on to explain that *'337 x 6mins (it may take longer to read the scientific papers) = 2,022mins, or 33.7 hours.'* The Commissioner acknowledges that this estimation exceeds the limit for the DHSC as outlined in paragraph 12.
27. In its submission to the Commissioner the DHSC explained *'the request is a burden on the department as it would take an excessive amount of time to review every email sent or received. It would be grossly oppressive in terms of the strain on time and resources, especially considering the other pressures on the department as we respond to an ongoing pandemic.'*

### **The Commissioner's view**

28. The Commissioner acknowledges the front-line pressures that the DHSC faces as a result of the ongoing coronavirus pandemic. However, returning to paragraph 17, the Commissioner must consider the evidence that the DHSC has provided in relation to the burden that compliance with the request would cause and here is where she considers the DHSC's submission is lacking.
29. Firstly, the DHSC has failed to provide the Commissioner with a sample of the emails or attachments in question and therefore it is difficult for the Commissioner to corroborate the assertions made by the DHSC in paragraphs 24 - 27.
30. This also makes it difficult for the Commissioner to corroborate the DHSC's assertions made about the potentially exempt information contained within the emails and attachments. Furthermore, the DHSC has failed to substantiate its concerns regarding potentially exempt information; it has not specified the exemptions in question or gone on to consider whether the exempt information would be easy to isolate.
31. Even if the Commissioner accepted the DHSC's vague calculation that compliance with the request would take approximately 34 hours, she considers that this figure is too close to the 25-hour limit as prescribed

by the Appropriate Limits and Fees Regulations to represent a 'grossly oppressive burden.'

32. The DHSC has failed to distinguish between the requirements of section 12 and section 14 in this instance. Unlike section 12, when applying section 14 a public authority must be mindful to balance the burden of compliance with the request with any purpose and value that the request may hold.
33. Within its submission the DHSC has highlighted that the CMO's opinion on herd immunity is already publicly available.<sup>5</sup> However, this in itself does not mean that the request lacks any purpose or value and the Commissioner notes that the complainant's position as outlined in paragraphs 22 and 23 is likely to be shared by members of the public.
34. The Commissioner is mindful that the complainant made a previous request for information as outlined in paragraph 8. In refusing this request under section 12 the DHSC is, in essence, inviting the complainant to submit a more refined request for information.
35. Therefore, the Commissioner disagrees with the DHSC's suggestion that '*the requestee has raised three FOI requests on this subject*' lends itself to an abuse of process. Instead, she considers the requestor's persistence supports the argument that the requests hold purpose and value.
36. Furthermore, the Commissioner does not consider the total number of requests that the complainant has made is relevant as the DHSC is relying upon the grossly oppressive burden that compliance with the request would cause, rather than vexatiousness as determined by the history and context of a request.
37. The Commissioner notes that the subject of herd immunity, and the government's application of such an approach, has been widely debated within the media.<sup>6</sup> Disclosure of the requested information, should that be appropriate, would encourage productive debate and validate the CMO's opinions that are already within the public domain.

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<sup>5</sup> [Re: The BMJ interview: Chris Whitty, England's chief medical officer, on covid-19 | The BMJ](https://committees.parliament.uk/oralevidence/1122/pdf/); <https://committees.parliament.uk/oralevidence/1122/pdf/>

<sup>6</sup> [Coronavirus: Whitty and Vallance faced 'herd immunity' backlash, emails show - BBC News](https://www.bbc.com/news/health-55844444)

38. At the time of raising their complaint the complainant specifically highlighted the conflicting reports in the media<sup>7</sup> relating to the government's consideration of herd immunity prior to the first nationwide lockdown. The Commissioner concurs with the complainant that disclosure may help to clarify any conflicting reports and make the government's stance on herd immunity at this time more clear.
39. Returning to *'weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request,'* the Commissioner would expect a public authority to tolerate a greater burden when considering requests for information relating to the pandemic.
40. Ultimately, the complainant has already narrowed their request for information to assist the DHSC and the Commissioner does not agree that compliance with this request, keeping in mind its purpose and value, represents a grossly oppressive burden upon the DHSC.

### **Other matters**

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41. The Commissioner originally asked that the DHSC provide its submission by 16 June 2021. The DHSC provided its submission, after an information notice was served, on 26 August 2021. The Commissioner consider the DHSC's lack of evidence, detail and samples provided within its submission particularly inadequate given this delay.

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<sup>7</sup> [Documents contradict UK government stance on Covid-19 'herd immunity' | Coronavirus | The Guardian](#)

## **Right of appeal**

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42. 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](mailto:grc@justice.gov.uk)

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

43. 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.
44. 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**

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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