ico. Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **9 September 2021**

Public Authority: **Department of Health Northern Ireland**
Address: **Castle Buildings**
Stormont
Belfast
BT4 3SQ

Decision (including any steps ordered)

1. The complainant requested evidence, provided by the Department of Health Northern Ireland (DoH), about the wearing of face coverings on public transport.

2. The Commissioner's decision is that the DoH failed to issue a response to the request that complies with the requirements of section 1(1) of FOIA. In addition, the DoH breached section 10(1) of FOIA by failing to respond to the request within the required timeframe.

3. The Commissioner requires the DoH to take the following step to ensure compliance with the legislation:

   - issue a fresh response in accordance with its obligations under FOIA.

4. The DoH 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 29 July 2020, the complainant wrote to the DoH and requested information in the following terms:

"Following Nichola Mallon's announcement that face coverings / masks must be worn on public transport please will you provide all medical and scientific evidence to support this decision? I understand it was an Executive wide decision based on evidence provided by the DoH. Will you provide a copy of that evidence?"

6. Prior to a substantive response being issued, he requested an internal review of the Department's handling of his FOI request. That request was received by the DoH on 22 September 2020.

7. Following the Commissioner's intervention, on 26 October 2020 the DoH responded to the request for information. It provided the complainant with links to published information.

8. The complainant requested an internal review on 26 October 2020.

9. DoH acknowledged that request for review on 27 October 2020. Subsequently, on 22 January 2021, it told the complainant:

"We … are currently working on your Internal Review response".

Scope of the case

10. Following earlier correspondence, the complainant contacted the Commissioner on 2 February 2021 to complain about the way his request for information had been handled.

11. He was dissatisfied with the reply he had received from the DoH in October 2020 and with its failure to provide a substantive response to his request for internal review dated 26 October 2020.

12. Given the history of this request for information, the Commissioner exercised her discretion to accept the complaint without the internal review having been carried out.

13. During the course of her investigation, the DoH provided the Commissioner with a copy of an internal review dated 15 February 2021. The Commissioner acknowledges that that correspondence was the response to the request for internal review from September 2020 rather than being a response to the internal review requested on 26 October 2020.

14. The analysis below considers the DoH's compliance with sections 1 (general right of access) and 10 (time for compliance) of FOIA.

Reasons for decision

Section 1 general right of access

15. Section 1 of FOIA states that:

    "Any person making a request for information to a public authority is entitled –

    (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

    (b) if that is the case, to have that information communicated to him".

16. In correspondence with the complainant, the DoH explained that the staff who were best placed to answer his query:

    "… are the very staff engaged in the daily discussions and consultations with the Minister and the Executive in considering the most appropriate course of action to steer us through the current crisis".

17. It further explained, "*in an effort to be as helpful as possible*", that a lot of information underpinning decisions taken by the Department and the Health Minister is derived from work undertaken by other organisations. It provided him with links to those various organisations.

18. Regarding its response to his request for information, the DoH told the complainant:

    "I realise that this perhaps does not answer your specific questions but I hope you may get the answers you seek via the published information".

19. However, it did not confirm whether or not the information was held for the purposes of FOIA, nor did it cite any exemptions.

20. The complainant disputed that the information provided fulfilled his request, telling the DoH:

    "Rather than sharing with me the evidence which I requested [name redacted] *has sidestepped the question".*

21. With reference to the links provided to the complainant, the DoH told the Commissioner:

> *"The links contain the scientific evidence that is accessed by CMO* [Chief Medical Officer]*, CSA* [Chief Scientific Adviser] *and the legislation staff when considering our Covid response".*

22. It acknowledged that, with hindsight, an explanation of how, and by whom, decisions were made "*would have been beneficial*".

23. Section 1 of FOIA concerns the general right of access to information held by public authorities and section 1(1)(a) requires a public authority to inform the applicant in writing whether it holds information of the description specified in the request. Where relevant information is held, section 1(1)(b) places an obligation on the public authority to provide that information, (unless an exemption under Part II of FOIA applies).

24. In this case, the Commissioner considers that, by failing to confirm or deny whether the requested information is actually held by DoH, or apply an exemption to refuse the request, the DoH failed to comply with the requirements of section 1(1) of FOIA.

Section 10(1) – time for compliance with request

25. Section 10 of FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

26. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.

27. However, as the Commissioner has concluded that the DoH has not complied with its obligations under section 1(1) of FOIA, it follows that the Commissioner also finds the DoH in breach of the requirements of section 10(1) of FOIA.

Other matters

Timeliness of the internal review

28. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice (the code) issued under section 45 of the FOIA which suggests that internal reviews should be responded to within 20 working days, and if

complex it is best practice for any extension to be no longer than a further 20 working days.

29. In this case, the internal review that the complainant requested on 26 October 2020 was not completed in accordance with that timeframe.

30. The Commissioner expects the DoH to ensure that the internal reviews it handles in the future adhere to the timescales set out in the code.

Does DoH hold information within the scope of the request?

31. The Commissioner has not made a determination on whether or not the DoH holds information within the scope of the request. However, she notes that during the course of her investigation, the DoH both referred to section 21 of FOIA being an appropriate exemption in this case and questioned whether, given the specific wording of the request, it holds the requested information for the purposes of FOIA. As DoH has not written to the requester to explicitly confirm or deny holding the information, the Commissioner has not further considered these statements.

Right of appeal

32. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.

34. 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 ……

Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF