ico. Information Commissioner's Office

# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** **9 December 2021**

**Public Authority:** **Public Health Wales**
**Address:** **phw.foi@wales.nhs.uk**

## Decision (including any steps ordered)

1. The complainant requested various information from Public Health Wales in respect of decisions it had made in response to the Covid-19 pandemic and protecting public health. Public Health Wales (PHW) refused the request citing section 14(1) (vexatious requests) of the FOIA.

2. The Commissioner's decision is that PHW has failed to demonstrate that section 14(1) is engaged in respect of this request.

3. The Commissioner requires PHW to take the following steps to ensure compliance with the legislation.

   - Issue a fresh response to the complainant which does not rely on section 14(1) of the FOIA.

4. PHW 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

5. On 23 November 2020, the complainant wrote to PHW and requested the following information:

   *"1. The specific statutory powers used under emergency legislation, or public health legislation, to close these schools and businesses.*

   *2. A copy of the legal notice served on the schools and businesses. A copy of a singled typical notice will suffice. Any personal data can be*

*redacted to comply with data management principles set out in Data Protection Act 2018 and GDPR.*

*3. Confirmation of the "Amplification Cycle Threshold [C t]" value used in the "Reverse Transcription – Polymerase Chain Reaction [R T – PCR]" tests undertaken in South Ceredigion / North Pembrokeshire, resulting in the closure decision.*

*4. Copy of the evidence available to "Public Health Wales" of the super-spreader events referred to.*

*5. The assessment by "Public Health Wales" of the implications, for the testing programme in Wales, of the Portuguese Appeal Court judgement 11 November 2020 regarding the validity of the R T – P C R test for the diagnosis of SARS-CoV-2 virus. A summary of the court findings is attached for your information.*

*6. Confirmation whether the false positive results generated by the R T – P C R test is included in the raw data provided to the "Office for National Statistics" and published as "new Covid 19 cases" in daily news bulletins by the British Broadcasting Corporation [BBC]."*

6. PHW responded on 22 December 2020. It refused the request on the basis that it was vexatious, citing section 14(1) of the FOIA.

7. Following an internal review PHW wrote to the complainant on 20 January 2021. It stated that it was satisfied with the original response and that there would be no change to that provided on 22 December 2020.

## Scope of the case

8. The complainant contacted the Commissioner on 20 January 2021 to complain about the way his request for information had been handled. In addition to not being satisfied with PHW's application of section 14(1), he stated that the decision to withhold the information hinders progress in an ongoing external investigation which he argued is in the wider public interest. He also stated that section 14(1) should not be used to withhold information that may prove embarrassing for a public authority.

9. The scope of the Commissioner's investigation is to determine whether PHW was entitled to rely on section 14(1) to refuse to provide the requested information.

## Reasons for decision

### Section 14(1) - Vexatious requests

10. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.

11. The term 'vexatious' is not defined in the FOIA, however, the Upper Tribunal in the Information Commissioner vs Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013) took the view that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question of whether a request is vexatious ultimately depends on the circumstances surrounding that request.

12. In further exploring the role played by circumstances and whether the request has adequate and proper justification, the Tribunal concluded that 'vexatious' could be defined as the *"…manifestly unjustified, inappropriate or improper use of a formal procedure."* (paragraph 27).

13. Consistent with the Upper Tribunal's decision which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance for section 14 confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

14. Where this is not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account wider factors such as the background and history of the request.

15. The Commissioner has identified a number of key "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance, but in short, they include:

    - Abusive or aggressive language.
    - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden.
    - Personal grudges
    - Unreasonable persistence
    - Unfounded accusations
    - Intransigence

- Frequent or overlapping requests.
- Deliberate intention to cause annoyance.

16. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious.

17. The Commissioner notes that in its original response, PHW informed the complainant that the reason it decided the request was vexatious refers to its assessment of the request and its impact.

18. In correspondence with the Commissioner, PHW has cited section 14(1) on the basis that compliance would create a disproportionate burden on the authority.

19. In this case the Commissioner's understanding of PHW's position is that its reasoning for citing section 14 due to the burden imposed by the request related to both time spent on applying exemptions, and also to the more general burden that the request would impose due to the volume of information it covers.

*Volume of information*

20. In its submission, PHW has stated that it had received 11 requests over a period of five months from June 2020 which covered 25 separate items of information.

21. It further informed the Commissioner that the resource required to answer these requests would have only been available if it was diverted from other aspects of the public health response, stating that multiple requests from one individual were placing a disproportionate burden on its organisation and on staff who were already under extreme pressure dealing with the pandemic.

22. The Commissioner would wish to highlight that PHW has not however provided any estimate of what would be involved in complying with this request.

*Potentially exempt information*

23. It has however stated that some of the requests are for information that is undoubtedly in the public domain, but rather than doing his own detailed research, the complainant submitted it as part of an FOI request. It has added, before it can engage an exemption (presumably section 21 – information accessible to the applicant by other means) it would have to show him where in the public domain it is, which it argues could take as much time as answering the request itself.

24. When relying on section 14(1) on the basis of disproportionate burden in relation to the time it would take to consider whether any exemptions from Part II of the FOIA apply to the requested information, the Commissioner's published guidance states that an authority is most likely to have a viable case to apply section 14(1) where:

    - the requester has asked for a substantial volume of information AND,
    - the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so
    - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

25. The Commissioner notes that PHW has not stated whether it believes that the request covers information that may be exempt under any provision other than section 21, or whether any such information can easily be isolated from the remainder, or if it is scattered throughout the requested material.

26. PHW has also stated that it believed the complainant's purpose in making his request was to seek information for publication in a blog. However, as this is not a relevant factor in relation to whether the request imposes a disproportionate burden, it is not covered further in his analysis.

*The Commissioner's decision*

27. The Commissioner would strongly recommend that any public authority whose main concern is the cost of finding and extracting the information to consider the request under section 12 where possible, as the bar for refusing a request as grossly oppressive' under section14(1) is likely to be much higher than for a section 12 refusal.

28. This is consistent with the views expressed by the Upper Tribunal in *Craven vs The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT 442 (AAC), (28 January 2013)* which stated:

    *"…if the public authority's principal reason (and especially where it is the sole reason) for wishing to reject the request concerns the projected costs of compliance, then as a matter of good practice serious consideration should be given to applying section 12 rather than section 14 …"*

29. The Commissioner has considered the arguments put forward by PHW, and as stated in paragraph 22 of this notice, he notes that PHW's arguments are lacking in detail in respect of what would be involved in complying with the request. On the basis of the information provided by PHW, the Commissioner is not satisfied that the bar has not been met in respect of the volume of information. This lack of detail, combined with PHW's failure to clarify whether the requested information is likely to contain information which would be refused on the basis of any exemptions (other than section 21) and if so, whether or not this could easily be isolated from the remaining information means that PHW has not presented a strong case for the engagement of section 14(1). The Commissioner has no option therefore than to conclude that section 14(1) is not engaged in respect of this request for information.

## Right of appeal

30. 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

31. 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.

32. 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 ……**

**Catherine Dickenson**
**Senior Case Officer**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
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**SK9 5AF**