

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2022

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

Decision (including any steps ordered)

1. The complainant has requested the Department of Health and Social Care (DHSC) to disclose all emails and records of meetings between the DHSC and the Independent Health Provider Network (IHPN) during February and May 2020. The DHSC refused the request, citing section 14 of FOIA.
2. The Commissioner's decision is that the DHSC is correct to refuse to comply with the request in accordance with section 14 of FOIA. He has however recorded a breach of section 10 and 17 of FOIA for failing to process the request correctly, initially.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 10 September 2021 the complainant wrote to the DHSC and requested information in the following terms:

"At the outset of the pandemic NHS England negotiated with the Independent Health Provider Network (IHPN) a contract to secure healthcare capacity from 26 private hospital companies. While the total cost has not been disclosed, there are serious concerns about the value

for money of this contract, reports of significant under-utilisation of the purchased capacity and successive renegotiations meant that private healthcare capacity was not available when the NHS was under greatest strain during the second wave.

Given these issues, it is important to understand the genesis of this deal, what the government was offered by the providers and what it expected to receive. I am therefore requesting records between the principle [sic] negotiators during the period the deal was being finalised, prior to the initial agreement of the 12th March 2020 up to the point at which the contract was formally signed on the 15th May 2020.

The Request

I would like to receive records of meetings and correspondence between the authority and the Independent Health Provider Network (IHPN) during the period 1st February and 15th May 2020. I would expect this to include:

1. All emails to and from the @ihpn.org.uk domain during the period
2. Records of meetings with the IHPN to include but not be limited to:
 - a. A list of dates of any such meetings
 - b. Preparatory briefings/lines to take
 - c. Agendas,
 - d. Minutes or notes,
 - e. Any presentation materials"
5. The DHSC responded on 6 October 2021. It stated that it does not hold the requested information and explained that this was because the DHSC was not a principal negotiator to secure healthcare capacity from 26 private hospital companies and did not attend negotiated meetings during the period 12 March 2020 up to the point at which the contract was formally signed.
6. The complainant requested an internal review on 21 December 2021. He accepted that the DHSC was not a principal negotiator but felt it was unlikely that such a spending commitment on the pandemic response would occur without any input from the DHSC. He also said that the DHSC has considered the wrong timeframe; his request was for the period 1 February to 15 May 2020.
7. The DHSC carried out an internal review and notified the complainant of its findings on 25 January 2022. It said that the searches undertaken

covered the timeframe specified in the request. It upheld its previous handling of the request and again said that the request was limited to correspondence between principal negotiators. It however advised the complainant that it would now process a new request not classing the DHSC as a principal negotiator and would come back to him.

8. The DHSC issued a fresh response on 16 February 2022. It refused to comply with the new request citing section 12 of FOIA. In accordance with section 16 of FOIA it suggested that the complainant narrow their request to a specific term, time period or specific representatives or ministers.
9. The complainant requested a second internal review on 16 February 2022.
10. The DHSC notified the complainant of the outcome of its internal review on 1 November 2022. It revised its position and said that it was now relying on section 14 of FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 21 December 2021 to complain about the way his request for information had been handled. He confirmed that he wished to complain about the DHSC's handling of the request on the first occasion and second.
12. The Commissioner has considered whether the DHSC was correct to limit the request initially to 'principal negotiators' only and its application of section 14 of FOIA to its second processing of the request. He has also considered whether there have been any procedural breaches of FOIA. The following section will outline his decision.

Reasons for decision

The initial handling of the request

13. The Commissioner notes that the DHSC limited the scope of the request initially to 'principle negotiators' and as it was not one of them during the commercial negotiations it informed the complainant that it did not hold the requested information.
14. The Commissioner considers the DHSC's initial interpretation of the request was overly narrowed. The request commenced with an explanation of the type of information the complainant was seeking. It then proceeded to clearly outline the request itself and this was

noticeably separate from the complainant's explanation. It said that the complainant required records of meetings and correspondence between the DHSC and the IHPN during a specified time period.

15. The Commissioner considers that even if the complainant misunderstood that the DHSC was not a principal negotiator, he was either aware or had reason to believe it would hold relevant information and this is what he was seeking. Requests can be read differently and sometimes there can be different interpretations. However, the Commissioner considers the complainant's interpretation is a reasonable and objective one based on the specific wording used. If a public authority is unsure of what an applicant really requires or feels there are different interpretations, it should seek clarification first rather than proceed to process the request restrictively or based on an interpretation that may not be the right one.
16. For the above reasons, the Commissioner has concluded that the DHSC was incorrect to overly narrow the interpretation of the request initially and issue a refusal notice stating that it did not hold the requested information. Below, the Commissioner will record the procedural breaches he has identified.

Section 14 and the seconding processing of the request

17. Section 14(1) of FOIA can apply when the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the public authority. However, there is a high threshold for refusing a request on such grounds. This means that a public authority will have to demonstrate that:
 - the requester has asked for a substantial volume of information; and
 - it has real concerns about potentially exempt information; and
 - it cannot easily isolate any potentially exempt information because it is scattered throughout the requested material.
18. The DHSC has said that it has carried out full searches for the information in the scope of the request and there are over 5000 emails across the relevant policy teams' email accounts. It confirmed that to assess this information would require each individual email to be reviewed and redactions undertaken in accordance with section 40 (personal data) and section 43 (commercial interests) of FOIA. This is because the correspondence between the DHSC and IHPN during that period formed the basis of the national contract arrangements that were in place by NHS England with 10 independent sector providers between January and March 2020. The DHSC advised that this information will contain the personal data of third parties and commercially sensitive information which will require redaction.

19. The DHSC confirmed that it had sampled 15 emails in the scope of the request. The sample exercise included searching for the emails in scope, reviewing these emails for information and assessing whether any valid exemptions would apply. The sample contained information which is commercially sensitive, so would require redaction under section 43 and the consideration of the public interest test. It explained further that the emails were largely of a brief nature between policy officials in this sample, but it acknowledged that correspondence and meeting minutes between IHPN and Ministers would take much longer to review and redact as they would be more extensive and complex in nature. It said that there was also a high probability that there would be emails that do contain financial information, which would then need to be redacted.
20. The DHSC confirmed that the emails in the sample ranged from a few lines to a couple of pages long whereas the correspondence where Ministers were involved were up to 10 to 20 pages long. It said that it took it 30 minutes to review the 15 emails in the sample, including applying relevant redactions. It therefore estimated that it would take in the region of 166 hours to review all 5000 emails if they were all of a brief nature. It is aware that not all emails will be as brief as the sample emails and some of the requested information will be more lengthy and more complex to review and redact. This therefore means that in reality it may well take the DHSC well in excess of 166 hours to review and prepare the requested information for disclosure.
21. The DHSC considers that complying with the request would be unduly burdensome in terms of time and resource and therefore section 14 of FOIA comfortably applies.
22. The Commissioner notes that the request encompasses a significant amount of information. As the DHSC has said, it has identified over 5000 emails that fall within the scope of the request. The DHSC has provided the sample emails to the Commissioner for him to consider and these demonstrate clearly that the requested information will contain personal data and commercially sensitive information which will require redaction. He accepts that in reality many of the emails and documents will require more than two minutes to review and redact and therefore the estimate provided will not be reflective of the more complex and lengthy correspondence held.
23. The DHSC has demonstrated that it would take in excess of 166 hours to comply with the request and prepare the requested information for redaction. Despite the request clearly having value, he accepts that this is overly burdensome for any public authority and would be an inappropriate diversion of resources and time.

24. For these reasons, the Commissioner is satisfied that section 14 of FOIA applies to this request.

Procedural matters

25. As the DHSC interpreted the complainant's request too restrictively, initially, the Commissioner has decided that the DHSC issued an incorrect response. It stated the information is not held when it was. It issued an incorrect refusal notice and only issued the correct one some time later and after the statutory timeframe stipulated by section 10 of FOIA had expired. The Commissioner has therefore recorded a breach of section 1, 10 and 17 of FOIA in this case.

Other matters

26. The DHSC failed to carry out the second internal review within a timely manner. The complainant requested the internal review on 16 February 2022, but it was not completed until 1 November 2022. The section 45 code of practice highlights how internal reviews should be carried out and in what timeframe. Even if the DHSC was entitled to the full 40 working days permitted by the code, the internal review was still delayed by several, further, months.
27. The DHSC is therefore reminded of the importance of the section 45 code of practice and the need to carry out internal reviews within the specified timeframes. Also, the Commissioner wishes to highlight the importance of providing comprehensive refusal notices and internal reviews to applicants. These should contain the level of detail the Commissioner generally receives during a section 50 investigation. If they do, this dramatically cuts down the time needed to investigate and the level of further input needed from public authorities.

Right of appeal

28. 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

29. 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.
30. 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

Samantha Coward
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