

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

### **Decision notice**

**Date:** 28 March 2024

**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 made three requests for a variety of information, including procedures for Parliamentary Questions and meeting notes for a number of groups. The Department of Health and Social care ("the DHSC") refused to comply with the requests, citing section 14(1) (vexatious) of the FOIA.
2. The Commissioner's decision is that the DHSC are entitled to refuse the requests under section 14(1).
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 11 and 12 June 2023, the complainant made three requests for information to the DHSC. These requests are set out in Annex A to this notice.
5. The DHSC responded on 10 July 2023. It stated that it had aggregated the requests and refused to provide the requested information under section 14(1) of FOIA. The DHSC maintained this position at internal review.

## Reasons for decision

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6. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. It is an absolute exemption and therefore not subject to the public interest test.
7. The word "vexatious" is not defined in FOIA. However, as the Commissioner's guidance on section 14(1) states, it is established that section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
8. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
9. However, the ICO recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.
10. Most people exercise their right of access responsibly. However, a few may misuse or abuse FOIA by submitting requests which are intended to be annoying, disruptive or which have a disproportionate impact on a public authority. The Commissioner's guidance on what may typify a vexatious request stresses, however, that it is always the request itself, and not the requestor, which is vexatious. However, a public authority may also consider the context of the request and the history of its relationship with the requester when this is relevant.
11. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) ("Dransfield"). Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.
12. Dransfield established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
13. The four broad themes considered by the Upper Tribunal in Dransfield were:
  - the burden (on the public authority and its staff);

- the motive (of the requester);
  - the value or serious purpose (of the request); and
  - any harassment or distress (of and to staff).
14. However, the UT emphasised that these four broad themes are not a checklist, and are not exhaustive. Rather, it stressed the:
- “importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests” (paragraph 45).
15. Sometimes it will be obvious that a request is vexatious and other times it will not. In considering such borderline cases, the key is to weigh up any purpose and value that the request represents against any disruption, irritation or distress that compliance with the request may cause the public authority. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request. The UT stated in Dransfield that:
- “all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA” (paragraph 82).

### **The DHSC’s arguments**

16. In its submission to the Commissioner, the DHSC stated the complainant has made 40 requests between 11 June 2022 and 12 June 2023 on the subject of COVID-19 prophylaxis treatments and Evusheld. The DHSC stated it has responded to all of these requests and provided information, advice and assistance wherever possible.
17. The DHSC stated their refusal was based on the cumulative effect of the complainant’s requests, as well as the subsequent internal reviews and, where information was not supplied, escalation to the Information Commissioner’s Office as complaints.
18. The DSHC also advised that the Antivirals and Therapeutics Taskforce (ATT), which was responsible for the policy decisions on these subjects, closed on 31 March 2023, and no further policy decisions are expected to be made about the use of Evusheld, which the DHSC asserts is the main focus of the complainant’s requests. For this reason, it argues

there is a diminished value in this information, and it is outweighed by the burden responding to the requests places on the public authority.

### **The complainant's view**

19. The complainant argues the requests are not vexatious, and there is still a significant public interest in the release of the information because these policy decisions have the potential to affect immunocompromised individuals.

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

20. In cases where a public authority is relying on section 14(1), it is for the public authority to demonstrate why it considers that a request is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA. As previously discussed, there is a high bar for engaging section 14(1).

### **Value or serious purpose**

21. In cases where the issue of whether a request is vexatious is not clear cut, the key test is to determine whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
22. When considering this issue the Upper Tribunal in Dransfield asked itself, "Does the request have a value or serious purpose in terms of there being an objective public interest in the information sought?" (paragraph 38). The public interest can encompass a wide range of values and principles relating to what is in the best interests of society, including, but not limited to:
  - holding public authorities to account for their performance;
  - understanding their decisions;
  - transparency; and
  - ensuring justice.
23. In this instance the three requests appear to focus on an issue of concern about the government's research into, and policy decisions on, Evusheld, and the Commissioner expects a public authority would demonstrate openness and transparency. There is a clear public interest in this matter.
24. However, even if the request does have a value or serious purpose, there may be factors that reduce that value. One such factor is if those matters have already been comprehensively documented and investigated. As noted earlier the ATT which is the focus of these

requests closed a year ago, and no further information is likely to be created. The DHSC also stated it has provided information about the ATT to the complainant on multiple occasions over the past year, and the work of it will be scrutinised as part of the independent inquiry chaired by Baroness Hallett examining the UK's handling of the COVID-19 pandemic. These factors reduce the value of the request.

## **Burden**

25. The DHSC did not specifically provide evidence to the Commissioner of the burden which responding to the requests would impose on it, but argued that the amount of work involved to respond to the requests would be unreasonable. The DHSC stated that it had answered previous requests on the same subject, and indicated prior requests involved hours of sifting through boxes of documentation and applying appropriate redactions. It stated that prior to the closure of ATT one full-time employee had been dedicated to responding to the complainant's requests. Since ATT's closure, the DHSC has diverted other key staff members to handling them, and argued this is not an appropriate use of resources.
26. The Commissioner considers that there is a high threshold for refusing a request as vexatious. A request is more likely to be vexatious when:
  - The requestor 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 by the ICO, and
  - Any potentially exempt information cannot easily be isolated because it is scattered through the exempt material.
27. Although DHSC has not provided a sampling exercise to support its position, advised how much information falls within scope of the requests, or how long it would take to suitably redact information for disclosure the Commissioner acknowledges that as ATT is no longer operational, it may be more difficult to locate and retrieve any relevant information.
28. The Commissioner does not consider the information requested is a large amount to process and prepare as the requests are fairly precise and clear, consisting of a moderate amount of recorded information. He accepts that personal data would need to be redacted but this would be a fairly straightforward process in this case considering the likely contents of the emails, the number of emails to review and the DHSC's experience of Data Protection issues.

29. Similarly, the Commissioner does not consider that a 'scattergun' approach has been taken here. When a request appears to be part of a completely random approach, lacks clear focus or seems to have been solely designed for 'fishing' for information without any idea of what might be revealed, the Commissioner may agree that a scattergun approach has been taken. However, the Commissioner considers this is not the case here. The requests were clearly focussed. The complainant is also well aware of what information such searches may reveal, as is the DHSC.
30. This is not an exceptional case but rather, in terms of size and work involved, a request comparable to the average request public authorities of this size often receive. Therefore, the DHSC has failed to convince the Commissioner that preparing this information for disclosure would impose a grossly oppressive burden.

### **Context and history**

31. The context and history of the request is often a major factor in determining whether the request is vexatious and may support the view that section 14(1) applies.
32. The Commissioner acknowledges that, in this case, the DHSC told the Commissioner and provided evidence that it has answered multiple requests from this complainant, which have frequently been made close together. These requests have also frequently been escalated to the ICO when information has not been disclosed.
33. The Commissioner accepts there is some value to the requests in this case, but when considered in the context of previous dealings with the requester, the Commissioner considers these three requests can be considered vexatious.
34. The Commissioner also notes that this approach is supported by case law in *Betts vs ICO*. This case suggests that even if a request was not vexatious in isolation, it could be considered vexatious when viewed in context. Therefore, an individual's concern about government policies on COVID-19 prophylaxis has resulted in ongoing FOIA requests and persistent correspondence for over a year. This has continued despite several disclosures and the diminishing public interest in the information. In the Commissioner's view, this demonstrates a continuation of a pattern of behaviour that is vexatious.
35. The Commissioner considers that the requests in this case, while not burdensome, can be considered to be a burden when seen in context of the history of the dispute.

### **Motive and harassment**

36. The complainant has stated their motive for the requests is to find out "the truth about decisions made, and the actions of the DHSC in respect of the immunocompromised".
37. The Commissioner acknowledges that there is clearly weighty public interests in the government's handling of the COVID-19 pandemic and how this has affected immunocompromised individuals. However, he considers that the DHSC has convincingly evidenced this public interest has been diminished by the passage of time, and is also likely to be addressed further by the independent inquiry led by Baroness Hallett.
38. Having balanced the purpose and value of the request against the detrimental effect on the DHSC, the Commissioner is satisfied that the request is not an appropriate use of FOIA procedure.
39. The Commissioner considers that the requests were vexatious and therefore the DHSC was entitled to rely on section 14(1) of FOIA to refuse them.

## **Annex a – requests for information**

### **1. 11 June 2023**

The COVID-19 tixagevimab/cilgavimab (Evusheld) pre-exposure prophylaxis National Expert Working Group met on 19 May 2022.

Please confirm:

- which members of the UKHSA and the Antivirals and Therapeutics Task Force attended this meeting (whether physically or virtually);
- which members of the UKHSA and the Antivirals and Therapeutics Task Force received the results of this meeting

### **2. 11 June 2023**

On 21 July 2021 a meeting of the UK CMOs took place in which the shielding policy and the shielded persons list was discussed.

Please provide:

- the agenda and list of papers provided to this meeting;
- the attendee list for this meeting; and
- the minutes of this meeting which include any reference to the shielding policy, the shielded persons list and the potential use of prophylaxis for COVID-19

### **3. 12 June 2023**

The DHSC has advised that it has reviewed and amended the process for checking responses to Parliamentary Questions.

Please provide:

1. The revised procedure document(s) whether in writing or via a computer workflow system detailing:

- the process flow of how the answers to the questions are allocated;
- the drafting/consultation process to prepare the answers; and
- the sign off/approval levels for each answer



2. Copies of any front sheets, authorisation summaries, workflow summaries and detailed sign off sheets with comments or other documents evidencing the governance audit trail

3. Copies of any authorisation process flow documents setting out the approver (sic) level for each stage of the process

Please additionally provide the original answer that was approved by the Deputy Director to each of the following Parliamentary Questions, for which the text was subsequently amended:

1. HL219 25/5/2022

2. UIN1507 7/6/2022

3. UIN11547 14/6/2022

4. UIN15321 20/6/2022

5. UIN6923 27/6/2022

6. UIN21130 4/7/2022

**Right of appeal**

4. 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)

5. 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.
6. 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 .....**

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**