

## **Freedom of Information Act 2000 (Section 48)**

### **Practice Recommendation**

**Date:** 11 July 2022

**Public Authority:** Department of Health & Social Care  
**Address:** 39 Victoria Street  
London  
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#### **Foreword**

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In response to the notices that we issued, the Department of Health & Social Care (DHSC) sent out a questionnaire to a wide range of staff to identify information that may be caught within their scope. As part of this exercise, DHSC notified us that it had identified that official information had been shared through:

- 29 private WhatsApp accounts;
  - 17 private text accounts;
  - 8 private email accounts; and
  - 1 private LinkedIn account
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1. In July 2021, the Information Commissioner received complaints, including from the COVID-19 Bereaved Families for Justice Campaign, about media reports in the Sunday Times regarding the alleged use of private correspondence channels by Ministers in the DHSC to conduct official government business during the pandemic.
2. In particular, the Campaign set out their concerns about what such practices, if happening, "may mean for those seeking transparency and accountability regarding the many life and death decisions taken in the Department of Health during the pandemic".
3. They also raised questions about any potential implications for the subsequent Inquiry into the handling of COVID-19 that the UK

Government had already committed to at the time of the media reports.

4. After consideration of the information available at that point, on 6 July 2021, the then Commissioner announced<sup>1</sup> that she was launching an investigation into the alleged use of private communication channels at the DHSC. This included investigating DHSC's Freedom of Information Act (FOIA) handling practices.
5. The Commissioner is required by law to ensure compliance with a range of information rights legislation. Under FOIA, there are codes of practice that the Commissioner is required to promote about how departments should manage information and the handling of FOI requests.
6. The Commissioner issued a FOIA Information Notice (IN) to DHSC on 5 July 2021, requiring it to provide specific information by a set deadline, 6 August 2021. DHSC requested and were given extensions to this deadline.
7. On 17 September, DHSC, as requested, provided an indicative timeline for providing the outstanding information by 31 October and confirmed its agreement to an on-site visit at DHSC.
8. A virtual site visit took place on 7 October 2021 and an on-site visit followed on 25 October 2021. DHSC gave a presentation during the on-site visit which included some informative information and illustrative examples. However, when asked to send this presentation and information to the Commissioner to assist with the investigation, DHSC stated it would not provide it.
9. Prior to the virtual site visit, DHSC provided some additional information on 4 October 2021. This was mainly around when it communicated relevant policies and procedures to staff, officials, Ministers and SPADs; information about the use of private communications channels; and a log of FOI requests over a set period.
10. The Commissioner has now investigated and considered in detail the information and explanations DHSC has provided in response to the FOIA IN and the subsequent follow-up enquiries.
11. The Commissioner has reached the view that DHSC's request handling practices do not conform to the section 45 Freedom of

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<sup>1</sup> [Blog: ICO launches investigation into the use of private correspondence channels at the Department of Health and Social Care | ICO](#)

Information Code of Practice, issued by the Cabinet Office in July 2018 (the Code).

12. The Commissioner considers that DHSC's practices do not conform with the following sections of the code:
  - Part 1 – relating to right of access
  - Part 4 – relating to time limits for responding to requests
  - Part 10 – relating to communication with the requester
13. Therefore, in accordance with section 48(1) of the Freedom of Information Act 2000 (FOIA), the Commissioner has elected to issue the following practice recommendation in relation to DHSC's performance under the s.45 Code. The Commissioner has also made broader recommendations to the UK Government as a whole in relation to its record management practices in a separate report he has laid before Parliament. This recommendation should be read alongside that report, which provides further detail on the evidence informing this practice recommendation.

## Summary

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14. Given the practice at DHSC of some Ministers and Non-Executive Directors using non-corporate, private correspondence and communication channels for conducting official business, the Commissioner has genuine concerns that information which should form part of DHSC's official record may not have been retained or accessible for the purposes of properly responding to legitimate FOI requests. These practices, which senior officials within DHSC were aware of, had the effect of undermining the concept of all official information being held and accessible via a single corporately controlled system.
15. To ensure that information relevant to our investigation was appropriately retained a FOIA IN was issued. It required information including:
  - any policies used by DHSC to inform its compliance with FOIA and its related codes;
  - copies of emails sent to and from private correspondence channels by departmental accounts, including any summaries made by private offices and others, and to give an outline of these exchanges; and
  - examples of recorded contact with Ministers to confirm checks of private email accounts to inform responses to FOIA requests.

16. In practice, DHSC required multiple extensions and provided information in response to the FOIA IN in stages in August, September and October 2021, and January 2022. Subsequent enquiries made on 3 February were responded to on 11 March 2022. DHSC did request extensions throughout the course of the investigation. It provided the reasons and explanations why it needed such extensions.

### **Nature of non-conformity**

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17. The actions of DHSC in response to the IN indicate that its handling of non-corporate communications was not consistent with the expectations set out in the s.45 code.
18. It is clear that the use of non-corporate messaging services was allowed to increase without co-ordinated oversight of their control and use. There was confusion about who ultimately controlled access and there was little, if any, evidence of control of the ongoing departmental access for retrieval or security requirements.
19. During the investigation, DHSC wrote to the ICO confirming that it had located one example of Ministers being requested to search their records for the purposes of an FOI request. Following review of DHSC's request log, the ICO requested information about whether a similar process had been followed in relation to eight specific requests, where it seemed likely such searches may also have been necessary. DHSC refused to provide specific details of the search processes it adopted when dealing with these eight requests. It challenged whether the IN actually covered this line of inquiry and suggested such searches would be too burdensome. The Commissioner can only conclude in light of the evidence available that it is likely such searches did not take place in at least some of these requests.
20. The Commissioner considers that the practices of DHSC in relation to the exercise of its functions under FOIA do not conform with parts 1, 4 and 10 of the code.

### **Part 1 – Right of access**

21. Section 1.1 of the code sets out requestors' rights to be informed whether or not the public authority "holds information meeting the description set out in the request".

22. During the course of the Commissioner's investigation it became clear, as is evidenced by the specific examples in the section below, that this right was not being met.
23. It is also clear from the evidence provided by DHSC, that this right of access was not met on numerous occasions, as referred to in paragraph 29 below, during the period considered in the Commissioner's investigation.

#### **Part 4 – time limits for responding to requests**

24. Section 4.1 of the code highlights the "clear" requirement that public authorities respond to requests for information promptly, and within 20 working days of receipt. It should be noted that this was in the context of a significant increase in information requests to DHSC, at a time when resources were extremely stretched as a result of the pandemic. The Commissioner has taken this into account in formulating his regulatory approach.
25. In this case, significant numbers of requesters did not receive a response to their information requests in the period considered by the Commissioner. Many who did receive responses, received them well outside of the expected, in the majority of cases, 20 working days.
26. Based upon the information initially provided by DHSC on 4 October 2021, there were 18 requests over 12 months old; 27 requests over nine months old; 21 requests over six months old; and 113 requests over three months old.
27. The Commissioner asked for further information about eight specific requests on 3 February 2022 (six of which had still been outstanding as at 4 October 2021); a limited response was provided by DHSC on 11 March. This information confirmed that five of the six outstanding requests had received responses since the FOI log was originally provided on 4 October 2021.

DHSC reference	Date of request	Date of response
1268836	04/11/20	24/02/22
1298943	29/01/21	11/03/22
1308894	23/02/21	28/02/22
1330417	14/05/21	Ongoing

1341025	28/06/21	10/03/22
1341231	29/06/21	18/10/21

## Part 10 – Communicating with the requester

28. Section 10.2 of the code states that initial responses to requests for information should include:

- a statement that the request has been dealt with under the Act;
- confirmation that the requested information is held or not held by the public authority or a statement neither confirming or denying whether the information is held;
- the process, contact details and timescales for the public authority's internal review appeals process;
- information about the applicant's further right of appeal to the Information Commissioner and contact details for the Information Commissioner's Office; and
- if some or all of the information cannot be disclosed, details setting out why this is the case, including the sections (with subsections) the public authority is relying on if relevant. When explaining the application of named exemptions, however, public authorities are not expected to provide any information which is itself exempt.

29. Given the evidence in the preceding section on "time limits", it is clear that DHSC has again, in numerous cases, failed to conform with the rights of individual requesters. Again, this is in the context of the volume increases and wider pandemic pressures noted above that the Commissioner has taken into account.

### Action recommended

30. In relation to parts 1, 4 and 10 of the code, DHSC must ensure it has appropriate procedures in place to both record and have access to official records. This is necessary to meet its obligations and respond fully, accurately and appropriately to information requests. Also, DHSC must ensure that it issues responses that give effect to the requester's rights of access within 20 working days of receipt of the request. The Commissioner recommends that DHSC should take the following steps to ensure conformity with the Section 45 code:

- Update guidance for staff on the use of non-corporate channels so it is consistent across the different policies currently used by the department. Cabinet Office have previously indicated that it is updating its own guidance on the use of private correspondence channels, which has been in place since 2013. The Commissioner will work with Cabinet Office, DHSC and others as needed to support the development of this new guidance.
  - Establish a centrally held register of the individuals permitted to use private channels and devices.
  - Establish a process for granting this permission that includes confirmation of how, and with what frequency, official information will be transferred onto official systems. This should include specific provision for when individuals leave the department suddenly including, for example, following a Ministerial reshuffle.
  - Review and update DHSC's existing information request handling policies and training to ensure they are consistent with the changes made in response to the measures outlined above.
  - Follow up with any DHSC Ministers, Non-Executive Directors or senior staff who have left during the pandemic period who may have used private devices and correspondence channels to seek confirmation in writing that all relevant records have been transferred onto the department's systems and seek to secure these where this may not be the case.
  - In light of any material that may be received as part of this exercise, review its FOI request log to ensure that this information, if relevant to any requests, is considered for release.
  - Write to the Commissioner by the deadline set out in the notice to confirm that it has complied with its recommendations and how it has achieved this.
31. Furthermore, in relation to part 4 of the code, the Commissioner recommends that DHSC should consider using the Commissioner's

FOI self-assessment toolkit to improve its timeliness compliance<sup>2</sup>.

It is noted that DHSC has already taken steps to improve its performance since the highest point of the pandemic, which is welcomed.

32. In relation to part 10 of the code, DHSC should ensure that it communicates with applicants in accordance with their rights, as set out above.
33. The Commissioner will review progress in these matters after three months to assess the improvements in these areas and feedback his observations to DHSC.

### **Failure to comply**

34. A practice recommendation cannot be directly enforced by the Commissioner. However, failure to comply with a practice recommendation may lead to a failure to comply with FOIA, which in turn may result in further regulatory action. Further, a failure to take account of a practice recommendation may lead in some circumstances to an adverse comment in a report to Parliament by the Commissioner.
35. The Commissioner will have regard to this practice recommendation in his handling of subsequent cases involving DHSC.

Signed ..... 

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<sup>2</sup> [FOI self-assessment toolkit | ICO](#)