

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

### **Decision notice**

**Date:** 17 September 2018

**Public Authority:** Public Health England  
**Address:** Wellington House  
133 – 155 Waterloo Road  
London  
SE1 8UG

**Complainant:** Emmanuel Freudenthal  
**Address:** emmanuel.freudenthal@gmail.com

### **Decision (including any steps ordered)**

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1. The complainant has requested information associated with the role of Public Health England (PHE) in the response to the Ebola crisis in 2014-2015. PHE released a little information, indicated that it does not hold the majority of the information and said that other information is exempt from release under section 24(1) of the FOIA (national security) and 40(2)(third person personal data).
2. The Commissioner's decision is as follows:
  - PHE breached section 1(1)(a) with regard to requests 1.1, 1.2, 1.3, 1.4, 3, 5 and 7 because it had indicated that it held no information within the scope of these requests when it did. PHE breached section 1(1)(a) with regard to request 8 as it indicated that it held relevant information when it does not.
  - PHE complied with section 1(1)(a) with regard to request 6.
  - PHE breached section 1(1)(b) with regard to requests 1.1, 1.2, 1.4, 3, 5 and 7 as it has not communicated to the complainant all the information that it has subsequently identified that it holds that falls within the scope of these requests.

- On the balance of probabilities, PHE holds no further information falling within the scope of the complainant's requests.
  - PHE breached section 10(1) with regard to requests 1.1, 1.2, 1.4, 3, 5, 6, 7, and 8 as it did not comply with section 1(1) within the required timescale.
  - PHE breached section 17(1) with regard to requests 1.3, 2 and 7 as it did not issue the complainant with an appropriate refusal notice. PHE breached section 17(3) with regard to requests 1.3 and 2 because its refusal to disclose related information under a Part II exemption did not discuss the associated public interest arguments.
  - The information requested in request 1.3 and request 2 is exempt from release under section 24(1) of the FOIA and the public interest favours maintaining the exemption.
3. The Commissioner requires PHE to take the following step to ensure compliance with the legislation:
- Release the information that PHE holds that falls within the scope of requests 1.1, 1.2, 1.4, 3, 5 and 7 – namely: numbers, dates, results; the Access Guidelines and Application Form document; the appropriate select committee hearing information and 'Lessons Identified Oversight' document; and the Material Transfer Agreement and Ebola Governance Group Terms of Reference document (with personal data redacted as appropriate).
4. PHE 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**

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5. On 14 August 2017, the complainant wrote to PHE and requested information in the following terms:

*"1 - The number of ebola samples analysed by each of the PHE labs in each of the countries affected by ebola between 2014 and now (with dates, PHE lab and result)*

*2 - The current location of all the samples analysed by PHE during that period (in the affected countries as well as UK and abroad)*

*3 - The Standard Operating Procedure (or similar document) that sets out how PHE decides where to send samples for analysis*

*4 - All of the funding sources of PHE for each of its activities in the affected countries (broken down for each activity/project)*

*5 - All the audits and evaluations of the activities/projects of PHE during ebola*

*6 - List of security incidents relating to ebola in PEH labs in the affected countries and in the UK*

*7 - The agreements that PHE might have signed with each of the government in the affected countries*

*8 - Consent forms, if any, of the patients whose blood was sampled by PEH or its partners"*

6. PHE responded on 22 September 2017 (its reference 376). It released information it holds that is relevant to request 4.
7. PHE said that information related to request 1 was owned by the Ministry of Health of Sierra Leone (MOHS), that it could not release it without the permission of this Ministry and that the relevant information would be published in due course.
8. PHE withheld the information requested in request 2 under section 24(1) of the FOIA. Other than make the observation that Ebola is a dangerous pathogen, PHE did not provide further explanation about its application of section 24(1) to this request and it did not provide any public interest arguments.
9. PHE said it did not hold information relevant to request 3 as it did not decide where to send samples for analysis but received them into its laboratories. PHE explained that specimens were transferred to PHE laboratories under the control of the joint command centre in Freetown, operated by MOHS and the Sierra Leone military, with the advice of the World Health Organisation (WHO). PHE confirmed it was not involved in these decisions and held no policies, procedures or similar documents that detail how these decisions were made.
10. PHE asked the complainant to clarify request 5 and provided the names of particular publications. With regard to request 6, PHE said that no security incidents had occurred.
11. In response to request 7 PHE said that it did not sign any agreements with any governments of countries affected by Ebola.

12. PHE broadly referred to section 40(2) of the FOIA in response to request 8 but said it was unable to answer the enquiry as samples had been taken by partner agencies.
13. The complainant requested an internal review on 22 September 2017. With regards to request 2, the complainant indicated that some sensitive information is offered online because it is potentially made available through applications to a 'PHE/MOHS Ebola Biobank'. He also made the following further request that is associated with request 2:

*"If you cannot provide me with the current locations of the samples, please provide me with the maximum aggregate information possible about the samples that you hold, including the following information:*

*the number of samples in the UK and their nature (swabs, blood samples etc.)*

*laboratory or origin*

*Date of hospitalisation*

*Laboratory*

*ID number*

*Symptom onset*

*Facility from where the patient was referred*

*Date tested*

*Patient age*

*Clinical chemistry results*

*Gender*

*Viral load*

*Original or follow up sample*

*Malaria test results*

*Ebola test result*

*What class of laboratory they are currently stored in*

*What institution owns them*

*What institution manages them*

*Who has access to them*

*to what end are they currently used"*

14. In his request for an internal review, the complainant also clarified request 5, as PHE had asked him to do, as follows:

*"Usually when projects are funded by DFID or any other donor, or funds are spent by a public body, then audits and evaluations are conducted throughout the project's implementation and at the end of the project. Audit and evaluations are to ensure that the funds are wellspent and to gather lessons learnt from projects. Under #4 you list two sources of funding for your work regarding ebola including*

*DFID. I would like all the audits and evaluations conducted on PHE's work on ebola."*

15. The complainant reminded PHE about the timeframe given in his request with regard to request 6.
16. He disputed that PHE does not have agreements in place with governments with regard to request 7, providing a link to where information about a PHE/MOHS Ebola Biobank Governance Group (EBGG) is published.
17. Finally, with regard to request 8, the complainant requested the following:

*"...the template for the consent form for the samples held by PHE, as well as aggregate statistics such as their number. Otherwise, please confirm that PHE does not have information about the consent given by the patients who contributed their samples."*

18. The complainant subsequently repeated the request at paragraph 13 in separate correspondence to PHE dated 25 September 2017. PHE's response to this request and others the complainant submitted on 25 September 2017 is the subject of a separate complaint that the Commissioner has considered: FS50715751.
19. PHE provided a review on 28 November 2017. It failed to address each request individually. It simply confirmed that it considered it had addressed the complainant's questions and had stated what information it holds.
20. PHE did however repeat that the information the complainant had requested about the location of Ebola samples is exempt from disclosure under section 24(1) of the FOIA. PHE also confirmed that information it holds about Ebola samples that are maintained within its Biobank is the property of MOHS and that it could not release this information without that party's permission. PHE indicated that some of the information the complainant had requested about consent forms is exempt from disclosure under section 40(2).
21. Providing an internal review is not a requirement of the FOIA. However the Commissioner views the internal review process as an opportunity for a public authority to reconsider its response to a request; to put right any failings or omissions in its initial response and to address any arguments or points the applicant has raised. If he or she was dissatisfied with an authority's original response, an applicant may well be prepared to accept an authority's position if he or she then receives a thorough and well explained or argued review response.

22. The Commissioner considers PHE's review response in this case to have been completely inadequate. First, PHE failed to address each request individually but simply lumped them altogether and broadly indicated that it had nothing further to add about any of them. Second, having asked the complainant to clarify request 5, PHE then ignored the clarified request in its review response. Neither did PHE address the valid points the complainant had raised about requests 2 and 7. And fourth, PHE again did not provide robust reasoning for its reliance on section 24(1), or provide public interest arguments. The review response provided on 28 November 2017 was brief and broad and gives the impression that PHE had not given any of the requests the re-consideration that each warranted. Consequently the complainant remained dissatisfied and submitted a complaint to the Commissioner.

### **Scope of the case**

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23. The complainant contacted the Commissioner on 27 November 2017 to complain about the way his requests for information had been handled.

24. The complainant has indicated that, although it took PHE more than 20 working days to provide it, he is content with PHE's response to request 4. He is also prepared to accept that information PHE redacted from material it released during the investigation is third person personal data that is exempt under section 40(2) of the FOIA; this matter was therefore also removed from the scope of the complainant.

25. The Commissioner's investigation has therefore first focussed on whether PHE has complied with section 1(1) with regards to requests: 1.1, 1.2, 1.4, 3, 5, 6, 7 and 8 (and the request associated with request 8, submitted on 22 September 2017). She has included within her investigation further associated requests the complainant submitted to PHE on 2 July 2018, following its release of relevant information during the investigation.

26. The Commissioner has next considered whether PHE can rely on section 24(1) to withhold the information that falls within the scope of request 1.3 and request 2.

27. The Commissioner has also considered whether PHE complied with section 10(1) and, where relevant, 17(1) and 17(3) with regard to these requests.

28. A series of submissions that the Commissioner received from PHE during the course of her investigation were, for the most part, wholly inadequate. In order to obtain from PHE the information the

Commissioner needed to make her decision it was finally necessary to serve PHE with an Information Notice (IN) on 12 July 2018.

29. The Commissioner has based her decisions on PHE's response to this IN which she received on Tuesday 21 August 2018, and on further discussion that, despite the IN, were subsequently necessary. The Commissioner has also taken account of PHE's correspondence with the complainant and the earlier submissions to her.
30. Generally in this investigation, the Commissioner has considered whether PHE had complied with the FOIA in its response to the complainant or at the conclusion of its internal review process, in respect of all of the complainant's requests.
31. The Commissioner has made observations about PHE's responses to the requests and engagement in the resulting investigation under 'Other Matters'.

## **Reasons for decision**

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32. The Commissioner had requested separate submissions from PHE for this complaint and for FS50715751. She first wrote to PHE about the current case on 12 March 2018 and, as is usual, gave PHE 20 working days to provide a submission. When she did not receive any submission, the Commissioner contacted PHE, to be told that it would provide a submission within two weeks. She finally received PHE's first submission – dated 25 May 2018 – on 29 May 2018. This means that PHE had effectively had almost 11 weeks in which to prepare a thorough and well-argued submission.

### **Section 1 – general right of access to information held by public authorities**

33. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held and is not subject to an exemption in Part II of the FOIA.
34. Section 10(1) of the FOI says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.



35. Request 1 is for:

"[1] *The number of ebola samples analysed by each of the PHE labs in each of the countries affected by ebola between 2014 and now (with [2] dates, [3] PHE lab and [4] result)*"

36. To repeat, in its response to the complainant PHE had said that information related to request 1 was owned by MOHS, that it could not release it without the permission of this Ministry and that relevant information would be published in due course. PHE appeared to maintain this position in its internal review decision.
37. In the Commissioner's opinion PHE failed to make its position with regard to this request clear. It appeared to the Commissioner that PHE's position was that it did not hold this information because the relevant information it *does* hold was held on behalf of another person – namely MOHS.
38. Section 3(2) of the FOIA says that information is held by a public authority if (a) it is held by the authority, otherwise than on behalf of another person, or (b) it is held by another person on behalf of the authority. In her initial correspondence to PHE on 12 March 2018, the Commissioner instructed PHE to review her published guidance<sup>1</sup> on this particular matter and to provide her with an explanation of its position.
39. In an initial submission to the Commissioner dated 25 May 2018, PHE stated that this data was owned by MOHS. PHE explained that during the Ebola outbreak in 2014-2015 in Sierra Leone, residual clinical specimens and accompanying data were collected from routine diagnostic testing in PHE-led laboratories. It said that some of these materials remain in Sierra Leone but the majority of samples (PHE provided associated numbers), and all of the data, have been transferred to the PHE laboratories in the UK for curation by PHE.
40. PHE went on to say that MOHS has retained ownership of the data and materials and that it will work with PHE and other collaborators to develop and conduct a series of research projects that will inform future public health strategy relating to Ebola. Researchers from the UK and overseas – from academia, governments, other research organisations

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1148/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf)



and commercial companies – can submit proposals to the Ebola Biobank to access and use the samples. Finally, PHE noted that as research findings become available, information is published in peer reviewed journals.

41. On 29 May 2018, the Commissioner invited PHE to strengthen its argument – if that was the argument it was making – that it did not hold the information in question itself and directed it, for a second time, to her published guidance on this matter.
42. PHE provided a further submission on 12 June 2018. It again failed to address the points raised in the above guidance. The guidance explains that when information is solely held by a public authority on behalf of another person, it is not held for the purposes of FOIA. However, the information will be held by the public authority if the authority is holding that information for someone else but also holding it to any extent for its own purposes. The guidance says that factors that would indicate that the information is held solely on behalf of another person include, for example, that the authority has no access to, use for, or interest in the information or that the access to the information is controlled by the other person.
43. Although ambiguous, PHE's position was that it was holding the information in question on behalf of MOHS and not for any of its own purposes. However, in its 12 June 2018 submission PHE, for the most part, simply repeated its position above without giving any further explanation or addressing the points raised in the above guidance. PHE added that it could not release the information without the permission of MOHS, and that MOHS was working with the WHO to analyse the data with the intention to publish a detailed analysis in due course. These points are not relevant because they do not address the points raised in the Commissioner's guidance; that is, they do not explain why PHE could not be said to hold the information for any of its own purposes and so did not hold it for the purposes of the FOIA.
44. In its 21 August 2018 submission, PHE first repeated the position it outlined on 25 May 2018, but then confirmed that, under section 1(1)(a), it holds the requested information. In a table in an appendix to its 21 August 2018 submission, in a column titled 'PHE response/further disclosure/clarification' PHE appears to have provided one set of answers to a series of held/not held questions about requests 1, 5, 6, and 7 that the Commissioner had originally sent to PHE on 12 March 2018. In the final column – 'PHE position with attachments and clarifications' – PHE has said that it is not claiming that it does not hold the information because it was holding it on behalf of MOHS. It finally stated that its responses to the questions about searches fully addressed the Commissioner's questions.

45. The Commissioner disputes that PHE had not claimed that it does not hold information relevant to request 1. The Commissioner first contacted PHE on 12 March 2018 with regard to this investigation and for five months PHE gave every indication that it did not hold this information as it was holding it on behalf of MOHS.
46. The Commissioner considers that her interpretation of PHE's position as being that it held the requested information on behalf of another party was strengthened during her subsequent investigation of FS50715751. In that case, which also concerns requests about PHE's response to the Ebola crisis, the Commissioner noted that in its response to the complainant, PHE first stated that MOSH owned the data about Ebola samples before clearly stating that, under section 1(1)(a) it did not hold the requested information (ie did not hold it for its own purposes).
47. With regard to the current case, PHE has now clearly confirmed that it *does* hold information falling within the scope of request 1. PHE's 21 August 2018 submission did not go on to take the next step however, which is to either release the information it has confirmed it holds or to apply an exemption to it. The Commissioner had to seek further clarification from PHE on 30 August 2018.
48. The Commissioner had to remind PHE that request 1 has four parts. PHE indicated to the Commissioner that it had already released information within the scope of 1.1 (number of samples) and 1.4 (results). The complainant had referred to a published '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank*' document when he submitted his second series of requests that is dealt with separately under FS50715751. The Commissioner notes that information within the scope of requests 1.1 and 1.4 is contained within the above Application Form at page 7.
49. However, the Commissioner finds that PHE has breached section 1(1)(a) with regard to these parts of request 1. In its response to the request, and at internal review, PHE indicated to the complainant that it did not hold information relevant to these parts, when it does. While information falling within the scope of these two parts is already in the public domain, PHE did not refer to the exemption under section 21 of the FOIA (information already reasonably accessible to the applicant) in its response or review. PHE therefore had a duty to communicate this information to the complainant; it did not and therefore also breached section 1(1)(b) with regard to requests 1.1 and 1.4.
50. The Commissioner also finds PHE has breached section 10(1) with regard to these two parts as it did not comply with section 1(1) within 20 working days.

51. On 30 August 2018, PHE confirmed that it considers request 1.3 (PHE labs) attracts section 24(1). A public authority can only apply an exemption to information it holds. The Commissioner therefore finds that PHE has breached section 1(1)(a) with regard to request 1.3 as, in its response and internal review, it had indicated it held no relevant information, when it does. The Commissioner has dealt with this element of request 1 further under the Section 17 and Section 24 sections of this notice.
52. Finally, PHE confirmed that it could release information within the scope of request 1.2 (dates). The Commissioner finds that PHE breached section 1(1)(a), (1)(1)(b) and section 10(1) with regard to request 1.2. It holds relevant information, having originally indicated that it does not, and has not communicated it to the complainant within 20 working days.
53. On the balance of probabilities the Commissioner is prepared to accept that PHE has now identified all the information that it holds that falls within the scope of request 1 and holds no further relevant information.
54. Request 3 is for:  
  
*"The Standard Operating Procedure (or similar document) that sets out how PHE decides where to send samples for analysis"*
55. To repeat, in its response to the complainant PHE had said that it did not hold information relevant to request 3 as it did not decide where to send samples for analysis but received them into its laboratories. PHE explained that specimens were transferred to PHE laboratories under the control of the joint command centre in Freetown, operated by MOHS and the Sierra Leone military, with the advice of the WHO. PHE confirmed it was not involved in these decisions and held no policies, procedures or similar documents that detail how these decisions were made.
56. PHE appeared to maintain this position in its internal review decision. Its position was therefore, at this stage, that it did not hold information falling within the scope of request 3.
57. PHE's initial submission to the Commissioner simply re-stated that it does not hold any relevant information without providing any further detail. The Commissioner reviewed PHE's initial response to the request of 22 September 2017, which PHE has referred to in its submission of 21 August 2018. In that response PHE had told the complainant that PHE "*did not decide where to send the samples*" and that it received them into its laboratories from a network of clinical services.
58. PHE has appeared to interpret the request as being for information related to decisions PHE may have made about the movement of

samples (from Sierra Leone) at the time of the Ebola crisis – this interpretation generated the ‘information not held’ response. However, although the request refers to sending ‘*samples for analysis*’ rather than ‘*...for research*’, it appeared to the Commissioner that PHE has misinterpreted the complainant’s request. Through the Ebola Biobank, researchers can apply for samples of the Ebola virus and the Commissioner understands that PHE and/or the EBGG makes decisions on these applications, with some being granted. The Commissioner considers that a more obvious interpretation of the request is that it is for a Standard Operating Procedure (or similar) associated with decision-making regarding applications to the Biobank (and perhaps elsewhere).

59. On 22 August 2018 the complainant confirmed to the Commissioner that this is what he is requesting. His request is for any process, procedure or framework that PHE/the EBGG refers to when assessing applications to the Biobank – or any other application for Ebola samples – in order to evaluate an application for an Ebola sample so as to reach a decision on whether the application should be granted. Such a process is quite usual when, for example, assessing grant applications.
60. On 30 August 2018, PHE sent the Commissioner a copy of the document: *Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank*. As discussed above, the complainant had referred to this document when he submitted a further request to PHE (request 9) which is the subject of the separate investigation: FS50715751. Under advice about ‘Eligibility criteria’ this document refers to ‘a standard set of criteria’ that it will use to assess all applications to the Biobank, which it then lists. It seems to the Commissioner that it is this information that the complainant had requested, although it is not clear to her why he did so when, as above, he appears to have access to information falling within the scope of this request already.
61. However, with regard to request 3, PHE had answered a question that the complainant had not asked and indicated that no relevant information was held. The Commissioner finds that PHE has breached section 1(1)(a), 1(1)(b) and section 10(1) with regard to request 3. It in fact *does* hold information within the scope of this request – the *Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank* document – and, because it has not indicated that this information is exempt information, PHE had a duty to communicate it to the complainant within 20 working days.
62. The complainant did not single out PHE’s response to this request in his request for an internal review but the Commissioner notes that his review request concerned ‘*PHE’s response*’ generally ie it included PHE’s response to request 3. As discussed, the internal review process was an

opportunity for PHE to reconsider its response to this request (and the others) and to check that its understanding of it was correct which, with hindsight, appears to have been necessary.

63. Request 5 is for:

*"All the audits and evaluations of the activities/projects of PHE during Ebola"*

64. In its response to the complainant PHE asked him to clarify this request, which he did. As discussed, in its internal review PHE then went on to ignore this clarified request.

65. PHE's initial submission to the Commissioner simply stated that it does not hold any relevant information and it did not provide any supporting detail. On further questioning from the Commissioner, PHE explained that any audits concerning assistance provided by PHE to disease outbreaks internationally are not disease-focused. Where undertaken, PHE said they tend to relate to areas such as facilities, training and processes to ensure the appropriate standards are maintained, such as health and safety.

66. The Commissioner had to go back to PHE a further time to note that the request is not for any 'disease-focussed' audits/evaluations as such; it is for audits/evaluations of any 'projects and activities... during Ebola' such as would include, in the Commissioner's view, any audits and evaluations of training and processes to ensure particular standards are maintained. She also noted the complainant's clarification of the request that he gave in his request for an internal review and which chimes with her own interpretation.

67. During a telephone discussion on 22 June 2018 the Commissioner invited PHE to consider this request again and to confirm whether, at the time of the request, it held any relevant information. PHE confirmed that it did not.

68. However, following a quick internet search the Commissioner found information about a two-year project called 'Resilient Zero' that UK Aid commissioned PHE to undertake that started in December 2015 and was associated with the Ebola crisis. A 'project completion review' – in the Commissioner's view, a project evaluation – was published on GOV.UK in March 2018. The Commissioner mentions this particular project not because she considers the information published about it falls within the scope of request 5 but because it reinforced her reasonable expectation that PHE would hold information on how it performed during the Ebola crisis.

69. On the basis of having identified the above project herself, the Commissioner was not convinced that PHE could so confidently say that it did not hold any information that was relevant to request 5 ie she was not convinced that PHE had undertaken no post-crisis assessment at all. It appeared that PHE still had not carried out the searches that the Commissioner had instructed it to undertake when she first wrote to it on 12 March 2018. On 22 June 2018, she again instructed PHE to carry out those searches with respect to request 5.
70. On 12 July 2018 PHE wrote to the Commissioner and first referred her to [www.parliament.uk](http://www.parliament.uk) where information on a select committee inquiry into '*Science in emergencies: UK lessons from Ebola*'<sup>2</sup> is published. It also sent her a Material Transfer Agreement (MTA) dated 15 May 2015 which it said was associated with this inquiry and which it had identified that it holds. On 3 July 2018, the Commissioner advised PHE to send the MTA to the complainant, since he was the one who had submitted the request. The Commissioner is not aware that PHE has released the MTA to the complainant at the date of this notice. The MTA is discussed further with regard to request 7.
71. In this 12 July 2018 correspondence, PHE had also identified a document it holds called '*PHE Ebola Lessons Identified Oversight*', a copy of which it sent to the Commissioner. This is discussed further below.
72. The Commissioner considers the select committee information to fall squarely within the scope of request 5. It appears to have been published in 2016 and, if this is the case, the Commissioner is very surprised that PHE did not refer the complainant to this information when it originally received his request in August 2017, since PHE must surely have been aware of the inquiry. At that point and now PHE could have refused to release this particular information under section 21(1) of the FOIA as it is already reasonably accessible to the complainant. However, PHE has not referred to section 21 in any correspondence with the Commissioner and on 30 August 2018 PHE indicated to the Commissioner that it would send the select committee information to the complainant.

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<sup>2</sup> <https://www.parliament.uk/business/committees/committees-a-z/commons-select/science-and-technology-committee/inquiries/parliament-2015/science-in-emergencies/>



73. Separately, on 2 July 2018 the complainant had written to PHE having received from it a copy of a Memorandum of Understanding (MOU), which is discussed further under request 7. In his correspondence, the complainant advised that request 5 would cover at least two types of documents mentioned in the MOU that PHE had sent to him; namely "*interim evaluation of joint activities*" (mentioned in article 6.3 of the MOU) and "*an evaluation of its successes and limitations will be expected to inform a decision on its renewal and any new Page 3 of 9 terms or amendments*" (mentioned in article 6.4 of the MOU).
74. In her Information Notice the Commissioner made a point of instructing PHE to take account of, and address, the points the complainant had raised in his correspondence to it of 2 July 2018.
75. The Commissioner has reviewed PHE's resulting submission of 21 August 2018. In this submission, PHE first states that the request 'as currently stated' is so broad that it would be unreasonable to attempt to answer it. The Commissioner completely disagrees. She considers that the original request is clear and notes that, in any case, it has subsequently been clarified multiple times.
76. In its submission PHE goes on to list numerous academic articles. These include articles on the Ebola virus more generally and case studies, and the Commissioner does not consider these articles satisfactorily address the complainant's request.
77. PHE then provides links to the select committee inquiry discussed above and refers to the above '*PHE Ebola Lessons Identified Oversight*' document.
78. Finally, PHE confirmed in its submission that it does not hold information that 'squarely' falls within the scope of the request and that it has reached this conclusion following numerous discussions with expert scientific staff involved in a) custodianship of the samples; b) directors who oversaw the transfer of the samples to PHE's custodianship/overseeing of the storage of the samples and c) general administrators/secretariat staff. In addition it had carried out searches of its servers and individual staff members' email accounts.
79. The Commissioner disagrees with PHE's view. She considers that, as well as the select committee information, the 'Oversight' document also clearly falls squarely within the scope of the complainant's request. It was not clear whether PHE had released this document to the complainant however, and, on 23 August 2018, the Commissioner advised PHE to release it to the complainant if it had not already done so. At the date of this notice, PHE has not confirmed that this information has been released.



80. PHE's 21 August 2018 submission omits any mention of the documents that the complainant referred to in his correspondence to it of 2 July 2018, regarding the MOU. It was therefore necessary for the Commissioner to discuss this matter further with PHE on 30 August 2018.
81. PHE acknowledged that the MOU refers to particular items – the '*interim evaluation of joint activities*' and "*an evaluation of its successes and limitations will be expected to inform a decision on its renewal and any new Page 3 of 9 terms or amendments*". It agreed that these two things might broadly be categorised as an audit or evaluation, as has been requested. However, PHE confirmed that, other than the select committee information and the 'Oversight' document, it does not hold any other information relevant to request 5. PHE told the Commissioner that the MOU is based on a generic template and that, just because the MOU refers to particular types of evaluation, this does not mean such an evaluation was done, or had needed to be done. PHE confirmed, for example, no PHE/MOHS 'joint activities' had occurred and so it holds no evaluation of such activities. The Commissioner is prepared to accept PHE's position regarding the MOU.
82. To summarise the Commissioner's findings with regard to request 5, PHE has now identified that it holds some information within the scope of this request: information relating to a select committee hearing, and a '*Lessons Identified Oversight*' document. The Commissioner finds that PHE has breached section 1(1)(a), 1(1)(b) and 10(1) with regards to this request: it had indicated that it held no information within the scope of this request, when it does, and it did not release this information to the complainant within 20 working days. However, the Commissioner is prepared to accept, on the balance of probabilities, that, at the time of the request, PHE held no further relevant information.
83. Request 6 is for:  
  
*"List of security incidents relating to ebola in PHE labs in the affected countries and in the UK"*
84. To repeat, in its response to request 6 PHE told the complainant that no security incidents had occurred. PHE appeared to maintain this position in its internal review decision.
85. PHE's initial submission to the Commissioner indicated that that no such security incidents had been experienced and that therefore it does not hold any information that is relevant to this request.
86. In its submission of 21 August 2018, PHE confirmed that it had again discussed this request with expert scientific staff involved in a)

custodianship of the samples; b) directors who oversaw the transfer of the samples to PHE's custodianship/overseeing of the storage of the samples and c) general administrators/secretariat staff. In addition it had again carried out searches of its servers and individual staff members' email accounts. PHE confirmed that it does not hold information falling within the scope of request 6.

87. On the basis of PHE having stated that there have been no security incidents relating to Ebola in PHE labs (and that, by inference, it held no relevant information), the Commissioner is prepared to accept on the balance of probabilities that no relevant information is held and that PHE complied with section 1(1)(a) with regard to this request. PHE breached section 10(1) with regard to this request however, as it did not comply with section 1(1) within 20 working days.

88. Request 7 is for:

*"The agreements that PHE might has [sic] signed with each of the government in the affected countries"*

89. In its response to the complainant of 22 September 2017, PHE had told him that it did not sign any agreements with any government of an affected country as it was working under the auspices of the World Health Organisation and the Department for International Development. It appeared to maintain this position at internal review.

90. In its initial submission to the Commissioner, PHE had again simply stated that it does not hold this information without providing any further detail. The Commissioner was surprised that PHE appears to holds no such agreements, and noted the link to the Ebola Biobank Governance Group that the complainant referred to in his request for an internal review. This therefore again necessitated her drawing out further explanation from PHE. The Commissioner disagreed with PHE's interpretation that request 7 is a request for agreements that the UK Government might have with the governments of countries affected by Ebola; it is clearly for such agreements that PHE might have.

91. In the telephone discussion on 22 June 2018, PHE then confirmed that the only material it holds that could be categorised as an agreement is the MOU referenced above and that it holds no agreements with any other of the governments in countries that had been affected by Ebola. By way of explanation PHE told the Commissioner that the work it does is very tightly controlled – partly due to resource restrictions. What PHE does is to support other appropriate bodies to undertake research to safeguard the public good which includes curating samples which it makes available to those appropriate bodies.

92. However, as mentioned above the complainant had also referred PHE to the EBG. PHE had not confirmed whether it holds any written agreement associated with this Group. Again, the Commissioner was not convinced that PHE had carried out any searches for information relevant to request 7 and on 22 June 2018, she instructed PHE to carry out searches for any further information.
93. On 29 June 2018, PHE had released the MOU to the complainant, with some names redacted. In its covering email to the complainant, PHE again suggested that the request was for 'signed agreements between the United Kingdom and the government of the affected countries'. It is not. The request is quite clearly for agreements that PHE might have with those governments and the MOU is one such agreement; being between PHE and MOHS.
94. As discussed, on 2 July 2018, the complainant had then written to PHE. As part of this correspondence, the complainant clarified what agreements might fall within the scope of request 7, having reviewed the MOU that PHE had released. These included MTAs, legally binding contracts for joint programmes (mentioned in article 6.2 of the MOU), confidential disclosure agreements (mentioned in article 7.3 of the MOU) and any amendments to the MOU (article 9 of the MOU). As discussed above, on 3 July 2018 the Commissioner instructed PHE to release to the complainant the further relevant information that it had identified that it holds; namely the MTA dated 15 May 2015.
95. In its correspondence to the Commissioner dated 12 July 2018, PHE identified that it does also hold a 'Terms of Reference' document for the EBG, which it acknowledged falls broadly within the scope of the requested 'agreements'. It sent the Commissioner a copy of this document but does not appear to have sent a copy to the complainant.
96. In the above submission, PHE also told the Commissioner that it has not exchanged correspondence with Guinea or Liberia; that PHE's support to Sierra Leone was under the auspices of the Department for International Development (DfID) and that any formal arrangement would have been made through DfID and the Foreign Office, acting through the British High Commission in Freetown. Referring to a webpage on which DfID posts details of contracts it has let for services, PHE has told the Commissioner that it acted on behalf of DfID through an inter-departmental agreement, and not as a contractor. DfID was responsible for letting contracts to suppliers and Non-Governmental Organisations, not PHE. PHE referred the Commissioner to the EBG 'Terms of Reference'.

97. As discussed, in her Information Notice dated 12 July 2018 the Commissioner specifically instructed PHE to address all the points that the complainant had raised in his 2 July 2018 correspondence to it.
98. The Commissioner has considered PHE's resulting submission of 21 August 2018, in relation to request 7. In this submission, PHE has referred to its original response of 22 September 2017 and its submission to the Commissioner of 20 June 2018 in which it had provided her with a copy of the MOU. PHE then goes on to confirm it holds the MOU but does not refer to the MTA it had also subsequently identified that it holds. PHE finally confirmed that 'coming to this conclusion' is – again – the result of discussions with expert scientific staff involved in a) custodianship of the samples; b) directors who oversaw the transfer of the samples to PHE's custodianship/overseeing of the storage of the samples and c) general administrators/secretariat staff. And again, it had carried out searches of its servers and individual staff members' email accounts. The Commissioner must assume that the conclusion PHE had come to is that it holds no other relevant information and not that it holds the MOU. Since PHE in fact also holds the MTA, the Commissioner did not find this conclusion at all robust.
99. The complainant had helpfully provided PHE with some examples of documents that might broadly be interpreted as agreements PHE might have with particular governments, and which are referred to in the MOU. Although the Commissioner's IN had instructed PHE to address the complainant's points, PHE did not explain why it does not hold such documents or argue why this information cannot be categorised as an example of the requested agreements. The Commissioner therefore had to discuss these matters with PHE on 30 August 2018.
100. The MOU refers to MTAs, legally binding contracts for joint programmes, confidential agreements and any amendments to the MOU. As discussed, PHE had identified that it holds the MTA. PHE has told the Commissioner that management of the scientific work programme was taken forward by the subsequently established EBG. Work done jointly is the work of the EBG and specific research projects and none of the EBG documents are legally binding. The Commissioner understands from this that PHE holds no 'legally binding' contracts with specific research projects or any other body associated with the Ebola response.
101. With regard to confidential disclosure agreements, PHE confirmed in writing that it is 'not aware' of any such agreements between MOU participants. This is not as unequivocal as stating that it does not hold such agreements; however on the basis of this statement and her discussion with PHE, the Commissioner is prepared to accept that PHE does not hold any confidential disclosure agreements. Finally, PHE confirmed that the MOU has not been amended. At this point, the

Commissioner considers that PHE has addressed the points the complainant raised about request 7 in his correspondence to PHE of 2 July 2018.

102. To summarise the Commissioner's findings with regard to request 7, PHE has now identified that it holds some information within the scope of this request: the MOU, the MTA and the 'Terms of Reference' document. It has released the MOU to the complainant. The Commissioner nonetheless finds that PHE has breached section 1(1)(a), 1(1)(b) and section 10(1) with regard to request 7. In its response and review to the complainant PHE indicated that it held no relevant information, when it does and, in addition, it did not communicate the information it holds to the complainant within 20 working days. The Commissioner is prepared to accept, on the balance of probabilities, that at the time of the request PHE held no further relevant information.
103. PHE redacted information from the MOU it released to the complainant. The Commissioner has considered this matter further under the Section 17 section of this notice.
104. Request 8 is for:
- "Consent forms, if any, of the patients whose blood was sampled by PHE or its partners"*
- On 22 September 2017, the complainant had also requested:
- "...the template for the consent form for the samples held by PHE, as well as aggregate statistics such as their number. Otherwise, please confirm that PHE does not have information about the consent given by the patients who contributed their samples."*
105. PHE's response to the complainant had suggested that it held the information requested in request 8 but that it was exempt under section 40(2). It confirmed that it was relying on section 40(2) to withhold the information at internal review.
106. In its initial submission to the Commissioner dated 25 May 2018 PHE said that its reference to section 40(2) had inadvertently misinformed the complainant that it holds information on consent. PHE acknowledged that although its response to the complainant mentioned that samples were taken by partner agencies, it had not explicitly stated that it does not hold the requested information, which it had now established was the case. It explained that the samples were collected from individuals seeking vital medical assistance and so no consent was required.

107. During the telephone discussion with the Commissioner on 22 June 2018, PHE again considered its position with regard to request 8 and the request of 22 September 2017. It confirmed that it does not hold this information in any capacity, for its own purposes or on behalf of the MOHS. It confirmed this position in its 21 August 2018 submission and again referred to the internal discussions it had had and the electronic searches it had carried out.
108. With regard to this request, the Commissioner must accept that PHE has sufficient knowledge of the circumstances following the Ebola crisis and the role of PHE and other agencies in responding to the crisis that it would know whether it holds patient consent forms or a consent form template. PHE has stated categorically to the Commissioner that it does not hold such information in any capacity and, in this instance, the Commissioner is therefore prepared to accept that this is the case. The Commissioner finds that PHE breached section 1(1)(a) with regards to request 8 and the request of 22 September 2017 because in its response and review it indicated it holds relevant information when it does not. PHE has breached section 10(1) as it did not comply with section 1(1) within 20 working days.

#### **Section 24 – safeguarding national security**

109. Under section 24(1) of the FOIA, information is exempt information if exemption from section 1(1)(b) is necessary for the purpose of safeguarding national security. Section 24 is subject to the public interest test.
110. PHE has applied section 24(1) to the information it holds that falls within the scope of request 1.3 and request 2.
111. Request 1.3 is for the identification of PHE labs that undertook analysis of Ebola samples. Request 2 is for:
- "The current location of all the samples analysed by PHE during that period (in the affected countries as well as UK and abroad)"*
112. With regard to request 2, in its response to the complainant and its internal review, PHE observed that Ebola is a dangerous pathogen and that it was therefore relying on section 24(1) to withhold the information he had requested. PHE did not discuss the public interest. In its internal review PHE added that the samples are managed under appropriate security arrangements to prevent misuse. Again, it did not refer to any public interest arguments.
113. In its initial submission, PHE told the Commissioner that the Ebola samples are stored in a secure location in the UK. It explained that it is a Category 1 responder under the Civil Contingencies Act 2014 and



plays a central role in the operational response to protect the population from any existing and new emerging infection, or developing radiation, chemical or environmental hazard. PHE said it routinely identifies and monitors new and emerging infectious disease outbreaks throughout the world. This role is underpinned by several international surveillance systems.

114. PHE went on to refer to the Commissioner's published guidance<sup>3</sup> on section 24 where she notes that 'national security' means the security of the United Kingdom and its people. PHE quoted the guidance as saying that the interests of national security include actions by an individual which are targeted at the UK, its system of government or its people. It also includes the reciprocal co-operation between the UK and other states in combating international terrorism. All this may be interesting but it did not clearly explain why releasing the specific information in question would be a risk to national security.
115. Finally PHE noted that safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent. It rightly observed that terrorists can be highly motivated and may go to great lengths to gather intelligence. In PHE's view there *"may be grounds for withholding what seems harmless information on the basis that it may assist terrorists when pieced together with other information they may obtain."*
116. This is the crux of the matter. The Ebola virus is a very severe, often fatal, illness in humans that spreads in the human population through human-to-human transmission. It is entirely necessary therefore for samples of Ebola virus to be kept in secure locations in the UK (and elsewhere). Samples becoming available to unauthorised individuals – including potential terrorists – would pose a significant risk to the UK population's security and to the security of other nations. Such an attack is, in the Commissioner's view, not completely outside the realms of possibility unfortunately, and she is therefore satisfied that the location(s) where samples of Ebola virus were analysed and may be held in the UK and elsewhere should not be disclosed to the public at large, under the FOIA.
117. The Commissioner has noted PHE's submission of 21 August 2018 in which it has confirmed it holds information within the scope of request 2 and repeated its position above as to why this information is exempt

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1174/safeguarding\\_national\\_security\\_section\\_24\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1174/safeguarding_national_security_section_24_foi.pdf)



from release under section 24(1), and the public interest arguments. In the discussion on 30 August 2018, PHE confirmed that it also relied on section 24(1) with regard to request 1.3. The Commissioner has decided that PHE is correct to apply section 24(1) to this request for the same reason – it concerns the possible location of Ebola samples.

118. The Commissioner disagrees with the complainant's view that information relevant to this request has already been published. The information on PHE's website to which the complainant has referred is simply a call for research applications and does not disclose the locations where Ebola samples are stored.

### **Balance of the Public Interest**

119. Section 24 is a qualified exemption and so it is nevertheless necessary to consider whether the public interest favours maintaining the exemption or disclosing the information.

120. In her published guidance, the Commissioner advises that factors that would support the public interest in disclosing information that engages section 24 include civil liberties and human rights and reassurance that measures in place to safeguard national security are effective. The guidance advises that factors that would support the public interest in withholding the information include maintaining UK security through the continued cooperation of other countries and taking account of another country's security.

121. PHE did not refer to any public interest arguments in its response to the complainant or in its internal review – this matter is discussed in the 'Section 17' section below. In its submission to the Commissioner dated 25 May 2018, PHE stated that the public interest in maintaining section 24 relates to safeguarding the UK's national security and that "it follows that [PHE is] concerned with the public interest of the UK and its citizens". This sentence comes from the Commissioner's guidance and, as such, the Commissioner finds that as a public interests argument for withholding the specific information in question, it is weak.

122. In its submission of 21 August 2018, PHE added that the public interest in releasing a specific address of a secure site is outweighed by the national security threat to staff based at the site and the general public if the site's defences were compromised. This would appear to be a health and safety matter which is provided for under section 38 of the FOIA. However PHE also said that releasing the requested information is likely to heighten the risk of attacks from parties wishing to exploit specific vulnerabilities.

123. A good deal of this submission's section on the public interest arguments is, for the most part, simply quotes from the Commissioner's section 24 guidance. PHE then closes its discussion by saying that there is a clear public interest in protecting a collaborative research studies, to include opportunities for training Sierra Leonian scientists. PHE says that this contributes to the wider Ebola recovery efforts, the rebuilding of the diagnostic and public health capability of Sierra Leone, and informing worldwide public health strategy to prepare nations for future Ebola epidemics.
124. Public interest arguments should relate solely to the exemption to which they are associated. This last public interest argument has no relevance whatsoever to safeguarding national security and the Commissioner has discounted it.
125. To say that PHE had significant concern about the sensitivity of the information to which it has applied section 24, its public interest arguments for withhold the information are thin. In forming a conclusion on the balance of the public interest in this case, the Commissioner has had to take into account the considerable public interest inherent in the maintenance of the particular exemption, as well as the specific factors that apply in relation to the requested information.
126. There is a general public interest in knowing how PHE is fulfilling its functions, in the transparency and accountability of its operations more generally and in the public being reassured that PHE is managing the Ebola samples appropriately. PHE has indicated to the Commissioner that the Ebola samples are being kept in Biosafety Level 4 facilities ie facilities that meet the necessary safety requirements. The Commissioner is satisfied that this satisfies any public interest in knowing where the Ebola samples are located ie the public can be reassured that PHE is storing and managing the samples securely. The complainant has not advanced any public interest arguments for disclosing this specific information.
127. In any situation where section 24(1) is found to be engaged, the Commissioner must recognise the public interest inherent in this exemption. Safeguarding national security is a matter of the most fundamental public interest; its weight can be matched only where there are also equally fundamental public interests in favour of disclosure of the requested information. The Commissioner finds that the public interest arguments for disclosing the location of the Ebola samples is outweighed by the public interest in keeping the Ebola samples secure. Withholding the information removes the risk to national security – albeit remote – by the samples' misuse, which could be facilitated if it was known where they are stored.

128. In conclusion, the Commissioner has recognised public interest of transparency and openness and ensuring PHE is effectively discharging its functions. She does not, however, believe that it matches the weight of the public interest in avoiding a disclosure that could be detrimental to national security.

129. She is therefore satisfied that the public interest in taking steps to prevent any possible unauthorised access to, and use of the Ebola virus to attack UK citizens, or the citizens of other countries, far outweighs any public interest in PHE being shown to be open and transparent.

### **Section 17 – refusing a request**

130. Section 17(1) says that if a public authority is relying on an exemption in Part II of the FOIA to either withhold information it holds, or to refuse to confirm or deny it holds relevant information, it should issue the applicant with an appropriate refusal notice within the timescale for complying with section 1(1). The Commissioner has published guidance on issuing a refusal notice<sup>4</sup>. The guidance explains that a refusal notice will need to state the section of FOIA being relied upon and in most instances explain the reasons for its decision. The explanation should be detailed enough to give the requester a real understanding of why the public authority has chosen not to release particular information.

131. PHE's reliance on section 24(1) with regard to request 1.3 emerged during the course of the Commissioner's investigation. The Commissioner therefore finds that PHE breached section 17(1) with regard to request 1.3 as it did not provide the complainant with an adequate refusal notice with regard to this request, or provide it within 20 working days.

132. In its response to request 2, other than make the observation that Ebola is a dangerous pathogen, PHE did not provide further explanation about its application of section 24(1) to this request and it did not provide any public interest arguments. In the Commissioner's view PHE's refusal notice with regard to this request was inadequate and, in addition, it was not provided within 20 working days of the request. She therefore finds that PHE breached section 17(1) with regard to request 2.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1211/refusing\\_a\\_request\\_writing\\_a\\_refusal\\_notice\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1211/refusing_a_request_writing_a_refusal_notice_foi.pdf)

133. With regard to the MOU that PHE released during her investigation in response to request 7, PHE redacted some information (personal data) but did not indicate under which exemption it had redacted this information, causing the complainant to question PHE further about this. Because it did not issue an adequate refusal notice with regard to this particular information within 20 working days, the Commissioner finds that PHE also breached section 17(1) with regard to its refusal to disclose this information.
134. Section 17(3) obliges a public authority to include, where applicable, a breakdown of the public interest factors which were taken into account and the reasoning behind the authority's conclusion that the public interest lay in maintaining the exemption.
135. With regard to its reliance on section 24(1), that exemption is subject to the public interest test. In its responses to request 1.3 and request 2, and its internal review, PHE did not refer to any public interest arguments associated with this exemption. The Commissioner therefore finds that PHE breached section 17(3) with regard to request 1.3 and request 2.

## Other Matters

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136. Reviewing PHE's correspondence with the complainant, the Commissioner considers PHE's approach to have been somewhat dismissive. At times she has found PHE's approach during her investigation to have been unnecessarily defensive. PHE has given the Commissioner the impression that it either considers that the obligations conferred by the FOIA do not apply to it, or that PHE simply does not understand its obligations under the FOIA.
137. If it is the former, the Commissioner advises PHE that the FOIA applies to PHE as much as it does to any other public authority and, as with any other public authority, PHE is legally obliged to comply fully with the Act and with any of her investigations under section 50 of the Act.
138. If it is the latter, the Commissioner advises PHE to make reviewing her published guidance a priority.
139. In future investigations, the Commissioner expects PHE to provide submissions to her that fully answer all the Commissioner's initial questions and fully address any other points the Commissioner raises. It should not be necessary for the Commissioner to have to go back to PHE repeatedly. This was a frustrating situation for both parties – and the complainant.
140. PHE did not provide all the information the Commissioner had requested even in response to the Information Notice, which the Commissioner could have progressed as an enforcement matter.
141. When a public authority receives a request for information, the first step is to establish what is being asked for, the second step is to consider whether the requested information is held. With regard to its original response to the requests, PHE has given the Commissioner the impression that it had not carefully considered each of the complainant's requests individually, either at the time of the request or on conclusion of the internal review.
142. In the course of the Commissioner's investigation, PHE has identified that it *does* hold information within the scope of some of the complainant's requests, having originally stated more than once that it did not. In other instances, it has transpired that it does not hold other information, having suggested that it does. Situations like that diminish the public's trust and confidence in PHE.

143. Despite any sensitivities associated with the requests in this case, for a number of reasons this investigation took far longer than was necessary to conclude. The Commissioner expects PHE to learn lessons from this case. She expects PHE to take the necessary steps to ensure that, in response to future requests, it can comply with the basic procedural aspects of the FOIA and, in response to any future complaints, can, at the start of any investigation, provide the Commissioner with all the information she needs within the required timescale.

## Right of appeal

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144. 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: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

145. 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.

146. 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**

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