Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 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)

1. In 12 requests, 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 indicated to the complainant that it did not hold most of the requested information and that the information it *did* hold is exempt from release under section 24(1) of the FOIA (national security) or section 40(2) (third person personal data).

2. The Commissioner's decision is as follows:

   - PHE breached section 1(1)(a) with regard to the majority of the parts of requests 9, and requests 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

   - PHE complied with section 1(1)(a) with regard to one part of request 9.

   - PHE breached section 1(1)(b) with regard to four parts of request 9 and requests 12 and 15.

   - PHE has complied with section 1(1)(b) with regard to request 14.

- PHE breached section 10(1) with regard to: four parts of request 9 and requests 10, 11, 12, 13, 14, 15, 16, 17, 18 and 20.
- PHE complied with section 10(1) with regard to one part of request 9.
- PHE breached section 17(1) and section 17(3) with regard to the majority of the elements of request 9, request 14 and request 19.
- PHE cannot rely on section 24(1) with regards to the majority of the parts of request 9.
- PHE can rely on section 24(1) with regards to request 9.3, 9.5, 9.7, request 14 and request 19 and the public interest favours maintaining the exemption.
- PHE cannot rely on section 40(2) to withhold any of the remaining information requested in request 9.
- PHE can rely on section 40(2) to withhold the personal data of third persons with regard to request 14 and request 19.

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

- Release to the complainant the information it holds that is relevant to request 12.1.
- If it has not already done so as a result of FS50713226, release the information it holds that falls within the scope of request 12.2 (the Memorandum of Understanding and Material Transfer Agreement with personal data redacted as appropriate).
- If it has not already done so, provide the complainant with the two documents within the scope of request 14, namely – '*Receipt and transport of clinical samples*' and '*Transport and storage of material in laboratory*' – that have been redacted in line with the versions it subsequently provided to the Commissioner on 19 October 2018.
- If it has not already done so as a result of FS50713226, release the information it holds that is relevant to request 15.1 (number of samples) and request 15.2 (kind of sample).
- Release the information it holds that falls within the scope of requests 9.1, 9.2, 9.4, 9.6, 9.8, 9.9, 9.10, 9.11, 9.12, 9.13, 9.14 9.15, 9.17, 9.18, 9.19 and 9.20.

4. PHE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 September 2017, the complainant wrote to PHE and requested information in the following terms:

"9 - Please provide all documents with aggregate information about the samples that you have, including the following information:

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

(please note that the above is available to PHE according to this document:
https://www.phe-culturecollections.org.uk/)

and:

- 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

This information is partly available page 7 of this document https://www.phe-culturecollections.org.uk/media/115212/accessguidelines-and-application-form-phe-mohs-biobank-final.pdf

10 - What personal information on patients (apart from those listed in question #9 above) does PHE's database contain?

11 - Does PHE have a copy of agreements between the UK and the government of the affected countries? If yes, please send them.

12 – [1] *What were the "partner agencies" that supplied PHE with samples (cf. your reply to my question #8 on consent in the previous FOI)?*
[2] *Please send your contracts or agreements with them.*

13 - What were the companies contracted to ship, store and/or transport the samples? Please send all the contracts with the companies contracted to transport, store and/or transport ebola samples.

14 - What processes did PHE implement to keep tracks of the samples in its possession? Please send any documents that outline those processes.

15 - How many samples, and of what kind (swabs, blood etc) did each of these agencies provide to PHE? From what countries?

16 - Where are the samples that PHE processed and are not currently in the Biobank? For each example, please provide their location, agency that took them from PHE, date they were given, Materials Transfer Agreement (MTA) or other paperwork, etc"

17 - If any samples were destroyed, please send us the number, location of destruction, date of destruction and SOP.

18 - How were samples transported from the affected countries to the UK? Please send us the contract/agreements between PHE and the transport companies

19 - Please send us the filled tables that researchers have submitted to request samples from PHE's Ebola biobank.
See page 8 of this document:
https://www.phe-culturecollections.org.uk/media/115212/access-guidelines-and-application-formphe-mohs-biobank-final.pdf

20 - Is the PHE aware of any license or patent applications resulting from the research done on the Ebola sample? If yes, can you

provide a list of those applications and the patents/licences that have been granted?"

6. These requests followed a series of eight requests that the complainant had submitted to PHE on 14 August 2017. PHE's response to these is the subject of the Commissioner's separate decision in FS50713226[1].

7. PHE responded to the current requests on 20 October 2017 (its reference 482). In its response, PHE first indicated that it holds some information falling within the scope of the complainant's requests and then listed the 12 requests.

8. PHE did not then go on to discuss each request separately. Instead it broadly advised that, other than information that had previously been disclosed to the complainant and that is already in the public domain, no further information could be made available. PHE said that, as had been previously stated, the information it holds is owned by the Ministry of Health of Sierra Leone (MOHS) and that it could not release it to the complainant without the Ministry's permission. PHE advised that it understood this information would be published in due course.

9. PHE went on to say that under section 1(1)(a) of the FOIA it does not hold information that would address most of the complainant's requests and that the FOIA does not oblige it to create new information or to seek it from third parties.

10. PHE re-stated what it had told the complainant in its response to his earlier set of requests. Namely, that the Ebola virus is a dangerous pathogen and any samples or cultures are managed under appropriate security arrangements to prevent misuse. As such, PHE said, access is limited to research scientists operating within Biosafety Level 4 facilities.

11. PHE finally referred to the exemption under section 24 of the FOIA and said it declined to provide any further information on this matter.

[1] https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259867/fs50713226.pdf

12. The complainant requested an internal review on 20 October 2017. He expressed surprise that PHE could refuse to reply to all of his "rather broad questions" about the samples by referring to section 24 of the FOIA.

13. PHE provided a review on 28 November 2017. It said that it had addressed the complainant's questions in its response of 20 October 2017 in which it had stated that it holds some of the requested information and had detailed which data items are held.

14. PHE went on to repeat that under section 1(1)(a) of the FOIA it does not hold information within the scope of most of the complainant's requests and was not obliged to create new information or seek it from third parties.

15. PHE advised the complainant that it does hold some relevant information about samples it received but indicated that this information is the property of MOHS and that PHE would need MOHS' permission to release it.

16. PHE then confirmed that it had invoked section 40 of the FOIA (third person personal data) with regard to the request for patient consent forms. It said that it had examined the suitability of the application of the exemptions and considered they were appropriately applied. PHE confirmed that, as such, the information remains exempt from disclosure.

17. Finally, PHE summarised that, in so far as it was obliged to, it considered it had fully addressed the complainant's original requests. The Commissioner has commented on the internal review PHE provided in 'Other Matters'.

Scope of the case

18. The complainant contacted the Commissioner on 30 November 2017 to complain about the way his 12 requests for information had been handled.

19. The Commissioner's investigation has first focussed on whether PHE holds information falling within the scope of each of the requests and, if so, whether it should communicate that information to the complainant.

20. The Commissioner has next considered whether PHE can rely on section 24(1) to withhold information it holds that falls within the scope of request 9, request 14 and request 19. In addition, she has

considered whether PHE can withhold information falling within the scope of these three requests under section 40(2).

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

22. A series of submissions that the Commissioner received from PHE during the course of her investigation were, for the most part, wholly inadequate. The submissions are discussed under 'Other Matters'. In order to obtain from PHE the information the Commissioner needed to make her decision it was necessary to serve PHE with an Information Notice (IN) on 12 July 2018. The Commissioner has also commented on PHE's response to the IN in 'Other Matters'.

23. 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 and correspondence with PHE that, despite the IN, were subsequently necessary. The Commissioner has also taken account of PHE's correspondence with the complainant and its earlier submissions to her.

24. 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.

Reasons for decision

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

Section 10 – time for compliance

25. 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.

26. 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.

27. PHE's ambiguous position in its correspondence to the complainant appeared to be that it was holding some information – principally

information about the Ebola samples – on behalf of MOHS and not for any of its own purposes. The Commissioner will consider each of the requests in turn.

28. Request 9 is as follows:

"Please provide all documents with aggregate information about the samples that you have, including the following information:

[1] *the number of samples in the UK* [2] *and their nature (swabs, blood samples etc.)* [3] *laboratory of origin* [4] *Date of hospitalisation* [5] *Laboratory ID number* [6] *Symptom onset* [7] *Facility from where the patient was referred* [8] *Date tested* [9] *Patient age* [10] *Clinical chemistry results* [11] *Gender* [12] *Viral load* [13] *Original or follow up sample* [14] *Malaria test results* [15] *Ebola test result (please note that the above is available to PHE according to this document: https://www.phe-culturecollections.org.uk/) and:* [16] *what class of laboratory they are currently stored in* [17] *what institution owns them* [18] *what institution manages them* [19] *who has access to them* [20] *to what end are they currently used*

This information is partly available page 7 of this document https://www.phe-culturecollections.org.uk/media/115212/accessguidelines-and-application-form-phe-mohs-biobank-final.pdf"

29. As referred to above, PHE's initial response to the complainant was that it held some information falling within the scope of the requests generally, but it did not explicitly say what information. It said that any information it did hold (apart from that already released) was held on behalf of MOHS. It further indicated that it did not hold the majority of the information. In the Commissioner's view PHE's position was ambiguous.

30. The Commissioner notes that in its submission to her dated 12 June 2018, PHE states that it is relying on section 24(1) with regard to the information requested in request 9 and that names and contact details of research facilities is exempt under section 40(2). In its submission dated 21 August 2018, PHE repeated the position it held in its earlier submission, including that it is relying on section 24(1) with regard to request 9. PHE also stated that it does not hold 'complete data' associated with the samples but does hold some data associated with the samples. PHE's application of section 24(1) and 40(2) to the information in question appeared to be confirmation that it *does* hold at least information falling within the scope of request 9.

31. The Commissioner has first considered the following parts of request 9:

    "[16] *what class of laboratory they are currently stored in*

    [17] *what institution owns them*

    [18] *what institution manages them*

    [19] *who has access to them*

    [20] *to what end are they currently used"*

32. With regard to what class of laboratory the Ebola samples are currently stored in, the Commissioner considers that PHE did address this request in its response. It had advised the complainant that samples are currently stored in appropriate Biosafety Level 4 facilities. The Commissioner considers it would be possible to link this response to the request for what class of laboratory the Ebola samples are stored in. The Commissioner therefore finds that PHE complied with section 1(1)(a) and section 10(1) with regard to this particular element of request 9.

33. With regard to the remaining four elements, again the Commissioner considers that these are requests that PHE broadly addressed in its response to this request and requests that formed part of FS50713226. MOHS owns the samples, PHE and an Ebola Biobank Governance Group (EBGG) manage them, PHE has access to them and grants access to successful applicants to the Biobank, and the ends to which the samples are used are indicated on the Biobank website and through a published '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank'* document.

34. However, the Commissioner finds that PHE breached section 1(1)(a) with regard to all the remaining elements of request 9, including the four parts above. This is because she considers that, in its response and internal review, PHE did not adequately comply with its duty to confirm or deny whether it holds information falling within the scope of all the remaining and specific elements of this specific request.

35. With regard to the four remaining elements of request 9 discussed above, in the absence of any clear grounds presented by PHE for refusing these elements of this specific request (such as relying on section 21 of the FOIA – information already accessible to the applicant) the Commissioner finds that the PHE was under a duty to communicate this information. She therefore finds that PHE also breached section 1(1)(b) with regard to these four parts. The

Commissioner also finds that PHE has breached section 10(1) with regard to the above four parts of request 9.

36. The remaining elements of request 9 are discussed in the 'Section 24' and 'Section 17' sections of this notice.

37. Request 10 is for:

"What personal information on patients (apart from those listed in question #9 above) does PHE's database contain?"

38. In its response and internal review, PHE had not addressed this request individually and it was therefore not clear what its position was with regard to this request.

39. In her first telephone conversation with PHE, the Commissioner had clarified that this is a request for categories of patients' personal information that had not been referred to in request 9 such as, for example, 'patient address' or 'patient ethnicity'. Having reviewed request 9, in the Commissioner's view this is also a request for any aggregated information held under any other categories.

40. PHE confirmed in its 21 August 2018 submission that it holds no additional personal data (that is, other than under those categories the complainant had indicated in request 9). PHE had confirmed that it had come to the conclusion as a result of discussions with expert scientific staff involved in the custodianship of the Ebola samples; directors who oversaw the transfer of the samples to PHE's custodianship and general administrators/secretariat staff involved in the record keeping. PHE also confirmed it had searched is servers and individual staff email accounts.

41. PHE has now stated categorically that it holds no information falling within the scope of this request. In her discussion of PHE's response to request 9 in the 'Section 24' section of this notice the Commissioner has discussed the published document called '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank'*. On page 5 of this document PHE lists the data associated with some of the samples it holds. These are the categories that the complainant also listed in request 9. The Commissioner is prepared to accept that the categories listed in the above published document are all the categories that PHE's database contains.

42. However, the Commissioner finds that PHE breached section 1(1)(a) with regard to this request because it did not clearly confirm in its response or in its review that it does not hold the specific information requested in request 10. PHE has also breached section 10(1) with

regard to this request as it did not comply with section 1(1) within 20 working days.

43. Request 11 is for:

"Does PHE have a copy of agreements between the UK and the government of the affected countries? If yes, please send them."

44. A request that the Commissioner had considered as part of FS50713226 was for copies of agreements between PHE and the governments of affected countries. The Commissioner considers that in the case of request 11, 'the UK' can be interpreted as the UK Government. In the course of its initial discussion with her, PHE confirmed that it holds no such agreements. It had identified that it does hold information within the scope of the separate request the complainant submitted in FS50713226, but does not hold any agreements between the UK Government and the government of other countries concerning the Ebola crisis.

45. Given the specifics of the request the Commissioner is prepared to accept that this is the case and that PHE does not hold information falling within the scope of request 11.

46. However, the Commissioner finds that PHE breached section 1(1)(a) with regard to this request because it did not clearly confirm to the complainant that it does not hold this specific information. PHE has also breached section 10(1) as it did not comply with section 1(1) within 20 working days, with regard to this specific request.

47. Request 12 is for:

"[1] *What were the "partner agencies" that supplied PHE with samples (cf. your reply to my question #8 on consent in the previous FOI* [FS50713226]*)?* [2] *Please send your contracts or agreements with them."*

48. As with the majority of the complainant's requests, in its response and internal review, PHE had not clearly confirmed whether or not it holds information within the scope of the two elements of this request.

49. In its initial submission to the Commissioner dated 12 June 2018, PHE had confirmed only that it holds no information within the scope of request 12 generally. During a telephone discussion with the Commissioner, PHE had told the Commissioner that it received samples from MOHS – working with the World Health Organisation (WHO) and the Sierra Leone military – and that no other partner agencies were involved.

50. In its 21 August 2018 submission, PHE says that "*the reference to 'partner agencies' covers others involved in the in-country laboratory work which includes other nations' response staff*." It goes on to say that this was a collaborative effort that was not subject to contracts/agreements but was carried out in accordance with "*the relevant international response standards*".

51. PHE confirmed that it holds no information within the scope of part [2] of the request – ie contracts or agreements. It said it has come to this conclusion as the result of the above discussions with staff and searches.

52. The Commissioner has reviewed PHE's response and internal review to the complainant and has considered its various submissions to her. With regard to request 12.1. PHE has not responded to the Commissioner's request for clarification, which she sent on 21 September 2018, on its point about 'partner agencies' covering others involved in laboratory work. However, in the course of this investigation PHE indicated to the Commissioner that MOHS was the partner agency that supplied it with Ebola samples. The Commissioner notes that in its response to request 3 in FS50713226 PHE had confirmed to the complainant that Ebola samples had been 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. The Commissioner finds that PHE did not comply with section 1(1)(a) or 1(1)(b) of the FOIA with regards part 12.1 of the current request because it did not clearly confirm whether or not it held relevant information. It appears that PHE *does* hold relevant information – the name of the partner agency – and, since PHE did not issue a refusal notice, it had an obligation to communicate this information to the complainant, which it failed to do. It has also breached section 10(1) as it did not comply with section 1(1) with regard to this part of the request within the 20 working days required.

53. The Commissioner has next considered request 12.2 – which is for any contracts or agreements PHE may have had with the partner agency; that is, MOHS. PHE has stated that it holds no relevant information.

54. With regard to request 12.2, the Commissioner considers that, given the associated gravity of the situation, some written agreement/terms of agreement *must* have been in place, under which samples of Ebola virus were transferred from MOHS to PHE.

55. The Commissioner has referred to the complainant's request 7 in FS50713226. That was for:

"The agreements that PHE might have signed with each of the governments in the affected countries."

56. Having stated more than once that it held no relevant information, during the course of the FS50713226 investigation, PHE identified that it held a Memorandum of Understanding (MOU) with MOHS, a Material Transfer Agreement (MTA) with MOHS and an Ebola Biobank Governance Group 'Terms of Reference' document. The Commissioner found that, on the balance of probabilities, this was all the information PHE holds that falls within the scope of request 7 of FS50713226.

57. Request 12.2 is also for agreements (and contracts) with the partner agency; that is, MOHS. Despite stating more than once during the course of the current investigation that it holds no information relevant to request 12.2, in the Commissioner's view two of the above three documents fall squarely within the scope of request 12.2: the MOU and the MTA.

58. PHE's response to the complainant is not clear. It indicated that it had already released relevant information to him but this was not a reference to the above two documents as the identification of these documents only occurred during the course of the FS50713226 investigation. This investigation took place after PHE's response and internal review of the current requests.

59. The Commissioner has decided that PHE has breached section 1(1)(a) of the FOIA with regard to part [2] of request 12. It did not clearly confirm whether or not it held information relevant to this specific request. It has now been ascertained that it does hold relevant information: the MOU and the MTA. In the absence of any grounds presented by PHE for refusing this element of the request the Commissioner finds that the PHE was under a duty to communicate the information. She therefore finds that PHE also breached section 1(1)(b). The Commissioner also finds that PHE has breached section 10(1) with regard to request 12.2 as it has not complied with section 1(1) within 20 working days.

60. As with request 7, the Commissioner is prepared to accept that the above two documents is all the information that PHE holds that is relevant to request 12.

61. Request 13 is for:

"[1] *What were the companies contracted to ship, store and/or transport the samples?* [2] *Please send all the contracts with the*

companies contracted to transport, store and/or transport Ebola samples."

62. Again, in its response and internal review PHE had not clearly confirmed whether or not holds information within the scope of this request.

63. PHE had indicated in its submission of 12 June 2018 that this request and request 14 are linked to, or duplicate, request 3 (FS50713226) and that, by implication, its original response to request 3 - that specimens were transferred to PHE laboratories under the control of the joint command centre in Freetown, operated by MOHS and the Sierra Leonne military with advice from WHO – also addresses request 13. This quite clearly is not the case.

64. Request 13 is as above whereas request 3 was for:

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

65. Following a discussion with the Commissioner, PHE then referred to section 24 with regard to request 13 and also indicated that it would harm the companies involved if it were known that they were involved in carrying samples of Ebola virus. The Commissioner again instructed PHE to clarify its position.

66. In a further submission dated 12 July 2018, PHE referred to the Material Transfer Agreement (MTA) dated 15 May 2015 that it had identified during the Commissioner's investigation of FS50713226 and which is discussed further in that decision. PHE did not provide any supporting explanation as to why the MTA addressed request 13. The MTA is between MOHS and PHE and it broadly concerns how PHE will curate the Ebola samples.

67. In its final submission dated 21 August 2018, PHE has referred to its previous submissions, indicating that specimens were transferred to PHE laboratories under the control of the joint command centre of Freetown, operated by MOHS and the Sierra Leone Military with advice from the WHO. PHE confirmed that, with regards to 13.1 it holds no information regarding what companies were contracted to ship/transport samples and had come to this conclusion through the aforementioned discussions and searches (paragraph 40). By implication, it therefore holds no information within the scope of 13.2.

68. Finally, PHE advised it had referred to the MTA because, while it noted that the MTA is not relevant to this specific request, its existence clarifies why a commercial shipping contract is not held.

69. Having considered PHE's submissions, the Commissioner considers that PHE has now addressed parts [1] and [2] of request 13 but has, however, breached section 1(1)(a) of the FOIA with regard to this request as its response and review did not make it clear that it held no relevant information. The Commissioner is prepared to accept that PHE does not hold information within the scope of request 13. She finds that PHE also breached section 10(1), however, as it did not comply with section 1(1) within the necessary timescale of 20 working days, with regard to this specific request.

70. Request 14 is for:

"What processes did PHE implement to keep tracks of the samples in its possession? Please send any documents that outline those processes."

71. Request 14 is for processes PHE may have implemented to keep track of Ebola samples in its possession. Contrary to PHE's assertion (paragraph 63), the Commissioner considers that its response to request 3 (FS50713226) does not address this request. Request 3 is for the criteria PHE applied when it considered research applications to the Ebola Biobank. (Researchers from the UK and overseas – from academia, governments, other research organisations and commercial companies – can submit proposals to the Ebola Biobank to access and use the samples. The Biobank is overseen by the EBGG.)

72. In its submission of 21 August 2018, PHE first re-stated its 12 June 2018 position. This was that PHE does not decide where to send samples. Instead it *received* (past tense) them from a network of clinical services and that the specimens were transferred to it under the control of the joint command centre for Freetown, operated by MOHS and the Sierra Leone military with advice from WHO. In the 21 August 2018 submission PHE then stated that routine laboratory processes for curating such samples 'conform to the necessary standards'. PHE also re-states that it considers request 14 duplicates of request 3. Finally, PHE referred to the MTA which it appears to consider is relevant to this request.

73. PHE's response to this request – and its interpretation of it - remained unclear. Having given the impression that it had interpreted the request as being for information concerning the movement of Ebola samples from Sierra Leone to PHE, it had then stated that it curates the samples in line with the necessary standards ie it has also suggested the request concerns the movement of the samples now that PHE has taken possession of them.

74. In the Commissioner's view this was clearly a request that concerns the Ebola samples that PHE now curates. Researchers apply to the Biobank for samples and, if the application is approved, samples are released to researchers. The Commissioner would have found it extremely surprising if PHE does not have a process in place for tracking those samples; either their movements internally within PHE, or their movement to a separate institution. This might be as simple as entering Who? What? Where? When? and How? information into a spreadsheet. In its submission to the Commissioner PHE referred to 'the necessary standards' and this may well have been the process to which the complainant is referring. The Commissioner does not consider the MTA addresses this request. The MTA concerns the overall governance of the samples; it does not cover how PHE keeps tracks of samples that may leave its laboratories to go to separate institutions or that move between its own laboratories.

75. The Commissioner therefore raised this matter again in a further telephone conversation with PHE. PHE told her that it keeps track of the movement of Ebola samples through a system of code numbers that it enters into its database against particular samples. The Commissioner considers the first part of request 14 to be a question rather than a request for recorded information under the FOIA. The above answer addresses this question.

76. However, the second part of 14 is a request for any documents that outline the above process ie it is a request for recorded information. On 21 September 2018 the Commissioner asked PHE to confirm whether or not it holds any information within the scope of this request. PHE did not address that particular point until 5 October 2018 when it sent to both the Commissioner and the complainant redacted copies of two documents that it considers fall within the scope of request 14: '*Receipt and transport of clinical samples*' and '*Transport and storage of material in laboratory*'.

77. At the time of its response to the complainant and following its internal review, PHE's position appeared to be that it did not hold information falling within the scope of request 14. It has transpired that it *does* hold relevant information. The Commissioner finds that PHE breached section 1(1)(a) with regard to request 14 because it did not adequately confirm or deny whether it held relevant information. PHE has complied with section 1(1)(b) because it has now communicated the information it holds to the complainant (with redactions), but it has breached section 10(1) because it has done so outside the 20 working day requirement.

78. The redactions that PHE has made to the above two documents are considered under the 'Section 24' and 'Section 17' sections of this notice.

79. Request 15 is for:

"[1] *How many samples,* [2] *and of what kind (swabs, blood etc) did* [3] *each of these agencies provide to PHE?* [4] *From what countries?"*

80. PHE did not provide an individual response to this request in its response to the complainant. In its internal review it indicated that the information about samples that it holds is the property of MOHS and that PHE would need MOHS' permission to release it.

81. From its submission of 12 June 2018, PHE's position again appeared to be that it does not hold the information requested in request 15, because the relevant information it does hold is held on behalf of another person – namely MOHS. It had also said that request 15 duplicates request 1 of FS50713226. Request 1 was for:

"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)"

Although on a similar matter, the Commissioner disagrees that request 15 duplicates request 1. Request 1 concerns the number of samples that PHE labs in different countries may have analysed. Request 15 concerns the number of samples that different agencies may have provided to PHE.

82. Referring back to its initial submission to the Commissioner dated 25 May 2018, which PHE confirmed also applies to FS50715751, the Commissioner understood that PHE considered that this information is owned by the 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. Some of these materials remain in Sierra Leone but the majority of samples, and all of the data, have been transferred to the PHE laboratories in the UK for curation by PHE.

83. PHE had said 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 and commercial companies – can submit proposals to the 'Biobank' to access and use the samples. Finally, PHE noted that

as research findings become available, information is published in peer reviewed journals.

84. In the 12 June 2018 submission, PHE again indicated that information within the scope of request 15 that it holds was transferred to the PHE laboratories in the UK for curation by PHE. It told the Commissioner that MOHS has retained ownership of the data and materials and that the Ministry will work with PHE and other collaborators to develop and conduct a series of research projects that will inform future public health strategies relating to Ebola.

85. It appeared to the Commissioner that PHE did hold information falling within the scope of request 15 but that its position was that it was either holding this information entirely on behalf of MOHS or that it was holding it on behalf of MOHS AND for its own purposes. Given its submissions and responses to the complainant, the Commissioner considers this to have been an entirely reasonable conclusion to have drawn.

86. However, in its 21 August 2018 submission, PHE has confirmed that it holds this information and 'has never claimed it to be exempt'. The Commissioner has not at any point suggested that PHE has applied an exemption to this material – the focus of her correspondence with PHE about this request over the last six months has been on trying to establish whether or not PHE holds the requested information, not whether it is exempt information.

87. In the above submission, PHE refers to its correspondence to the Commissioner of 25 May 2018 (in which it had provided her with some information within the scope of this request) and said it had provided her with further information about the samples within the submission.

88. Request 15 has four parts: 1) the number of samples provided, 2) of what kind (swab, blood etc), 3) from each agency and 4) from what countries.

89. The Commissioner considers that the information PHE holds that falls within the scope of request 1.1 in FS50713226 also addresses request 15.1 (number of samples). In FS50713226 PHE indicated to the Commissioner that it had already released information about the number of samples involved. The complainant had referred to the published '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank*' document when he submitted the current series of requests. The Commissioner notes that information within the scope of request 15.1 is also contained within the above *Application Form* at page 7.

90. However, the Commissioner finds that PHE breached section 1(1)(a) with regard to request 15.1. It indicated in its internal review that it did not hold information falling within the scope of this request (because it held it on behalf of MOHS), when it does. In the absence of any grounds presented by PHE for refusing this element of the request the Commissioner finds that the PHE was under a duty to communicate the information. She therefore finds that PHE also breached section 1(1)(b). The Commissioner also finds that PHE has breached section 10(1) with regard to request 15.1 as it has not complied with section 1(1) within 20 working days.

91. With regards to 15.2 (kind of sample), the Commissioner finds that information within the scope of this request is also contained in the '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank*' document at page 7. However, for the reasons above the Commissioner again finds that that PHE breached section 1(1)(a), 1(1)(b) and 10(1) with regards to request 15.2.

92. Requests 15.3 and 15.4 concern the agencies and countries involved. Again, PHE's response and review do not address these specific requests. In its previous response to request 3 (FS50713226), PHE had 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). The Commissioner considers this response to the previous request broadly addresses requests 15.3 and 15.4 – the only agency that provided Ebola samples was MOHS; the only country involved was Sierra Leone.

93. PHE had indicated in its internal review that it did not hold information within the scope of request 15 (including 15.3 and 15.4) because it held information about samples on behalf of MOHS and not for its own purposes.

94. The Commissioner finds that PHE *does* hold information within the scope of requests 15.3 and 15.4 and it had released it in response to the earlier request. The Commissioner must find that PHE breached section 1(1)(a) and 1(1)(b) with regard to these two parts. First, it indicated it did not hold relevant information when it does; second, in the absence of any grounds presented by PHE for refusing these elements of the request the Commissioner finds that the PHE was under a duty to communicate the information. PHE has therefore also breached section 10(1) as it did not comply with section 1(1) within 20 working days. Given that PHE communicated the information in question in response to request 3, the Commissioner does not intend to order PHE to now communicate this information in response to request 15.

95. Request 16 is for:

"Where are the samples that PHE processed and are not currently in the Biobank? For each example, please provide their [1] *location,* [2] *agency that took them from PHE,* [3] *date they were given,* [4] *Materials Transfer Agreement (MTA) or other paperwork, etc"*

96. PHE's ambiguous response to all the requests, including this one, has been discussed. In its submission to the Commissioner dated 12 June 2018, PHE confirmed that it is withholding the requested information under section 24(1). It re-stated this in its submission of 21 August 2018. What PHE had not done, is acknowledged that there are four parts to request 16, which the Commissioner has noted above, and address each part separately.

97. In its previous submissions to the Commissioner PHE had also indicated that this request is a "direct repeat" of the complainant's request 2 in FS50713226. While it may concern Ebola samples and their locations, in the Commissioner's view request 16 is quite clearly not a direct repeat of request 2, which was for:

"The current location of all the samples analysed by PHE during that period [between 2014 and the date of the request] (in the affected countries as well as UK and abroad)"

98. On 30 August 2018, the complainant confirmed that through request 16 he is seeking information on the samples that have left the Biobank as the result of successful research applications and information on any samples curated by PHE that are not kept in the Biobank but in other facilities.

99. The Commissioner found that PHE's IN submission did not provide her with all the information she had requested from it; indeed in further telephone conversations and communications with PHE during September 2018 it appeared to the Commissioner that it was only at that point that PHE started to properly consider request 16 (and request 19) for the first time.

100. During discussions the Commissioner had with PHE with regard to request 16, it became apparent that, at the time of the request, PHE had received five applications to the Biobank of which two were successful. However, at the time of the request it appears that no Ebola samples had been physically removed to either of the two successful institutions. With regard to request 16.1 and 16.2 therefore, PHE could not be said to hold relevant information at the time of the request – there were no associated other locations where

Ebola samples were kept and no agencies had taken Ebola samples at that point.

101. Requests 16.3 and 16.4 are for the dates Ebola samples were passed to other institutions and for the related Material Transfer Agreements (MTA). The Commissioner has noted that in the published '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank*' document it is stated (by PHE) that for each research project that is approved (ie each successful application to the Biobank) PHE will send an MTA to the applicant for review and completion by the applicant's institution. This had suggested to the Commissioner that PHE potentially could hold information within the scope of requests 16.3 and 16.4.

102. Following discussion with the Commissioner, PHE confirmed that it holds MTAs associated with the two successful applications and it sent these to the Commissioner. The Commissioner notes that although the MTA template is dated 22 June 2016, the first MTA, for Study 1, is dated 7 March 2018 and the second, for Study 4, is dated 18 April 2018. Given their dates (the Commissioner assumes that the two dates indicate when the samples were passed to each institution), the Commissioner does not consider that PHE would have held these MTAs at the time that the complainant submitted his requests, on 25 September 2017.

103. In respect of request 16 therefore, the Commissioner finds that, at the time of the request, PHE did not hold information falling within the scope of any of the four parts of this request. However, the Commissioner has decided that, because, in its response and review, it had not clearly confirmed or denied whether it held information relevant to this specific request, PHE breached section 1(1)(a) and breached section 10(1).

104. Although it did not hold the MTAs in question at the time of the request, PHE has indicated to the Commissioner that it is prepared to release them to the complainant, redacted as appropriate.

105. Request 17 is for:

"If any samples were destroyed, please send us the number, location of destruction, date of destruction and SOP."

106. As above, in its internal review, PHE had indicated that it did not hold information about samples because it held this information on behalf of MOHS and not for its own purposes.

107. However PHE has told the Commissioner in discussion that no Ebola samples have been destroyed and therefore it holds no information on

the destruction of Ebola samples. PHE confirmed this position in its submission of 21 August 2018. The Commissioner is prepared to accept that this is the case.

108. Because PHE did not address this specific request in its response or internal review, the Commissioner finds that PHE breached section 1(1)(a) and 10(1) with regard to this request.

109. Request 18 is for:

"How were samples transported from the affected countries to the UK? Please send us the contract/agreements between PHE and the transport companies"

110. This request appears to broadly duplicate request 13, which is dealt with above.

111. Request 19 is for:

"Please send us the filled tables that researchers have submitted to request samples from PHE's Ebola biobank"

112. PHE's response to this request and its internal review response were again ambiguous. As with request 9, PHE had suggested that information that it held and had not previously released was held on behalf of MOHS but that it did not hold the majority of the information the complainant had requested (across all 12 requests).

113. However, during the Commissioner's investigation PHE clarified that it considered information captured by request 19 was exempt under section 24(1). It thereby seemed to accept that it held information within the scope of request 19 for its own purposes.

114. The Commissioner therefore finds that PHE has breached section 1(1)(a) with regard to 19 because it did not clearly confirm or deny whether it held information falling within the scope of this specific request.

115. The Commissioner has discussed request 19, and matters associated with it, further under the 'Section 17' and 'Section 24' sections of this notice.

116. Request 20 is for:

"Is the PHE aware of any license or patent applications resulting from the research done on the Ebola sample? If yes, can you provide a list of those applications and the patents/licences that have been granted?"

117. To repeat, as in previous requests, PHE's response and internal review do not address this specific request.

118. Request 20 is conditional on PHE being aware of any licence or patent applications resulting from the research done on an Ebola sample. In discussion with the Commissioner, PHE confirmed that it is not aware of any such licence or patent applications and that it does not grant licence or patent applications itself.

119. In its 21 August 2018 submission, PHE has confirmed that it is not aware of any license or patent applications and consequently, it holds no relevant information. The Commissioner is prepared to accept that PHE does not hold information falling within the scope of request 20. She finds, however, that it breached section 1(1)(a) and section 10(1) with regard to request 20.

Section 24 – national security

120. 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.

121. PHE has told the Commissioner that the information about Ebola samples is held on linked databases ie, the information is held electronically and not in paper documents. As with all the information to which it had applied section 24(1), across this complaint and FS50713226, PHE refused to provide this information to the Commissioner. PHE advised that, instead, the Commissioner was welcome to come to its offices to view it. The Commissioner was prepared to do this – on this occasion. On reviewing the information requested in requests 9 and 19 in the Commissioner's opinion it was not necessary to view that information as what the information would be is obvious from the requests.

122. With regards to request 14, as has been mentioned, on 6 October 2018 PHE released two documents to both the complainant and the Commissioner from which some information had been redacted under section 24(1) and 40(2): *Receipt and transport of clinical samples*' and '*Transport and storage of material in laboratory*'. It was not clear to the Commissioner what some of the redacted information was likely to be, which necessitated a further conversation with PHE. PHE again confirmed that it was not prepared to provide the Commissioner with unredacted versions of the two documents. It did however, accept, that some information had been incorrectly redacted and, on 19 October 2018, it provided the Commissioner with versions of the two

documents that contained fewer redactions. The Commissioner will now consider each of these requests in turn.

123. Request 9 is for:

"Please provide all documents with aggregate information about the samples that you have, including the following information:

[1] *the number of samples in the UK* [2] *and their nature (swabs, blood samples etc.)* [3] *laboratory of origin* [4] *Date of hospitalisation* [5] *Laboratory ID number* [6] *Symptom onset* [7] *Facility from where the patient was referred* [8] *Date tested* [9] *Patient age* [10] *Clinical chemistry results* [11] *Gender* [12] *Viral load* [13] *Original or follow up sample* [14] *Malaria test results* [15] Ebola test result (please note that the above is available to PHE according *to this document: https://www.phe-culturecollections.org.uk/) and:* [16] *what class of laboratory they are currently stored in* [17] *what institution owns them* [18] *what institution manages them* [19] *who has access to them* [20] *to what end are they currently used*

This information is partly available page 7 of this document https://www.phe-culturecollections.org.uk/media/115212/accessguidelines-and-application-form-phe-mohs-biobank-final.pdf"

124. The complainant appears to have identified the majority of the above categories from information contained in the '*Access Guidelines and Application Form for the PHE-MOHS Ebola Biobank*' document to which he has referred in his request. As the Commissioner has noted above, there are 20 elements to this request.

125. As has been discussed, PHE's position with regards to all of the requests was not clear in its response to the complainant and internal review as PHE had not discussed each of the 12 requests separately. In its first submission to the Commissioner associated with this case, dated 12 June 2018, PHE indicated that it was relying on section 24(1) with regard to request 9 in its entirety. It also said that it considered that request 9 groups together several other requests, such as request 1 (FS50713226) and request 15 and requests concerning ownership, location and storage.

126. Parts 9.16, 9.17, 9.18, 9.19 and 9.20 have been discussed under the 'Section 1' section of this notice.

127. Before going into other elements of request 9 more deeply, the Commissioner notes, as the complainant does in his request, that information within the scope of some elements of request 9 is

contained within the previously mentioned *Application Form*, at page 7. Namely:

- request 9.1 – 10,800
- request 9.2 – Blood: 5,973, Live Swab: 70, Dead Swab: 1,674, Unknown Swab: 2,938 and Other: 145
- request 9.15 – 1,444

128. Since this information is already in the public domain, it follows that it cannot be exempt from release under section 24(1). The Commissioner finds that PHE incorrectly applied section 24(1) to these three parts of request 9. Since section 24(1) is not engaged with respect to these elements it has not been necessary to consider the public interest. The Commissioner has gone on to consider PHE's application of section 24(1) to the remaining elements of request 9.

129. Having reviewed the other elements of the request, in the Commissioner's view these can be broadly categorised as concerning either a) the samples and those that provided them or b) the samples' and patients' various locations and management.

130. The elements falling under group a) would appear to be:

9.4 – date of hospitalisation

9.6 – symptom onset

9.8 - date tested

9.9 – patient age

9.10 – clinical chemistry results

9.11 – gender

9.12 – viral load

9.13 – original or follow up sample

9.14 – Malaria test results

144. The remaining elements, falling under group b), would appear to be:

9.3 – laboratory of origin

9.5 – laboratory ID number

9.7 – facility from where the patient was referred

145. The Commissioner has first considered the requested elements falling under group a). She notes PHE's various submissions in which it appears to argue that, since Ebola is a dangerous pathogen, releasing any information about the samples would risk national security. While there may be a sufficiently strong argument for withholding the current locations of Ebola samples (this is discussed further below) PHE has not persuaded the Commissioner that releasing, for example, the *dates* a large number of people were hospitalised, or the *gender* or *ages* of those hospitalised, would put national security at risk. The Commissioner has decided that the information requested under group a) does not engage the exemption at section 24(1) of the FOIA. Since section 24(1) is not engaged with respect to these elements it has not been necessary to consider the public interest. Since PHE had broadly alluded to section 40 in its internal review response, the Commissioner has, however, considered whether this particular information can be categorised as personal data. This is discussed in the 'Section 40' section of this notice.

146. With regard to the elements falling under group b) - 9.3, 9.5 and 9.7 - the Commissioner considers that this information would indicate where Ebola samples may potentially be located.

147. The Ebola virus is a 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). If information was disclosed that would reveal what research institutions might hold Ebola samples, samples may be at risk, albeit slight, of becoming available to unauthorised individuals – including potential terrorists. This 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 are held, or might be held, in the UK and elsewhere should not be disclosed to the public at large, under the FOIA. The Commissioner has decided that PHE is correct to find that the information engages the exemption under section 24(1) of the FOIA.

148. The complainant has not put forward any public interest arguments that would indicate a public interest in releasing this information that outweighs the risk, albeit slight, to national security of such a release. The Commissioner is satisfied that the public interest in ensuring that unauthorised individuals do not gain access to the Ebola virus with a view to attacking UK citizens, or the citizens of other countries, outweighs any public interest in PHE being shown to be open and

transparent. As such, the Commissioner considers the public interest favours withholding this information under section 24(1).

149. Request 14 is for:

"What processes did PHE implement to keep tracks of the samples in its possession? Please send any documents that outline those processes"

150. PHE has now released to the complainant two documents that it considers fall within the scope of this request: '*Receipt and transport of clinical samples*' and '*Transport and storage of material in laboratory*'.

151. PHE has redacted from these documents information that it considers would release information about the possible location(s) of Ebola samples. It has also redacted information that it considers is the personal data of third persons. That particular matter is discussed under the 'Section 40' section of this notice.

152. The Commissioner has reviewed the final redactions contained in the two documents above, which PHE provided to her on 19 October 2018. From the context around the redacted information, she is prepared to accept that the some of the redacted information concerns the possible locations of Ebola samples: either directly, such as the name of a particular organisation, or indirectly, such as identifying information that might broadly indicate the name of a particular organisation. For the reasons given in her discussion of request 9, the Commissioner is satisfied that information that identifies the location where Ebola samples is stored, within the information released in response to request 14, is exempt information under section 24(1). Such information should be protected in order to safeguard national security.

153. In the absence of any public interest argument for release – other than a general public interest in PHE being transparent – the Commissioner again finds that there is a stronger public interest in the information being withheld, in order to protect public safety and national security.

154. Finally, request 19 is for:

"Please send us the filled tables that researchers have submitted to request samples from PHE's Ebola biobank"

155. As has been referenced multiple times in this notice, PHE's response to the complainant and its internal review response were ambiguous. It did not refer to requests individually but indicated only that it did

not hold some information and that some information was exempt under either section 24(1) or 40(2).

156. In its 12 June 2018 submission to the Commissioner, with regard to request 19, PHE re-stated that the Ebola virus is a dangerous pathogen and any samples or cultures are managed under appropriate security arrangements to prevent misuse. PHE said it is therefore relying on section 24(1), and section 40(2) as some of the information is the personal data of third persons. PHE provided no further explanation than that and, despite the Commissioner having first asked for it on 9 April 2018, PHE did not provide her with a copy of the information it was withholding. The Commissioner therefore had to ask PHE again to provide the withheld information so that she could make a judgement on whether that information attracted section 24(1) and 40(2). PHE indicated to the Commissioner that it was not prepared to release this information to her.

157. The Commissioner therefore had to discuss the matter of the withheld information with PHE in a telephone conversation on 22 June 2018. PHE broadly described the withheld information to her and the Commissioner acknowledges that the application forms in question were not at hand at that point. PHE explained that the tables requested in request 19 gave names and contact details of individuals and associated research establishments and details of the proposed research. In its subsequent submission of 21 August 2018 PHE has confirmed its reliance on section 24(1) and 40(2) with regard to this request.

158. Reviewing the '*Access Guidelines and Application Form'* document, it became evident that the application form template contained other tables than those mentioned in the earlier telephone conversation. Tables included in the form are: '1. Samples Requested', '2. Title of Proposal', '3. Study Team', '4. Background', '5. Summary of the Research with Overview of Methods', '6. Database Variables (incorrectly mis-labelled as '5')', '7. Resource Required and Available Funding' and '8. Biosafety and Biosecurity'.

159. The complainant's request is quite clearly for any completed applications to the Biobank that PHE may have held at the time of the request.

160. The Commissioner initiated another telephone conversation with PHE to discuss this request as it was not clear to her why, if it was in fact held, some of the information in the application forms would engage the section 24(1) exemption.

161. On 1 October 2018, PHE confirmed to the Commissioner that, at the time of the request, it held five completed applications forms that had been submitted to the Biobank. It then provided these to the Commissioner and indicated that it would release these to the complainant with researchers' names withheld under section 40(2) and institutions' names and any information that would potentially identify an institution withheld under section 24(1).

162. The Commissioner is satisfied that the names of institutions and any other identifying information about those institutions can be withheld from the application forms under section 24(1) for the reasons given above; namely that it would identify where Ebola samples are located. Again, she is satisfied that the public interest favours maintaining the exemption. The section 40 aspect is discussed below.

Section 40 – personal data

163. PHE first referred to section 40 in its internal review dated 28 November 2017; at that point the Data Protection Act 1998 ('the DPA') was still in force. PHE has redacted certain information from the information it has released in response to request 14 and request 19 under section 40(2), as it says it is the personal data of third persons. The Commissioner has also considered whether the information requested in the group a) elements of request 9 can be categorised as personal data which would be exempt from release under section 40(2).

164. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and the conditions under either section 40(3) or 40(4) are also satisfied. The Commissioner has therefore first considered whether the information in question can be categorised as personal data.

Is the information personal data?

165. The DPA says that for information to constitute personal data it must relate to a living individual and that individual must be identifiable.

166. Information will 'relate to' a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

167. The information requested in the group a) elements of request 9 is associated with patients involved in the Ebola crisis. However, given the volume of patients involved (which the Commissioner understands to be in the 1000s) and the nature of the categories of information

that have been requested, the Commissioner does not consider that a specific person or people could be identified if that information was to be released. The Commissioner is therefore satisfied that the information in group a) of request 9 cannot be categorised as personal data. It is therefore not necessary to go on to consider whether any of the conditions under section 40(3) or 40(4) have been met with regards to this particular information.

168. The withheld information with regard to requests 14 and 19 is the names of particular individuals. The Commissioner is satisfied that an individual's name relates to them and that they can be identified from it. She is therefore satisfied that this information can be categorised as personal data. She has gone on to consider whether any of the conditions under section 40(3) or section 40(4) apply.

Is a condition under section 40(3) or 40(4) satisfied?

169. Under section 40(3)(a) of the FOIA disclosing personal data would contravene (i) any of the data protection principles or (ii) section 10 of the DPA (right to prevent processing likely to cause damage or distress).

170. PHE's explanation for its application of section 40(2) is scant, to say the least. Drawing principally on information it has provided to her in conversation, the Commissioner has considered whether disclosing the information in question would not be fair or lawful and would therefore contravene the first data protection principle.

171. In assessing fairness, the Commissioner considers whether the information relates to the public or private life of the individual; whether the individual has consented to their personal data being released, their reasonable expectations about what will happen to their personal data and the consequence of disclosure on the individual concerned.

172. The Commissioner understands that the information in question concerns particular staff and the names of researchers from other institutions; as such the information relates to these individuals' professional life. However, the Commissioner further understands that these individuals are not senior managers within their respective organisations and, as such, would not have the expectation that their names might be released in response to an FOIA request. It follows that to release their names into the public domain may well cause those individuals a degree of distress or damage.

173. Despite the above, the withheld information may still be disclosed if there is a compelling public interest in doing so that outweighs the

legitimate interests of the data subjects; that is, the individuals concerned in this case. The Commissioner has not been presented with any public interest arguments to support the position that the names of the individuals concerned should be released.

174. The Commissioner is therefore satisfied that it would not be fair to release the withheld information under the FOIA: the individuals concerned would have the reasonable expectation that their personal data would not to be released in response to an FOIA request and there are no public interest arguments for disclosure that would override those individuals' rights and freedoms. Disclosing the information would therefore contravene the first data protection principle and a condition under section 40(3) has been met.

175. The Commissioner is satisfied that PHE can withhold some of the information it has redacted from the information it released in response to requests 14 and 19 under section 40(2). The information is the personal data of third persons and a condition under section 40(3) is satisfied because releasing it would breach the first data protection principle. Because a condition under section 40(3) has been met, it has not been necessary to consider the condition under section 40(4).

Section 17 – refusing a request

176. 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).

177. 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.

178. The Commissioner has published guidance on writing a refusal notice[2]. 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

[2] https://ico.org.uk/media/for-organisations/documents/1211/refusing_a_request_writing_a_refusal_notice_foi.pdf

give the requester a real understanding of why the public authority has chosen not to release particular information.

179. PHE's reliance on section 24(1) and 40(2) with regard to requests 9, 14 and 19 specifically was confirmed during the course of the Commissioner's investigation. As has been discussed, PHE's response and internal review response to the complainant made broad references to section 24(1) (and 40(2)) but did not link the exemptions to any specific requests.

180. The Commissioner therefore finds that PHE breached section 17(1) with regard to requests 9, 14 and 19 as it did not provide the complainant with an adequate refusal notice that specifically addressed each of these requests.

181. PHE did not put forward any public interest arguments in its responses to the complainant with regard to its reliance on section 24(1) and therefore also breached section 17(3) of the FOIA.

Other Matters

Internal review

182. As the Commissioner explained in FS50713226, 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/or to address any arguments or points the applicant has raised. If he or she was dissatisfied with the authority's original response, an applicant may well be prepared to accept the authority's position if he or she then receives a thorough and well explained or argued review response.

183. The Commissioner does appreciate that the complainant in this case submitted a high number of separate requests to PHE at the same time and that this would make the job of providing a response more complex. That said, as with the internal review PHE provided in FS50713226, the Commissioner is concerned about the internal review response PHE provided in the current case, which she considers to have been inadequate.

184. First, contrary to what it had stated in its review, in its response PHE had not stated that it holds some of the requested information and detailed which data items are held. It had first stated that it holds some information (without specifying what) and then stated that, under section 1(1)(a) it does not hold the majority of the requested information (again, without linking this statement to specific requests).

185. Second, in its review PHE seems to have suggested that it had invoked section 40(2) in its response to the complainant. In fact, it had not referred to section 40(2) in its response and PHE's reliance on this exemption emerged in the internal review.

186. Third, PHE confirmed that it was satisfied with its application of "the exemptions" by which the Commissioner understands PHE to have meant section 40(2) and section 24(1). The complainant had queried PHE's application of section 24(1) – as it appeared to him - to all his requests. However PHE provided no further explanation as to its reliance on this exemption; did not identify to which specific requests it had applied this exemption and, again, did not provide any public interest arguments associated with section 24(1).

187. As with FS50713226 the review response PHE provided on 28 November 2017 gives the impression that it had not given any of the requests the re-consideration that each warranted. Contrary to what it had stated in its review, PHE had clearly not fully addressed the complainant's requests. Consequently the complainant again remained dissatisfied and submitted this second complaint to the Commissioner.

Submissions to the Commissioner

188. The Commissioner had requested separate submissions from PHE for this complaint and for FS50713226. She first wrote to PHE about the current case on 9 April 2018 and, as is usual, gave PHE 20 working days to provide a submission.

189. PHE finally provided one submission on 25 May 2018, the focus of which appeared to be FS50713226, although both reference numbers were given in its submission. This necessitated the Commissioner requiring clarification from PHE on its position regarding FS50715751. PHE provided this further submission on 12 June 2018. This means that PHE had effectively had 45 working days in which to prepare a thorough and well-argued submission. This submission should have provided the Commissioner with all the information she needed to make her decisions.

190. From the submission PHE provided to the Commissioner on 12 June 2018, it appeared that PHE's position was that it does not hold the information the complainant has requested and it did not hold this information because it was holding it on behalf of another person (ie MOHS). The Commissioner had sent PHE a series of questions on 9 April 2018 that would help her determine if PHE held the information, and held it on its own behalf, and she had directed PHE to her appropriate published guidance.

191. 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.

192. In its 12 June 2018 submission PHE simply stated that it does not hold information within the scope of these requests, without

addressing the relevant guidance or providing any explanation on how it had reached this conclusion.

193. It was therefore necessary for the Commissioner to go back to PHE for a third time as PHE had simply asserted that it did not hold particular information without providing supporting explanations. The Commissioner asked PHE again to explain why it was sure it holds no information relevant to particular requests. The Commissioner again did not receive a satisfactory submission in response and remained dissatisfied following a telephone discussion with PHE on 22 June 2018.

194. As with FS50713226, PHE had given the Commissioner the impression that it had not considered each request individually or carefully; that it had an interpretation of some of the requests that was not correct, and that it had not carried out adequate searches for any relevant information – despite having had more than three months to do so by this point. The Commissioner therefore went back to PHE again and required it to re-consider particular requests in the light of her discussion with it, and to carry out appropriate searches.

195. The Commissioner again did not receive a satisfactory response from PHE and so it was that the Information Notice became necessary.

196. When the Commissioner first writes to a public authority at the start of her investigation, she asks the authority a series of relevant questions, considered answers to which should provide her, in most cases, with all the information she needs to come to a decision. This submission should be provided to the Commissioner by the required deadline. In this case, the Commissioner first wrote to PHE on 9 April 2018. In the subsequent six months, the Commissioner has had to go back to PHE for clarification or further explanation on multiple occasions. PHE was still identifying relevant information that it holds in October 2018. It should have identified this information at the point it responded to the complainant's request on 20 October 2017 or following its internal review in November 2017.

197. The Commissioner notes that PHE has offered no explanation as to why, having been adamant it did not hold any information within the scope of most of the complainant's requests in this case and FS50713226, it has subsequently identified a not insignificant amount of relevant information.

198. PHE should be aware that the Commissioner is unlikely to demonstrate the same level of patience in any future investigation and, in future cases, she is prepared to make her decision based on the first submission she receives from PHE.

Information notice

199. An Information Notice (IN) is a formal legal document that it is within the Commissioner's power to serve on a public authority, under section 51 of the FOIA. The Commissioner will serve an IN in order to be furnished with information she needs to enforce the requirements of the Act. An IN clearly states that failure by the authority to comply with steps detailed in the IN may be dealt with as a contempt of court.

200. The IN the Commissioner had served on PHE required it to consider all the requests again; to confirm if it held relevant information; to confirm what, if any, exemption it was withholding information under and to provide justification for relying on that exemption including public interest arguments. As is usual, the Commissioner gave PHE 30 calendar days to provide its response to that IN. PHE requested a further seven days. PHE therefore had 37 days in which to prepare a thorough and well-considered response to the IN.

201. The IN response that PHE finally provided to the Commissioner was, again, inadequate. It was necessary for the Commissioner to go back to PHE for further explanation a number of times and PHE was still identifying relevant information that it holds at 6 October 2018. On this occasion, given the very significant delays that PHE had caused during the course of the investigation, the Commissioner's priority was to ensure the complainant received any relevant information PHE holds, as soon as possible.

202. It is not normally necessary to serve an IN on a public authority and the Commissioner would not expect to have to serve another on PHE in the course of any future investigations. However, if such a course of action is necessary and if PHE again does not comply with the IN, the Commissioner will be prepared more readily to deal with the matter as a contempt of court.

Right of appeal

203. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

204. 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.

205. 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

Pamela Clements
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