



# Management Committee

<b>Title of meeting</b>	Management Committee
<b>Date</b>	Monday 27 September 2021
<b>Sponsor</b>	Michael Brodie
<b>Presenter</b>	[REDACTED]
<b>Title of paper</b>	Review of PHE's handling of FOI requests from Mr EF between August 2017 and September 2021

## 1. Purpose of the paper

The purpose of the paper is to set out findings from an investigation into the handling of several Freedom of Information Act and Data Protection Act requests from Mr EF, an investigative journalist, which prompted severe criticism of Public Health England on 25 May 2021 by Anthony Snelson, Judge of the First-tier Tribunal (Information Rights) (See Annex A). In light of that criticism it is right and proper to examine the current handling of requests for information within PHE and to enhance existing systems where necessary to reduce the risk of reoccurrence.

The Management Committee should note that, in recent correspondence, Mr EF has indicated he is writing an article about PHE's handling of his requests for information. Mr EF has an open subject access request for copies of his personal information which is in progress with the Information Rights Team. Additionally, Mr EF lodged a complaint with the Information Commissioner's Office (ICO) on his latest FOI request for correspondence associated with the Tribunal case and any lessons learned information. The Information Rights Team await communication from the ICO on material required to address the complaint. There therefore exists a risk of further negative publicity.

## 2. Recommendation

The Management Committee is asked to **note** the investigation findings set out below.

## 3. Background

This investigation was undertaken by the Senior Strategy Adviser for Complaints who was not involved in the handling of these requests at any stage. A search on Mr EF's surname in Outlook brings up almost 1,500 emails. The findings below arise from a reading of those emails which contain substantive material and information. However, a formal and detailed quality assurance audit has not been conducted.

By way of context, the Information Rights Team have handled 6,954 information requests between 1 April 2017 and 31 March 2021. The team's logs indicate there have been 212 instances of Internal Reviews being conducted (representing 3.05% of all original requests received). The ICO have issued 8 Decision Notices to PHE during this period, two associated with this matter. Four of the 8 decisions were not upheld or were partially not upheld, illustrating that PHE's approach was correct.

In August 2017 Mr EF submitted two initial requests for information (comprising 20 questions) about PHE's involvement in the West Africa Ebola incident in 2014 / 2015 under the Freedom of Information Act 2000 (FOIA). He has also submitted requests for personal information under the Data Protection Act 1998. Some information and documents held by PHE about the incident were highly sensitive and Section 24 of the FOIA (national security) was applied to parts of the material with other sensitive information relating to individual members of staff, external researchers, and research institutes being withheld under Section 40 (personal information).

Mr EF requested Internal Reviews of the Information Rights Team's handling of all his requests and, dissatisfied with the outcomes, submitted complaints to the ICO. The ICO issued Decision Notices and Information Notices during their investigation into Mr EF's complaints, measures necessary when a public body has not provided material or information to the satisfaction of the ICO.

#### **4. Findings**

Based on the subject matter of Mr EF's requests, PHE's disclosure position in the early stages (2017 and 2018) preceded the internal discovery process. This impeded an objective and comprehensive scanning by the Information Rights Team of available material from appropriate sources within PHE.

Given the sensitivity of the material, there was understandable concern about the initial requests received from Mr EF which centred on the transportation and storage of Ebola samples. One early contributor expressed the view that "*a note to the appropriate security authorities would be helpful*" which reflects a lack of understanding of the FOIA and PHE's obligations under it. After repeated application by Mr EF and / or the ICO, much of the material was eventually disclosed with relevant exemptions being applied to redact sensitive information under Sections 24 and 40.

Material relating to the Ebola incident does not appear to have been stored in a central repository but was obtained over time from various members of PHE staff who held the material in personal email accounts. This contributed to delays and prevented Information Rights staff in the early stages being able to assess what material was held.

PHE's responses to the first two requests from Mr EF, comprising 20 distinct questions, lacked specificity and did not adequately set out the PHE disclosure position by reference to appropriate FOIA legislation. PHE confirmed they had "interpreted" the content of two of Mr EF's questions. The appropriate action would have been to seek clarification from Mr EF under the relevant FOIA legislation prior to any response being issued.

When documents were released with redactions having been applied under Section 40 (Personal information), Mr EF immediately recognised that some

redacted parts of the documents did not constitute personal information and he appropriately challenged the use of the Section 40 exemption.

At times senior leaders controlled much of PHE's approach. Junior members of staff were frequently referring to senior staff for direction. The contrast between the autonomy afforded to the Case Officers' handling of the cases in 2017 / 2019 and 2020 / 2021 is marked and reflects the increased levels of FOIA experience and knowledge which have developed within the Information Rights Team since 2017 to 2019.

Deadlines of 20 working days set by the ICO for response from PHE were not met on every occasion. PHE did negotiate extensions to some of the deadlines but there are examples of the ICO Case Officer having to chase for updates. The ICO did at times set unreasonable deadlines for response from PHE when the original 20-day timeframe had expired. Requests for background information (for example, on how PHE had conducted internal searches for relevant material) failed to satisfy the ICO and later necessitated a more forensic approach to preparing submissions for the ICO, on occasion with the support of external legal firms.

The cumulative effect of all these characteristics gave rise to misgivings on the part of both Mr EF and the ICO which were not adequately addressed at the first opportunity in PHE's responses.

It should be noted also that Mr EF was, on the whole, very civil and polite in his correspondence. He frequently had to chase for acknowledgements and responses to previous emails and experienced significant delays in obtaining responses. The concerns he raised about the content and quality of PHE's initial responses to his requests were mostly supported by the questions put to PHE by the ICO and the directions the ICO set down in the formal Information and Decision Notices.

## **Conclusions**

This case was very much an exception in terms of its complexity, sensitive subject matter, protracted nature, and inadequate case-handling. There was a clear 'snowball effect' of additional labour and costs for PHE arising from the sub-standard handling of the original requests from Mr EF. Errors in that handling gave rise to justified concerns for both Mr EF and the ICO that PHE was not fulfilling its statutory obligations.

Risks of re-occurrence of this type of outcome are mitigated by the following measures:

- The Information Rights Team has grown substantially since March 2020 and now comprises 8 officers and a manager. There is far greater depth of experience and knowledge of information rights within the team than there was when Mr EF's requests were first received in 2017. The centralised team has delegated authority to progress information rights requests.
- A Quality Assurance Framework has been embedded in the team's work since 1 April 2021. A sample of approximately 15% of closed cases are

randomly selected and assessed according to a QA scorecard each month. The scorecard measures many of the aspects identified in PHE's poor handling of these requests including statutory requirements, timeliness compliance, information governance, and overall quality.

- Bespoke analyses of case progression are periodically undertaken to share learning with the Information Rights Team and drive further improvements.
- An upgraded process document has been developed which sets out processes members of the team are expected to follow in progressing information requests.
- The Information Rights Team now conduct regular awareness raising presentations with staff across the organisation.

### **Recommendations**

Senior leadership are asked to explore options for the development and implementation of an organisation-wide Electronic Documents and Records Management System. This would enable timely and consistent access to material and reduce the burden on teams when asked to provide input and information to the Information Rights Team.

### **Authors:**

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September, 2021

## **Annex A**

### **12 May 2021 Decision of First-tier Tribunal (Information Rights), paragraph 43**

*“Finally, we cannot leave this case without passing comment on PHE’s behaviour in response to Mr [EF’s] requests and the Commissioner’s many communications. We have quoted from the DN [Decision Notice] at some length because it tells an extraordinary and disturbing story of a woeful failure on the part of a substantial public authority to live up to its obligations in relation to freedom of information. It is hard to see its conduct, towards Mr [EF] and the Commissioner, as anything other than contemptuous. If that perception is unfounded, it might be thought that the only other explanation lies in a most unhealthy combination of operational incompetence and inadequate leadership. We profoundly hope that PHE will make learning lessons and improving its systems and practices a high priority. What happened here should never be repeated.”*