

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2023

Public Authority: UK Health Security Agency (Executive Agency of the Department of Health and Social Care)

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to an outbreak of E.coli. The UK Health Security Agency (UKHSA) refused to provide the information, citing section 22 of FOIA – future publication.
2. The Commissioner's decision is that the UKHSA correctly applied section 22 of FOIA to parts 1-7 of the request. However, regarding parts 8, 9 and 10, the UKHSA has breached section 10 of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 6 December 2022 (received on 7 December 2022), the complainant wrote to UKHSA and requested information in the following terms:

“Re: Large Outbreak of E.coli O157

To whom this may concern,

Please could you supply me with the following under the Freedom of Information Act about the large outbreak of E.coli O157 that was

reported on the 23rd September this year, in Food Safety News. This is a daily American newsletter, which stated there were 192 cases in the UK since early September. Link below:
https://www.foodsafetynews.com/2022/09/Nearly_200_sick_in_UK_E_coli_O157_outbreak_|_Food_Safety_News

1. The current total number of confirmed cases of E.coli O157 including those in England, Scotland, Northern Ireland and Wales, in relation to this outbreak. I note that the article in the link above, gave this information at that time, which appears to have been disclosed by the UKHSA. Phage type(s) would also be helpful in relation to question 1.
2. Is there any other non O157 STEC's that have been linked to this outbreak in England?
3. Have there been any cases of HUS linked to this outbreak in England and have there been any deaths?
4. Is there any other non O157 STEC's that have been linked to this outbreak in Scotland, Northern Ireland and Wales?
5. Have there been any cases of HUS or deaths linked to this outbreak in Scotland, Northern Ireland and Wales?
6. How many patients who had contracted E.coli O157 or non O157 STEC in this outbreak required medical or hospital treatment?
7. A breakdown of age & sex of those involved in this outbreak? I note this information may possibly have been gathered from some questionnaires and telephone calls to those affected by this outbreak.
8. Do the UKHSA now consider this outbreak to be over?
9. Has the suspected outbreak been linked or considered to be from food and or an environmental source?
10. If from a food or food products, who distributed the product or products and who if different from the distributor(s) sold the product or products to the final consumer?
11. Will the UKHSA be publishing an outbreak investigation report into this outbreak, as has sometimes previously occurred in some other outbreaks of STEC and will this be with full disclosure & full transparency of all the facts and information discovered during this outbreak?"

5. UKHSA responded on 4 January 2023. It stated that it held the requested information but that it was exempt under section 22 of FOIA and that the public interest favoured non-disclosure.
6. The complainant requested an internal review on 11 January 2023 on the grounds of public interest and because they believed that the information had already been provided to 'Food Safety News' by the UKHSA.
7. Following an internal review UKHSA wrote to the complainant on 8 February 2023. It stated that it was upholding its citing of section 22 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 13 February 2023 to complain about the way their request for information had been handled.
9. UKHSA provided a response to the Commissioner on 20 March 2023 and another response on 30 March 2023, after further queries.
10. The Commissioner outlined to the complainant UKHSA's position that it intended to publish the requested information within the next three months, though this timeframe was potentially subject to delay. However, the complainant was not content regarding any delay in view of the public interest.
11. Additionally, the Commissioner telephoned UKHSA on 9 May 2023 because its latest response to him had included the fact that it did not hold information in relation to questions 4, 5, 9, and 10. He asked if the complainant had been made aware of this matter. UKHSA agreed to send a new response as soon as possible but needed further time to verify that this was the case. The Commissioner also expressed the view that it seemed unlikely that what UKHSA intended to publish would necessarily be the entirety of the information requested by the complainant's questions. UKHSA agreed to provide a further response to the Commissioner.
12. On 19 May 2023 UKHSA wrote to the Commissioner again. In this response UKHSA stated that it intended to respond again to the complainant to provide the information requested at part 8 of the request. It also intended to confirm that it did not hold information relating to parts 9 and 10. However it did, in fact, transpire that it held information at parts 4 and 5 of the request. The Commissioner asked to be copied into this revised response to the complainant.

13. UKHSA responded again to the complainant as indicated in the paragraph above, on 19 May 2023. It confirmed that it held some of the requested information but explained that it did not hold information regarding the questions at parts 9 and 10 of the request. UKHSA referred the complainant to "the Food Standards Agency as holders of the food chain supply information" and provided contact details. It also provided a response to part 8 of the request.
14. The Commissioner considers that the scope of his investigation is to consider UKHSA's citing of section 22 of FOIA to parts 1-7 of the request. He does not intend to consider part 11 of the request for the reasons given below.

Reasons for decision

Section 22 – Information intended for future publication

15. Section 22(1) of the FOIA states that:

"Information is exempt information if –

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)".

16. The Commissioner's guidance says,

"For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that it must have a settled expectation that the information will be published at some future date."¹

¹ [information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf \(ico.org.uk\)](#)

However, there does not have to be a set publication date.

17. The guidance goes on to state that the information the public authority intends to publish must be the specific information that has been requested.
18. Section 22(1) is also qualified by a public interest test.
19. Firstly, the Commissioner does not intend to consider part 11 of the request, other than to say that an answer should have been provided in the refusal notice rather than UKHSA apparently relying on the citing of the exemption as providing an implicit response. Clearly part 11 did not fall under section 22 of FOIA but the fact that a report detailing the outbreak and answering the other parts of the request was going to be published, in effect answered the question.
20. UKHSA has provided the withheld information to the Commissioner. It maintains that it has "consulted with our gastrointestinal infections team who have advised that a full outbreak report detailing all the information requested" by the complainant "is intended for future publication". UKHSA hopes that this information will be published within two months but is "reliant on external partners contributing to the report" so it cannot guarantee this timeframe. However, it maintains its position.
21. The Commissioner had also asked questions about the complainant's belief that some of the requested information has already been released to 'Food Safety News' and an article had been published on the subject. UKHSA suggests that the information "could have been obtained from publications from the Food Standards Agency".
22. The complainant who has had many years of experience in matters relating to E-coli states that, in fact, there are direct quotes from an individual from UKHSA in the article:

'Dr. Lesley Larkin, head of surveillance, gastrointestinal infections and food safety at the UK Health Security Agency (UKHSA), said a rise in E. coli cases notified to public health surveillance systems had been seen in recent weeks.

"The latest data shows early indications of a return back to expected levels for this time of year but we are continuing to closely monitor the situation. Whole genome sequencing shows us that this increase in reports is being driven by a particular strain of STEC O157 which has caused an outbreak, and we are investigating potential causes with public health and food safety experts in the UK and Ireland," she said.

"Making sure you wash your hands with soap and water is the best way to stop this bug from spreading. When preparing food make sure you thoroughly wash salad, fruit and vegetables and follow all the safe cooking instructions for meat."²

23. The complainant argues that UKHSA has not rebutted the article. "If this article was to be factually incorrect or fictitious by the UKHSA, they have this ability through their communications department and have a director of communications." They also point out that UKHSA's assertion to the Commissioner that the information could have been obtained from Food Standards Agency (FSA) articles is false as, he states, there was no information published until 7 December 2022 (10 weeks later) when a paper from the Chief Executive of the FSA was delivered which stated the following:

"Incidents

1. In my final report of 2022, I will begin with an update on current incidents.

Working with Food Standards Scotland (FSS), the UK Health Security Agency (UKHSA) and other government departments, we are investigating what the UKHSA has reported is the largest **E. coli** STEC (Shiga toxin-producing E. coli) outbreak since Whole Genome Sequencing (WGS) began in 2014. To date, there have been a total of 259 confirmed cases identified in the UK with sample dates ranging between 23 August-29 October 2022. The majority of these cases were reported in August and early September, however the situation has since stabilised and there have been no further cases reported. Investigations suggest UK produced lettuce and salad leaves could have been implicated but it is too early to be certain that they were the source of illness. The ongoing supply chain investigation is extensive and complex, and we continue to look for the root cause and where in the supply chain the food safety risk occurred."

24. The complainant's view is that UKHSA is not entitled to withhold information under section 22 of FOIA that it had already disclosed. Whilst having no objection to the information being published in 'Food Safety News', "it makes a mockery of them forcing me into asking for a FOI request for this information unless Food Safety News or their reporter submitted a FOI request".

² [Nearly 200 sick in UK E. coli O157 outbreak | Food Safety News](#)

25. After UKHSA had responded again to the complainant on 19 May 2023 they questioned how any reasonable person could have any confidence in the statement. The complainant points to the way that UKHSA had dealt with the FOI request up to that date which "does not inspire any confidence or belief in what they are saying". They question whether UKHSA had had any intention of publishing the information on its website as this was not its normal practice and was doing it to prevent "further embarrassment on their part". The complainant does not accept that UKHSA is entitled to withhold information that they believe had already been disclosed to 'Food Safety News'.
26. On 19 May 2023 UKHSA also confirmed to the Commissioner that the final published report will provide all the requested details. UKHSA provided a link to information that the Commissioner requested as an example of a similar published report on its website: [Listeria outbreak investigation: hospital-provided pre-prepared sandwiches, UK May to July 2019 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).
27. Although the Commissioner understands the complainant's opinion that UKHSA provided information to the media relating to this information, he takes the view that, even if this had been the case, the information in the public domain does not answer all the remaining questions asked in the information request. Additionally, the information quoted from 'Food Safety News' confirms an outbreak but was some time before the information request, by which point the details may have changed. It is unclear where 'Food Safety News' obtained all the information but clearly quotes some views from the UKHSA.
28. The quote the complainant provides from the FSA is more detailed but was provided to underpin their view that the article in 'Food Safety News' was not obtained from it as it was published many weeks after the article. It was also published just after the request was made.
29. The Commissioner has been at pains to establish that UKHSA does intend to publish all the information relevant to the request that it holds. This means information relating to parts 1-7. He has now been assured that the published information will provide the information relating to these parts. This information was intended for publication at the time of the request, it is intended for publication within two months, though this timeframe cannot be guaranteed. The exemption is therefore engaged.

Public interest test

30. The Commissioner's guidance points out that "there could be instances when it is reasonable to withhold the information under section 22, but

the public interest in disclosure outweighs the public interest in withholding it"³.

31. FOIA does not specify the factors that should be considered in balancing the public interest. However, the public interest in releasing the information will often be stronger if the publication date is far in the future or where it isn't set.

Public interest factors in favour of disclosing the requested information

32. The complainant argues that the refusal to disclose the information to them is not transparent and "call[s] into question the impartiality of the UKHSA when making such decisions". The complainant pointed out that they had not asked when the report was going to be published but if it was and whether it would have "full transparency". They provided the Commissioner with some information regarding a "similar outbreak" from 2020 which, the complainant suggests, may be connected.
33. They also raise the issue of the comments made by individuals in 'Food Safety News' which indicate that there is a public interest in disclosure. The individuals "involved were clearly disappointed with the response of the UKHSA and the FSA".

Public interest factors in favour of maintaining the exemption

34. UKHSA acknowledges "that there is strong public interest in information being made as freely available as possible, and that disclosure leads to greater transparency in Government". Conversely, "there is also very strong public interest in ensuring that information is made available to everyone at the same time, thereby ensuring equity of access".
35. If UKHSA was to have released the information at the point it was requested, it "may also interfere with our established process for publishing information to ensure that only accurate and validated data is released". The public interest is best served by its future publication.

Balance of the public interest

36. In this case the publication date was seven months away from the date of the request, though it seems that the complainant was not informed of this likely timescale. The publication date is an approximate one but is

³ [information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf \(ico.org.uk\)](https://ico.org.uk/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf)

currently only two months away. The Commissioner understands the complainant's view that this is important public health information but it is also important to be able to consider in detail what occurred and collate the relevant facts accurately, once they have been validated. In this instance, he does not accept that the public interest in disclosure overrides this.

Procedural matters

37. Section 10 of the FOIA requires a public authority to disclose non-exempt information within 20 working days of receiving a request.
38. UKHSA breached section 10(1) of FOIA in respect of parts 8, 9 and 10 of the request by not complying with section 1(1) within the 20 working day statutory timeframe.

Other matters

39. Although the Commissioner has accepted that UKHSA has cited section 22 of FOIA correctly, he is concerned at the way this request has been handled. The internal review should have established what information was held or not held. After the Commissioner began his investigation there was some inaccuracy in its responses. The Commissioner would expect UKHSA to ensure that its responses are accurate as it had many opportunities to provide an accurate response but did not finally do so until five months after the request, four months after the time for compliance.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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