

Written evidence from Dr Mike Sheaff¹ (FOI 27)

Public Administration and Constitutional Affairs Committee The Cabinet Office Freedom of Information Clearing House inquiry

Introduction and background

In this submission I describe my experience of having a FOI request rejected by the Department of Health in a manner that indicated a concerted monitoring of my requests across different public authorities. The inquiry's remit refers to the "coordination of the handling of Freedom of Information cases", and while I cannot comment on the particular organisational arrangements involved in this surveillance, I believe it undermined the principle of public access to information. First, I provide some background to this request.

Until retirement from full-time employment in December 2020, I was an Associate Professor of Sociology at the University of Plymouth. My research and teaching focused on health-related issues, from an early research publication on competitive tendering in the NHS (Sheaff, 1988) to a text book for use by health profession students (Sheaff, 2005).

More recently, my research has involved use of freedom of information requests (e.g. Sheaff, 2017; Sheaff, 2019 & Sheaff, 2020). My interest in FOI was first stimulated by experiences as Non-Executive Vice-Chair of Plymouth Primary Care Trust, when raising questions with the Strategic Health Authority about a failed NHS contract (around the time of the "Lansley reforms").

Meeting many obstacles, and finding that as a non-executive director I was exempt from protection under the Public Interest Disclosure Act, I was also told by the Parliamentary & Health Service Ombudsman that my concerns fell outside their remit. Frustratingly, given the PIDA exemption, the PHSO's explanation for this decision was that it was considered to be a personnel matter given my non-executive role.

I turned to the use of FOI, eventually submitting 23 requests to nine public authorities. As I note elsewhere, "When multiple disclosures from different agencies are combined, these data can have what Monaghan and Hameed (2012) call a mosaic effect; that is, the sum of FOI records released in portions can reveal more than its parts in isolation." (Sheaff, 2020). Two of my requests led to Information Tribunal hearings. Although my appeals were dismissed on the grounds that the information comprised 'personal data', one judgment referred to, "the entirely legitimate purposes of Michael Sheaff's quest for greater transparency and accountability" (Sheaff and The Information Commissioner & The Department of Health, EA/2014/0005).

In 2015, my then member of parliament (for Plymouth Sutton & Devonport), Oliver Colvile MP sent some of the information disclosed through my requests to Meg Hillier MP, in her role as Chair of the Public Accounts Committee. Ms Hillier wrote to Mr Colvile on 8th January 2016 to explain she had asked the National Audit Office to investigate, but 'despite an extensive records trawl, the Department could only locate limited information.' She added, 'unfortunately, 'some records of enduring value were not identified as such at the time and

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are no longer available'. At the end of her letter, Ms Hiller adds a handwritten note to Mr Colvile, to say, 'I will raise questions about record keeping as a result of your enquiry.'

Below I describe aspects of a request made to the Department of Health, indicating a substantial level of monitoring of other FOI requests I submitted and of other correspondence, including letters sent by Oliver Colvile MP to Ministers. The level of surveillance I fet casts doubt on the accuracy of the government's assertion that, "the consideration of FOI requests is, and remains, applicant-blind. All FOI requests are treated exactly the same, regardless of who the request is from and their occupation." [‘Response to points raised in openDemocracy article, 08/02/21’](#)

The collection of information for use in FOI responses

I became aware of efforts to obstruct my questions in September 2013, when a complaint against me was sent to my employer, the Vice Chancellor of the University of Plymouth. This claimed that the concern I was raising:

‘was originally the subject of an independent review by the Appointments Committee (*sic*). They found no substance to MS’s concerns. Indeed it was highly critical of the way he had raised them. Given MS was dissatisfied with the outcome he asked the Parliamentary Ombudsman, and the Information Commissioner, to review his complaint. Again, they found no substance to MS’s allegations. . . .’ (email from NHSPS to the office of University of Plymouth Vice-Chancellor (UoP VC), 24.09.13. Disclosed by UoP in response to a Subject Access Request).

Given the emphasis being given to the “independent review”, on 15th January 2014 I wrote to the Department of Health, requesting details of the contract for this review, including its terms of reference. On 31st January 2014 DH informed me it was refusing to provide the information on the grounds that, “an authority is not obliged to respond to vexatious requests.”

The letter went on to provide considerable detail of my FOI requests, including those to organisations other than the Department of Health, letters I had sent, and correspondence from Oliver Colvile MP:

“The Department of Health notes that these requests are part of a continued course of action by which you have continued to write in/request information on two key, but clearly linked issues, firstly relating to the Secure Healthcare UK Ltd social enterprise and secondly about an appointments process that had taken place within the NHS South of England. In particular, you have consistently requested information and offered views on named officials (including requests for the personal data of others) as part of an appointments process in the NHS South of England.

“We have noted the total number of requests you have submitted under the FOIA into these two matters. These include 13 initial requests, 2 of these have been internally reviewed by the Department and have been the subject of formal complaints you submitted to the Information Commissioner.

“We also note and take account of that fact that you have written on the same issues to the Department by way of general policy correspondence both from yourself (on 3

occasions) direct and also via your local Member of Parliament (Oliver Colville MP) (on 8 occasions). Department of Health Ministers (Paul Burstow, previous Minister of State for Care Services, Dan Poulter, Parliamentary Under Secretary of State and Norman Lamb, Minister of State for Care and Support) have, as a result, already responded to your MP on these matters on a number of previous occasions.

“As Norman Lamb, Minister of State for Care & Support had explained in March 2013

“I note Mr Sheaff’s continuing concerns. However, these were matters for the NHS organisations involved, and the Appointments Commission, and I am afraid that there is nothing I can add to previous replies with respect to his concerns”.

“We further note that you have submitted specific FOI requests, policy correspondence (including to Department of Health Ministers via Oliver Colville MP) regarding an appointments process within NHS South of England now on 6 occasions. We also acknowledge that you have also requested Subject Access Requests (under the Data Protection Act) from the Department of Health and have written to other public authorities in a concerted attempt to obtain such information, namely the Appointments Commission and NHS South West SHA.”

Not only did this indicate a very substantial level of monitoring to compile such a comprehensive list, this went beyond FOI requests (to different public authorities) to include other correspondence, notably that sent to government ministers by an MP on behalf of a constituent.

Oliver Colville MP wrote to the Health Minister requesting a meeting, receiving this reply:

“You ask that I meet with you and Mr Sheaff to discuss his continuing concerns. I regret I have to decline . . . there is nothing I can usefully add to the various independent investigations that have been conducted on this matter. . . I regret that Mr Sheaff continues to have concerns over this matter, but am of the view that we have devoted as much attention to his concerns as can reasonably be expected under the circumstances.” (Correspondence from Health Minister to Oliver Colville MP, February 2014).

I requested an internal review of DH’s claim that my request was vexatious, making reference to comments by Judge Wikeley in Independent Police Complaints Commission v Information Commissioner (EA/2011/0222):

“the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill-intentioned requests. . . (but) This approach should not be seen as giving licence to public authorities to use section 14 as a means of forestalling genuine attempts to hold them to account. For example, an investigative journalist may make a single request which produces certain information, the contents of which in turn prompts a further request for more information, and so on. Such a series of requests may be reasonable when viewed both individually and in context as a group. The same may also be true of a request made by a private citizen involved in a long-running dispute or exchanges with the public authority.” (para 36).

DH replied on 27th February 2014, upholding its decision in a letter which included these comments:

“In this instance, the Department balanced issues between whether the request would be of significant interest to the wider public at large versus whether the request met any or some of the criteria set under the key 13 indicators.

“In this instance, we concluded that your request (s), put together with other approaches you have made to the Department, meet at least 8 of the criteria under the 13 key indicators. These included:

- 1) burden on the authority;
- 2) personal grudges;
- 3) unreasonable persistence
- 4) frequent or overlapping requests
- 5) scattergun approach
- 6) disproportionate effort
- 7) no obvious intent to obtain information; and
- 8) futile requests. On this latter indicator, we note the ICO’s new guidance states:

“The issue at hand individually affects the requestor and has already been conclusively resolved by the authority or subjected to some form of independent investigation”

I should point out that whilst we are aware that you have submitted FOI requests and other correspondence to other NHS public authorities, these have not to date been taken into account with our decision on engaging s. 14 (1) of the FOIA.”

This indicated something of a shift in the rationale for refusal, suggested in the comment that details of other FOI requests and wider correspondence did not contribute to the Department’s decision. The internal review response continued:

“You subsequently went on to explain further the background and context to your original request, which related back to issues you raised at that time which resulted in an investigation undertaken by the Appointments Commission in 2011 and 2012. I also understand that you referred a formal complaint on the matter to the Health Ombudsman. As you know, both of these investigations had concluded its findings some two years ago, and had exonerated the individuals involved formally closed matters down.

“We consider that the wider public would not be interested in matters that were essentially local NHS issues, rather than of national importance and which were properly investigated and closed down some two years ago. This passage of time also has a bearing on the Department’s view of engaging s. 14(1) of the FOIA. We consider these local matters regarding the NHS South of England were properly investigated, reported on and closed down by the relevant responsible public authorities at the time.

“Finally, you explained that “In the circumstances of this case, with information becoming incrementally available, I do not consider this further request can be described as a, “manifestly unjustified, inappropriate or improper use of FOIA”.

“In reviewing our records regarding your previous FOI requests, we disagree that the Department has been providing information to you “incrementally”. Rather, we have

complied with and have processed each and every valid FOI request within the s. 10 time limits of the FOIA. In addition, we have also provided replies to your Internal Review within the guidance set out from the ICO i.e within 20 working days as normal practice and within 40 working days as an exception. The Department has similarly replied to you on your Subject Access request in compliance with the statutory provisions of the Data Protection Act 1998 (as amended) and has met the Whitehall standard on replies to your general correspondence.

“Finally, may I point out that the FOIA regime is not an appropriate route to enter into further dialogue with the Department in continuing to reflect personal grievances against public authorities who are now no longer in existence.

“The review is now complete”.

My comment on incremental disclosure was of course made in relation to Judge Wikely’s observations in *Independent Police Complaints Commission v Information Commissioner*, not connected with timeliness of responses. But with neither PIDA nor the PHSO allowing complaint routes for non-executive directors, closing the FOI channel eliminated the only available means for investigating legitimate concerns. What struck me at the time was a notable similarity with points made in the complaint against me sent to the Vice-Chancellor of the University of Plymouth four months prior to the first refusal by DH. I could not help thinking this suggest some form of co-ordination and information-sharing.

Conclusion

As previously explained, details of the substantive issue were subsequently published in academic articles. Disclosures from different public bodies revealed that despite some NHS organisations being aware that the contractor in which I was interested was in considerable financial difficulty, the Department of Health made a payment to it of nearly £1.5 million ten days before it went into liquidation. Correspondence from the health minister indicated that the first reference to the organisation’s debts in the Department’s own records came just two days before its collapse. The construction of a mosaic of information from different sources provided an illustration of what Diane Vaughn describes in her analysis of the Challenger disaster as “structural secrecy”, with relevant information failing to cross organisational boundaries.

In her letter to Oliver Colvile MP of 8th January 2016, Meg Hillier MP explained that business units within the Department would decide if records were kept for the current year and the previous six (as required by the Finance Act) or for a period of 25 years, adding, ‘unfortunately, some records of enduring value were not identified as such at the time and are no longer available’.

These documents would therefore presumably have been in existence at the time of my requests in 2013 and 2014. This makes me very concerned that a focus of the Department at that time was the use of an extremely detailed profile of requests and correspondence, from myself and my MP, to impede the use of FOIA.

Although the emphasis given to this information was downplayed in the internal review, surveillance of this kind should generate concern, especially given the subsequent judgment

from the information tribunal referring to “the entirely legitimate purposes of MS’s quest for greater transparency and accountability”.

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