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18 August 2009

Dear Ms Bennett

**FREEDOM OF INFORMATION ACT (FOIA): REQUEST FOR INFORMATION ON THE “THREE INQUIRIES”: AYLING; KERR-HASLAM AND NEALE ENQUIRIES: CASE REF: 421417**

Thank you for your further email dated 13 June requesting further information concerning the Ayling, Kerr-Haslam and Neale Inquiries. I am sorry for the delay in responding to your follow up request, which we have handled as a request for an internal review.

Ms Ling Woo originally wrote on your behalf on 18 May about three inquiries as follows:

*“ I would be grateful if you could answer the following:*

*1. Why the 3 Inquiries were set up under section 2 of the NHS Act 1977 rather than section 84 of the NHS Act 1977? As you will be aware, Inquiries constituted under s2 do not have powers of compulsion, but can write to ask that the Secretary of State use his power to compel witnesses etc.*

2. Was the reason to limit the scope of the Inquiries to local NHS procedures (and thus prevent examination of other agencies such as the GMC)?

3. If so, why did the DH want to limit the scope of the 3 Inquiries in this way?

4. Why did the Secretary of State create the 3 Inquiries to share a Secretariat, legal team and budget (thus pooling resources), yet fail to take the opportunity to create a benchmark for Health Inquiries?

5. Why did the Secretary of State decide not to use the 3 Inquiries to create a benchmark by which to assess patient complaints overall?

6. Why was the Secretary of State not interested in whether information from the 3 Inquiries was connected either within or across organisations?

7. Why were the Inquiries not tasked with assessing culpability?

8. If Inquiries are to be seen as thorough or robust, how can they be if they do not determine what happened in each alleged incident?"

The Department of Health responded as follows:

"I am afraid that Mr or Ms Woo does not say what the three inquiries are. Without this information I am afraid that the Department of Health is unable to comment."

You wrote again to the Department of Health on 19 May as follows:

*"Lord Darzi of Denham (Parliamentary Under-Secretary, Department of Health; Labour) | Hansard source stated:*

*'The NHS Redress Act 2006 is a piece of framework legislation that will need to be enacted through secondary legislation. The department has continually believed that putting in place the appropriate secondary legislation for this piece of work will require considerable stakeholder involvement to discuss the detail around the working of any scheme. This would mean that any legislation could not be implemented any earlier than at least 2010.*

*The department considers it is currently more important to embed the general principles of wider redress across the National Health Service—those of apologies and explanations, a spirit of openness, a culture of learning from mistakes and robust investigation—rather than focusing on financial redress only for those cases:*

*which are of low monetary value (currently envisaged to be under £20,000); which satisfy set principles in tort law; and where financial compensation would be appropriate.*

*The significant and important area of work around complaints reform*

*is currently underway and will be implemented in April 2009. It will lay the general foundations of redress, in its wider sense, across health and social care by:*

*putting the patient or service user at the heart of any complaints process and ensuring that it will be easier and simpler for people wishing to make a complaint; moving to a more open, accessible, flexible and sensitive approach to responding to complaints; ensuring robust and appropriate investigation; emphasising the benefits of responding to complaints properly to help improve services; and learning from mistakes.*

*Once these principles are embedded across health and social care organisations, applying redress measures more specifically to any particular scheme or initiative (such as in the area of clinical negligence) can be considered further.'*

*Is there any intention by the Department of Health (or the wider government) to extend the "general principles of wider redress" to criminal cases committed by health professionals against patients? Examples of such cases would include Shipman, Clifford Ayling, William Kerr, Michael Haslam, Peter Green, Beverly Allitt, Paul Cobb etc.*

*Is it intended that the Redress Scheme would include vicarious liability for such (criminal) "wrongs" and thus provide compensation in the same way as it will for clinical negligence cases?*

*I would appreciate your considered response to these questions."*

The Department of Health responded on 16 June as follows:

"The intention of the NHS Redress Act is to improve the system for handling and responding to clinical negligence claims by providing for the establishment of a scheme to enable settlement, without the need to commence court proceedings, of certain claims which arise in connection with hospital services. Under this Act, a scheme may only apply to cases involving tort, which is in law a civil wrong arising from an act or failure to act for which an action for personal injury or property damages may be brought.

It would not be for the Department of Health to introduce mechanisms through either legislation or otherwise for a compensatory/redress scheme for deliberate criminal acts which would be subject to criminal court proceedings."

You responded on the same date as follows:

*"Thank you for answering my initial questions on the NHS Redress Scheme. I trust that you will, in time, answer my additional questions on the same matter."*

You wrote subsequently on 5 June to provide some clarification as follows:

*"This is a poor excuse for not responding to an FOI Request. I am of course referring to the Ayling Inquiry, the Kerr-Haslam Inquiry and the Richard Neale Inquiry which were known by parliament and referred to in the Inquiries' Report themselves as 'The 3 Inquiries' because (as I said in my request) they shared a legal team, budget, secretariat, Terms of Reference etc. From that*

*information, it is difficult to understand how you could fail to identify the Inquiries in question. I trust you are not attempting to use my response today as "clarification" to extend the FOI (hard) time limit for another 20 working days?*

*It is totally unacceptable that you have taken this length of time to pettily ask which Inquiries I am referring to and I shall therefore seek an internal review if you do not respond to my initial request within the statutory time limit."*

The Department of Health responded on 12 June as follows:

"I am sorry that you feel my colleague's reply of 5 June did not address your original concerns and also that it was not as timely as you would have referred. The Department replies to all correspondence as quickly as possible and aims to answer all letters and emails within 20 working days. However, the Customer Service Centre receives a great deal of correspondence and it is not always possible for officials to respond to communications as quickly as they would hope. Please let me assure you that the Department treats correspondence from the public as a priority. Every effort is made to ensure that response times are kept to a minimum.

Firstly, I would like to advise you that the Department is dealing with your email as a general enquiry to the Department of Health, rather than as a request made under the Freedom of Information (FOI) Act, although you have cited it when writing to us. This is because the FOI Act gives a right to obtain recorded information such as archived documents, reports, communications and statistics. It does not extend to such sources of information as officials' memories, reasons for a Government decision, or requests for the Department's opinion regarding the state of the law, unless these are to be found in actual pre-existing documents.

With regard to the issues raised in your original email of 18 May, Section 2 of the NHS Act 1977 was believed to be the most appropriate way of obtaining compliance with the Inquiry team. There is a long standing discussion on whether compulsion helps or hinders a private, inquisitorial inquiry, with no clear conclusion either way. I can also confirm that Section 2 was not used in order to limit the scope of the Inquiries to local NHS procedures.

With regard to your issue over the pooling of resources, the three Inquiries did not share a secretariat or legal team, although some members of it were common to all three Inquiries. It is not clear what you mean exactly when you refer to creating 'a benchmark for Health Inquiries', but whatever that does mean, I can assure you that this was not its purpose. Each of the Inquiries reported themes common to each other, and each dealt appropriately with the handling of complaints within the terms of reference that each was set.

The Department is also not aware that the former Secretary of State was not interested in whether the information from the three Inquiries was connected within or across organisations, as you suggest.

Turning to your concerns about assessing culpability, the Inquiries were tasked with investigating the responses to incidents, concerns and complaints, and how they were handled by the NHS. Culpability was described for those failures in all three reports.

Finally, the Inquiries were tasked with examining the responses of the NHS, and not the original incidents themselves. They approached that task both thoroughly and robustly. "

You wrote again to the Department of Health on 13 June as follows:

*"I would appreciate the Department treating this as an FOI request because all of the information I seek should be in published form, such as the Inquiry Reports themselves, press releases, appointment documents etc. I would also appreciate someone who has actual knowledge of the 3 Inquiries addressing my questions, because you have failed to answer my questions correctly.*

*Firstly, the Ayling Inquiry was granted powers of compulsion under s84 of the NHS Act, it says so in the Inquiry Report and also in the Select Committee on Administration's (into budgets for recent notable Inquiries) minutes of evidence.*

*Secondly, you state 'With regard to your issue over the pooling of resources, the three Inquiries did not share a secretariat or legal team, although some members of it were common to all three Inquiries.' How can you say this when each of the Inquiry Reports state that they had the same Secretariat, Solicitor, Deputy Solicitor and Commissioning Manager for Experts? In fact, it would be fairer to merely point out that they employed their own Counsel. Have you actually read any of the Inquiry Reports?!!! If you had, then you would realise that you have made an error.*

*Can I bring to your attention s.1.13 on page 9 of the Ayling Inquiry Report which reads: 'Pauline Fox was appointed as Secretary to the 3 Inquiries and in October 2001 she established a secretariat to serve THOSE Inquiries. She left the 3 Inquiries in December 2002 to take up another appointment. Colin Phillips was appointed to replace Pauline Fox and he took up post in March 2003. John Miller was appointed Assistant Secretary to the Inquiry. Michael Fitzgerald was appointed Solicitor to the 3 Inquiries; subsequently he was assisted by Duncan Henderson who was appointed Deputy Solicitor to the 3 Inquiries... Dr Ruth Chadwick was appointed as Commissioning Manager (Experts) to the 3 Inquiries.'*

*On page 2 of the Foreword, The Kerr-Haslam Inquiry Report reads: 'The Secretariat was led by Colin Phillips, supported by his team of John Miller, Kypros Menicou [etc.]. Dr Ruth Chadwick ensured that the team of Experts..Michael Fitzgerald and Duncan Henderson got through a huge amount of work that sadly has become the lot of solicitors to Inquiries.'*

*The Neale Inquiry Report reads:*

*'Michael Fitzgerald and Duncan Henderson conducted a fair but deeply penetrating investigation of the evidence...The Secretariat Team was also of the highest calibre. Led initially by Pauline Fox ably supported by Deputy Secretary Kypros Menicou, the Secretariat was well established when I was appointed in September 2002. Kypros then led the Secretariat during difficult months and ensured the smooth running of the oral hearings, which took place between early summer and September 2003. I was fortunate to have Colin Philips appointed as replacement Secretary...The Inquiry was also assisted by Dr Ruth Chadwick'*

*Thirdly, when I talk of "culpability", I mean of the criminal culpability (i.e. guilty verdict) of the Defendants, Ayling, Kerr and Haslam.*

*I haven't bothered to respond to the rest of your so-called response to my request because it is patently clear that you do not have the necessary knowledge of the*

*subject matter required to answer my questions. I would therefore appreciate you passing on my request to a more knowledgeable colleague.”*

The Department of Health's Complaints Manager, David Burke subsequently wrote to you as follows:

*“Thank you for your further email of 13 June asking for information about the Ayling, Kerr-Haslam and Richard Neale inquiries. Your email was passed to me as the Complaints Manager for the Department and I am sorry for the delay in replying to you.*

*I have asked the Department's Freedom of Information (FOI) team to consider your request within the terms of the FOI Act, as you have asked. They will be doing this over the next few weeks and we will then contact you again. The time taken to consider your request has exceeded the 20 work days stipulated by the FOI Act and I am also sorry that this is the case.*

*As Martin Gatty's email explained, the Department's FOI team and Customer Service Centre decided not to consider your original questions under the FOI Act. This was because they felt that your questions were mainly asking for opinions and viewpoints, rather than for specific records.*

*However, you have made clear in your more recent email that you would like the Department to consider your request under the FOI Act because you would like to see any recorded information that relates to your questions.*

*I realise you may be disappointed by the length of time that this process has taken, but I hope you will be satisfied with this outcome. I will be monitoring the progress of the investigation into your request, and if you have any questions in the meantime you can email me at [dhxxxx@xx.xxx.xx](mailto:dhxxxx@xx.xxx.xx) please mark any such email for the attention of the Complaints Manager.”*

As I explained in my email of 3 August to you, the information contained within the Department of Health's responses to you specifically relating to the “Three Inquiries” (Ayling, Kerr-Haslam & Neale Inquiries) had been provided on the basis of the corporate memory of a key senior policy official leading the work of the Inquiries at the time.

To re-iterate what I had explained in my note to you of 3 August. You will appreciate that requests under the Freedom of Information Act provide applicants with the right to available officially recorded information and not official's corporate memories. Nevertheless, we wanted to provide you with a helpful response at that time. That is why we dealt with your correspondence originally as a general complaint. We have honoured your request to deal with your further correspondence as a Freedom of Information request under the provisions of the Freedom of Information Act on the basis that there may be officially recorded information available to address the further points you have made.

We have now investigated whether there are official records that may help with your request on some of the following topic areas you cite, e.g. 1. the setting up of the Inquiries; 2. their Terms of Reference & scope; 3. shared Secretariat arrangements; 4. possible “benchmarking” to assess patient complaints overall; 5. advice received by the Secretary of State at that time related either within or across organisations; 6. assessment of culpability; and 7. the robustness of the Inquiries. However, our policy

team's files were not set up in such a way to easily identify, extract & prepare documentation for release that would address your specific points.

We have considered and interrogated the wide range of official file records kept on the Ayling, Kerr-Haslam & Neale Inquiries, which would assist in providing responses to your questions.

We have considered the range of recorded information we would have to allocate a dedicated resource to identify, extract and, where appropriate, prepare (redact) such official information to address your request. Unfortunately, we are unable to provide you with the information you request as this would breach the prohibitive costs limits under the Section 12 exemption of the Freedom of Information Act.

In practical terms, the cost of complying with your request will exceed the appropriate limit because it will take more than three and a half working days (the equivalent of the £600 cost limit) to identify and extract material that can be released under the Freedom of Information Act. Unfortunately, it is not possible to advise how much the cost of meeting your request will exceed the limit as we would only be able to provide an estimate costs by fully evaluating all the relevant files that fall within scope of your request (s). A significant number of these are physical files, which are not available electronically. As you may appreciate, the use of this exemption is perfectly legitimate for the Department of Health in this specific instance. However, we can confirm that there are potentially 505 physical files plus 139 electronic files within scope of your request (s). I have viewed a small sample of the documents concerned and estimate it would take an average of 5 minutes to read and prepare any relevant document (s), reckoning an average of 2 pages per document and estimated processing time of three minutes per page, giving a total effort required of just over 28 hours to process this part of the request. Each document would need to be redacted to remove the personal details of junior staff, and may need to be redacted in respect of other material.

Unfortunately, this exceeds the appropriate limit of £600 provided in the Freedom of Information and Data Protection (appropriate limit and fees) regulations 2004.

I am sorry to respond at this late stage with what will, I acknowledge, will be a disappointing reply. However, we would be more than pleased to re-consider any further request you may wish to submit, which you may be able to narrow-down accordingly to bring any such request outside of the Section 12 exemption on prohibitive costs.

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to:

Head of the Freedom of Information Team  
Department of Health  
Room 317  
Richmond House  
79 Whitehall,  
London  
SW1A 2NS

Email: [freedomofinformatxxx@xx.xxxgov.uk](mailto:freedomofinformatxxx@xx.xxxgov.uk)

If you are not content with the outcome your complaint, you may apply directly to the Information Commissioner's Office (ICO) for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by the Department. The ICO can be contacted at:

Information Commissioner's Office,  
Wycliffe House,  
Water Lane,  
Wilmslow,  
Cheshire, SK9 5AF

Yours sincerely

TONY DOOLE

*Senior Casework Manager, Freedom of Information Team*