

Review of FOI Request 14/242

Review completed on 14 August 2014

Purpose Of Internal Review

The purpose of this internal review is to determine whether the Medicines and Healthcare Products Regulatory Agency ('the agency') dealt properly with the applicant's request under the Freedom of Information Act (FOIA).

The terms of reference of this review are:

- To read all correspondence between the applicant and the agency, and other relevant correspondence;
- To form an opinion on the handling of the correspondence by the agency;
- To advise whether the actions taken by the agency in reaching their decisions is justified under the FOIA;
- To make recommendations for further action by the agency if appropriate; and
- To prepare a report of the review for the agency and the requester.

Introduction

On 8 June, Mr Leonard Spencer wrote to the agency requesting information on staff appraisals for the last reporting year of 2013-2014 (on which performance markings and pay will be based on for the current 2014 to 2015 financial year). Specifically he requested the "what" and "how" ratings (specific objectives for staff and the way in which they carried out these objectives), by grade and by division. He also requested the number of staff, in each division, who had not agreed or refused their rating.

On 7 July, after the 4 July deadline had expired, Mr Spencer wrote to the agency chasing a response and an explanation for the delay.

On 15 July the MHRA wrote back to Mr Spencer, advising him that the ratings had not been finalised yet but that the agency anticipated that the process would be completed by the end of July. The agency also forewarned Mr Spencer that it was unlikely that it could provide the information in the format that he had requested as the information was of a sensitive, personal nature and that staff members could potentially be identified from it when combined with other information likely to be in the public domain.

Mr Spencer wrote back on 16 July, requesting a review, on the grounds that he was not concerned about whether or not the information was finalised yet because line managers had already supplied ratings to their staff and he was happy to receive the information in its current form.

He also disagreed with the agency's position regarding individual privacy for staff members regarding sensitive personal information such as their performance marking, on the grounds that it was "unlikely" that there was a single person in a particular grade in a particular division. He also disagreed with the agency's refusal to give the number of people who had refused to agree their rating on the grounds that it was an abuse of the

Act.

Background correspondence

See relevant correspondence at Annex A

Consideration Of The Issues

The issues under consideration are:

- Has the agency answered the request?
- Have any exemptions been properly applied?
- Has the agency fulfilled its general obligation to be helpful?

Has the agency answered the request?

No, the agency believed the information, as requested, not to be held at the time, as there was a clear policy and process in place which meant that the gradings held at the time of the request could change significantly and therefore could not be considered final. Mr Spencer did not specify at the time that he would be content to receive provisional markings and the agency assumed that he was only referring to final markings; this interpretation turned out to be incorrect only after Mr Spencer came back requesting an internal review. On reflection, the agency could have requested clarification from Mr Spencer, however, at the time, the misunderstanding was not obvious and there were no other grounds on which the request lacked clarity according to the agency's interpretation of it. Also, the offer made by the agency of Mr Spencer re-applying when the process was completed would seem reasonable in this aspect of the request.

Have any exemptions been properly applied?

Although the agency did not actually apply any exemptions at the time of responding, because they believed the information not to be held, they did warn Mr Spencer that Section 40(2) of the FOI Act 2000 was likely to apply to a future request for the same information, as individual staff members risked having sensitive personal data disclosed as a result of performance markings being made public. The agency would be correct to apply this exemption to a future request as there is already considerable information in the public domain about agency staff members, at least in their professional roles, as many of them put their names and job titles on official letters, social media e.g. "Linkedin", and organograms have been made available to individuals on request in the past which could combine job titles with grades and therefore aid identification of a staff member. Mr Spencer has also said *"should there be only one person at grade 7 in the Communications Division, then I would agree it may be possible to discover the performance rating of that person in the event the agency either now, or in the future, disclosed the identities and grades of all its employees at the time of the performance management review. I think this unlikely. I appreciate that discretion will be necessary where there is only one person at a particular grade in a particular Division. However, if there are c.10 people at grade E in the Communications Division, it would be impossible to identify an individual based on the information I have requested. I therefore suggest that where there there [sic] is a single person at a given grade in any Division, then information be provided on an agency wide basis"*. In fact it is indeed the case that some divisions in the agency are very small and there are single members of staff at one

particular grade in some cases and very small numbers (e.g. 2 or 3) in others. This alone means that, in at least 2 divisions, the individual members of staff could be identified and in 2 more divisions it would be possible to identify at least 50% of the staff without too much work. The same would apply to those members of staff who wished to challenge their grade, as it would be most likely that staff members who had received a 4 or 5 marking in either or both areas would be the ones that wished to challenge it, therefore making it obvious who they were in the smaller divisions.

Has the agency fulfilled its general obligation to be helpful?

Partly, the agency did offer the chance for Mr Spencer to re-apply once the grades had been finalised, however they missed a chance to seek clarification from Mr Spencer (although, as stated previously, the need to do so was not obviously apparent) and the agency also replied late to the request, which was due to an internal misunderstanding and for which the agency should apologise to Mr Spencer.

Conclusion and recommendations

I am unable to find against the agency in a case where officials genuinely believed they did not hold the information at the time of the request, and where they did not actually apply an exemption – merely forewarned that they would be likely to apply it to a future request. Given Mr Spencer has offered “*I therefore suggest that where there there [Sic] is a single person at a given grade in any Division, then information be provided on an Agency wide basis*” then this could now be provided, however this was not known to the agency at the time.

This information will follow shortly under a separate cover. Please note again that the figures will be provisional and are likely to be subject to significant change following the consistency panels and appeals, some of which have yet to be lodged. Please also note that, for the reasons stated above, staff names and a divisional breakdown will not be provided as this would identify/be likely to identify staff and therefore contravene the first principle of the Data Protection Act 1998 in that a person’s Data must be processed fairly and lawfully. The figure for staff who will be appealing their markings is still not known at this point, part of the reason for this is likely to be that Union advice to staff is to appeal once the final mark is known.

The answering Division must supply this information no later than 10 working days

I do, however, find against the agency on procedural grounds, as a request for clarification would have helped and that they replied late to the request – this constitutes a minor breach of section 16 of the Act.

I would also like to sincerely apologise to Mr Spencer for the lateness of the MHRA’s reply.

I find that the agency has thereby breached section 10(1) of the Act, and the responsible staff member has been advised for future reference.

If Mr Spencer remains dissatisfied, they may ask the Information Commissioner (ICO) to make a decision on whether or not we have interpreted the FOIA correctly in dealing with

the request and subsequent internal review. The ICO address is listed below:

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

Kirsten Padgham
Policy Division
Medicines and Healthcare Products Regulatory Agency

Annex A

Original message 8 June 2014

-----Original Message-----

From: Leonard Spencer [<mailto:request-215663-d3c23793@whatdotheyknow.com>]

Sent: 08 June 2014 20:05

To: MHRA Customer Services

Subject: Freedom of Information request - Staff performance for appraisal year 2013/14

Dear Medicines and Healthcare products Regulatory Agency,

For the latter half of the staff appraisal year 2013/14, the MHRA adopted the new Civil Service Competency Framework. Staff were given a rating between 1 and 5 for the 'what' and the 'how' – with 1 being very good and 5 being very poor.

Please provide ratings for both the 'what' and the 'how' for all staff in grades A, E, H, S and 7 for the Communications Division in the following format (or so that it can be converted to this format with no loss of information):

Communications: Staff member 1 – grade: A, what: 4, how: 2, staff member 2 – grade: E, what: 2, how: 1, ... staff member X – grade: 7, what: 4, how: 5.

Please provide the same information for the remaining eight MHRA Divisions – Devices, Operations and Finance, Human Resources, Information Management, Inspection, Enforcement and Standards, Licensing, Policy and Vigilance and Risk Management of Medicines. Please do not combine the information from the nine divisions.

The MHRA procedure and guidance applicable to the appraisal year 2013/14 provides that the final rating must be agreed between the employee and their line manager. Please provide the number of staff in each Division who have not agreed or refused to agree their rating, eg:

Communications: 1, Devices: 4, Operations and Finance: 0 ... Vigilance and Risk Management of Medicines: 2.

Yours faithfully,

Leonard Spencer

Please use this email address for all replies to this request:

request-215663-d3c23793@whatdotheyknow.com

Mr Spencer chasing email 7 July 2014

-----Original Message-----

From: Leonard Spencer [<mailto:request-215663-d3c23793@whatdotheyknow.com>]

Sent: 07 July 2014 18:05

To: MHRA Customer Services

Subject: Re: FOI 14/242

Dear MHRA Customer Services,

I refer you to my request of 8th June 2014 - your reference FOI 14/242. By law you were required to reply promptly and by no later than 4th July 2014. You have done neither.

Please provide the information I have requested and also an explanation for the delay.

Yours sincerely,

Leonard Spencer

-----Original Message-----

Our Ref: FOI 14/242

Dear Mr Spencer,

RE: REQUEST UNDER THE FREEDOM OF INFORMATION ACT 2000

Thank you for your enquiry which we received on 9 June 2014.

I confirm that your request is being handled under the Freedom of Information Act and you should receive a reply within 20 working days from our date of receipt.

If you need to contact us again about this request, please quote the reference number above.

Kind Regards,

Customer Services

External Relations

Medicines and Healthcare Products Regulatory Agency

Tel: 020 3080 6000

MHRA Response 15 July 2014

Dear Mr Spencer,

Thank you for your email.

Attached is the response to your FOI request.

Kind Regards,

Customer Services
External Relations
Medicines and Healthcare Products Regulatory Agency

Tel: 020 3080 6000

(PDF attached at the time – see accompanying copy)

Mr Spencer Internal Review request 16 July 2014

-----Original Message-----

From: Leonard Spencer [<mailto:request-215663-d3c23793@whatdotheyknow.com>]

Sent: 16 July 2014 21:23

To: MHRA Customer Services

Subject: Internal review of Freedom of Information request - Staff performance for appraisal year 2013/14

Dear Medicines and Healthcare products Regulatory Agency,

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Medicines and Healthcare products Regulatory Agency's handling of my FOI request 'Staff performance for appraisal year 2013/14'.

I find your response of 14 July 2014 to be wholly unacceptable.

Firstly, I am not concerned whether the information I have requested under the Freedom of Information Act has 'not been finalised yet'. Ratings were given by line managers to their staff so the information I requested exists. How the Agency intends to further process the information is irrelevant to this request. I am happy for it to be provided in its current form – there is no exemption under the Act for it not to be supplied on the basis that further processing may or may not take place.

Secondly, I cannot in general terms agree with your position that you would unlikely be able to provide the information I have requested due to its 'sensitive personal nature'. For example, should there be only one person at grade 7 in the Communications Division, then I would agree it may be possible to discover the performance rating of that person in the event the Agency either now, or in the future, disclosed the identities and grades of all its employees at the time of the performance management review. I think this unlikely. I appreciate that discretion will be necessary where there is only one person at a particular grade in a particular Division. However, if there are c.10 people at grade E in the Communications Division, it would be impossible to identify an individual based on the

information I have requested. I therefore suggest that where there is a single person at a given grade in any Division, then information be provided on an Agency wide basis, ie:

Whole Agency: Staff member 1 – grade: 7, what: 4, how: 2, staff member 2 – grade: 7, what: 2, how: 1, ... staff member X – grade: 7, what: 4, how: 5.

Finally, I cannot accept that providing the number of people 'who have not agreed or refused to agree their rating' could possibly lead to the identification of a single individual. To take such a position shows a clear lack of understanding of the information requested and is an abuse of the Act.

A full history of my FOI request and all correspondence is available on the Internet at this address: https://www.whatdotheyknow.com/request/staff_performance_for_appraisal

Yours faithfully,

Leonard Spencer

Please use this email address for all replies to this request:
request-215663-d3c23793@whatdotheyknow.com