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Dear Information Commissioner,

[Urgent application in respect of the Department of Health and Social Care – full disclosure of NHS England’s reports from Exercise Cygnus](#)

I am writing to you directly to request your intervention in an ongoing public interest case which strikes at the heart of democratic transparency in the UK.

**Background:**

I am an NHS doctor working in a hospital which is dealing with an enormous surge in seriously sick patients with COVID-19. The Nuffield Council on Bioethics has now called for national guidance on pandemic surge and triage (1). It is unacceptable for doctors to make complex ethical decisions on allocation of scarce resources without national guidance, and it damages the UK’s response to COVID-19 if small groups of doctors have to draw up ad hoc guidelines (2) in the absence of national policy.

Exercise Cygnus was a national tier 1 exercise involving 44 agencies which modelled the UK's response to an influenza pandemic, but which the Government has used as a template for its response to the current coronavirus pandemic. Represented by Leigh Day Law, I have been trying to secure disclosure of reports related to Exercise Cygnus from the Department of Health and Social Care (DHSC) since April 2020. Our public interest legal case is funded by over 2,800 Crowdjustice donations and has received widespread national media coverage (3).

In response to a previous intervention from the Information Commissioner, the DHSC published a very limited report on Cygnus on 20 October 2020, but their report provided almost no NHS data from this national pandemic exercise. We have now uncovered evidence that NHS England (NHSE) submitted a briefing paper on "surge capacity and population triage" to the DHSC on 13 December 2017, as a "Lesson Identified" from Exercise Cygnus. Both the DHSC and NHSE are refusing to respond (4) to widespread calls from NHS doctors for national guidance on population triage policy as NHS services are overwhelmed. I believe that disclosure of this briefing paper and all the reports from Exercise Cygnus is urgent, necessary and in the public interest during current pandemic conditions.

**Brief summary of Freedom of Information process to date:**

- (i) On 21 May 2020, Leigh Day Law wrote to the DHSC on my behalf, and made the following FOI request:

"The reports that were prepared as part of the Cygnus Exercise. We understand that there was a report produced on each aspect of the exercise, such as NHS, social care and each Local Resilience Forum."

*[Ref FOI 1217882 - Refined FOI request Moosa Qureshi (21-05-2020) (13-54).pdf - attached]*

- (ii) On 19 June 2020, after 20 working days, the DHSC replied:

“The Department is currently assessing the public interest in release under section 35, but requires further time in line with section 10(3) of the FOIA. We anticipate this process will take no longer than a further 20 working days to complete. We therefore aim to respond fully to your request by 17 July.

Please accept my apologies for this delay.“

[*Ref FOI 1227906 Qureshi.pdf* - attached]

- (iii) The DHSC then contacted us again on 16 July 2020 to say that it continued to weigh up “the public interest balance”, then again on 14 August, then again on 12 September, then again on 12 October.

The ICO intervened on 28 September, and wrote to my legal team as follows:

“The Commissioner considers that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the total time exceed 40 working days.”

[*Ref ico to cp (28 Sep 20)(time for PIT).pdf* - attached]

- (iv) Eventually the Health Secretary disclosed Public Health England (PHE)’s report (5) on Exercise Cygnus to Parliament on 20 October 2020, which was 101 working days after our request on 21 May. Of note, the PHE report did not disclose the reports of the NHS and social care and Local Resilience Forums which we had requested in our FOI request dated 21 May 2020.
- (v) The Information Commissioner’s attention is drawn to the fact that – while refusing to give any substantive response to our FOI request from May until October 2020, at the same time the DHSC was arguing before a judge that he should reject our application for Judicial Review because the FOI process was the more appropriate remedy for disclosure of information.

- (vi) On 13 November, we withdrew our Judicial Review application for “report/s produced following... Exercise Cygnus” and “a specific report focusing on NHS population triage”, as a result of denial by the DHSC that it held the NHS population triage report.

*[Ref Judicial Review – Grounds.pdf - attached]*,

Subsequently a document from NHSE was uncovered which proved that NHSE had submitted a report on population triage to the DHSC on 13 December 2017. My legal team wrote to the DHSC on 4 December 2020 to say that we were “extremely concerned that [we] may have withdrawn [our] proceedings on the basis of incorrect assurances from [the DHSC]”

*[Ref Letter to GLD (04-12-2020).pdf - attached]*

The Government Legal Department’s response on 18 December 2020 was to invite us to submit another FOI request.

- (vii) On 21 December, I submitted another FOI request for information which effectively was very similar to my first FOI request dated 21 May 2020, except that now I had the official names of the reports and documented proof that the DHSC held those reports:

“two reports submitted by NHSE to the former Chief Medical Officer Dame Sally Davies following Exercise Cygnus and “owned” by the Department of Health and Social Care:

Pandemic Influenza Briefing paper – NHS Surge and Triage (completed December 2017) – please provide me with a copy of this report.

Pandemic Influenza Briefing paper – Adult social care and community healthcare – please provide me with a copy of this report.”

*[Ref FOI request 21-Dec-2020 DHSC.pdf - attached]*

(viii) The DHSC has responded to my new FOI request on 21 January 2021, acknowledging that it holds relevant information. The DHSC is now assessing the public interest by section 36 instead of section 35, but the tenor of its response is almost identical to its initial response on 19 June 2020:

“The Department is currently assessing the public interest in release under Section 36 (prejudice to the effective conduct of public affairs). We anticipate this process will take no longer than a further 20 working days to complete. We therefore aim to respond fully to your request by 18 February 2021.”

[Ref FOI 210121 Qureshi.pdf – attached]

#### **Request for direction / enforcement notice by the Information Commissioner:**

The DHSC has failed to disclose “a report produced on each aspect of the [Cygnus] exercise, such as NHS, social care and each Local Resilience Forum”, as we requested on 21 May 2021. The PHE report submitted on 13 July 2017 (and finally disclosed to Parliament on 20 October 2020) is not a response to our FOI request dated 21 May 2020 because it fails to give any substantive detail on NHS or social care reports from an exercise which modelled a national healthcare emergency.

Furthermore, the DHSC’s latest response on 21 January 2021 to my renewed FOI request dated 21 December 2020 is almost a replicate of its previous responses dated 19 June 2020, 16 July 2020, 14 August 2020, 12 September 2020 and 12 October 2020. The fact that the DHSC has repeatedly delayed even making a decision while it has “assessed the public interest” over several months represents a fundamental subversion of the Freedom of Information process because my legal team cannot challenge the DHSC’s decision at Tribunal until after it has made a decision.

In addition, the DHSC cannot reasonably be carrying out a genuine “public interest” assessment of my latest FOI request when it has already set out detailed legal

arguments against our Judicial Review application for “report/s produced following... Exercise Cygnus” and “a specific report focusing on NHS population triage”.

PHE has recorded over 3000 COVID-19 deaths in the UK over the last 48 hours. The DHSC continues to refuse to give national guidance to NHS professionals on the ground regarding allocation of scarce resources, which will inevitably result in disjointed, unplanned, ad hoc decision-making and excess avoidable mortality. We know that NHSE submitted two important pandemic briefing papers to the DHSC over 3 years ago, addressing how the NHS would make decisions about resource allocation in an overwhelming pandemic. I invite the Information Commissioner to act urgently in the public interest and issue a direction / enforcement notice to expedite disclosure of these documents so that NHS Trusts and their workers have a national guidance framework to help them deal with the UK’s accelerating COVID-19 mortality, and to promote norms of transparent and functional democracy.

Yours sincerely,

M. 

Dr Moosa Qureshi

- (1) <https://www.nuffieldbioethics.org/news/statement-the-need-for-national-guidance-on-resource-allocation-decisions-in-the-covid-19-pandemic>
- (2) <https://jme.bmj.com/content/medethics/early/2020/11/20/medethics-2020-106771.full.pdf>
- (3) <https://cygnusreports.org/media/>
- (4) <https://www.independent.co.uk/news/health/coronavirus-hospitals-nhs-rationing-ethics-b1787310.html>
- (5) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/927770/exercise-cygnus-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927770/exercise-cygnus-report.pdf)