

## OPEN LETTER

To : Ms Sarah Albon, Chief Executive, Health and Safety Executive

Date: 14 March 2022

Your Ref: CE-04322

Dear Ms Albon

### **1) Complaint : Failure to process Freedom of Information request in timely manner 2) Submission of further Freedom of Information requests**

Thank you for your reply to my open letter of 7th February, received this morning. In that letter I reminded you of a Freedom of Information (Fol) request (ref: 202108316) which has remained outstanding since August 2021. I asked you to progress it. Five weeks later it is still unresolved and I have had no indication that it is being progressed. This is unsatisfactory, particularly since I have been patiently waiting six months. I have therefore resubmitted the details of the Fol to your Central Disclosure Team, this time as a formal complaint about the Executive's mishandling of this request for information.

Similarly I am also submitting six further new Fol requests. Again, in order to follow HSE procedures I have also submitted these via the official route to your Central Disclosure Team. These have been submitted as separate, individual requests since they relate to different topics. As such, they cannot be collectively rejected on the grounds of "excessive cost" (exceeding 3 x 8 hour working days).

However, I thought it may be helpful to reproduce the seven Fol's in this letter for your information and also because item (2) below relates specifically to HSE Senior Management at CEO/Director level.

#### **(1) Fol Reference 202108316 (outstanding since August 2021)**

##### 1.1) Background

In his letter to me (17/6/2021: ref CETO-198-21) your Lead for Health and Social Care Services Sector (MM) confirmed that:

- responsibility for policy relating to PPE in healthcare settings rests solely with the Department of Health and Social Care {DHSC} and Public Health England {PHE}, (*now the UK Health Security Agency {UK-HSA}*), together with the devolved administrations and this policy is set out in the document known as the "Four Nations COVID-19 IPC Guidance";
- the HSE denies any responsibility for "directing, influencing, approving or supporting" their PPE policy in any way; and
- the HSE has provided "technical input" to those responsible for the IPC guidance

In my reply to him I requested, by way of a Freedom of Information request, to have sight of that "technical input".

##### 1.2) Initial Response

Your Central Disclosure Officer (CH) rejected the Fol request on the grounds that it would take a member of staff more than 3 x 8-hour working days to locate, extract and prepare the information for release (exceeding your fees policy of £600).

##### 1.3) Appeal / Internal Review

I replied by email to MM (with a copy to yourself) on 26<sup>th</sup> August to the effect that this was an unsatisfactory response.

I commented that one would expect an organisation so efficiently structured and organised as the HSE to have correspondence with DHSC/PHE conveniently grouped in a network folder structure, perhaps with a subfolder relating to correspondence about COVID-19/PPE.

I found it difficult to believe (and still do) that it would take 24 working hours to locate and append the relevant information to an email and send it back to me.

I made it clear that the purpose of my request was so that I, and other colleagues with an interest in these matters, could ascertain the extent to which the policy-makers in the DHSC, PHE, IPC-Cell and ARHAI had taken note and applied your guidance to their IPC guidance – if indeed they had taken any notice of your guidance at all.

## 1.4) Justification for appeal being upheld

### 1.4.1 Narrowing the scope of the Fol

In that same email (26 August) I did respond to the offer made by CH that HSE would reconsider the Fol afresh if I were to narrow down the scope of my request. I did this by limiting the scope to:

- letters, emails and file notes of relevant discussions with PHE, DHSC, IPC Cell; and
- within the date range Jan 2020 to August 2021; and
- which contained advice or information in respect of respiratory protection for healthcare workers, with the term 'respiratory protection' (in this context only!) taken to include Fluid Resistant Surgical Masks.

This should have enabled you to do an electronic search of your filing system to rapidly identify relevant correspondence.

I identified the minimum scope of my Fol to include correspondence which either advocated (or advised against) using FRSMs when caring for patients with suspected or confirmed COVID-19.

This really shouldn't have been so difficult, as I would have hoped that your experts' advice to these less-expert people in the IPC Cell would have been that FRSMs are not effective protection for close-quarter care of infectious patients and that FFP3s or equivalent RPE should be worn (or FFP2/N95 in case of supply shortages).

### 1.4.2 Precedent established by a previous Fol

To further support my appeal, on 29 August I made the observation to your Central Disclosure Officer (CH) that you had already responded to a previous Fol (ref 2021-05-19-8) which related to much the same thing. ARHAI had claimed that HSE had written to the IPC-Cell stating HSE's position that FFP3s should only be used for Aerosol Generating Processes (which I struggled to believe!). I requested a copy of that correspondence.

All credit to another Central Disclosure Officer (MS) who responded to confirm that HSE had "no knowledge of any such communication". For such a reply to be given, I would draw the reasonable assumption that the officer has made a trawl through the appropriate correspondence files within the 24 working hours allotted (otherwise you would have rejected that Fol too). My point is that if you were able to do a trawl through the relevant files once in May, you should have been able to do it again in August. It would not have been necessary to rewrite or interpret the correspondence. It should have been possible to redact a few names and append to an email.

## **(2) Record of a meeting of HSE Directors**

### 2.1 Background

This relates to HSE's 'further guidance' concerning the reporting of COVID-19 under the RIDDOR regulations. Up until 19<sup>th</sup> July 2021 (the so-called 'Freedom Day') your guidance stated that a RIDDOR report would only be necessary for 'occupational exposure' if "***the person's work had brought them into contact with a known coronavirus hazard without effective control measures, as set out in the relevant PHE guidance, in place such as personal protective equipment (PPE)...***". (this statement having been noted in the guidance displayed online between 30/4/21 – 31/5/21, and most likely had been in place for many months beforehand)

By making this statement you, the HSE, publicly accepted that PHE guidance represented "***effective control measures***". This guidance mandated that "***Fluid Resistant Surgical Mask (FRSM Type IIR) masks must be worn when providing direct care within 2 metres of a suspected/confirmed COVID-19 case***". HSE must have known the precise content of the PHE IPC guidance before assigning it the attribute 'effective control measures'. It would have been extremely irresponsible for HSE to have made any such comment about the guidance without having first ascertained the details contained therein.

The Health Protection (Coronavirus, Restrictions)(Steps etc.) (England) (Revocation & Amendment) Regulations 2021 came into force at 23:55pm on 18<sup>th</sup> July 2021 (the night before 'Freedom Day'). Within just a few hours the HSE website had been amended so as to read "***whether or not the person's work directly brought them into contact with a known COVID-19 hazard without effective control measures in place.***" The removal of the reference to 'relevant PHE guidance' being highly significant, distancing HSE guidance from the flawed PHE/UK-HSA guidance.

## 2.2 Fol Request

To provide me with a copy of the minutes, notes, transcript, audio recording or any other type of record made of any meeting at which you or any HSE Director were present which took place during the preceding week (commencing 12<sup>th</sup> July 2021) at which the text on all the HSE web pages (including the RIDDOR pages) was reviewed and amendments agreed.

If no minutes, notes or other written records were made at that meeting, then please ensure that a set of notes is prepared to the best of the attendees' recollections of the discussions around the removal of the reference to "PHE guidance" mentioned above.

I would be surprised if no minutes or notes are kept when HSE Senior Management meetings are held since, when HSE review a duty-holder's health and safety management arrangements, your inspectors routinely check whether written records have been properly made of meetings.

## 2.3 Further information

Although strictly speaking not an Fol request, I have a question which I hope you will see fit to answer: "At any time during the pandemic has HSE held the view that FRSMs are "effective risk control measures" against a virus which, since April 2020, its scientists have advised is transmissible via the airborne route and therefore inhalable?"

### **(3) HSE Attendance at the meeting of the Advisory Committee on Dangerous Pathogens (13/3/20)**

Please would you provide copies of any letters, emails, file notes or any other sort of communication written by the members of HSE staff who attended the ACDP meeting on 13th March 2020 in relation to the information they learned during the meeting that COVID-19 was to be declassified as a High Consequence Infectious Disease (HCID) and that respiratory protection for healthcare workers was to be reduced from FFP3 respirators to FRSMs.

### **(4) HSE Communications with 3<sup>rd</sup> parties relating to HCID declassification and/or RPE downgrade**

Please would you provide copies of emails, file notes or any other sort of correspondence with PHE, DHSC, NHS, Central Government Department, Ministers or Health-related departments in the devolved administrations between 5 March and 31 March 2020 in relation to the declassification of COVID-19 and/or the change in respiratory protection for healthcare workers from FFP3 respirators to FRSMs.

### **(5) HSE evidence to the Commons Science and Technology Committee**

Please would you provide a copy of the letter<sup>†</sup> which HSE's Chief Scientific Advisor was requested to write by the Chair of the Committee at the hearing on 26 October 2021 ([paragraph Q2542](#)), together with any attachments and ensuing correspondence. If these documents are already in the public domain, please provide the link.

<sup>†</sup> *The Chair requested a summary of the evaluations that he (and HSE) have made which justify the HSE continuing the same guidance that has been in place since near the start of the pandemic.*

### **(6) HSE's own Risk Assessment Inspectors visiting healthcare premises**

In your letter to me of 20 April 2021 (ref CE-156-21) you referred to the fact that your Inspectors visited 17 hospitals during November 2020 and January 2021 (the height of the second wave).

Please would you provide a copy of the Executive's own risk assessment for its inspectors visiting those hospitals and any other healthcare premises where infectious COVID-19 patients were known, or were likely to be present. In particular this needs to clarify:

- the type of Respiratory Protective Equipment that HSE employees were required to wear during such visits (or whether surgical masks were considered sufficient);
- any instructions/guidance for HSE employees in the event that persons at the establishment being visited might request that their RPE be removed and FRSMs donned instead in line with Health Trust/Board policy (*as some Health Trusts/Boards have done with their own employees who have purchased their own FFP3 respirators or other RPE in order to better protect themselves*).

## **(7) Instructions to HSE Inspectors visiting healthcare premises**

Please provide a copy of any email, memo, instruction or any similar document (or details of any verbal instruction) which may have been issued to HSE Inspectors visiting healthcare premises to the effect that they should not comment, criticise or enforce against any such employer whose employees were wearing FRSMs whilst in close contact with COVID-19 patients (regardless of their own personal and professional views on the adequacy or inadequacy of surgical masks for respiratory protection)

Since this is an 'open letter' which will be publicly accessible, I propose to display any response that you might care to make alongside this letter on my website, together with the replies from your Central Disclosure Team. Any personal information will be redacted.

Yours Sincerely

DFJ Osborn BSc CMIOSH SpDipEM



Chartered Safety and  
Health Practitioner



(address and contact details provided on  
accompanying e-mail)

cc: Ms Sarah Newton, Chair, Health and Safety Executive