# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** **7 January 2013**

**Public Authority:** **The Information Commissioner**
**Address:** **Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**

*Note:* The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 ("FOIA"), he is under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice (although this right may be restricted by the appellate body in certain circumstances). For the sake of clarity, in this notice the term "ICO" is used to denote the Information Commissioner dealing with the *request*, and the term "Commissioner" denotes the Information Commissioner dealing with the *complaint.*

## Decision (including any steps ordered)

1. The complainant requested copies of any documents that contained information related to the ICO's ability to limit the use of a particular cookie on its website. He also requested that these documents be provided in their original form to ensure that he received all of the information stored. The ICO disclosed some information in response to the request. The complainant contended that, as he had not been provided with the documents in their original electronic form, the ICO had not disclosed all of the information that was held, specifically the full sequence of bytes contained in the original documents. The ICO argued that, as the complainant had not provided further information to allow it to identify which information he was requesting, section 1(3) applied and it was not obliged to comply with the request.

2. The Commissioner's decision is that the ICO has correctly applied section 1(3) to the request. He therefore does not require the ICO to take any further steps to ensure compliance with the legislation.

## Request and response

3. The complainant made the following request for information to the ICO on 20 December 2011:

> *"Your plans for the ICO's website in view of the changes to the rules on cookies (http://www.ico.gov.uk/news/current_topic...) contain this statement: "Currently our website contains one cookie that we do not use, but is essential for part of the site to operate. At present we have left this in place across the site, as we're unable to remove it from one part of the site without affecting another."*
>
> *Please could you supply a copy of any documents that contain explanations of why you are unable to limit the use of this cookie just to the parts of the site where it is actually necessary, or that discuss plans for solving this problem. I would like all the information stored in any such documents, including the full sequence of bytes forming the raw storage of the document. Therefore please supply them in their original form (or as close as possible if redaction is necessary), rather than scanning printouts as per your normal practice."*

4. On 23 January 2012 the ICO responded. It provided some information but withheld other information under sections 36(2)(c) and 40(2). It indicated that it required further time to consider the application of the public interest to the information withheld under section 36.

5. In relation to the complainant's request to be provided with the information in its original form, rather than as scanned documents, the ICO explained that it was only able to provide the information in a PDF format due to the software that was used to carry out the redaction of documents. It pointed to the Commissioner's guidance in relation to the application of section 11. This stated that *"… although an applicant can ask for an electronic copy they are not entitled to specify down to the next level, the specific software format."*. The ICO therefore informed the complainant that it believed that, by providing him with an electronic copy of the information that it held that fell within the scope of his request, it had complied with the requirements of section 1 of FOIA.

6. The complainant subsequently confirmed that he did not wish to challenge the application of sections 36 and 40(2). However, on 8 February 2012, he requested an internal review in relation to the decision to provide him with information in a PDF format rather than in its original form. By doing so, he argued that the ICO had not provided him with all of the information that he was entitled to receive under the Act. Specifically, by not providing him with a copy of the relevant documents in their original format, he had not been provided with the full sequence of bytes which constituted part of the document.

7. The ICO sent the complainant the outcome of its internal review on 1 June 2012. This upheld its original position. It informed him that it was of the view that the full sequence of bytes in relation to the relevant documents did not amount to information under the Act.

8. During the course of the Commissioner's investigation, the ICO reviewed its position with regard to what constituted "information" for the purposes of FOIA. It confirmed that this was not limited to the text or visual appearance of a document but could include other data contained within a copy of a document. However, it did not accept that the full sequence of bytes that the complainant had requested constituted "information" under the Act. The ICO sought clarification from the complainant under section 16 as to the data, beyond the text of the original documents, that he was seeking to obtain.

9. The complainant informed the ICO that he believed that his request was clear in that he was simply seeking all of the data contained within the original documents. By releasing the documents in their original form, the ICO could provide him with all of the information that he had requested.

10. The ICO informed the complainant that without further clarification it could not identify the information that he wished to obtain and therefore believed that section 1(3) applied to his request. Consequently, it was not obliged to respond.

11. The complainant provided a response to the ICO explaining why he did not believe that section 1(3) was applicable to his request.

## Scope of the case

12. The complainant initially contacted the Commissioner on 16 May 2012 to complain about the ICO's delay in providing him with the outcome of its internal review. Having received the outcome of the internal review, he remained dissatisfied with the ICO's view as to what constituted "information" for the purposes of the Act, specifically that this did not

include the full sequence of bytes contained in the original copies of the documents that had requested, and its subsequent view that it was not obliged to respond to his request by virtue of section 1(3).

13. The Commissioner initially considered the extent to which any data contained within the original copies of the requested documents constituted "information" for the purposes of the Act. Having determined what may constitute "information" under FOIA, he then went on to consider whether the ICO was entitled to rely on section 1(3).

14. The complainant also raised concerns about the length of time taken by the ICO to carry out its internal review, the lack of regular updates as to its progress and the failure of the ICO to retain some of the requested documents in their original form. These issues are considered in the "Other matters" section at the end of the notice.

## Reasons for decision

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### Section 1

### 1. To what extent does the data contained within the original documents constitute "information" for the purposes of FOIA?

#### (i) The ICO's and the complainant's arguments

15. When it initially responded to his request, the ICO provided the complainant with scanned copies of the documents that he had requested rather than copies of the documents in their original format. In its internal review response, it noted his request to be provided with the documents in their original electronic format but explained that, having considered the matter in conjunction with its IT advisors, it had concluded that it was not reasonably practicable for it to give effect to his preference under section 11(1). In reaching that conclusion it informed the complainant that it had considered all the circumstances, including the cost of doing so.

16. The ICO went on to explain that, in relation to some of the documents, it did not have the capability to apply relevant redactions to those document in the form requested. In relation to others, it did not have the capability to readily interpret and thus understand the information which the full sequence of bytes, contained in the original form of those documents, could potentially reveal. In the ICO's view, FOIA could not reasonably be applied so as to put a public authority in a position where it had to disclose information in a form which it could not itself interpret.

17. The ICO also informed the complainant that it believed that there was a strong argument for saying that the full sequence of bytes contained in the documents in their original form did not amount to "information" for the purposes of the Act and that these were not issues that were considered when the Act was drafted.

18. The complainant explained that, in his view, the policy of the ICO, and many other public authorities, to release information as scanned copies of paper documents was unhelpful and reduced the value of FOI releases (for example, it was not possible to copy and paste from them, nor search inside them). However, he noted the ICO's view, which was in line with decisions of the First Tier Tribunal, that section 11 of FOIA did not allow requesters to ask for documents in a particular electronic format. Consequently, he accepted that the ICO was not obliged to provide him with documents in a properly readable PDF format.

19. However, the complainant went on to explain that, whilst the law may not allow him to ask for a document in an electronic format of his choosing, he believed that it did allow him to ask for the document to be left in its original format, because all elements of that electronic document constituted information in their own right. The raw stream of bytes that he had originally requested was itself useful information as it contained instructions that computer software could process. It also encoded various metadata and formatting information.

20. The complainant pointed out that he had asked for the *"full sequence of bytes forming the raw storage of the document".* In his view, this constituted significantly more information than just the textual content of the messages and documents that the ICO had provided to him initially. In general it would, for example, for a Word document, also comprise other information. This included details of the font name, size and weight and instructions as to the layout to use in displaying the document. Previous drafts of the document or other information about recent edits might also be embedded.

21. The complainant explained that for emails, the header information of the email contained various metadata about the message. For example, "References" or "In-Reply-To" information indicated which other email or emails the present email was a reply to, allowing email clients to unambiguously provide a "threaded" display of the emails. The "Received" headers helped to demonstrate that emails from outside organisations had really come from those organisations. He stressed that these examples of information that the ICO might hold were just illustrative and were not an exhaustive list.

22. In relation to the ICO's contention that the full sequence of bytes did not amount to "information" for the purposes of the Act and that this was

not something that would have been considered at the time of its drafting, the complainant argued that it had not presented any evidence to support this claim. He pointed out that the concept of electronically stored information was well-established at the time the Act was passed. Additionally, if it were possible to reinterpret an Act on the basis of hypothetical arguments of whether specific consequences were considered at the time, he doubted that MPs' expenses would have been released.

23. The complainant also argued that the FOI regime did not make any provision for exempting information on the basis of vague, unspecified harms. If the ICO had some concrete reason for thinking that complying with his request would be damaging, it should claim a specific exemption and give details.

24. Finally, the complainant pointed the ICO to a number of tools and sources of information which might allow it to overcome specific technical difficulties with understanding or redacting the documents that he had requested.

25. During the course of the Commissioner's investigation, the ICO reviewed its position. It subsequently informed the complainant that it accepted that "information" for the purposes of the Act could include more than just the text or visual appearance of a document, and could also include the document properties, formatting information, and other metadata stored in a public authority's software systems. However, it did not accept that the full sequence of bytes that he had requested was in itself separate information that must be provided under the Act.

26. The ICO's view was that bytes were merely the format in which relevant information (ie the text and metadata) was stored by the computer. It went on to explain that the full sequence of bytes might also encode other raw data but, if this was not intentionally recorded as part of the document, it would not be considered to be information held for the purposes of the Act.

27. The result of this, in the ICO's view, was that there was no obligation under s1 of the Act to provide the full sequence of bytes or a document in its original software format in order to provide all of the information that it was required to disclose. Where a requester was seeking not just the text of a document but also some metadata recorded in the software which the public authority could readily access, the ICO believed that a public authority was under an obligation to consider the request in accordance with the Act. However, while it was obliged to provide recorded metadata to a requester, it did not have to be provided in the format of bytes.

**(ii) The Commissioner's view**

28. Section 1(1) of FOIA provides that:

> *"Any person making a request for information to a public authority is entitled –*
>
> > *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> >
> > *(b) if that is the case, to have that information communicated to him."*

29. Section 84 of FOIA defines "information" as *"information recorded in any form"*. The Commissioner believes that information can clearly therefore include more than just text. For example, he accepts that the style, layout and design elements of a document are also information recorded in that document. He also accepts that information that can be extracted from electronic databases using query tools in the software, or by using query languages, is information held.

30. It therefore seems clear that metadata about an electronic document must also be information held for the purposes of the Act. This information is captured automatically by the software and can generally be viewed (and extracted) by a user navigating to document properties or other screens within the software program or electronic records management system.

31. This view is reflected in the guidance that the Commissioner has recently issued which is entitled *"Determining whether information is held"*. The section headed "Information on the properties of electronic documents (metadata)" on page 17 addresses the issue of the properties of electronic documents that may constitute "information" for the purposes of the Act. Paragraphs 42-44 state:

> "42. *When an electronic document is created and subsequently worked on, information about its properties is automatically generated and stored. This information records details such as the author, dates, editing history, size, file paths, security settings and any email routing history. It is commonly known as metadata. Metadata is recorded for the business purposes of the public authority and is used in their records management. The Lord Chancellor's code of practice on the management of records issued under section 46 of FOIA promotes the recording of metadata at paragraph 9.3(e). For the purposes of FOIA and the EIR this information is held by public authorities.*

> 43. *In addition, when an electronic document is produced information on its formatting such as the fonts used, headings and other style settings is also automatically recorded. Such information can be viewed in the relevant format menus of the software program. As with metadata, this information is held for the purposes of FOIA and the EIR.*
>
> 44. *If an applicant specifically requests information on the properties of an electronic document, public authorities will be obliged to provide it, subject to other provisions in the relevant legislation. However, if it is not requested there is no expectation that public authorities will provide it."*

32. In relation to whether a sequence of bytes constitutes information for the purposes of the Act, the Commissioner understands that the sequence of bytes will encode the text, formatting and metadata of a document in binary code that the computer can read and process. The bytes (binary code) are merely the format in which the information is stored and processed by the computer. Therefore, his view is that the bytes should be viewed as a different format of this information, rather than different information.

33. The Commissioner also understands that, because of the way the software works, the sequence of bytes may actually encode some additional raw data that is not necessarily reflected in the final document text, properties or metadata. For example, the bytes may encode the keystrokes made during the creation of a document. Consequently, the full sequence of bytes may contain embedded within it, and technically recoverable, items such as edits made by the author during initial typing and corrected mistakes.

34. However, the Commissioner would not consider that this sort of additional raw data is actually "recorded information" for the purposes of the Act. He is of the view that for information to be "recorded information", there needs to be a conscious decision or intention to set it down in writing (or record it in other permanent form). The keystroke history of a document is embedded as a by-product of the way the software works, rather than forming a necessary or intentional part of the finished record. There is no choice made to record it, and no business need to do so. In fact, if the original keystrokes have been changed this is because they have been deliberately overwritten with the later text. The intention is to discard the earlier typing and record the later version.

35. By contrast, any draft versions actually saved by the author are deliberately captured as part of the record. In relation to metadata, although the individual may not have made a conscious decision as such

to record this information, it is a necessary part of electronic records management and an integral part of the final record. Any metadata fields automatically populated by the software system are in this sense deliberately captured as part of the record by the organisation using the software.

36. The Commissioner has therefore determined that *"the full sequence of bytes forming the raw storage of the document"* requested by the complainant is not additional recorded information that must be provided under the Act.

**2. Does section 1(3) apply to the request?**

37. The Commissioner considered whether the ICO was entitled to rely on section 1(3) as a basis for not responding to the complainant's request.

38. Section 1(3) provides that:

> *"Where a public authority –*
>
> *(a) reasonably requires further information in order to identify and locate the information requested, and*
> *(b) has informed the applicant of that requirement,*
>
> *the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."*

39. The ICO explained that it had sought technical advice, both internally and externally, in order to clarify what information it held, in terms of metadata, on its systems and what therefore could possibly be provided to the complainant in response to his request.

40. The result of this lengthy exercise was to confirm that there was no clear definition, or a common understanding, of what constituted metadata. Therefore, the ICO had, under section 16(1) of FOIA, sought clarification from the complainant as to the metadata that he was seeking to obtain. As the complainant had been unable to provide the clarification it needed, it was of the view that it was unable to respond to the part of his request that referred to metadata. In its view, without this clarification, it was unclear as to the exact recorded information the complainant was trying to obtain. It therefore believed that section 1(3) applied and that it was not obliged to respond to his request.

41. When the ICO initially asked for clarification as to what metadata the complainant was interested in, he explained he thought that the answer

was clear from his original request that he would like all of the metadata that the original documents contained.

42. In response to the ICO's subsequent request for clarification and its view that, without this clarification, section 1(3) would be applicable, the complainant argued that the difficulty in identifying metadata stemmed from the ICO's own decision to effectively reinterpret his original request as being for the content and metadata of the requested documents. In one of its emails it had introduced the concept of a distinction between intentionally recorded metadata and unintentionally recorded raw data. In his view, it was therefore for the ICO to define that distinction more precisely (and thus identify what metadata was intentionally recorded) if it felt that it needed to answer his request as it had reinterpreted it.

43. However, from the complainant's perspective, he still maintained that the raw bytes were information in themselves. In any event, he believed that both metadata and raw data were captured equally by his request without needing to identify which was which. He went on to argue that, even if raw data was not captured by his request, there was no prohibition on the ICO releasing it. Consequently, the ICO could straightforwardly answer its own interpretation of his request by releasing the raw bytes, leaving him to extract any metadata he wanted for himself. He confirmed that he would be happy to discuss any technical difficulties that this might pose in the case of documents that required redaction.

44. The Commissioner notes that section 8 of FOIA requires that, for a request under the Act to be a valid request, it must describe the information requested. He has already determined, above, that "the sequence of bytes" requested by the complainant does not constitute a request for "information" under the Act. Therefore, in his view, a request phrased in these terms does not adequately describe the information requested, as it is not possible for the ICO to identify precisely what information, within the terms of the Act, is being sought. For the sake of completeness, the Commissioner does not consider that a request for information in a document automatically covers all related metadata. For metadata to become relevant it must be clear from the wording of the request that metadata has been specifically requested.

45. In view of the above, the Commissioner believes that it was reasonable for the ICO to seek further clarification from the complainant to be able to identify and retrieve relevant "information" from the data that it held. In the absence of further clarification form the complainant, the Commissioner has determined that the ICO correctly applied section 1(3) to the complainant's request and was therefore not obliged to respond to the request.

## Procedural issues

### Section 16

46. In light of the Commissioner's findings in relation to the application of section 1(3), he has determined that the ICO should have provided advice and assistance to the complainant in order to clarify what information he was seeking to obtain by the conclusion of the internal review. In not doing so the ICO breached section 16(1). As the relevant advice and assistance has now been provided the Commissioner has not ordered any steps in this regard.

## Other matters

### Delay in completing the internal review

47. The complainant raised concerns with the Commissioner about the length of time taken by the ICO to carry out its internal review and the lack of regular updates as to its progress.

48. The complainant requested an internal review on 8 February 2012 and received notification of its outcome on 1 June 2012. The Commissioner's guidance states that an internal review should not take longer than 20 working days in most cases or 40 working days in exceptional circumstances. The Commissioner notes that the complainant's request raised some difficult and novel issues concerning the application of the Act which may have justified the ICO taking up to 40 working days to complete the internal review. However, the ICO took considerably in excess of this period of time. The Commissioner expects that in future the ICO will ensure that it complies with his guidance on the time for completion of internal reviews.

49. In addition, the Commissioner notes that paragraph 41 of the Section 45 Code of Practice states, in relation to a public authority carrying out an internal review, that

> *"In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay."*

50. The complainant was provided with an update on the progress of the internal review on 6 March 2012 informing him that it was anticipated

that it would be completed by 30 March 2012. On 30 March he was informed that it was anticipated it would be completed by 27 April 2012. On 4 May 2012, following an email from the complainant asking for an update as to the progress of the internal review, he was informed that a response would be provided as soon as possible. On the same day the complainant emailed to ask for a date when it was expected that he would receive a response. Having heard nothing further by 16 May 2012, the complainant submitted a complaint to the Commissioner. As noted above, he received notification of the outcome of the internal review on 1 June 2012.

51. By not providing the complainant with an update and new target time for the completion of the internal review by 27 April 2012, the ICO did not comply with the Code of Practice. This is of particular concern given the already lengthy delays, referred to above, that had taken place. The Commissioner expects that in future the ICO will ensure that it provides a requester with updates in relation to the expected time for the completion of internal reviews in accordance with the Code of Practice.

**Failure to retain documents in their original form**

52. The complainant also expressed his concern that the ICO had not retained some of the documents that fell within the scope of his request in their original form.

53. During the course of the Commissioner's investigation, the ICO explained that the emails that fell within the scope of the request were sourced from a number of members of staff at the time that the initial response was being provided. At that point, the ICO, in line with its existing policy, was only considering whether it should disclose the content of the emails. It was not considering the possible disclosure of any information that sat behind the content.

54. In line with normal practice, one set of emails was provided by a member of staff as paper copies. Copies of these emails were only retained in a scanned format after the response to the request was sent out. Consequently, any data held in the emails in their original form was lost.

55. The complainant's original request was for all of the information stored in the requested documents, including the full sequence of bytes forming the raw storage of the documents, and for those documents to be provided in their original form. Whilst the ICO believed, at the time of the request, that the information that could be requested under the Act was limited to the content of documents, the Commissioner considers that it should have been aware of the possibility that such a view could change. This may have been as a result of the ICO's own review of its

position or as a result of an appeal by the complainant. It should therefore have taken steps to ensure that all of the relevant documents were retained in their original form, at least until the conclusion of the investigation of any complaint and any subsequent appeal to the Tribunal.

56. The Commissioner's view is that as a matter of good practice, any requested information should be kept for 6 months after a public authority's last communication about a request. This is particularly important if a public authority has refused to disclose any part of that information. In addition, the section 46 Code of Practice states that, if a public authority refuses to disclose information, it should be kept until the complaint and appeals provisions of FOIA have been fully exhausted.

## Right of appeal

57. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

58. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jo Pedder**
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