

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2015

Public Authority: Information Commissioner's Office
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner (the Commissioner). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. 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. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the ICO for information regarding a pay award made to members of the ICO's Executive Team. The ICO failed to respond to the request within 20 working days and the Commissioner has found that the ICO breached section 1(1)(b) and section 10(1) of FOIA in its handling of the request. The Commissioner requires no steps to be taken.

Request and response

2. On 5 November 2014 the complainant made a request to the ICO for information regarding a pay award made to members of the ICO's Executive Team. The request read as follows:

"Response to letter from CG to PD, 1 October 2014, regarding Recognition Agreement complaint

Please provide us with details of the 'appropriate agreement' from MoJ relating to the original ICO pay remit, including: the ICO's case put to MoJ for significant increases to ET pay; the rationale for MoJ accepting; a copy of any recorded information relating to this issue.

Response to letter from CG to JM, 1 October 2014, regarding PCS request for information relating to allowances and ET pay

Please provide precise details of the alleged additional responsibilities of the Deputy Commissioners."

3. The ICO acknowledged the request on 20 November 2014 but no information was provided and it appears that at this point the ICO failed to recognise this as a request for information under FOIA.
4. The ICO issued a response to the request on 21 January 2015 when it confirmed that it held no recorded information falling within the scope of the request.
5. On the same day the complainant contacted the ICO to ask that it carry out an internal review of its handling of the request. In doing so they questioned the ICO's claim that no recorded information was held and suggested that it would be good corporate governance to hold a record in a matter of such significance. As regards part 1 of the request, it said that it expected that there would be a record of discussions between the ICO and the Ministry of Justice and of any documentation or communications sent/received as part of that process, for instance the meeting agenda and minutes. For part 2 of the request the complainant also suggested to the ICO relevant repositories where recorded information might be held.
6. The ICO presented the findings of its internal review on 18 February 2015. For part 1 it said that it had reconsidered the request taking into account the complainant's comments. As a result it now identified a certain amount of recorded information which it intended to disclose. This information was provided to the complainant and comprised an email chain of 5 emails between the Information Commissioner and an official at the Ministry of Justice as well as an extract from an email between the Information Commissioner and Simon Hughes MP, the Minister of State for Justice. A small amount of information was redacted under the section 40(2) exemption. For part 2 of the request it also disclosed extracts from an additional 7 emails, 1 letter and 2 posts

placed on the ICO's intranet which it had now identified as falling within the scope of the request.

Scope of the case

7. The complainant initially contacted the Commissioner on 15 December 2014 to complain about the ICO's failure to respond to their request for information.
8. Following the complaint the ICO responded to the request and carried out an internal review as outlined above. The complainant subsequently confirmed that they wished the Commissioner to consider the ICO's failure to respond to the request within the statutory deadline of 20 working days and the failure to identify the requested information until the internal review stage. It also complained that it had not been advised of the internal review procedure when the ICO responded to the request to say that no information was held.

Reasons for decision

Section 1 – General right of access to information held by public authorities

Section 10(1) – Time for compliance with a request

9. 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.*
10. Section 10(1) of FOIA provides that a public authority must comply with a request promptly and in any event not later than the twentieth working day following the date of receipt.
11. In this case the complainant made their request on 5 November 2014 but did not receive a substantive response until 21 January 2015 when it explained that no recorded information was held. This response significantly exceeded the deadline of 20 working days. Therefore, the Commissioner finds that by failing to respond to the request within 20 working days the ICO breached section 10(1) of FOIA.

12. However, after the complainant had made their complaint to the Commissioner, and after it had completed an internal review, the ICO found that it did in fact hold a significant amount of recorded information (16 separate pieces of information). Therefore, by failing to provide this to the complainant within the time for statutory compliance the ICO has also breached section 1(1)(b) of FOIA. Aside from the delay in handling the request, it is very disappointing and regrettable that this information was overlooked and not identified when the ICO initially responded to the request.

Section 17 – Refusal of a request

13. As noted above, the complainant has complained that they were not informed of the ICO's internal review procedure when they were initially told that the requested information was not held.
14. The requirement to inform an applicant of a public authority's internal review procedure is dealt with in section 17(7) of FOIA which provides that:

(7) A notice under subsection (1), (3) or (5) must-

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

15. A correct reading of section 17(7) makes it clear that a breach of this section only occurs when a public authority actually refuses a request. That is to say it issues a refusal notice refusing to confirm or deny if the requested information is held, cites an exemption in Part II of FOIA, or else applies sections 12 or 14 of FOIA. Where a public authority states that the requested information is not held there is no breach of section 17(7) if it does not provide details of its internal review procedure or the right to complain to the Commissioner.
16. However, the Commissioner would still expect public authorities to offer an internal review procedure where it has said that requested information is not held. Indeed, to do so has such obvious benefits for all parties that offering an internal review in such circumstances has in effect become standard practice. The Commissioner would refer to the Code of Practice issued under section 45 of FOIA which provides guidance on desirable practice which public authorities should follow in

connection with the discharge of their functions under Part I of FOIA. In relation to internal reviews it states that, "Any written reply from the applicant...expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint". This is also reflected in the Commissioner's own guidance to public authorities which says that "if a requester complains even when you have not refused a request, you should carry out an internal review if they...believe you hold more information than you have disclosed".

17. Therefore whilst he is not recording a breach of FOIA the Commissioner must acknowledge that on this point the ICO's handling of the request did not follow best practice.

Right of appeal

18. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

19. 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.
20. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
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SK9 5AF**