

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 September 2015

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

N.B: 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)

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1. The complainant made a request to the ICO for information about publishing details of cases where it had decided not to issue a Decision Notice under section 50(2)(c) of FOIA. In response the ICO said that the requested information was not held.
2. The Commissioner's decision is that the requested information was not held and that the ICO dealt with the request in accordance with FOIA. He requires no steps to be taken.

### Request and response

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3. On 2 February 2015 the complainant made a request for information to the ICO which read as follows:

*1) How many cases have the Information Commissioner refused to issue*

*a Decision Notice within the last three months citing Section 50(2)(c) of the Freedom of Information Act 2000 ?*

*2) What was the requests that were made, and to what department?*

*3) Did the Information Commissioner make these decisions available to the public and if so how and where?*

*4) Who can a member of the public appeal to, if the Information Commissioner refuses to issue a Decision Notice and the Information Rights tribunal refuses to accept an appeal against a decision by the Information Commissioner without one.*

*5) Is it not the case that if the Information Rights tribunal will not hear an appeal against a decision made by the Information Commissioner, if the latter refuses to issue a Decision Notice, then the Information Commissioner is in effect barring their right to appeal.*

4. The ICO responded to the request on 25 February when it disclosed information to answer each of the complainant's questions. In particular, in response to part 3 of the request it explained that:

*We do not proactively make the information about the number of cases we close under section 50 (2) (c) or information from these cases, for example, closure letters, available proactively. We do however publish statistics about our performance which contains all the cases not progressed for any reason each quarter. This number will include the cases closed under section 50 (2) (c)*

5. This led to the complainant making a new request for information on 25 February 2015 which read as follows and it is this request which is the subject of this Decision Notice.

6. *I would like copies of all documentation you hold which you have decided not to release to the public for proactive reasons under section 50 (2) (c) of the Freedom of Information Act. This includes copies of closure letter you refer to above.*

7. On 6 March the ICO sought clarification of the information sought and the complainant responded to say:

*"Please didn't interpret the question - Just answer the request I have made"*

8. The ICO responded on 25 March 2015 and said that in respect of that part of the request which asked for *'all documentation you hold which you have decided not to release to the public for proactive reasons under section 50 (2) (c) of the Freedom of Information Act'* no information was held. It explained that this was because the only information about FOI complaints which it proactively disclosed was the decision notice, where one has been served. Therefore it explained that

it had not 'decided not to release' information about section 50(2)(c) for proactive reasons, and consequently did not hold the information.

9. As regards the second part of the request – for copies of the closure letters – the ICO disclosed this to the complainant with the personal data of the recipients redacted under the section 40(2) exemption.
10. The complainant subsequently asked the ICO to carry out an internal review of its handling of the request and it presented its findings on 24 April 2015. The review upheld the response to the request.

## **Scope of the case**

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11. Following the completion of the internal review the complainant contacted the Commissioner to complain about the ICO's decision to refuse his request.
12. The Commissioner noted that in his request for an internal review the complainant had not challenged the ICO's decision to redact personal data from the closure letters. Therefore, the Commissioner said that he would proceed on the basis that the complainant only wanted to challenge the first part of his request of 25 February 2015 – documentation about a decision not to disclose details of cases closed under section 50(2)(c). The Commissioner invited the complainant to contact him if his understanding of his complaint was not correct but heard nothing further.

## **Reasons for decision**

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### **Section 1 - Information not held**

13. In its response to the Commissioner it stated that at the internal review stage it had interpreted the complainant's request as a request for a copy of the decision not to proactively disclose the information on cases closed under section 50(2)(c) of FOIA. Section 50(2)(c) allows the Commissioner to refuse to make a decision on a complaint if that complaint is frivolous or vexatious. The ICO reiterated that it did not hold any information about such a decision.
14. In the Commissioner's view there does appear to be some ambiguity about what the complainant is asking for but the ICO's interpretation is borne out by the complainant's request for internal review where he states:

*"I'm sorry but your reply is a nonsense. If the Commissioner has decided for whatever reason not to disclose the information about FOI cases which are refused under section 50(2)(c) then the Commissioner must at some stage have taken a decision not to proactively disclose it. Please supply it."*

15. In any event, the Commissioner notes that the complainant had refused to clarify his request and therefore the ICO was entitled to interpret the request how it saw it.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request). In order to assist with this determination the Commissioner asked the ICO to explain what steps it took to search for the requested information.
17. In response the ICO explained that during the internal review process it had contacted the Heads of Department for the relevant business functions. It reiterated that it found no information falling within the scope of the request. However it did say that they highlighted minutes of a meeting where the general matter of publishing information about cases closed other than with a decision notice had been discussed. This information did not discuss the specific issue raised by the complainant (cases closed under section 50(2)(c)) and so did not meet the terms of the request. However the ICO said that the minutes were provided to the complainant because it felt that it was useful to illustrate that it had had conversations about this general topic – if not this issue specifically.
18. The Commissioner is satisfied that the requested information is not held. It is clear that since the ICO is only obliged to publish cases closed by way of a decision notice, it is not necessary to publish information about cases closed in other ways and so there is no reason to think that the ICO must have taken a proactive decision not to do this. Moreover, following the request the ICO took steps to ensure this was correct by contacting relevant members of staff to confirm no such decision was taken. Therefore, the Commissioner has decided that on the balance of probabilities, the requested information is not held.
19. As mentioned above, it appears to the Commissioner that there is some ambiguity about exactly what information the complainant is asking for and the complainant has refused to provide any clarification. The

Commissioner wishes to state, for the sake of clarity, that if it is the case that the complainant intended for his request to be interpreted in a different way, the Commissioner is still satisfied that the requested information is not held or else has already been provided to the complainant. To the extent that the complainant is asking for information about each of the cases that were refused under section 50(2)(c) then the Commissioner is also satisfied that the ICO has complied fully with the request. The ICO has disclosed the closure letters for each case closed under section 50(2)(c) in the 3 months leading up to the request which explain the full circumstances of the case and fully explain why the case has not been taken forward.

## Right of appeal

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20. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

21. 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.
22. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**