

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2022

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

Decision (including any steps ordered)

1. The complainant requested correspondence relating to a particular press statement. The Information Commissioner ("the ICO") initially relied on section 36 of the FOIA (prejudice to the effective conduct of public affairs) to withhold the information, but later disclosed it.
2. The Commissioner's decision is that the ICO failed to respond to the request within 20 working days and therefore breached section 10 of the FOIA
3. The Commissioner does not require further steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information 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 in his capacity as a public authority – a duty confirmed by the First Tier Tribunal. 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. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request, and the term "the Commissioner" when referring to the Information Commissioner dealing with the complaint.

Request and response

5. On 29 December 2020, the complainant wrote to the ICO and requested information in the following terms:

"On 28th December, the ICO issued a statement on arrangements for data transfers between the UK and the EU. This statement included a quote from the Information Commissioner about the four month extension of frictionless transfers, which Elizabeth Denham described as 'the best possible outcome for UK organisations processing personal data from the EU'. I would like to make a request about the statement and the quote from the Commissioner. I am requesting the following information:

- 1) Who wrote the statement?*
- 2) Who wrote the quote attributed to Mrs Denham?*
- 3) Any recorded information about the content of this statement and the quote from the Commissioner, held in emails, notes or other internal correspondence or records*
- 4) Any correspondence between the ICO and the DCMS about the content of the statement or the quote from the Commissioner.*

"Please note that I am not requesting information about the deal itself, only the statement and quote issued by the ICO on the 28th December 2020."

6. On 5 March 2021, the ICO responded. It provided some information within the scope of the request but refused to provide the remainder. It relied on section 36(2)(b)(ii) of the FOIA to withhold the information.
7. The complainant requested an internal review on 13 March 2021. The ICO sent the outcome of its internal review on 28 May 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 29 May 2021 to complain about the way his request for information had been handled.
9. Following receipt of submissions and the withheld information, the Commissioner contacted the ICO on 9 December 2021. He explained that, whilst the exemption was likely to be engaged, he considered that, in the particular circumstances of the case, the balance of the public interest favoured disclosing the information. He suggested that, in the interests of resolving the case informally, it would be better for the ICO

to simply disclose the information – with suitable redactions to protect personal data. The ICO subsequently disclosed the information on 14 January 2022. It withheld a small quantity of personal data.

10. The Commissioner wrote to the complainant on the same day and, given that the original information had been disclosed, invited him to withdraw his complaint.
11. The complainant responded on 15 January 2022 to say that he was not willing to withdraw his complaint. He was unhappy that it had taken a year for the ICO to disclose the requested information and considered that the application of the exemption had been inappropriate. He therefore asked the Commissioner to continue investigating the use of the exemption as he considered that the ICO's broader use of section 36 was "flawed and unjustifiable."
12. Where a public authority relies on an exemption to withhold information, but subsequently discloses it, the Commissioner will not usually investigate whether the exemption was appropriately cited. Firstly, it would act as disincentive for the public authority to disclose the information in the first place – disclosing information whose sensitivity may have diminished since it was first requested is often easier than dealing with an investigation by the Commissioner. Secondly, such an investigation would confer no practical advantage on the complainant as, even if the complaint were upheld, the public authority could only be required to disclose information the complainant already possesses. Equally, the Commissioner might conclude that the public authority was entitled to withhold the information at the point it did so – resulting in the perverse position whereby the Commissioner would be issuing a decision finding that the complainant was not entitled to have information they had already received.
13. The Commissioner will therefore not be investigating the ICO's use of section 36 – either in this case, or more broadly. However, he wishes to place on record that he saw nothing in the ICO's submission which would suggest that the exemption was not cited in good faith.
14. As the complainant has not challenged the personal data redactions, the Commissioner considers that he (the complainant) now accepts that the ICO has (albeit belatedly) complied with its duty under section 1 of the FOIA. The Commissioner considers that the scope of his investigation is to determine whether the request was responded to in a timely fashion.

Reasons for decision

15. Section 1(1) of the FOIA states 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.*

16. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

17. The ICO noted in its original refusal notice that its response had been delayed by the ongoing burden of the pandemic. The Commissioner accepts that the pandemic in general (and, in particular, the nationwide lockdown in force whilst the request was being dealt with) has caused considerable difficulties to many public authorities in complying with their obligations under information rights legislation. Nevertheless, the statutory deadlines remain unchanged.

18. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the ICO has breached section 10 of the FOIA.

Other matters

19. The Commissioner considers that an internal review should normally be completed within 20 working days and should never take longer than 40 working days. He notes in this case that despite the delay in processing the original request, it took that ICO in excess of 50 working days to complete its internal review – which he considers to be poor practice.

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF