

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2024

Public Authority: Information Commissioner's Office (ICO)

Address: Wycliffe House, Water Lane, Wilmslow, SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested the ICO to disclose information relating to a tribunal case involving the Judicial Appointments Commission (JAC) where it transpired that there was an issue with its section 36 of FOIA qualified person's (QP) authorisation. The ICO disclosed the recorded information it holds.
2. The complainant disputed that the ICO had disclosed all the recorded information it holds and claimed that it has also breached section 16 of FOIA by failing to provide them with advice and assistance.
3. The Commissioner's decision is that on the balance of probabilities the ICO has identified and disclosed all the recorded information it holds falling within the scope of the request. He has concluded that there is no breach of section 16 of FOIA.
4. As a result the Commissioner does not require any further steps to be taken.

Naming

5. This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He's 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.

Request and response

6. On 28 September 2023, the complainant wrote to the ICO and requested information in the following terms:

"I would like to make a FOIA request as follows:

- (1) I refer to the case of Abbas Mithani v Information and Judicial Appointments Commission EA/2022/0299 – EA/2022/0300 and EA/2022/0310 which has been heard by the first tier tribunal. Judgment in that case was reserved. In that case, it transpired that there had been no person authorised to issue qualified-person opinions in the history of that organisation until 10 October 2022. It was also ascertained that, despite this, there were several cases in which the exemption in s. 36 of the FOIA was relied on by the JAC.

Please provide the following information:

(a) Has the information commissioner [IC] been informed of this by the JAC?

(b) If he were informed, please state how.

(c) If the IC were informed in writing, please let me have all communication passing between the JAC or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you sent your response to this request, including any advice or guidance given to the JAC by the IC to remedy these situations.

(d) If the answer to (c), above, were Yes, please let me know whether the advice or guidance provided to the JAC has been complied with and provide all communication passing between you and the JAC confirming this.

(e) If the IC were informed orally, please state when and what he was told and any communication (whether oral or in writing) passing by or between the JAC and the IC.

- (f) If any of the answers to (a) to (e) above were Yes, please let me know what action the IC proposes to take against the JAC.
- (g) If the IC were not informed, please state what action the IC proposes to take for this very serious breach of the FOIA.
- (2) In respect of the cases referred to in question (1), above, please state what remedial action (if any) the IC proposes to take in the matter, such as notifying the requesters that the JAC misled the ICO and is now entitled to the information sought.
- (3) In respect of the cases where QPs were issued without authorisation, please state, whether there was a complaint made to the IC by the requester, providing full details of the requester (other than their personal data) and the decision notice issued by the IC.
- (4) Regarding Question (3), above, will the IC be rescinding the decision notice he issued and substituting for that notice a fresh decision notice?
- (5) If so, when does he propose doing this?
- (6) The IC's guidance on section 36 expressly states that public bodies must identify the QPs in their organisations. It appears that caseworkers at the ICO simply assume that the authorisation is in force. This has happened in other cases, e.g., *Salmon v IC and King's College* [2008] EA 2007/1035, specifically referred to in the IC's guidance. It is understood that this is because of resource issues at the ICO. Please provide:
- (a) any internal written guidance issued by the IC to caseworkers about what they should look for when dealing with section 36 exemption.
- (b) Whether or not there is any such written guidance, please let me know whether there is any policy or guidance (official or unofficial) that in section 36 cases, the caseworker need not ask for copies of the authorisation. Please provide full details of this.
- (c) Has or does the IC intend to inform the requesters directly of this fact? If so, please let me know whether the requesters have been informed of this and, if so, how.
- (d) Does the IC consider that it is required to inform any other body about the breaches referred to above? If it is, please provide evidence that it has.

(7) If the IC obtained legal advice in relation to the above, please provide full details of that advice.”

7. The ICO responded on 19 October 2024. It responded to each question in turn, providing either the recorded information it does hold or confirming that no recorded information is held. For question 6, the ICO applied section 21 of FOIA and directed the complainant to where the information held can be found on its website.
8. The complainant requested an internal review on 20 October 2023. They stated that the ICO had not provided appropriate advice and assistance under section 16 of FOIA (advice and assistance), disputed that all the recorded information held had been provided and asked the ICO to provide its comments and position on a number of observations they had made from the response of 19 October 2024.
9. The ICO carried out an internal review on 16 November 2023 and notified the complainant of its findings. It outlined the purpose of the review process and how the complainant’s requests for opinions, clarification of the ICO’s position and other commentary on matters concerning the tribunal case referenced in their request are outside the scope of FOIA. In terms of any additional recorded information being held, the ICO reviewed the request again and confirmed that it was satisfied that its initial response was accurate and it holds no further recorded information within the scope of the request. It did however direct the complainant to an additional case relevant to question 5 of the request. In terms of section 16 of FOIA the ICO confirmed that there is no expectation under this element of the legislation to do what they had asked.

Scope of the case

10. The complainant contacted the Commissioner on 23 November 2023 to complain about the way their request for information had been handled. They stated that they are entitled to the specific information requested in questions 1 and 2, felt question 3 had not been answered properly and that questions 4, 5, 6 and 7 posed simple questions, which the ICO should answer. No complaint was raised about the application of section 21 of FOIA.
11. The complainant also stated that the manner in which the ICO has answered their questions, amounts to a breach of section 16 of FOIA.
12. The Commissioner wrote to the complainant on 18 March 2023 to explain the limitations of his investigation. He explained that the investigation is limited to the wording of the original request and what

recorded information is held, if any, falling within scope. FOIA does not provide a right to request answers to questions or to receive explanations on specific issues unless the answers to those specific questions or those requests for explanation are already held in recorded information, which is unlikely. It was noted that the complainant's internal review request (and therefore complaint to the Commissioner) was asking for explanations from the ICO and for it to enter into specific dialogue over the section 36 of FOIA issue the request focuses on and previous decisions. It was also asking what the ICO intends to do in the near future around that issue. Asking what a public authority intends to do in the future is not a valid request for recorded information at that specific time. Unless the public authority has already taken the action described and holds recorded information relating to that.

13. As he advised the complainant at the outset of his investigation, the scope of the Commissioner's investigation has therefore been to establish whether or not, on the balance of probabilities, the ICO holds any further recorded information to that already identified. He will also consider whether there has been any breach of section 16 of FOIA.

Reasons for decision

Section 1 – general right of access

14. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
15. In cases where a dispute arises over whether recorded information is held by a public authority at the time of the request, the Commissioner - following the lead of a number of First-tier Tribunal decisions - applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
16. The Commissioner asked the ICO to go through each element of the complainant's request again and ensure that all recorded information it holds falling in scope is identified. The ICO obliged and provided the following submissions.
17. In relation to question 1 of the request the ICO consulted its solicitor, who was involved in the tribunal case to establish if the ICO was informed by JAC. The solicitor confirmed that the issue came up in a witness statement JAC presented during the appeal to the tribunal. They

confirmed absolutely that at no point during the investigation did JAC inform the ICO directly of the issue outlined in this question.

18. The ICO therefore reached the view that, given the issue had only arisen via a witness statement presented to the court and the ICO did not engage in discussion with JAC directly about it outside of these proceedings, it could not be said that the ICO was notified of the issue by JAC direct. It therefore answered no to this element of the request in its response to the complainant.
19. It argued that since all the parts in question 1, following on from that point, are conditional on the ICO having been informed directly by JAC, the ICO concluded that it does not hold any recorded information relevant to these elements of the request.
20. With regards to question 2, again the ICO handled this part of the request by consulting the solicitor involved in the appeal. During the appeal the ICO maintained that section 36 of FOIA applied and it was the ICO's position that even if no authorisation was in place at the time, JAC could still claim a late reliance on this exemption. The ICO therefore took the stance that, given it accepted JAC's reliance on section 36 of FOIA, there would be no remedial action taken and as such no recorded information held.
21. Concerning question 3, the ICO explained how in its initial response it had interpreted this part of the request to be for any complaints about JAC's application of section 36 of FOIA, specifically relating to the issue of the QP authorisation, and that since this had arisen and been resolved in the tribunal case, this meant there was no recorded information held.
22. However, it noted that the complainant further clarified this point in their internal review request to mean any complaints about section 36 of FOIA in general prior to the matter having been raised at the tribunal. The ICO advised in its internal review response that there were two decision notices relating to section 36 of FOIA and these could be accessed on its website.
23. As a result of the Commissioner's investigation and instruction, it has reviewed the cases held on its casework management system to see if any other complaints have been made that did not result in a decision notice, and it confirmed that there is no other information held. The ICO therefore said with certainty that the complainant has been provided with all the information held.
24. Turning to question 4, the ICO advised that it does not have the power to rescind a decision notice. This is a matter for the tribunal only. It

therefore does not hold any information in relation to this part of the request.

25. Question 5, the ICO stated that this element of the request is dependent on question 4. As it holds no recorded information in relation to question 4, it follows that it hold no recorded information for question 5 too.
26. In relation to question 6, the ICO explained that it consulted its FOI Policy team and FOI Managers. It said that the FOI Policy team provided the information found on its knowledgebase that they thought may be relevant to this question – this being the section 36 of FOIA Line to Take (LTT) and the policy advice from September 2023, both of which were provided to the complainant with its response.
27. It confirmed the FOI Policy team also provided several other LTTs and policy advice notes on the topic of section 36, but these all fell outside the scope of the request. This is because these topics related to the application of section 36 of FOIA (e.g. the chilling effect argument or the evidence required to demonstrate the QP opinion is reasonable) and not the technical question of whether the public authority holds authorisation for the QP.
28. The ICO said it also undertook a detailed sample review of the documents (these were mostly tribunal and upper tribunal policy reviews) and concluded that none were of any relevance to the specifics of this request. The FOI Policy team also supported this by confirming, in there professional and expert opinion, that although there will be many cases relating to different aspects of section 36 of FOIA, there is very unlikely to be any where there was no authorised QP.
29. With regards to question 7, the ICO advised that it does not hold any recorded information relevant to this aspect of the request.
30. The Commissioner is satisfied that on the balance of probabilities the ICO has carried out extensive and thorough searches to determine what recorded information it holds falling within the scope of the wording of the original request. Any recorded information has been supplied or section 21 applied because the information is available to the complainant via other means – the ICO's website. The request was reviewed again at the internal review stage and as a result of the Commissioner's instruction. The Commissioner has no reason to doubt the ICO's position and has not received an evidence to the contrary.
31. As detailed in the scope section of this notice, a good proportion of the internal review request (reasons for remaining unhappy) was asking for the ICO to enter into specific dialogue over the section 36 of FOIA issue and what its initial response to each question meant or suggested. This

is outside the requirements of FOIA. FOIA requires a public authority to establish what recorded information it holds falling within the scope of a particular request. If it does not hold any, it is required to confirm that this is the case. If it does it is required to either disclose it or issue a refusal notice explaining why information is exempt under Part II of FOIA. The Commissioner considers the ICO has done that and therefore met its obligations under FOIA.

Procedural matters

32. Section 16 of FOIA requires a public authority to provide appropriate advice and assistance so far as that is reasonable and practicable to do so to an applicant when trying to make an information request.
33. The complainant believes the ICO has breached section 16 of FOIA in this case because it has not assisted them in understanding the information or documentation provided and provided a direct response to the inferences they have made from the initial response.
34. There is no requirement under section 16 of FOIA for a public authority to do that and as detailed in the scope section of this notice, such requests are outside the scope and requirements of FOIA. As the ICO correctly advised the complainant, this section is primarily focused on ensuring that public authorities take the necessary action to ensure that a request is valid, assist a complainant in making a request or refining an existing request where it is found that section 12 of FOIA applies due to the cost of compliance.
35. The Commissioner is therefore satisfied that there is no breach of section 16 of FOIA in this case.

Right of appeal

36. 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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF