

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 June 2008

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant asked for a list of documents disclosed by the Cabinet Office under the Freedom of Information Act 2000 (the "Act") and the Environmental Information Regulations 2004 (the "EIR") and the dates of their disclosure. The Cabinet Office responded that the information is not held. The Commissioner's investigation found that, whilst constituent elements of the information requested are held by the Cabinet Office, they are not held in the form of a consolidated list. The Cabinet Office has argued that the process of gathering the information requested into a list constitutes information "creation", an activity which the Act does not require public authorities to undertake. The Commissioner does not accept this view and has found that information falling within the scope of the request was held by the Cabinet Office. The Commissioner instructed the Cabinet Office to provide the complainant with the requested information or, should they estimate that to do so would exceed the "appropriate limit" as defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, provide the complaint with an indication of what information can be provided within the appropriate limit, to assist the complainant in reframing the request so that it might be accommodated within the appropriate limit.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Note about Linked Decision Notice

Whilst this decision notice addresses the Cabinet Office's compliance with a discrete request for information it is linked to another request

which is the subject of a separate decision notice issued by the Commissioner (ICO case reference: FS50198141). This other request (referred to as the “modified” request) was submitted by the complainant following the Cabinet Office’s response to the request examined in this decision notice. It is relevant here both because the subject matter of the requests is similar and because the modified request was directly inspired by the Cabinet Office’s response to the original request, analysis of which is the subject of this decision notice.

The Request

2. On 22 September 2006 the complainant requested the following information from the Cabinet Office:

“Please provide a list of all documents (in whatever form) disclosed under FOIA/EIR by the Cabinet Office, together with dates of release.”
3. The Cabinet Office responded on 13 October 2006 stating:

“...the information you requested is not held by the Cabinet Office. We do not record documents released in this way.”
4. On 16 October 2006 the complainant wrote back to the Cabinet Office stating:

“I am somewhat baffled that you are unable to provide me with a list of disclosures made by the Cabinet Office under FOIA or Environmental Information Regulations to date.”

“You fail to suggest any alternative way of responding to my request, as required under section 16 of FOIA.”

The complainant also submitted a supplementary or “modified” version of his request. The modified request is the subject of another Decision Notice issued by the Commissioner (ICO case reference: FS50198141)
5. The Cabinet Office responded on 14 November 2006 and, whilst responding to the complainant’s modified request, did not acknowledge his request for internal review of his original request. In handling the modified request the Cabinet Office directed the complainant towards statistics on the Ministry of Justice’s (the “MOJ”) website (at that time the Department for Constitutional Affairs (the “DCA”)) which related to central government departments’ handling of requests for information.
6. On 27 November 2006 the complainant wrote to the Cabinet Office and asked that they conduct an internal review of his original request. He also restated his modified request and queried why it appeared that the

Cabinet Office did not "...operate a system for keeping track of FOIA requests that would contain the information requested, or at least, something close to it." The complainant asked the Cabinet Office to explain what system they had for keeping track of requests for information and to consider how his request might be addressed in the light of this.

7. On 31 January 2007 the Cabinet Office wrote to the complainant and stated:

"I have carefully reviewed the handling of your requests and am satisfied that they were dealt with appropriately. The Cabinet Office simply does not hold a *'list of all documents'* disclosed under the FOI Act or Environmental Information Regulations. The FOI Act does not oblige public authorities to create information that is not held at the time of the request and in this case there would also be significant administrative burdens in doing so."

The Cabinet Office also provided some clarification about its system for keeping track of FOI requests stating that it was designed:

"...to manage the FOI cases we have and to provide the data required by the Department for Constitutional Affairs. The reply of 14 November 2006 highlighted the DCA's statistics so you could see what type of information is collected, which we thought may have been of interest to you."

8. The complainant wrote to the Cabinet Office on 25 February 2007. He stated that he considered that they had not addressed his modified request. He explained that his modified request was prompted by the Cabinet Office's confirmation that the information specified in his original request, was not held and in lieu of any assistance from the Cabinet Office as to how his request might be revised to identify relevant held information. He asked the Cabinet Office to provide the information identified in the request.

9. On 16 March 2007 the Cabinet Office wrote to the complainant and stated:

"We dealt with your original and subsequent revised request and undertook an internal review of our handling of these. The findings of which were that the information requested was not held in the format required. We do not maintain our records in such a way to provide you with the information requested, and under the Freedom of Information Act we are not required to create information."

The Investigation

Scope of the case

10. On 26 March 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Whether the Cabinet Office holds the information requested or, at least, “something close to it”.
 - Whether the Cabinet Office provided sufficient advice and assistance.
11. During the course of his investigation the Commissioner has considered the following issues:
 - Whether the Cabinet Office holds information falling within the scope of the request.
 - Whether the Cabinet Office provided the complainant with sufficient advice and assistance as defined under section 16 of the Act.

Chronology

12. On 4 December 2007 the Commissioner contacted the Cabinet Office and asked them to provide clarification of their handling of the request, specifically:
 - As the subject matter of the request was requests for information handled by the Cabinet Office the complainant had a reasonable expectation that some relevant information would be held. Also, the Commissioner would expect public authorities to have systems in place for recording and tracking requests for information. As no information was provided, the Commissioner asked whether the Cabinet Office considered advising the complainant how he might resubmit his request in a form which identified information which they did hold.
13. On 14 January 2008 the Cabinet Office responded to the Commissioner, stating that with regard to this request and a request which is the subject of another linked decision notice issued (see note above):

“...the Cabinet Office did not hold the information requested and that was the sole reason for our declining to comply with the requests.”

The Cabinet Office clarified that, although the “basic building blocks” of the information requested were held, they considered that “significant manipulation” of this constituent information, involving “knowledge and judgement” would be required in order to produce the specified

information. The Cabinet Office explained that they considered this process would be equivalent to information 'creation', something which the Act does not require public authorities to undertake.

14. In their response the Cabinet Office also provided the Commissioner with an explanation of their method for recording requests for information. In respect of information specified in the complainant's original request they clarified:

"The Cabinet Office's initial method of recording Freedom of Information (FOI) requests was to record centrally on a spreadsheet key information including the name of the requester, the request itself, the date of the request, the date it was cleared and usually, though not always, the outcome. In November 2005 the system was changed, the spreadsheet was archived, and from then on each case was recorded individually on a database. The fact that information may have been released was, of course, recorded, but the information itself was not copied onto the spreadsheet or database, nor was it described and listed anywhere."

15. The Cabinet Office explained that each unit within their office has responsibility for handling requests which relate to their specific duties. In turn, each unit would hold a physical folder containing correspondence relevant to the request, including a copy of the information requested. Therefore, in order to provide a list of information disclosed, each of these paper files would need to be collected and the relevant disclosed information would need to be extracted and compiled. The Cabinet Office explained that this process would amount to information generation.
16. The Cabinet Office explained that at the time the request was received they had handled approximately 2900 requests, of which some 400 had resulted in information being released. The Cabinet Office argued that even if they were to accept the Commissioner's view that "...listing of information did not constitute the creation of fresh information", by their estimate the cost of compiling the information would exceed the 'appropriate limit' as defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations")¹.
17. The Cabinet Office also responded to the Commissioner's enquiry about whether they considered they had offered sufficient advice and assistance to the complainant. The Cabinet Office explained that, as they considered they did not hold the requested information and, given

¹ For central government departments such as the Cabinet Office the appropriate limit is set at £600, calculated by estimating the staff time (calculated at an hourly rate of £25) that a public authority would need to employ in determining whether it holds the information, locating the information, retrieving the information and extracting the information from a document containing it.

the format in which the constituent data was held it was difficult to know what could be offered which would not have fallen far short of what the complainant required. As the request had specified details of every request since January 2005 they thought it unlikely that the complainant would have been interested in information across a narrower time-frame which, even then, in their view would not have been held.

18. On 13 February 2008 the Commissioner wrote to the Cabinet Office and sought further clarification about their systems for recording requests for information.
19. The Commissioner invited the Cabinet Office to comment upon representations he had received from the complainant which confirmed that, had he been given an opportunity, he would have reframed or narrowed his request in a manner which would identify information which could be provided by the Cabinet Office. The Commissioner put it to the Cabinet Office that the complainant's voluntary submission of a modified version of his request was evidence of this disposition.
20. On 14 March 2008 the Cabinet Office wrote to the Commissioner and clarified that, with regard to the original request:

“...neither the original method of tracking requests (a spreadsheet) nor the revised system (a database) hold the information that was released to requestors. Each unit which released information should have retained a copy or a description of what was issued, but this would be the only record of individual disclosures. We could not provide the requester with a complete or partial set of information disclosures without physically arranging for each unit to locate their files and extract the relevant information.”
21. The Cabinet Office also provided further details of the operation of their post-November 2005 database system for recording requests. They explained that all requests are passed to a central point (the FOI team) which records the request on the database. Requests are allocated a reference number and are passed to the unit holding information relevant to the request for them to process this. The details recorded in the database include: reference number, name of the requester, date received, and a very brief description of the request.
22. The Cabinet Office further confirmed that the “...description of the request only runs to ten words or so, and is useful, for example, in distinguishing between a number of requests made by the same requestor, but is in no way a complete and accurate description of the request.”
23. The Cabinet Office also provided details of the functionality of the database, explaining that it can be used to generate figures which are used for their statistical returns:

“These can show, for instance, in how many cases requests were granted or refused in full, or in how many cases certain exemptions were applied, etc. These, however, are composite figures and do not show details of individual cases (although they can show the brief description of each case, as referred to above).”

Analysis

Section 1

24. The Commissioner has considered whether information falling within the scope of the request is held by the Cabinet Office.
25. The Cabinet Office has argued that it does not hold a list of documents released in response to requests for information. It has also explained that the constituent information which would allow such a list to be provided, namely, information released in response to requests, was neither recorded in either of their request handling systems nor was it described or listed.
26. The Commissioner acknowledges that public authorities will often receive requests made under the Act for lists of information. In many cases this will not be information which the public authority holds in list form but the constituent data parts, instead, will be held in a database or other disparate sources. A common response to such requests is that the information is simply not held, because, as noted above, the public authority is not in possession of a physical list, as requested. A number of public authorities have further claimed that responding to such a request would involve the creation of new information.
27. The Commissioner does not accept this position and instead is of the view that where a database or other electronic source contains recorded information identified in a request, the information is held, and the public authority is under an obligation to provide it (unless it is exempt). Further, the Commissioner considers that the actions required to access the specified information constitute information retrieval or extraction rather than the creation of new information, because, simply, the information is held, albeit embedded within a broader resource of data. As the Act provides a right of access to recorded information, and such information is recorded, the difficulty of the retrieval or extraction process is irrelevant to the question of whether the information is held. However, the complexity of this procedure, in terms of the time it would take to locate and extract the

requested information is clearly relevant to the consideration of costs under the Fees Regulations².

28. Additionally, where a public authority holds information constituent to a request (the “building blocks”) in the form of manual records the Commissioner considers that it is held, provided that the work involved in providing this does not involve the exercising of more than a minimal degree of skill and judgement.
29. This issue has previously been considered by the Information Tribunal in *Johnson v the ICO and Ministry of Justice* (EA/2006/0085). In deciding whether constituent information recorded in manual form was held for the purposes of the Act the Tribunal considered that the extent to which an authority would need to manipulate information in order to comply with a request. It concluded that where the levels of “skill and judgement” in collating information were minimal or where substantive manipulation of the constituent information were not necessary to comply with a request, information should be considered to be held.
30. In this case, according to the Cabinet Office’s explanation (noted at paragraph 15 above), copies of requested information are held within paper files dispersed throughout the various units with responsibility for handling requests. The Commissioner considers that the actions required in order to locate, retrieve and extract this information would involve a minimal level of skill and judgment. Whilst the Commissioner acknowledges that it is possible that the work involved in compiling the information requested would exceed the appropriate limit as defined by the Fees Regulations, he considers that the information was, nevertheless, held by the Cabinet Office at the time the request was received. The Cabinet Office therefore breached section 1(1) of the Act in that it failed to confirm it held the information and should have communicated the information to the complainant.

Section 16

31. Section 16 of the Act places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it. The section goes on to state that this duty is complied with when the provision of advice and assistance in any case conforms with the section 45 Code of Practice (the “Access Code”).
32. Paragraphs 8. to 11 of the Access Code deal with “clarifying the request” and relate specifically to circumstances where a public

² This position has been articulated in a decision notice (ICO case reference: FS50166599) already issued by the Commissioner, viewable on the ICO’s website here: http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50166599.pdf

authority needs more detail to enable it to identify and locate the information sought. Paragraph 8. says that public authorities are entitled to ask for more detail if needed to enable them to identify and locate the information sought. In this circumstance public authorities should assist applicants in describing more clearly the information requested. The Code does not require public authorities to assist applicants in describing the information more clearly if they don't need more detail to identify and locate the information sought. In this case the Commissioner finds that the request was clear and did specify the information sought. The Commissioner's finding above is that the information is held and therefore the Cabinet Office should have communicated the information to applicant in compliance with section 1(1) of the Act. The Commissioner therefore finds that there is not a breach of section 16 in addition to the breach of section 1.

The Decision

41. The Commissioner's decision is that the Cabinet Office has not dealt with the complainant's request in accordance with the following requirements of Part I of the Act:
- Section 1(1) – in that it failed to confirm that it held information that fell within the scope of the request and it failed communicate to the complainant such information they held which fell within the scope of his request.

Steps Required

42. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Either provide the complainant with information falling with the scope of the request or,
 - Where the cost of compliance is estimated to exceed the appropriate limit, advise the complaint of this by providing a notice stating this fact in compliance with section 17(5) of the Act and provide an indication of what information which can be extracted, located and retrieved within the cost limit to assist the complainant in refining his request.

Failure to comply

49. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 18th day of June 2008

Signed

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

Section 1(1) 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.”

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”