

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 December 2009

Public Authority: Ofcom
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Summary

The complainant made a series of requests to Ofcom regarding the number of complaints received from viewers/listeners that were deemed not to have broken any broadcasting code and which on review, were subsequently overturned. Ofcom refused the request on cost grounds under section 12 of the Freedom of Information Act 2000 ("the Act"). The Commissioner finds that section 12(1) has been applied correctly. He has also recorded a number of procedural breaches.

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.

The Request

2. On 14 February 2008, the complainant made the following information request:

"B. During the period of the last two years, up till the date of this email, how many viewers/listeners complaints that were deemed not to have broken any broadcasting code (not upheld) gone to the next stage, a review.

C. From the answer to B, if any, how many went to be additionally reviewed.

D. From the answer to C, if any, how many went to Ofcom's internal appeals.

E. From the answer to D, if any, how many were deemed not to have broken any broadcasting code, not upheld.”

3. The public authority responded to this request on 13 March 2008 as follows:

“Ofcom’s complaints database does not categorise a case as “a request for review from a complainant” after the complainant has received a not upheld decision.

In the two years prior to the date when your request was received, Ofcom logged approximately 78,000 new cases relating to television and radio broadcasts. Of these cases, 250 were logged from complainants who were responding to the outcome of their complaint. However, these responses included both requests for review and comments on the outcome of a complaint. Therefore, Ofcom does not hold the information on the total number of cases in the last two years that have been not upheld and then reviewed.

As Ofcom does not hold the information to respond to your first question under the Act, it is not possible to answer your further questions”.

4. The complainant requested an internal review on 19 March 2008.

5. Ofcom responded on 22 May 2008 advising the complainant that they were unable to provide the information requested. They advised that an initial search had indicated there were 250 cases which were from complainants responding to the outcome of their complaints. These included complaints in which:

- complainants have commented on the outcome of their initial complaints;
- complainants have requested further information on the outcome of their case;
- complainants have requested a formal review; or
- complainants have requested all of the above

Ofcom stated that 250 cases were logged as new cases and were noted in the database as being linked to the original complaint. Ofcom said that there was no single category within the database that listed specifically those cases in which the complainants have requested a review. Therefore Ofcom would have to review not only the 250 cases already mentioned but also the remaining 78000 cases to see if a review had been requested. Ofcom stated that the cost of this exercise would be in excess of £450 and therefore it was neither able to confirm nor deny that it held the information requested by the complainant.

The Investigation

Scope of the case

6. On 29 May 2008 the complainant contacted the Commissioner to complain that Ofcom had not answered his request for information.

7. The complainant also raised the issue regarding the length of time taken by Ofcom to complete their review. This is not addressed in this Notice because it is not a requirement of Part 1 of the Act. It is however covered under “other matters”.

Chronology

8. The Commissioner wrote to the complainant on 13 November 2008 setting out his understanding of the complaint. In his letter to the public authority on the same date the Commissioner requested further information on the following:
 - Having identified the 250 cases, what would be the cost of analysing them with a view to establishing the number of those which indeed were requests for further reviews?
 - Explanation as to the need to review all 78000 cases when a pool of 250 cases had already been identified.
9. The complainant responded on 23 November 2008 and mentioned that Ofcom had not mentioned any timescale or monetary value in their initial reply. The complainant wanted to know if Ofcom could supply information up to the level of the “appropriate limit”.
10. On 3 December 2008, the Commissioner acknowledged the complainant’s email and advised him that he would be looking into the issue of providing information up to the “appropriate limit”.
11. On 15 December 2008 the public authority responded to the Commissioner’s letter of 13 November, advising that they had conducted a trial run to determine how long it would take to review the 250 follow up cases.
12. Having considered the public authority’s response, the Commissioner provided a copy of his assessment of the complaint to the complainant on 7 January 2009. The assessment concluded that the Commissioner was satisfied that the costing calculation provided by the public authority was both fair and reasonable. The Commissioner further advised that where a public authority has made a reasonable estimate that the “appropriate limit” would be exceeded then the public authority is under no obligation to undertake work up to that limit.
13. The complainant responded on 12 January 2009 and expressed dissatisfaction that he had not been able to obtain the information requested. The complainant however did not disagree with the Commissioners findings that section 12 had been engaged.

Analysis

Substantive Procedural Matters

Section 12 (cost of compliance)

- 14 The full text of the legal provisions of the FOIA have been set out in the Legal Annex at the end of this Notice.
15. Section 12(1) of the Act does not oblige a public authority to comply with a request if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 set a cost limit of £450 for public authorities, calculated at a rate of £25 per hour, providing an effective limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
16. Regulation 4(3) provides that only certain activities may be taken into account when calculating the cost. Those activities are:-
 - “(a) determining whether it holds the information,*
 - (b) locating the information, or a document which may contain the information,*
 - (c) retrieving the information, or a document which may contain the information, and*
 - (d) extracting the information from a document containing it.”*
17. The public authority has provided to the Commissioner representations concerning the time and costs involved in reviewing all its records to ascertain the total number of complaint cases in the last two years that have not been upheld and then reviewed.
18. Ofcom conducted a trial run to determine how many requests for a review could be identified from a sample spreadsheet. The results were that a total of 8 cases were reviewed in one hour. Ofcom advised that the numbers would have been less if the person carrying out the trial run had to log the details of the outcome of each case on a separate spreadsheet in order to report back to the person making the FOI complaint. Based on this trial run, Ofcom estimated that the total number of hours that it would have taken to review the 250 follow up cases to be 31.25 which at a rate of £25/hour would have cost £781.25.
19. The Commissioner questioned the need for Ofcom to review all 78000 cases when 250 cases (where a review may have been requested) had already been identified. Ofcom advised that the 250 follow-up cases were those which, upon receipt, were assessed and deemed worthy of further investigation, and which were consequently given a new case reference, aligned to the original complaint and tagged as requests for review. There were however other instances where complainants wrote to Ofcom to express their displeasure in response to its findings, but where the complaints were not given separate case numbers and

not linked to an original complaint. These cases were therefore not identified and isolated unlike the 250 follow-up cases.

20. Ofcom advised that whilst it assesses all of the complaints and comments that it receives, in many instances, correspondence relating to an original case would not be deemed to raise any substantive issues. In such cases the correspondence is not identified separately as a follow-up case but rather it is filed in the original complaint file along with other material relating to that complaint. Thus, requests for review which are deemed not to be cases to answer are contained within original complaint files without any external indication that correspondence from the complainant, post finding, has been received.
21. Ofcom advised that in order to ensure that all correspondence containing requests for review is accounted for and to comply with the information request accurately and completely, they would need to review not only the 250 follow up cases but all 78000 cases. Ofcom calculated, using the results of the trial run, that it would take them approximately 9750 hours to review all 78000 at a cost of roughly £243,750.
22. In view of the above, the Commissioner accepts the authority's reasoning that the relevant cost limit of £450 would be exceeded in complying with the request. Section 12(1) has therefore been applied correctly.

Procedural matters

Section 1(1) (General right of access) and Section 10 (Time for compliance)

23. Section 1(1) of the Act provides that any person making a request for information to a public authority is entitled to (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. Under section 10(1), a public authority must inform a person making a request for information whether it holds the information requested, and communicate that information to the applicant, no later than the twentieth working day following the date of receipt.
24. The public authority originally advised the complainant on 13 March 2008 that they did not hold the information. On 22 May 2008, after the public authority had carried out an internal review, they advised the complainant that they were neither able to confirm or deny whether they held the information requested (although they did make reference at this stage to the cost limit). The Commissioner considers this was incorrect as the requested information is clearly held within the body of 78,000 cases. By failing to provide the complainant with the correct information no later than 20 working days after the information was requested, the public authority breached the requirements of section 1(1) (a) and section 10(1) of the Act.

Section 16 (duty to provide advice and assistance)

25. The public authority did not provide to the complainant advice as to how his request could be refined in order that it could be complied with without exceeding the cost limit. The public authority has argued in their letter to the Commissioner dated 15 December 2008 that it would not be able to provide meaningful advice as to how to refine the request. The Commissioner accepts that in view of the nature of the request and the way the information was held on the database, no meaningful advice could have been offered as to ways to refine the request in order to bring it within the cost limit.

Section 17 (refusal of request)

26. Section 17(5) provides that a public authority which, in relation to any request for information, is relying on a claim that section 12 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact. The public authority failed to do this.

The Decision

27. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- Section 12(1), in that it correctly concluded that the cost limit of £450 would be exceeded in order to carry out a search of the records
 - Section 16(1), in that no meaningful advice could have been provided as to how to refine the information request.
28. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Section 1(1)(a), in that it incorrectly concluded that the requested information was not held.
 - Section 10(1), in that the public authority failed to confirm the information was held within 20 working days.
 - Section 17(5), in that the public authority failed, in its response, to state that it was relying on section 12(1)

Steps Required

- 29 The Commissioner does not require any steps to be taken.

Other matters

30. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
31. Ofcom did not provide a breakdown of the costs to the complainant; although it is not a statutory requirement, it would have been good practice. The Tribunal offered support for this approach in the case of Gowers and the London Borough of Camden in which it said that a public authority **should** demonstrate how their estimate has been calculated:
“... a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the cost limit...”
32. Part VI of section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his `Good Practice Guidance No. 5`, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took 43 working days for an internal review to be completed, despite the publication of guidance on the matter.

Right of Appeal

33. 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 21st day of December 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

General Right of Access

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 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Duty to provide Advice and Assistance

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”.

Refusal of Request

Section 17(1) provides that -

“A public authority which ... 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.”

Section 17(5) provides that-

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1 (1), give the applicant notice stating that fact”.