

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2017

Public Authority: The Bank of England
Address: Threadneedle Street
London
EC2R 8AH

Decision (including any steps ordered)

1. The complainant has requested information about whether or not discussions took place between the Bank of England (The Bank) and Lloyds Banking Group (LBG). In refusing the requests the Bank relied on section 12 – costs of compliance exceed the appropriate limit.
2. The Commissioner's decision is that the Bank was entitled to rely on section 12 to refuse the requests but that it breached section 16 in failing to provide advice and assistance to the complainant. She does not require the Bank to take any further steps.

Request and response

3. On 11 March 2016, the complainant wrote to the Bank and requested information in the following terms:

"whether the FSA and/or Bank of England discussed the BIS's concrete proposals (which were approved by the committee days after the ECNs were issued) with LBG in the work they did together in structuring Seaview."

4. On 12 March 2016 the complainant wrote to the Bank in the following terms:

"whether you will provide the information on whether and when the FSA / Bank of England shared the information on the proposed changes to deducts DTA's and significant investments in insurance businesses with Lloyds?"

5. On 16 March 2016 the Bank advised that it was handling the correspondence as requests for information under FOIA.
6. The Bank responded to the request on 11 April 2016. It refused to provide the requested information. It aggregated the requests and cited section 12 FOIA.
7. Following an internal review request on 11 April 2016, the Bank wrote to the complainant on 25 July 2016 and upheld its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 23 June 2016 to complain about the way his request for information had been handled.
9. The complainant set out to the Commissioner that the requests were not submitted as requests under FOIA but was part of extensive correspondence with the Chief Executive of the Prudential Regulation Authority (PRA), a subsidiary of the Bank.
10. The complainant set out that during extensive correspondence with the PRA, he had previously been provided with information without reference to FOIA. Given the previous, extensive correspondence, the complainant stated that he did not specify a period of time to which the requested information applied as this was not necessary.
11. In the circumstances, the Commissioner considers the scope of the case is to determine whether the requests constituted valid requests in accordance with FOIA section 8 and if so, whether the Bank was entitled to rely on section 12 to refuse the requests.

Reasons for decision

Section 8 – request for information

12. The complainant has asserted that his questions, asked as part of ongoing correspondence, were not made as requests under FOIA. However, it is the Bank's position that despite being part of the detailed correspondence, these elements constitute requests under FOIA.
13. In its submissions to the Commissioner, the Bank emphasised that as the Commissioner's own guidance explains, requests do not need to be specifically labelled as requests under FOIA to trigger the requirements of the legislation:

*'The request does not have to make any direct reference to the Act, or be the sole or main theme of the requester's correspondence. In fact, a request buried within the text of a long piece of correspondence will be as valid as a stand-alone request, so long as it also fulfils the other criteria outlined in Section 8.'*¹

14. Section 8(1) of FOIA states that to be a valid FOI request, a request has to fulfil three criteria:

'8(1) In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested'*

15. The Commissioner notes and agrees with the Bank's position that the requests meet the requirements of sections 8(a) and (b) because the requests were in writing and stated the applicant's name and correspondence address.
16. Although the FOIA does not prescribe how the information sought must be described, the Commissioner considers that the purpose of section 8(1)(c) is to enable the public authority to narrow down what the requester wants.
17. It is the Commissioner's position that a request will meet the requirements of section 8(1)(c) as long as it contains a sufficient description of the information required. Details as to date, author purpose or type of document, physical location, subject matter or relevant business area may all help to identify the nature of the information requested. Each request must be considered on individual merits to determine whether the information sought has been adequately detailed for the purposes of section 8.
18. It is the Bank's position that the complainant's emails describe the information being requested, albeit that the emails were framed as questions. The Bank has set out to the Commissioner that her guidance on section 8 FOIA² states that a request which takes the form of a question will still be valid under section 8(1)(c) where it still describes

¹ <https://ico.org.uk/media/1164/recognising-a-request-made-under-the-foia.pdf> - see paragraph 10.

² <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

distinguishing characteristics of the information. The guidance cites examples and it is the Bank's position that these examples support the fact that the request is a valid request under FOIA.

19. With regard to the complainant's email of 11 March 2016, the Commissioner recognises that this is only seeking to establish whether information is held, ie a positive or negative answer, rather than a copy of any recorded information itself. However, in the Commissioner's opinion, requests which only seek to establish whether recorded information is held – as opposed to actually asking for recorded information itself - are still valid requests.³ Furthermore, the Commissioner is satisfied that it is clear from the complainant's email of 11 March 2016 the nature of the information being requested, namely confirmation as to whether the FSA and/or Bank discussed BIS' proposals with LBG in relation to the work on 'Seaview'.
20. In reaching this view, the Commissioner considers it important to emphasise that the right of access to information provided by section 1(1) of FOIA is in two parts: section 1(1)(a) provides the right to be informed whether requested information is held and section 1(1)(b) provides the right to be provided with the requested information, if of course it is held. If the Commissioner took that approach that a request which only sought to establish whether a public authority held particular information, ie a request that only required a yes/no response, was not a valid FOI request, then in effect the right of access provided by section 1(1)(a) would be undermined.
21. With regard to the complainant's email of 12 March 2016, the Commissioner recognises that this is phrased in a slightly different way to the email sent the day before. This latter email is seeking confirmation as to whether the Bank will disclose information on a certain subject rather than simply asking for confirmation as to whether the Bank holds information on the subject in question. However, in the Commissioner's view any response the Bank provided to this question (eg stating that it would disclose the information; that it would not disclose the information; that it would disclose only part of the information; or indeed that it did not hold the information and thus could not provide it) would still require the Bank to comply with the requirements of section 1(1)(a) of FOIA. Furthermore, the Commissioner is satisfied that it is clear from the complainant's email of 12 March 2016 the nature of the information being requested, namely whether FSA/Bank shared information on a specific topic with Lloyds.

³ The Commissioner has confirmed this position in a number of previous decision notices, see for example including FS50547998 & FS50594414.

22. Consequently, for the reasons outlined above the Commissioner is satisfied that both of the complainant's emails meet the requirements of section 8(1)(c) of FOIA and therefore both emails constitute valid FOI requests.

Section 12 – cost of compliance exceeds appropriate limit

23. Section 12 of FOIA states that:

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

“(2) Subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

24. In other words, section 12 FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.
25. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12 effectively imposes a time limit of 18 hours in this case.
26. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
- determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
27. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
28. Regulation 5 of the Fees Regulations states that an authority can aggregate the cost of complying with two or more requests providing that they relate, to any extent, to the same or similar information and those requests are received by the authority within any period of sixty consecutive working days.

29. The Commissioner is satisfied that as the requests were received within a day of each other and relate to the same subject matter, the Bank has correctly aggregated the costs of complying with both requests.
30. The complainant has asserted, in correspondence to the Commissioner that the Bank has contrived a time limit exemption based on unreasonable and implausible assumptions. As an example of this he has cited the fact that the Bank has taken the relevant period to be 1 January 2009 to 31 December 2009. The complainant's position is that this time period is excessive and unreasonable because the information relates to a particular paper arising from an exercise initiated in September 2009 and concluded in early December 2009.
31. The complainant has further set out, to support his assertion that the time limit is contrived, that the number of people involved was low. It is his position that the requested information relates to a major exercise conducted by a specific committee of which only a limited number of FSA directors were members and that the contact involved was at the highest level.
32. Furthermore, the complainant has asserted that it is inconceivable that the FSA does not have a readily available trail of communications as the regulators must already have located this information in the course of investigating consumer complaints.
33. The complainant's position is that this is a high profile issue which has attracted press interest and has been raised by the Treasury Select Committee.
34. In considering the application of section 12 the complainant has set out that an estimate should not be based on assumptions such as the fact that all records need to be searched as it is his position that it is likely that staff in the relevant department would know where the requested information is stored.
35. The complainant has stated that his correspondence made it clear that he was referring to a particular project which was completed within a few months at the end of 2009. He asserts that the Bank's estimate on a search of the whole year is therefore neither sensible nor realistic. He has set out that the information could only have been included in communications from a very small number of senior staff working on the projects and therefore the Bank should not, in estimating the costs of complying with the request, rely on general assumptions about the volume of documents which would need to be searched.

Would compliance exceed the appropriate limit?

36. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be 'reasonable': she expects it to be sensible, realistic and supported by cogent evidence.
37. Turning first to the question of the time frame adopted by the Bank to the requests; it has explained that although there was no time frame specified in either request it introduced a time frame as a proportionate and reasonable way to limit the amount of records searched for and located. The Bank has set out that it introduced the time frame to the requests in an attempt to bring it within the costs limit.
38. The Bank has further set out to the Commissioner that in considering the relevant time frame it gave due weight to the nature of the proposals in the requests, the period during which the proposals were developing, the requisite searches and the time span within which records might be entered in the Bank's systems. The Bank has set out that some documents created in late 2009 may only have gone on to the system in early 2010.
39. With specific reference to the period during which the proposals were developing, the Bank noted that FSA personnel attended various groups throughout 2009 and draft proposals on certain relevant issues would have been discussed during this period. This would ensure sufficient time to agree the consultation package which was then issued in December 2009.
40. In the circumstances as set out by the complainant and the Bank, the Commissioner considers that the Bank was correct to impose a time frame as failure to do so would have had the effect of creating an estimate which would have been neither realistic nor sensible. Turning to the time frame which was imposed, the Commissioner considers that in the specific circumstances of this case, the Bank is best placed to know when issues relating to the request were first instigated. Whilst the Commissioner accepts that the complainant may have only wanted to receive information from a short period in 2009, this was not explicit from the requests.
41. The Bank has set out to the Commissioner that in order to respond to both of the requests it would be necessary to undertake an initial identification exercise in order to determine whether information falling within the scope of the requests is held.
42. In responding to the Commissioner, the Bank has set out that in order to determine whether or not information in scope were held, it would be

likely that this would be during the course of 2009 and contact could have taken place between a wide range of individuals.

43. Relevant records, the Bank set out, may be held in either hard copy or electronically and in addition, the Bank has asserted that there would be difficulty in determining appropriate terms for any search.
44. This was because many of the terms which would be relevant to a search are commonly used and likely therefore to produce a substantial number of both physical and electronic documents, many of which would not be within the scope of the request.
45. The Bank has set out to the Commissioner which search terms were used and explained that given the limitations of its particular electronic filing system the search was restricted to titles of documents stored; the Bank acknowledged that not all relevant documents may be captured.
46. In its submission to the Commissioner, the Bank has set out that the only way to guarantee a comprehensive search would be an extensive manual process to review all electronic documents. The Bank asserts that this would be highly disproportionate and would certainly exceed the costs limit.
47. Despite its limitations, the Bank conducted an exercise to search electronic records. The search was conducted for the year 2009 and focused on relevant folders within the legacy electronic filing system. This search produced 654 documents containing a relevant search term in its title. In order to then identify information within the scope of the requests, each document would have to be read. The documents varied in length and complexity and would therefore take differing amounts of time to be read with a view to determining if each document fell within the scope of the requests. The Bank assumed a read time of six minutes for each document and therefore for these documents alone it would take at least 65 hours to complete the exercise. The Commissioner notes that whilst the Bank has not provided evidence to support the time frame of six minutes per document, even allowing for only two minutes read time, it would take almost 22 hours to complete the exercise.
48. Although no full document content search was undertaken, the Bank asserts that it is reasonable to assume that using the same search terms, a full content search would identify a further significant amount of documents potentially falling within the scope of the requests. Each document identified would have to be read in order to determine if it held information within the scope of the requests.

49. Turning to legacy FSA paper files, a search facility exists where the Bank can search titles of files and a description of files but not the content or specific documents within those files. A search of this system, using the same search terms, identified 99 files containing one of the search terms in its title and 12 paper files that contain one of the search terms in the description of the file. The entire content of these files would need to be read in order to determine if information within the scope of the requests was held. Although no estimate has been provided from this exercise, it is clear to the Commissioner that in conjunction with the exercise detailed at paragraph 47 of this notice, the time limit of 18 hours would be far exceeded in order to determine if information falling within the scope of the request is held.
50. In all of the circumstances set out by the Bank, the Commissioner is satisfied that the cost of complying with this request, even to the extent that it could confirm or deny whether information is held, would significantly exceed the 18 hour/£450 limit imposed by section 12 and that the Bank was correct to refuse the request on that basis. She notes that the Bank has relied on section 12(1) but considers that the applicable section is section 12(2).

Section 16 – duty to provide advice and assistance

51. Section 16 places a duty on a public authority to provide advice and assistance to persons who propose to make, or who have made a request for information.
52. Whilst the Commissioner notes that the Bank has advised the complainant that it would consider a more focused request, it has not provided any advice or assistance as to how any request might be refined or narrowed in order to potentially bring it within the cost limit.
53. The Bank did set out that a re-formulated request may still be refused and drew the complainant's attention to the provisions of the Financial Services and Markets Act 2000 (FSMA) which may, in conjunction with section 44 of FOIA (the statutory bar exemption) prevent disclosure of certain information under FOIA.
54. The Commissioner's position is that the Bank should have explored with the complainant ways in which he may have been able to refine his request with a view to bringing the request within the costs limit; this may have addressed and resolved the issue of the time frame. The Bank's failure to offer appropriate advice and assistance constitutes a breach of section 16 FOIA.

Other matters

55. The Commissioner notes that in responding to the request for internal review, the Bank took over 3 months to issue a response upholding its original decision.
56. Although there is no statutory time frame for completion of an internal review, the Commissioner has issued guidance on this issue. It is her position that internal reviews should be completed within 20 working days and in exceptional circumstances, completion may take up to 40 working days. However, her guidance sets out that in no circumstances should an internal review take longer than 40 working days. She would ask that the Bank ensures in future that reviews are completed in a timely manner.
57. In responding to the Commissioner, the Bank was specifically asked to set out whether or not it had provided advice and assistance to the complainant in line with the duty imposed by section 16 but the Bank did not respond on this issue. She would ask in future that the Bank addresses all issues raised as part of any ICO investigation.
58. Also in its submission, the Bank has set out to the Commissioner that the complainant has a long history of FOIA requests with the Bank and the Prudential Regulation Authority. The Bank asserts therefore that it can be assumed that the complainant has some understanding of the FOIA framework. It has set out that if the complainant believes that his requests are not requests within the meaning of section 8, it is puzzling that following the Bank's response he requested an internal review and subsequently referred the matter to the ICO.
59. The Commissioner considers that if a public authority treats correspondence as a request under FOIA then it must expect that a requester may avail himself of any review processes under that same legislation; in this case a request for internal review and complaint to the Commissioner. It is the Commissioner's position that the FOIA is applicant and purpose blind and public authorities should not take into account any perceived understanding of the legislation on the part of a requester.

Right of appeal

60. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.

62. 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

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