

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2018

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information associated with what he has categorised as "*accidental decision notices*". The Information Commissioner's Office ('ICO') refused to comply with the requests under section 12(1) of the FOIA confirming that to do so would exceed the appropriate cost limit.
2. The Commissioner's decision is that:
 - under section 12(1) the ICO is not obliged to comply with the complainant's requests; and that
 - the ICO complied with section 16(1) of the FOIA as it offered the complainant adequate advice and assistance.
3. The Commissioner does not require the ICO to take any steps.

Request and response

4. On 15 May 2017, the complainant wrote to the ICO and requested information in the following terms:

"The number of cases since the Fish Legal decision was issued (the 16 February 2015) where the ICO has issued a decision notice by accident, i.e. where they have asserted that there is no public authority (or another requirement of s.50(1) has not been fulfilled) and not informed a complainant of their right to appeal to the First-tier Tribunal. Mrs [Redacted]'s letter to me of the 12th of February is just one such example of a decision notice of this form. As I understand it, these are coded as a specific category in the ICO's database. I also ask for copies of all these accidental decision notices. All correspondence with the First-tier Tribunal administration concerning such matters. The First-tier Tribunal has an (improper) practice of consulting Mr [Redacted] (e.g. by emailing him and asking if there is a 'valid decision notice') and refusing to register a case on the basis of his response."

5. On 27 May 2017 the complainant confirmed that the ICO's understanding of the requests (below) was correct:

"[1] - We understand you are asking for the number of times and copies of final letters the ICO has written to a complainant to advise them that the organisation they have complained about is not a public authority (Not PA) or otherwise the matters raised are not eligible for consideration under s50 of the Freedom of Information Act 2000 (Not s50), where the ICO have failed to advise the individual of their right to appeal to the First-Tier Tribunal.

[2] - Again, we understand that you are asking us to provide you with all correspondence exchanged between the ICO and the First-tier Tribunal administration staff that relates to any appeal or query raised with the Tribunal by any individual who has received a letter from the ICO advising them that the organisation they have complained about is not a public authority (Not PA) or otherwise the matters raised are not eligible for consideration under s50 of the Freedom of Information Act 2000 (Not s50)."

6. The ICO provided a response to the clarified requests on 22 June 2017. It explained that it was not obliged to comply with either of the requests as to do so would exceed the appropriate cost limit. The ICO explained the work it would need to do to provide a response to both requests, and the sampling exercise it had undertaken with regard to request 1. The ICO calculated that it would take approximately 35 hours to comply with the requests. It invited the complainant to narrow the scope of his request by, for example, identifying particular organisations in which he is interested.
7. The ICO provided a review on 21 July 2017. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 16 August 2017 to complain about the way his requests for information had been handled.
9. During the Commissioner's investigation, the ICO advised the Commissioner that the complainant had subsequently reframed the first request and that it had voluntarily provided a response to this refined request on 13 September 2017. The ICO confirmed that it had taken well in excess of the cost estimate it had calculated to comply with this request.
10. On 18 January 2018 the complainant confirmed to the Commissioner that, despite now having been provided with information falling within the first request, he preferred to progress his complaint about the ICO's 22 June 2017 response to both requests as they had originally been clarified on 27 May 2017.
11. The Commissioner's investigation has focussed on whether the ICO was correct to rely on section 12(1) of the FOIA to refuse to comply with the complainant's clarified requests of 27 May 2017. She has also considered whether the ICO complied with section 16(1) and offered the complainant adequate advice and assistance.

Reasons for decision

Background

12. Section 50 of the FOIA says that any person can apply to the Commissioner for a decision on whether a request for information that he or she has made to a public authority (PA) has been dealt with in accordance with the requirements of the FOIA. Related to this, the Commissioner can investigate and decide whether a body is a PA (though the Upper Tribunal has recently decided that if the body is not a PA for the purposes of section 50(1) of the FOIA, the Commissioner does not have jurisdiction to issue a decision notice).
13. If, when considering such a complaint to her, the Commissioner considers that the body concerned is clearly not a PA for the purposes of the FOIA, she can, if she considers it appropriate in all the circumstances, attempt an informal resolution. In these cases, the Commissioner will contact the complainant to explain her assessment, including in writing.

14. The complainant's position is that this correspondence can, in effect, be categorised as a formal decision notice. As such, he considers it should include a reference to the complainant's right to appeal 'the decision' at the Information Tribunal (IT).
15. The ICO has explained to the Commissioner that in the course of providing its 13 September 2017 response to the separate request, it had identified that it had closed 402 FOIA complaint cases under the categories 'Not PA' and 'Not section 50' during the period 16 February 2015 and 27 May 2017, when the request had been clarified. In order to respond to this request, the ICO says it was necessary to manually check those 402 closed cases to locate the information requested.
16. With regard to the sampling exercise it carried out, the ICO established that, for 20 of the closed cases, it took approximately two minutes per case to locate whether or not the ICO had referred to the IT within its correspondence to the complainant. Of these 20 cases, only one included advice to the complainant of their right to appeal to the IT. The ICO therefore estimated that, based on these calculations, it would take over 13 hours to comply with the first request. In reality, the ICO has told the Commissioner that it took a lot longer than 13 hours.

Section 12 – cost exceeds the appropriate limit

17. Section 12(1) says that a public authority is not obliged to comply with a request if the authority estimates it would exceed the appropriate cost limit to do so.
18. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to the ICO. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
19. The Commissioner notes that her guidance on section 12 says that multiple requests within a single item of correspondence are separate requests for the purpose of section 12. This was confirmed by the

Information Tribunal in the case of Ian Fitzsimmons v ICO & Department for Culture, Media and Sport (EA/2007/0124, 17 June 2008).

20. Section 12(4) of the FOIA says that where two or more separate requests are made by one person to a public authority, providing certain conditions are met, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied. Those conditions require the requests to be:
 - made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - made for the same or similar information; and
 - received by the public authority within any period of 60 consecutive working days.
21. In other words, when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions at paragraph 20 are satisfied.
22. Therefore a public authority should ensure that each request can be aggregated in accordance with the conditions laid out in the Fees Regulations above. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.
23. In its submission to the Commissioner the ICO confirmed that it would take more than 13 hours to comply with the first request of 27 May 2017, for the reasons given at paragraphs 15 and 16. The Commissioner has noted that the ICO says that it had taken a lot longer than 13 hours to comply with the clarified version of this request in order to provide the response of 13 September 2017.
24. With regard to the second request, the ICO says its records indicated that between 16 February 2015 and 27 May 2017 it had received notification of an appeal to the IT 648 times.
25. The ICO has told the Commissioner that whilst basic details of these appeals are kept within its 'FOI Appeals Log', that Log does not include the level of detail it would need to be able to locate those appeal cases that relate specifically to issues concerning 'Not PA' or 'Not s50' outcomes.

26. As before, in order to locate the requested information the ICO says it would need to individually check each of the 648 appeal cases, and in particular the opening correspondence between it and the IT administration staff. The ICO again estimates this search would take two minutes per case. Therefore, based on these calculations the ICO estimates that locating information within the scope of the second request would take over 21 hours.
27. The ICO also noted that its legal team advised that appeals folders in its document management system are normally only created once it has been established that the appeal has been accepted. It says that there may be a small number of cases where the folder is created and the correspondence saved but then the appeal does not go ahead. However, the ICO says it would need to manually check each appeal folder, through the process described above, to ascertain this.
28. In the scenario that the complainant has put forward – where the ICO is contacted by the IT and it advises the IT that it has not issued a decision notice – the ICO says the most likely outcome is that a folder is never created. The correspondence is therefore never saved. It would be deleted from the recipients' Outlook email folders in line with the ICO's retention schedule. This saves emails for a maximum of six months, unless they are manually deleted sooner. According to the ICO, the manual search described above would therefore be not only time consuming but would be unlikely to locate the information in which the complainant is interested.
29. The complainant has advised the Commissioner that he considers that the ICO overestimated the length of time it would take to comply with what he has categorised as 'part 1' of his request and that this "somewhat infected" the ICO's response to 'part 2'. In the complainant's view, he had submitted one request and it follows that both parts of the request have to be considered together. This is, he says, unless the Commissioner concluded that to comply with 'part 2' would take very little time at all and so upheld his complaint on that basis.
30. It seems to the Commissioner that the complainant's view is somewhat contradictory. His position seems to be that he submitted only one request, unless complying with one 'part' of the request is possible within the cost limit. In which case, his one request can be considered to be two requests or 'parts'.
31. Having reviewed the requests the Commissioner notes that they are for similar information on the same matter, submitted by the same person on the same day. She is satisfied they can be categorised as two

separate requests and that, in line with section 12(4) of the FOIA, the two requests can be aggregated for the purposes of section 12(1).

32. The Commissioner has taken account of the complainant's arguments. However, she considers that the time estimates that the ICO calculated, which it based on a sampling exercise, are reasonable. She notes that the ICO says that one of its estimates was later born out, indeed exceeded, when it responded to the request that the complainant clarified.
33. Consequently, she is satisfied that it would exceed the appropriate cost limit to comply with the two requests of 27 May 2017 and that the ICO was correct to rely on section 12(1) with respect to these requests.

Section 16 – advice and assistance

34. Section 16(1) of the FOIA places a duty on a public authority to offer an applicant advice and assistance, so far as it would be reasonable to expect the authority to do so.
35. In this case, the ICO referred to this duty in its response to the complainant of 22 June 2017 and suggested one way in which the complainant might narrow down his request so that the ICO might be able to comply with it within the cost limit. The complainant did then go on to clarify the first request, which the ICO provided a response to on 13 September 2017. The Commissioner is satisfied the ICO complied with its duty under section 16(1).

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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.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.

Signed

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF