

Freedom of Information Act 2000 (Section 51) Information notice

Date: 20 October 2023

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street

London SW1A 2AH

Section 51

Under section 51 of the Freedom of Information Act 2000 (FOIA), which is set out below, the Information Commissioner (the Commissioner) has the power to serve a notice on a public authority requiring it to furnish him with any information he requires to enforce the requirements of FOIA.

- 51. (1) If the Commissioner
 - (a) has received an application under section 50, or
 - (b) reasonably requires any information-
 - (i) for the purposes of determining whether a public authority has complied or is complying with any of the requirements of Part I, or
 - (ii) for the purposes of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under section 45 and 46,

he may serve the authority with a notice (in FOIA referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.



Circumstances leading up to this Notice

The Commissioner's engagement with the FCDO

- 1. The Commissioner contacted the FCDO on 25 January 2023 about its recent FOI performance. The Commissioner explained that as part of his approach to FOI regulation he reviewed matters brought to his attention, either through casework or other intelligence, and that he used this information to identify systemic problems which may need addressing. The Commissioner noted that the latest quarterly FOI statistics for central government bodies showed a reduction in the percentage of requests which the FCDO has completed within the statutory deadline or with a permitted public interest test (PIT) extension.² The Commissioner cited the statistics set out in table 1 in the annex to this notice. He highlighted that for the last reported guarter the percentage of requests meeting the 20 working day deadline, or with a permitted extension, had fallen to 74% from previously consistent performance around the low to mid 80% mark.³ The Commissioner asked the FCDO for an explanation for this recent dip in performance.
- 2. The FCDO responded on 13 February 2023 and explained that such recent performance was due to a number of factors, namely an increase in both FOI requests and subject access requests, an increase in complaints to the Commissioner in respect of FOI requests and vacancies in its Information Rights Unit. The FCDO explained the steps it had taken to address these issues, including additional resources and the filling of vacancies.
- 3. The Commissioner contacted the FCDO on 2 March 2023 and asked to be provided with its performance figures for the period January to March 2023 as soon as they became available. The Commissioner also asked

¹ The Commissioner referred the FCDO to his FOI and Transparency regulatory manual https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v10.pdf

² Section 17(3) of FOIA states that where a public authority is relying on a qualified exemption, it can have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information. FOIA does not define how long a reasonable time is. The section 45 Code of Practice on request handling states that "it is best practice for an extension to be for no more than a further 20 working days". This means that the total time spent responding to a request should not exceed 40 working days unless there are exceptional circumstances.

³ An index of all central government FOI statistics is available here https://www.gov.uk/government/collections/government-foi-statistics



the FCDO to provide further information on the steps being taken to improve performance.

- 4. The FCDO responded on 13 April 2023 and provided the figures set out in table 2 in the annex noting that these reflected an upward trend in performance. It also provided some additional details about the steps taken to address performance.
- 5. The Commissioner contacted the FCDO on 21 April 2023 to acknowledge receipt of this response and explained that he did not require any further submissions from the FCDO at this stage.
- 6. The Commissioner contacted the FCDO again on 26 May 2023 and explained that he had reviewed the recently published annual FOI performance statistics for 2022. The Commissioner noted that the timeliness figures for the FCDO showed that 51% of requests were met within the 20 working day deadline and that 79% of requests were met within the 20 working day deadline or within the permitted extension. The Commissioner explained that in light of these figures he wished to better understand the age of profile of outstanding FOI requests that the FCDO has.
- 7. To facilitate this process, the Commissioner asked the FCDO to provide:
 - The total number of overdue requests, with this figure spilt down to show the number of overdue requests subject to a permitted extension and the number of overdue requests not subject to extension.
 - The number of requests over 6 months old, spilt down between the number of requests subject to a permitted extension and those which are not.
 - The number of requests over 12 months old, spilt down between the number of requests subject to a permitted extension and those which are not.
 - Date of the oldest outstanding FOI/EIR request subject to a permitted extension and the date of the oldest outstanding request which is not subject to such an extension.
- 8. The Commissioner noted that the previous performance statistics provided to him by the FCDO for January to March 2023 showed an improvement in overall timeliness. However, to allow the Commissioner to understand the FCDO's most recent performance, he also asked for details of:

⁴ https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2022/freedom-of-information-statistics-annual-2022-bulletin



- the total number of requests responded to in April 2023;
- the number (and percentage) responded to within the 20 working day deadline;
- the number (and percentage) of requests responded to within the deadline or within the permitted extension; and
- the number (and percentage) of requests responded to outside of the permitted extension.
- 9. The FCDO provided the Commissioner with a response on 12 June 2023. The figures it sent are set out in tables 3 to 7 in the annex. The FCDO explained that the delays in relation to its oldest requests were due to a number of factors including their complexity, change in ownership in policy areas and need to consult with numerous subject matter experts. The FCDO also highlighted that staff vacancies had impacted its response rates as had the fact that it had been leading the UK's response on a number of international crises. The FCDO explained that it would be happy to meet with the Commissioner to discuss the response.
- 10. This meeting took place on 13 July 2023. As part of this discussion the Commissioner explained that as part of his recent monitoring and enforcement work he was keen to understand how public authorities use the permitted public interest test (PIT) extension provisions within FOIA following his previous focus on section 10 of FOIA. The Commissioner noted that the FCDO made considerable use of this provision and he wished to better understand how the FCDO did so to inform his regulatory approach. The FCDO outlined the reasons why it used the PIT extension and why delays in it concluding such considerations could occur; namely the need for liaison with stakeholders from across government, the need for input from sensitivity reviews which can take time and the impact of crises. The FCDO explained that it could provide further details on older requests to allow for a better understanding of this and to allow a more focussed discussion around specifics.
- 11. The Commissioner contacted the FCDO on 25 July 2023 and asked it to provide him with the following details for all requests that are over 6 months old:
 - The date the request was received.
 - A copy of each request.
 - Confirmation as to whether the request is subject to the permitted PIT extension (and if so, which exemptions have been cited).
 - An explanation for the delays in processing each request / an explanation as to why the public interest considerations for any permitted extension requests have not yet been completed.



12. The Commissioner asked the FCDO to provide the above information by 31 August 2023 (and therefore take a 'snapshot' of requests that were 6 months old in late August).

- 13. At the FCDO's request, the Commissioner discussed his email of 25 July 2023 with it on 20 September 2023. The Commissioner explained that his request for such information was to allow him to better understand how the FCDO was using the PIT extension and the cause of delays in non-PIT cases. The FCDO explained that the provision of the requested information would require considerable work and it did not wish to detract from operational performance. The Commissioner noted that he was keen to get this data as soon possible, but noting the FCDO's concerns, he agreed that it could provide the information for first three bullet points set out in paragraph 11 by 29 September 2023 and as much information on the fourth bullet point by that date also. The remainder of fourth bullet data could be sent by 6 October 2023. The Commissioner explained that in terms of the fourth bullet he was simply seeking a few lines about the reasons for the delay so that he could identify any themes/trends rather than a detailed explanation. The Commissioner also confirmed that he did not need a snapshot of current cases and the same data for the 38 six month cases reported in June 2023. Rather, data simply on current six month old cases was sufficient.
- 14. The FCDO wrote to the Commissioner on 29 September 2023 and reiterated its point that the information requested was considerable and that it would require significant effort to provide it. The FCDO again emphasised that he was committed to ensuring that it provided the best response to requesters. Therefore, the FCDO explained that so it could best understand how to provide the right information, it would welcome more details as to what information was actually needed and its intended use. This was particularly the case in relation to an explanation of the PIT considerations and copies of the request. The FCDO noted that during the meeting in July, the Commissioner had explained that he was trying to gain an insight into the use of PIT extensions to inform his guidance. However, the FCDO noted that the level and scope of information requested in the Commissioner's email of 25 July 2023 suggested something different.



The Commissioner's rationale for requiring the requested information

15. The Commissioner considers it to clear both from his letter of 25 July 2023, and his discussion with the FCDO on 20 September 2023, **what** information he was seeking from it.

- 16. Furthermore, on the basis of the same communications the Commissioner also considers it to be clear **why** he wanted such information. For avoidance of any doubt such reasons are as follows.
- 17. Firstly, to better understand the FCDO's use of the PIT extension to further both the Commissioner's understanding of this practice by this particular government department and to contribute to his broader understanding of the use of this provision across government. Secondly, to better understand the reasons for delays in requests over six months not subject to the PIT extension.
- 18. Underpinning the Commissioner's reasons for wanting sight of such information is the data available to him regarding the FCDO's recent FOI performance, including that provided to him by the FCDO during the recent engagement as set out above.
- 19. In respect of the PIT extension, the Commissioner notes that the FOI statistics for central government bodies show that for the last three years for which data is available the FCDO has relied on this provision of FOIA for a significant percentage of the requests which it has received. This pattern has also continued for the first six months of 2023.⁵ The Commissioner also notes that his own casework data shows that he has received a considerable number of complaints about the FCDO extending its use of the PIT beyond a timeframe considered to be reasonable. Since 1 January 2023 the Commissioner has issued five decision notices⁶ finding the FCDO in breach of section 17(3) of FOIA and in separate five cases he has had cause to contact the FCDO about its extended use of this provision.⁷ The Commissioner also notes that FCDO's use of the PIT extension has also been the focus of external comment in this article by mySociety.⁸

⁶ ICO references <u>IC-255335-Q6L9</u>, <u>IC-226525-Y7K1</u>, <u>IC-236383-T3M8</u>, <u>IC-231530-W0G8</u> & <u>IC-168940-J3B5</u>.

⁵ See table 8 in the annex.

⁷ ICO case references IC-256526-P7H1, IC-256365-V7L1, IC-254405-R5R6, IC-248268-T8C1 & IC-236597-J5Z2.

⁸ https://www.mysociety.org/2023/07/06/as-time-goes-by/



20. In respect of delayed requests not subject to the PIT extension, since 1 January 2023 the Commissioner has issued nine decision notices finding the FCDO in breach of FOIA given its delayed response to requests. Since 1 January 2023 the Commissioner has also had cause to contact the FCDO about delayed responses in seven further cases. 10

- 21. In accordance with sections 51(1)(b)(i) and (ii) and section 51(2) of FOIA, the reason the Commissioner therefore requires the information set out below is to establish whether the FCDO is complying with its obligations under Part 1 of FOIA and whether its practices conform with the section 45 Code of Practice (the Code).
- 22. More specifically, provision of such information will:
 - assist the Commissioner in determining whether the FCDO's practice in respect of the public interest test extensions conforms with that proposed in section 4 of the Code;
 - assist the Commissioner in determining whether the FCDO's practice in respect of consultation with third parties conforms with that proposed in section 3 of the Code;
 - provide the Commissioner with an insight into the FCDO's compliance with the timeliness of requirements within Part 1 of FOIA, both in respect of section 10(1) and section 17(3).
- 23. The use of the Commissioner's section 51 powers in this case is to support his regulatory work because, based on the data available to him to date, he considers that he may need to use his wider powers such as a Practice Recommendation or Enforcement Notice. The use of such wider powers is set out in Commissioner's FOI and Transparency regulatory manual, which the Commissioner cited in his initial correspondence with the FCDO of 25 January 2023. The manual also explains that the Commissioner may use an Information Notice in order to formally require a public authority to provide him with information about its compliance with Part 1 of FOIA and or the Codes of Practice.¹¹

⁹ ICO references <u>IC-249453-Y7L7</u>, <u>IC-244046-K2R7</u>, <u>IC-244013-Z7H5</u>, <u>IC-228807-Q3F2</u>, <u>IC-228381-W5L9</u>, <u>IC-215421-Z8P2</u>, <u>IC-221220-H8H4</u>, <u>IC-209157-D3Y9</u> & <u>IC-175674-Q7S0</u>.

¹⁰ ICO references IC-255793-B8J9, IC-251151-Z7J6, IC-246050-V2M8, IC-240953-G5L4, IC-239405-G2V6, IC-216341-Y4V0 & IC-210787-F2F8

¹¹ See Page 10 "Level 2", second bullet point. https://ico.org.uk/media/about-the-ico/documents/4026123/foi-and-transparency-regulatory-manual-v12.pdf



24. The Commissioner wishes to also emphasise that the information sought by this Notice is in keeping with the data public authorities should expect him to ask about, as set out in his guidance for how public authorities can assess their own timeliness compliance, including in relation to PIT extensions.¹²

25. Furthermore, the Commissioner notes that in asking for the information set out below, in particular that described at paragraph 28, he has given consideration to the potential burden placed on the FCDO in complying with this Notice. The Commissioner would emphasise that he has not asked for case correspondence on **all** requests that are over six months; only the case correspondence for ten requests. Furthermore, the Commissioner's decision to ask for the FCDO's entire case file for these ten requests is designed to avoid the FCDO having to review and select individual parts of a case file or for the FCDO to have to 'create information' and provide a narrative explanation for any delays.

Information required

26. In view of the matters described above the Commissioner hereby gives notice that in the exercise of his powers under section 51 of FOIA he requires that the FCDO shall, within 30 calendar days of the date of this notice, furnish the Commissioner with a copy of the following information:

- 27. For all requests that are over 6 months old:
 - A copy of each request and confirmation of the date it was received.
 - Copies of all correspondence the FCDO has exchanged with the requester (ie both correspondence sent by the FCDO and correspondence it has received from the requester).
- 28. For the five oldest requests subject to a PIT extension **and** the five oldest requests not subject to a PIT extension:
 - a copy of the FCDO's entire 'case file' for each request. By which the Commissioner means copies of communications or notes recording internal consultations within the FCDO about the request and copies of communications or notes recording consultation with third parties

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https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/assessing-the-level-of-your-compliance-with-foia-and-eir-timescales/



about the request. Any material caught by section 51(5) of FOIA in a case file can be redacted if the FCDO consider it necessary.

Failure to comply

29. 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 FOIA, and may be dealt with as a contempt of court.



Right of appeal

30. There is a right of appeal against this information notice to the First-tier Tribunal (Information Rights). Information about the appeals process can 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

31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this information notice is sent. If Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Signed
Phillip Angell

Head of FOI Complaints and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF



Annex

Table 1

Date range of requests	Percentage of requests meeting 20 working day deadline	Percentage of requests meeting 20 working day deadline or with permitted extension
1 October to 31 December 2021	49%	85%
1 January to 31 March 2022	49%	83%
1 April to 30 June 2022	53%	82%
1 July to 30 September 2022	48%	74%

Table 2

Month	FOI's received	Within target	Percentage
January 2023	109	86	79%
February 2023	100	86	86%
March 2023	131	121	92%

Table 3

Total number of overdue requests	Number of requests subject to permitted extension	Number of requests not submitted to permitted extension
125	77	48



Table 4

Total number requests over 6 months old	Number of requests subject to permitted extension	Number of requests not submitted to permitted extension
38	19	19

Table 5

Total number requests over 12 months old	Number of requests subject to permitted extension	Number of requests not submitted to permitted extension
15	8	7

Table 6

Date of oldest FOI/EIR (with permitted extension)	Oldest outstanding FOI/EIR without a permitted extension
2/10/2020	16/04/21

Table 7

Question	April 2023	May 2023
The total number of requests responded to in April and May 2023	107	106
the number (and percentage) responded to within the 20 working day deadline	58 – 54%	73 – 68%
the number (and percentage) of requests responded to within the deadline or within the	84 – 79%	91 – 86%



permitted extension		
the number (and percentage) of requests responded to outside of the permitted extension	23 - 21%	15 - 14%

Table 8

Year / time period	Percentage meeting deadline	Percentage meeting deadline or with permitted extension
2020	56%	79%
2021	56%	87%
2022	51%	79%
January to March 2023	58%	82%
April to June 2023	56%	80%