

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **01 October 2021**

Public Authority: HM Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant wrote to the public authority seeking an explanation of the comments made by an official in an email that had been disclosed pursuant to a freedom of information request. The public authority considers that the complainant did not make a valid request for information under the FOIA.
2. The Commissioner's decision is that save for the last part of the request, the complainant's request does not constitute a valid request for information under the FOIA. Furthermore, on the balance of probabilities, the public authority does not hold recorded information matching the complainant's request in any event.
3. No steps are required.

Request and response

4. On 1 December 2020 the complainant submitted a request for information to the public authority in the following terms:

"HMRC's Freedom of Information Team provided a response to a recent FOI request (FOI2020/01810) on 02 November. Within this response, a series of internal email exchanges were disclosed as an annex to the summary letter, which was headed Freedom of Information Act 2000 (FOIA) and explained HMRC's interpretation of the aforementioned request. One of these emails (dated 30 September with a timestamp of 16:49) was sent from the Solicitor's Office and Legal Services (SOLS) - the sender's name has been redacted. The subject line was 'Sensitive FOI's regarding HMRC contractors' and the recipients of this email were as follows [Names Redacted]...

Within the body of this specific email, a paragraph was included which stated:

"Whilst we could respond to these requests with reference to just contingent labour it does still leave an elephant in the room which needs to be addressed and which would lead to further questions. To do so would also be inconsistent with how we have responded to previous questions."

Apropos the above, please provide a clear, unambiguous and factual explanation of precisely what 'the elephant in the room' refers to in the specific context of this paragraph and email. Please also explain, and provide in full, those 'further questions' which would be raised as a result of the 'elephant in the room' being addressed. Additionally, please explain, in detail and in full, why addressing the 'elephant in the room' would be inconsistent with how you have responded to previous questions on this subject."

5. The public authority issued the following response on 14 December 2020 (in a letter dated 8 December 2020):

"Section 1 of the FOIA gives applicants the right of access to recorded information held by a public authority.

Requests requiring explanation or clarification are not requests for recorded information and therefore do not fall within scope of the FOIA.

The referenced email was sent in response to tracked comments on a previous message querying whether the scope of a request under the FOIA was limited to contingent labour. Previous FOIA responses referenced both contingent labour and those working as part of a

professional service contract. A full copy of this email and the corresponding attachment have been provided as an annex to this letter.

Where requested information contains the personal information of officials to a degree which is contrary to their expectation of privacy, this has been withheld under section 40(2) FOIA. On this basis, all identifying information relating to junior officials has been withheld..."

6. The complainant requested an internal review of this decision on 6 February 2021 by way of a lengthy submission querying various aspects of the public authority's response including the view that the FOIA only gives applicants the right to recorded information.
7. On 9 February 2021 the public authority wrote to the complainant with details of the outcome of the review. The review upheld the original response and provided the following explanation by way of clarification:

"The [explanatory note](#) to [section 1 FOIA] states:

'This Part:

provides for the general right of access to recorded information held by public authorities and specifies the conditions which need to be fulfilled before an authority is obliged to comply with a request;'

The [Guide to Freedom of Information](#) further provides that:

'The Act does not cover information that is in someone's head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it'

Your request sought an explanation/clarification which was not in recorded form and by virtue of the above was a not a valid request under the FOIA. On a discretionary basis, HMRC provided an explanation and disclosed further information providing the context to the matter. The personal information of junior officials was redacted from this discretionary release pursuant to section 40(2) FOIA."

Scope of the case

8. The complainant contacted the Commissioner on 16 February 2021 in order to complain about the public authority's response to her request. The Commissioner has referred to the complainant's submissions in the relevant part of her analysis below.
9. The Commissioner's substantive investigation focussed on whether the public authority was entitled to conclude that the complainant's request of 1 December 2020 was not a valid request for information under the FOIA. In addition, in the event that the complainant submitted a valid request, whether the public authority holds information matching the request.
10. The complainant also referred to wider concerns which the Commissioner considers fall outside the scope of her jurisdiction in section 50 FOIA.

Reasons for decision

Is the complainant's request a valid request for information under the FOIA?

11. By virtue of [section 8 FOIA](#), a request for information has to be in writing, state the name of the applicant including an address for correspondence and, describes the information requested.
12. [Section 84 FOIA](#) defines 'information' for the purposes of section 1(1) FOIA (ie information which an applicant can request under the FOIA) as "information recorded in any form..."
13. Therefore, not only must the complainant's request satisfy the criteria in section 8 FOIA, it must also be a request for recorded information in order to constitute a valid request for information under the FOIA. The only question that the Commissioner has to consider in this regard is whether the complainant submitted a request for recorded information to the public authority on 1 December 2020.
14. The Commissioner considers that the FOIA provides a right of access to information 'held' by public authorities. A public authority is not required to create new information in order to comply with a request for information under the FOIA. It only needs to consider information already in existence at the time a request is received.
15. It is necessary to also mention that in deciding whether information requested by an applicant is held by a public authority, the

Commissioner will rely on the civil burden of proof; ie on the balance of probabilities. She will reach a decision based on the adequacy of the public authority's search for the information (if she considers that a search is necessary) and/or any other reasons which explain why the information is not held.

16. The complainant's request relates to the following paragraph in an internal email (the relevant email): "Whilst we could respond to these requests with reference to just contingent labour it does still leave an elephant in the room which needs to be addressed and which would lead to further questions. To do so would also be inconsistent with how we have responded to previous questions."

17. The complainant's request can be divided into 3 parts. Each part will be considered in turn.

"please provide a clear, unambiguous and factual explanation of precisely what 'the elephant in the room' refers to in the specific context of this paragraph and email..."

18. The public authority has explained that the relevant email was sent in response to tracked comments on a previous message querying whether the scope of requests under the FOIA was limited to contingent labour. Previous FOIA responses referenced both contingent labour and those working as part of a professional service contract. A copy of the email and the corresponding attachment were provided to the complainant on a discretionary basis.

19. The public authority has further explained that were it to have responded to the FOIA requests with reference to just contingent labour, "the elephant in the room" that the official was referring to would have been the service contractors (ie those working as part of a professional service contract not as contingent labour).

20. On 22 July 2021, Jim Harra, the Chief Executive and First Permanent Secretary of HMRC wrote to Lord Fox reiterating the above explanation¹.

21. The complainant says:

"The original submission listed the names of fourteen senior HMRC officials (along with three whose names had been redacted) who were in

¹ A copy of the letter has been published by the House of Lords Economic Affairs Committee [here](#) Although the letter post-dates the public authority's final response to the request, the complainant has confirmed that she is aware of it.

receipt of the email from the SOLS office containing the phrase 'the elephant in the room'. According to the ICO's own website, 'the Act covers ALL recorded information held by a public authority. It is not limited to official documents and it covers, for example, drafts, emails, notes, recordings of telephone conversations and CCTV recordings'. On this basis alone, it would be undeniable that the subject of 'the elephant in the room' would have been discussed, debated and at some stage undoubtedly included in an email, a note, a document or any other form of media which constitutes and is defined as 'recorded information'. What HMRC have done - in this instance and in many others - is to astutely conceal that pertinent evidence by diverting attention to something which is wholly unconnected and irrelevant to the request."

22. It is clear from the complainant's request that she would like to know what the official meant by "the elephant in the room" in the "specific context" of the relevant email, not in an additional context beyond the relevant email. Whether the relevant email was sent to 14 senior officials does not in itself add weight to the complainant's view that recorded information explaining the meaning of "the elephant in the room" must be held by the public authority.
23. The Commissioner considers that this part of the request seeks to know what the official was thinking when they referred to "the elephant in the room". The request seeks an explanation of the meaning of "the elephant in the room" in the context of the relevant email. It is difficult to see how the request for a precise explanation of its meaning is a request for recorded information rather than a request for clarification of the official's views with reference to "the elephant in the room".
24. If the Commissioner is wrong, she finds that on the balance of probabilities, the public authority does not hold recorded information matching this part of the complainant's request in any event. This is because, the request is for an explanation of the view expressed by an official in relation to how the public authority should consider responding to requests for information in light of previous responses to similar requests. There is nothing to indicate that the public authority holds or should hold recorded information explaining precisely what the official was specifically thinking of when they referred to "the elephant in the room" in that context. It is worth noting that the public authority has explained the meaning of "the elephant in the room" in the context of the official's comments.

"Please also explain, and provide in full, those 'further questions' which would be raised as a result of the 'elephant in the room' being addressed..."

25. The Commissioner is satisfied that this part of the request does not seek recorded information held by the public authority and as such is not a valid request for information under the FOIA. Rather, it seeks to know what "further questions" the official thought would be raised as a consequence of "the elephant in the room being addressed".
26. If the Commissioner is wrong, she finds that on the balance of probabilities, the public authority does not hold recorded information matching this part of the complainant's request in any event. This is because, it is far from clear that the "further questions" whatever they may be, exist beyond what was in the official's head at the time. It is difficult to determine with any degree of certainty the questions that the official had in mind in order to be able to ascertain whether they are likely to be held by the public authority. However, it is worth noting that in his letter to Lord Fox, Jim Harra explained that the "leave an elephant in the room---which would lead to further questions" refers to the likelihood that if the public authority did not treat the FOIA requests as including service contractors, then this would result in further requests for this information.

"Additionally, please explain, in detail and in full, why addressing the 'elephant in the room' would be inconsistent with how you have responded to previous questions on this subject."

27. The Commissioner finds that this part of the request is a valid request for information under the FOIA. This is because, the complainant seeks to know the rationale for a comment she considers was made by the official in relation to the nature of the public authority's responses to previous FOIA requests. The responses to previous FOIA requests, which the public authority would need to consider in order to address the request, is recorded information. The rationale for the comments that the official purportedly made could be obtained from responses to previous FOIA requests (if they were held by the public authority) supporting those comments.
28. However, on the question of whether the public authority holds information matching the request, the Commissioner is satisfied that on the balance of probabilities, it does not. This is because, in the Commissioner's view, it is clear from the official's comments they meant that to respond to the FOIA requests with reference to just contingent labour would be inconsistent with previous responses, not that addressing "the elephant in the room" (ie responding with reference to service contractors as well) would be inconsistent with previous responses. There is a significant difference between the former and latter interpretation.

29. The letter from Jim Harra to Lord Fox supports the Commissioner's interpretation. The First Permanent Secretary explained that the relevant email was in response to a question about information requests made under the Freedom of Information Act regarding the tax affairs of contractors working for the public authority; in particular, it addressed whether the scope of the requests was contractors providing contingent labour to the public authority or included contractors working for companies that supplied services to the public authority (ie service contractors).
30. In the circumstances, there is nothing to suggest that the public authority held recorded information which would explain why responding to the FOIA requests with reference to contingent labour as well as service contractors would be inconsistent with previous responses because this was the opposite of the factual position.
31. It is worth restating that the public authority has also explained to the complainant why the official considered that responding to the FOIA requests with reference to just contingent labour would be inconsistent with previous responses.
32. For the above reasons, the Commissioner finds that save for the last part of the request, the complainant's request is not a valid FOIA request. Furthermore, on the balance of probabilities, the public authority does not hold recorded information matching the complainant's request in any event.

Right of appeal

33. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

34. 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.
35. 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

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