

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2023

Public Authority: Information Commissioner's Office
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information relating to offences of ICO employees. The ICO refused the request under section 12 (cost of compliance exceeds appropriate limit).
2. The Commissioner's decision is that section 12 applies and the ICO isn't obliged to deal with the request. The Commissioner is also satisfied that the ICO complied with its obligations under section 16 (advice and assistance).
3. The Commissioner does not require further steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority. The complainant has the same right of appeal against the Commissioner's decision as they would any other public authority, details of which are at the end of this notice.

5. This notice uses the term “the ICO” to refer to the Information Commissioner dealing with the request and dealing with previous complaints brought under FOIA. It uses the term “the Commissioner” when referring to the Information Commissioner dealing with this complaint.

Request and response

6. On 30 July 2023, the complainant wrote to the ICO and requested:

“Please provide a full statistical count and disclosure of any and all male or transgender male employees working for the ICO from 1.1.2022 – 1.1.2023 who have sexual offence convictions concerning any sexual offence committed against a genetic or transgender woman or girl, found to have been committed by a guilty verdict reached by a jury in any criminal court in England, Scotland, Wales, Northern Ireland or the British military – if any.

This would include who such males are and what they were (sic) convicted of

I put forward this FOIR for the following reasons:

1. For the information and safety of genetic and transgender women plus girls using this service.
 2. Because from past discussions with the ICO I was given the expectation that it was possible to ask this FOI once a year, for a yearly check, for the benefit of the public and to promote transparency and public trust in the service particularly to promote such trust in the service from genetic plus transgender women and girls of the public.
 3. The service will be asked in the future to handle sensitive data protection info.
 4. The service will be asked in the future to handle sensitive FOIR requests including issues regarding known human rights abuses of a non-consensual sexual nature, towards women and girls both genetic and transgender.”
7. The ICO responded on 9 August 2023. It explained that it wasn't obliged to respond to the request in line with section 12.
 8. Following an internal review ICO wrote to the complainant on 23 August 2023. It upheld its original position.

Reasons for decision

9. Section 12 of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request, or determining whether information is held in response to the request, would exceed the appropriate limit.
10. When considering whether section 12 applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are set out at Regulation 4(3) and 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."
11. If the public authority estimates that compliance with the request would exceed the appropriate limit, it is not obliged to comply with it. There is no public interest to consider. The appropriate limit for the ICO, as set out in the Regulations, is £450 or 18 hours work. This limit is calculated at a rate of £25 per hour (again, as outlined in the Regulations).
12. When citing section 12, the Commissioner expects a public authority to provide a reasonable estimate as to how long compliance with the request would take. This estimate should be based on cogent evidence and on the quickest method of gathering the requested information.
13. In its refusal notice, the ICO explained to the complainant:

"our criminal records checks and security checks are managed by the Cabinet Office; we are advised that the checks have been completed and whether the employee has any convictions or not. We are not advised of specific convictions just that there is something on their record, this is then followed up with the employee directly by the ICO's HR team. There is also a possibility that an employee could receive a conviction whilst already employed at the ICO which would be reported to HR either directly or through the line management structure."
14. It has gone onto explain:

"We do not keep a record of disclosed convictions centrally which means that to find out whether we hold any information which falls

within the scope of your request we would need to review individual HR files.”

15. If information is held centrally on one database, then it's usually easy for a public authority to retrieve, and scrutinize it, in response to an FOI request. However, as the ICO has explained, it doesn't hold a central record of disclosed convictions for its staff. Therefore, the quickest method of gathering the requested information would be a manual trawl of the relevant HR files.
16. The ICO has explained that, in the timeframe specified in the request, there were approximately 400 male or transgender males employed at the ICO and thus 400 HR files to check.
17. The ICO has estimated that it would take a minimum of five minutes to search each HR file, with many files taking significantly longer dependent on the length of service or amount of information contained within the file.
18. At this rate, the ICO has calculated that to determine to extract the withheld information would take approximately 33 hours, exceeding the limit laid out in the Regulations.
19. The Commissioner has considered the ICO's estimation that it would take five minutes to go through each HR file. Each file will contain the basic information relating to the employee, their personal information, emergency contact information and employee contract etc. However, the longer the individual has worked at the ICO, the more information will be contained in their file (for example, some individuals will have had multiple posts at the ICO and many will have completed multiple performance reviews).
20. There is a difference between information that needs to be recorded and information that is regularly reported on. Presumably, each HR file records the presence or absence of a criminal conviction but the details of the conviction would need to be recorded in the file separately, after a member of the HR team follows up with the individual in question.
21. Compliance with this request isn't just a case of the ICO checking each of the 400 HR files to determine whether a conviction is recorded but seeking to ascertain whether that conviction is a sexual offence committed against a 'genetic or transgender woman or girl.' The Commissioner is satisfied that the fastest (and only) way of gathering the requested information would be a manual check of each HR file.
22. The Commissioner doubts that it would take five minutes to check the HR file of a new starter. However, he agrees with the Commissioner that the longer a member of staff has been employed with the ICO, the longer it will take to review the whole file. Overall, the Commissioner is

satisfied with the figure of five minutes (on average) per file. Therefore, he's also satisfied with the total compliance estimate of 33 hours, though he agrees with the ICO that the actual figure is likely to exceed this total.

23. When requesting an internal review, the complainant indicated that the section 12 matter 'should be put aside' and the information provided regardless of the time, and cost, it would take the ICO to do so.
24. The ICO is under no obligation to comply with the request, nor is it under any obligation to provide any information it can obtain within the cost limit.

Section 16 – advice and assistance

25. When refusing a request under section 12, a public authority needs to offer reasonable advice and assistance to the requester. The aim of this advice and assistance is to help the complainant refine their request to one that might be able to be dealt with within the appropriate limit.
26. In its refusal notice, the ICO suggested that the complainant:

"limit your request to a particular time period, for example, male or transmale individuals who became employed by the ICO within the current financial year, this would significantly reduce the number of HR files we would need to consider and the files would be likely to have limited information in them due to the shorter length of service."
27. The ICO has emphasised that the request would need to focus on male colleagues who began employment with the ICO during a specific time period (preferably the current financial year). This would ensure that limited information is held within the HR file and therefore the required checks would take less time.
28. With the above in mind, the Commissioner is satisfied the ICO has complied with its obligations under section 16.

Other matters

29. The Commissioner notes that, as part of the request, the complainant requested the identity of any member of staff whose conviction fell within the scope of the request. This would be special category data and to disclose it in response to an FOI request would likely be in breach of data protection principles.
30. The complainant has indicated that this request will be asked in the future. Any identical request, or substantially similar, request will likely also be refused under section 12. The ICO has provided advice and assistance on how the complainant may refine their request to one that

falls within the cost limit – though the Commissioner notes this isn't a guarantee.

31. Furthermore, section 12 contains within it a provision that allows a public authority to aggregate the total costs of complying with any requests that it receives, within a certain time period, from the same person for the same or substantially similar information.

Right of appeal

32. 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

33. 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.
34. 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

Alice Gradwell
Senior Case Officer
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