

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 9 October 2019

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to amendments to the Code of Practice issued under section 45 of the FOIA. The Cabinet Office claimed that it did not hold any information relevant to the request.
2. The Commissioner's decision is that, on the balance of probabilities, the Cabinet Office does not hold the requested information. Accordingly no further steps are required.

Background

3. Section 45 of the FOIA requires the Secretary of State to issue a Code of Practice (the Code) providing guidance to public authorities as to good practice in complying with the requirements of Part I of the FOIA.
4. In July 2018 the Cabinet Office published a revised version of the Code¹ (the original having been published in 2004).

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Request and response

5. The complainant submitted the following request to the Cabinet Office on 2 November 2018:

"Can you please provide me with any information held by the Cabinet Office in connection with the production of the new code which mentions the possible retention, deletion or amendment of or otherwise relates to:

(a) [Paragraph 14] from the 2004 edition of the code

(b) any other passage in the 2004 edition dealing with the provision of advice and assistance."

6. The Cabinet Office responded on 29 November 2018. It stated that it did not hold the requested information. The complainant requested an internal review on 3 December 2018 and set out reasons as to why he considered that the Cabinet Office was likely to hold the requested information.
7. The Cabinet Office provided the outcome of that internal review on 10 December 2018. It accepted that it had incorrectly interpreted the complainant's request, but advised that a further search had been carried out. The Cabinet Office remained of the position that it did not hold any relevant information.

Scope of the case

8. On 15 February 2019 the complainant wrote to the Commissioner to complain about the Cabinet Office's response to his request. The complainant did not accept the Cabinet Office's claim that it did not hold any information relevant to the request.

Reasons for decision

Information not held

9. Section 1 of the FOIA says that a public authority is required to respond to a request for information. The authority is required to confirm or deny that it holds the requested information, and disclose relevant information that it holds, unless an exemption or exclusion applies. If a public authority does not hold recorded information that

would answer a request, the Commissioner cannot require the authority to take any further action.

10. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly her investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps she could require the public authority to take if the complaint were upheld.
11. In this case the complainant's request for internal review provided detailed clarification of his request and explained what information he expected to be held. The complainant noted that the revised Code omitted several passages relating to the provision of advice and assistance as required by section 16 of the FOIA. He pointed out that these passages had been referred to by the Commissioner and the First- tier and Upper Tribunals in various cases. The complainant was concerned that no explanation had been provided for removing what he considered to be a long-established benchmark of good practice.
12. The complainant considered it "extraordinary" that the Cabinet Office claimed not to hold any recorded information that would explain why such significant changes had been made. In the complainant's opinion it would be "remarkable" for the Cabinet Office to allow officials to make substantial amendments to a statutory code of practice without keeping appropriate records of their reasons for doing so.
13. The Commissioner asked the Cabinet Office to provide a full explanation of the searches conducted for the requested information. The Commissioner noted that the refusal notice advised that the Code had been expanded and rewritten before the public consultation. She asked the Cabinet Office to confirm when this expansion and revision took place, and who undertook it. The Commissioner suggested that it was reasonable to assume that the officials responsible would have been given some kind of guidance or instruction on what amendments were required. She asked the Cabinet Office to confirm what instructions had been given to the officials undertaking this work, and who was responsible for approving or signing off the amendments made or proposed.

14. The Commissioner also asked the Cabinet Office to clarify how it was satisfied that the information referred to by the complainant was removed in accordance with instructions given, i.e. that the relevant parts of the Code were not deleted accidentally or without justification.
15. Finally, the Commissioner observed that the Cabinet Office had advised the complainant that the revised Code went through an extensive endorsement process before being published. The Commissioner asked the Cabinet Office to clarify what records were maintained of this endorsement process, and confirm whether the Cabinet Office checked these records as part of the search for the requested information.
16. In its response to the Commissioner the Cabinet Office confirmed that it had searched all the relevant files and had not located any information falling within the scope of the request.
17. The Cabinet Office explained that work on revising the Code began at the Ministry of Justice following the post-legislative scrutiny conducted in 2012. The Cabinet Office confirmed that it had consulted officials who had worked on the Code throughout the process. These officials had confirmed that instructions were given verbally rather than in writing, and no records were kept of these instructions.
18. The Cabinet Office further explained that, following the transfer of freedom of information policy in 2015, work on the Code took the form of one working document. Therefore the Cabinet Office said that it did not hold different versions or drafts of the revised Code.
19. The Commissioner accepts that the Cabinet Office has undertaken reasonable searches. The Commissioner accepts that these searches ought to have identified the requested information, if it were held by the Cabinet Office at the time of the request. The Commissioner further notes the Cabinet Office's assertion that instructions were given verbally and no records were created or retained.
20. The Commissioner acknowledges the complainant's reasons for disputing the Cabinet Office's claim that no recorded information is held. The Commissioner agrees that it is somewhat surprising that the Cabinet Office removed large portions of the Code without any explanation or justification. The Commissioner considers it unsatisfactory that the Cabinet Office is seemingly unable to provide any recorded evidence of its reasoning behind these amendments.

21. However, the Commissioner can only investigate whether or not information is held by a public authority at the time of the request. The Commissioner has seen no evidence to suggest that the Cabinet Office does in fact hold information that it claims not to hold.
22. In addition, the Commissioner is unable to identify any further action that the Cabinet Office could reasonably be expected to take in order to comply with the request. As has been set out above, if information is not held then it cannot be disclosed in response to a request. In conclusion, the Commissioner finds, on the balance of probabilities, that the Cabinet Office does not hold the requested information.

Other Matters

23. Although it does not form part of the Commissioner's decision, the Commissioner considers it opportune to refer to "Openness by Design"², her recently-published strategic plan on access to information. The Commissioner would draw particular attention to the following comments:

"Access to information rights depends on public authorities documenting their key activities and decisions. Failure to do this can undermine public accountability, the historical record and public trust." (Page 13)

24. The Commissioner would strongly encourage public authorities to review their practices in order to ensure that appropriate records are created and retained.

² https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_-_design_strategy_201906.pdf

Right of appeal

25. 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 123 4504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

26. 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.
27. 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

Sarah O'Cathain
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF