

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2022

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

Note

This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested the ICO to disclose a list of all decision notices issued from January 2010 onwards which contain the text "Schedule 12A" in the body of the decision notice itself. Initially the ICO refused to comply with the request under section 14(1) of FOIA. During the Commissioner's investigation the ICO changed its position and claimed a late reliance on section 12 of FOIA.
2. The Commissioner's decision is that the ICO is entitled to refuse to comply with the request in accordance with section 12 of FOIA. Section 12 triggers the duty to provide appropriate advice and assistance. The

ICO has provided what advice and assistance it can and this is included in this notice. The Commissioner is therefore now satisfied that the ICO has met its obligations under section 16 of FOIA.

3. The Commissioner does not require any further action to be taken.

Request and response

4. On 21 April 2021, the complainant wrote to the ICO and requested information in the following terms:

"Please provide a list of any ICO Decision Notices containing the text phrase "Schedule 12A" in the body of the Decision Notice itself. Alternatively, rather than providing a list of DN's the ICO may choose to provide copies of the DN's themselves

The scope of this request limited to the period Jan 2010 to now. Ideally, the date used should be the date as identified in the DN itself. Alternatively, the ICO may use some alternative date related metadata (such as the date loaded into the DN repository) if this is easier.

Note: The time scope can be reduced even further to just those DNs held on the live DN repository if this helps to reduce the ICO effort estimate (for example because certain DNs have been archived and are no longer easily accessible)

I suggest that the ICO considers using the search strategy described below to identify the requested information. However, the ICO may use any other search strategy if this is likely to produce similar results in a shorter time.

Note: I request that the ICO's response includes both the list of identified DNs and as well as answers to the related effort estimation questions.

1. ICO's preferred approach.
2. Is it the ICO's intention to use my suggested approach (described below)? (Y/N)
 - a. If No, then please explain why. This explanation needs to include (i) a summary description of the chosen alternative approach, OR (ii) the reasons why the ICO believes that no alternative approach will achieve the intended outcome within the Sec. 12 limit.
 - b. If Yes, then please proceed as per below

2. Download a copy of the DN repository to a USB Memory stick or Win10/MacOS PC

Is it technically possible for the ICO to extract a copy of the Data Notice repository to either a USB 3 memory stick or a PC running Win10/MacOS? (Y/N)

a. If No, then please explain why.

b. If Yes, then please explain the estimated effort

3. Create a text index using Win10/MacOS's inbuilt indexing functionality Use Win10/MacOS's inbuilt indexing functionality to automatically create a "search index" of the downloaded documents:

a. For Win10, see here:

<https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fsupport.microsoft.com%2Fen-us%2Fwindows%2Fsearch-indexing-in-windows-10-faq-da061c83-af6b-095c-0f7a-4dfecda4d15a&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904192807%7CUnknown%7CTWFpbGZsb3d8eyJWIjojMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=PxpNS%2FHosSNr0RI2ueFKSK2tcIq47mQ2wSCCMj1wF5c%3D&reserved=0>

b. For MacOS see here:

<https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fsupport.apple.com%2Fen-gb%2FHT201716&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjojMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=N0mJDCm%2BtdbR6FeAv%2FGSb3DQSa8gNM4tGlrsfT19C3o%3D&reserved=0>

Note: if the DN repository has been downloaded to a USB 3 memory stick, then the indexing functionality needs to be configured to include this additional device in its index.

d. Please explain the estimated effort

4. Use the OS's "File Search" functionality.

Use Win10/MacOS "File Search" functionality to quickly identify any documents in the downloaded folder containing the text "Schedule 12A"

- a. On Win10/MacOS, copy any file previously identified as containing the text "Schedule 12A" to a separate folder. These DNs are the response to the FOI question asked.
- b. Optionally, identify the DN number and provide a response that contains just a list of identified DNs.

CONTEXT

This FOI information request is a refined version of Part B of my previous FOI request issued to the ICO on 21st Dec 2020 (see here: https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.whatdotheyknow.com%2Frequest%2Ficos_internal_guidance_notes_rel%23incoming_1735822&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=wkf5MemU%2BXk1i9oOZyS1Ij%2B1GmaEw2rgGr02HG0IdhM%3D&reserved=0). My earlier request was refused on the grounds of Sec. 12 Cost exceeds limits.

A summary of Part B of my earlier request is: "I am seeking a list of all ICO Decision Notices that include the text "Schedule 12A". I also provided additional context and explained that the purpose of my request was to compare the results of two different search methods (a) the ICO's definitive response versus (b) a Google search using the "site" modifier (site:<https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fico.org.uk%2F&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=BUqvFeT5zR1WbuEFA%2B4hD7Ssor0YTSacnTutIngBfWk%3D&reserved=0> "schedule 12a")

Note: "Schedule 12A" of LGA is a reference to an exemption often claimed by Local Councils under the Local Government Act (LGA) 1972 to prevent the release of certain documents discussed at Local Authority Committee meetings.

The ICO claims that the keyword search functionality used on the ICO's own website

(<https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Ficosearch.ico.org>

[g.uk%2Fs%2Fsearch.html%3Fcollection%3Dico meta%26profile%3Ddecisions%26query&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c](https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Ficosearch.ico.org%2Fsearch.html%3Fcollection%3Dico_meta%26profile%3Ddecisions%26query&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&a)

[4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&a](https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Ficosearch.ico.org%2Fsearch.html%3Fcollection%3Dico_meta%26profile%3Ddecisions%26query&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&a)

[mp;sdata=iYLI%2FGGe8IGF7pjMaPvOoPgBDEdVMvwwIq7jk5QTFef0%3D&reserved= 0\)](https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Ficosearch.ico.org%2Fsearch.html%3Fcollection%3Dico_meta%26profile%3Ddecisions%26query&data=04%7C01%7Cicoaccessinformation%40ico.org.uk%7C3519224d2ad342344f5f08d904d085aa%7C501293238fab4000adc1c4cfefba21e6%7C1%7C0%7C637546115904202801%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C1000&a) only searches for text contained in the SUMMARY

extract and does NOT search for the text in the body of the Decision Notice itself. The ICO also claims that the only way to answer Part B of my earlier request is to undertake a MANUAL search of EVERY Decision Notice (i.e. open the DN, digitally search for text phrase, closed the DN, go to the following DN).

The purpose of this new request remains the same as my earlier request, however the wording of this new request also guides the ICO through what I hope to be a practical semi-automated process that will provide the answer I am seeking well within the Sec. 12 cost limits."

5. The ICO responded on 18 May 2021. It refused to comply with the request citing section 14(1) of FOIA.
6. The complainant requested an internal review on 19 May 2021.
7. The ICO carried out an internal review and notified the complainant of its findings on 16 June 2021. It upheld its previous application of section 14(1) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 20 September 2021 to complain about the way his request for information had been handled. He stated that the ICO's application of section 14(1) is challenged in light of the underlying challenge to the application of section 12 of FOIA

in relation to his earlier request of 21 December 2020, which has been investigated under case reference IC-94169-V2H1¹. He stated that if the application of section 12 of FOIA to his earlier request fully or partially fails, this undermines the ICO's application of section 14(1) in relation to this request.

9. During the Commissioner's investigation the ICO decided to withdraw its application of section 14(1) of FOIA and claim a late reliance on section 12.
10. The Commissioner considers the scope of her investigation to be to determine whether the ICO is entitled to rely on section 12 of FOIA in relation to the complainant's request of 21 April 2021.
11. This notice should be read in conjunction with the decision notice the Commissioner has issued for case reference IC-94169-V2H1, as the majority of the ICO's submissions and the Commissioner's decision in this case are applicable here. The main difference is the timeframe specified in this request (decision notices from 2010 onwards) when compared to the complainant's earlier request (all decision notices held).

Reasons for decision

Section 12 – cost limit

12. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.
13. Section 12(1) of the FOIA says that a public authority is not obliged to comply with section 1(1) if the authority estimates that the cost of doing so would exceed the appropriate limit.
14. 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 make a notional charge of a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the

¹ [ic-94169-v2h1.pdf \(ico.org.uk\)](https://ico.org.uk/ics/94169-v2h1.pdf)

appropriate limit of £450 set out above, which is the limit applicable to the ICO.

15. 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.
16. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the applicant refine the request so that it can be dealt with under the appropriate limit, in line with section 16(1) of FOIA.
17. The ICO advised that the decision notice repository is held by its Communications Team for the purposes of publication on its website. In order to provide the complainant with all decision notices containing the phrase "schedule 12A" it would be required to manually check each decision notice. It confirmed that it had contacted its Communications Team who have confirmed that the decision notices are held on its content management system and they are indexed by decision, sector, authority and section of the legislation, as well as the date of the decision notice. This is the information that is deemed necessary for its business purposes and to ensure that decision notices which are published on its website can be filtered in a way that is reasonable for the purposes of most people.
18. The ICO advised that its Communications Team confirmed that it is unable to search the text or body of the decision notices held in the content management system. It explained that it contacted its IT teams to see if what the complainant had suggested was possible.
19. It went on to explain how the content management system is held on non-network computers which are only accessible by a small number of staff. The ICO's Communications Team are not able to download the decision notice repository to a USB memory stick or other removable memory device as the complainant has suggested. There is no facility to download the notices in bulk, they can only view each notice individually. The ICO would therefore have to see if a third party company could do that work for it and that would incur a cost to the ICO.

20. The ICO confirmed that there are over 13,500 decision notices which fall within the scope of this request. It stated that if it was able to secure a portable memory device containing all the decision notices which would need to be searched, it would then need to use a standalone device to run the search software. To resolve the issue of pdfs not containing readable text, the Windows machine would need to have OCR software installed and this would need to be added as an extension to the indexing functionality. The ICO confirmed that this is not software that is routinely used by ICO staff which means its IT team would be required to research suitable software, seek approval for this and then download it. There may also be a cost incurred to secure a licence if free licences are not considered suitable.
21. The ICO said it cannot easily undertake the searches in the way the complainant has requested. In fact it would require third party involvement and specialist expertise from its IT teams which, in its opinion, means this no longer constitutes a reasonable search.
22. As detailed in the decision notice served in respect of case reference IC-94169-V2H1, in order to comply with the complainant's request the ICO would be required to open each decision notice individually and search for "Schedule 12A". It undertook a sampling exercise for case reference IC-94169-V2H1 and this established that it would take 45 seconds to check each notice, if it accessed them via the website. To individually check over 13,500 notices would clearly exceed the cost limit of 18 hours by a substantial margin.

The Commissioner's decision

23. As detailed in the decision notice he served for case reference IC-94169-V2H1, it is the Commissioner's view that the correct approach is to consider the cost of compliance based on the public authority's information systems as they are, not how they should be or could be. The notice outlined the case law which supports this view in detail, so it shall not be repeated here.
24. There is no requirement for the ICO to consider the complainant's suggested means of retrieving the requested information. This is because before the ICO can even see if these suggestions would work, it would need to download all the decision notices from the content management system in bulk. The ICO does not have the facility to do that; the functionality does not exist. It can only open up each notice and download them individually. The ICO would need to consult a third party provider to see if they can do this and this would be at a cost to the ICO. The relevant consideration in terms of section 12 of FOIA and whether it applies in a given case is to consider the public authority's information systems as they are.

25. The Commissioner notes that this request is reduced in scope to cover decision notices issued from 2010 onwards. However, it still remains the case that compliance would exceed the appropriate limit of 18 hours by a substantial margin due to the manner in which the requested information is held and what would be required in order to retrieve the requested information. He is satisfied that there are no alternative, less time consuming means of complying with the request. The ICO has explained why the complainant's suggested means of retrieving the requested information are not possible based on how its information systems currently are and, indeed, how there is no requirement for it do so under the FOIA.
26. As detailed in his decision notice for case reference IC-94169-V2H1, the Commissioner is satisfied that section 12 of the FOIA applies in this case.

Section 16 advice and assistance

27. Section 12 of FOIA triggers the duty to provide advice and assistance so far as this would be reasonably practicable. As the ICO initially applied section 14(1) to the request, it did not consider section 16 and what advice and assistance could be provided at the time it issued its refusal notice and internal review response.
28. The ICO has however now considered section 16 and informed the Commissioner of what advice and assistance it can reasonably provide. It stated that due to the number of decision notices it holds it would not be possible to suggest to the complainant that he narrow the scope of his request by timeframe. This is because it would only be able to search a small number within the cost limit, this would be fairly random and not achieve what the complainant wants. It can therefore only suggest (as it has already done so in relation to case reference IC-94169-V2H1 that the complainant carry out his own search of the decision notices held and narrow his search to local government, sections 44 and 44(1)(a) of FOIA and by date. This is because schedule 12A is a schedule to the Local Government Act, so any reference to it is likely to be found in local government cases discussing exemptions 44 and 44(1)(a).
29. The Commissioner is satisfied that there is no other advice and assistance that can be provided. The ICO has explained how decision notices are held and what it is able to search and suggested to the complainant how he may locate the most relevant decision notices by limiting his own search to local government and specific exemptions. The Commissioner accepts that there is no useful advice and assistance that could be provided in terms of timeframe due to the sheer number of decision notices held and any such suggestion not providing the complainant with the information he requires.

30. For the above reasons, the Commissioner is satisfied that the ICO has now met its obligations under section 16 of FOIA.

Right of appeal

31. 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

32. 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.
33. 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

Samantha Coward
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Wycliffe House
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