

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2022

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

Decision (including any steps ordered)

1. The complainant requested a copy of a particular policy. The Information Commissioner ("the ICO") relied on section 21(1) of FOIA (reasonably accessible) to withhold the requested information.
2. The Commissioner's decision is that the ICO has correctly identified the information within the scope of the request and that it is entitled to rely on section 21 to withhold that information. As the ICO failed to issue its refusal notice within 20 working days, it breached section 17 of FOIA.
3. The Commissioner does not require further steps to be taken.

Background

4. This request stems from the complainant's concerns about the ICO's ability to investigate itself.
5. Section 50 of FOIA and Regulation 18 of the Environmental Information Regulations (EIR) place a statutory duty upon the ICO to determine any complaints brought about the way a public authority has dealt with a request made under either piece of legislation. The ICO is the only body that is granted this statutory duty – although its decisions can be appealed to the First Tier Tribunal, which is an independent body.
6. The situation is similar under data protection legislation. Section 165 of the Data Protection Act 2018 and Articles 57 and 77 of the UKGDPR give any data subject the right to complain to the ICO if they feel that their

data protection rights have been infringed by any data controller. The ICO is the only body that has a statutory function to deal with such complaints – although data protection rights can also be enforced through the courts.

7. However, whilst the ICO is the designated regulator for these pieces of legislation it is also simultaneously a public authority for the purposes of the FOIA (and the EIR) and a data controller for the purposes of data protection legislation. This means the ICO is itself subject to the very legislation it oversees. This creates an anomalous situation whereby a person who is unhappy with the way that the ICO has dealt with their request for information, or request to exercise data protection rights must, in the first instance, contact the very body they wish to complain about. This creates, as the complainant has pointed out, a conflict of interest (or, at least, the appearance of a conflict of interest) for the ICO.
8. In practice, the ICO attempts to get around this conflict by separating its complaint-handling functions from its request-handling functions. There is a designated "Information Access" team within the organisation charged with dealing with any information requests or requests to exercise the rights of a data subject. If the person making the request is dissatisfied with the way that the ICO has dealt with that request, they can then refer the matter back to the ICO to be dealt with as a complaint. That complaint will then be referred to either one of the FOIA/EIR complaints handling teams (who deal with complaints about a range of public authorities) or to one of the Data Protection complaints teams (who deal with complaints about a range of data controllers). The complaints team will then correspond with the Information Access team as it would if it were any other (separate) organisation.
9. Once the complaint investigation has been concluded, the person submitting it may then (if they remain dissatisfied) appeal a FOIA or EIR decision to the Tribunal or, if the matter relates to data protection rights, they may seek to enforce those rights in court.
10. This situation has long been regarded as an oddity. However the ICO is a creature of statute. It cannot refuse to respond to requests, and it cannot refuse to deal with valid complaints – because it is the body (and the only body) that has the statutory function to deal with such complaints. That is the effect of the laws that Parliament has passed.
11. This decision notice uses the term "the Commissioner" to refer only to the Information Commissioner in his statutory role determining this particular complaint. It uses the term "the ICO" to refer to the Information Commissioner acting (or having acted) in any other capacity.

Request and response

12. The complainant wrote to the ICO on 18 May 2021 as part of broader concerns he had about his previous interactions with the ICO and, in particular, the inherent conflict of interest involved when an organisation tries to investigate itself. As part of that letter, he asked:

“The Complainant therefore asks the ICO to inform him of how the ICO will address these concerns re conflict of interest. It is expected that the ICO will already have a documented policy which lays out how such complaints about ICO’s own responses under the DPA & FOIA/EIR legislation are to be handled. Please provide the Complainant with a copy by return.”

13. The ICO responded on 31 August 2021 to say that any information it held was exempt from disclosure under section 21 of FOIA because it was already reasonably accessible to the complainant. However, it did direct him to the most recent version of its service guide and to its employee code of conduct – which were already published.
14. The ICO completed an internal review on 29 September 2021 and upheld its original position.

Scope of the case

15. The complainant first contacted the Commissioner on 20 July 2021 to complain about the way his request for information had been handled. At that point, the ICO was yet to respond and the Commissioner’s intervention was necessary to bring about a response.
16. Following the completion of the ICO’s internal review, the complainant made further requests for information. Those further requests and the way that the ICO dealt with them are outside the scope of this particular complaint.
17. The Commissioner wrote to the complainant on 14 January 2022. He pointed out that the information the ICO had relied upon section 21 to withhold was self-evidently in the public domain and that the complainant’s later interactions with the ICO indicated that he (the complainant) had been able to access the information. The Commissioner suggested that the complaint be concluded with a procedural decision notice finding that the ICO had not dealt with the request within the statutory timeframe.

18. The complainant responded on 20 January 2022. He considered that the ICO held further information within the scope of his request. He also suggested that the request ought to have been dealt with under the EIR. Once again, he expressed his concerns about the way the ICO deals with complaints about itself.
19. The Commissioner considers that the scope of his investigation is as follows:
 - a) What is the correct access regime for dealing with the request?
 - b) Is the ICO entitled to rely on section 21 in the manner it has?
 - c) Has the ICO correctly identified the information within the scope of the request?
 - d) Has the procedural handling of the request met the requirements of the legislation?

Reasons for decision

A – What is the correct access regime for dealing with the request?

20. The Commissioner is satisfied that the ICO was correct to deal with the request under FOIA. The EIR govern the right of access to environmental information. They are not themselves a “measure” which affects the elements of the environment and therefore information “on” the EIR would not fall within the definition of Regulation 2(1)(c) of the EIR – as the complainant suggested.

B - Is the ICO entitled to rely on section 21 in the manner it has?

21. Section 21 of the FOIA allows a public authority to withhold information from disclosure if it is already reasonably accessible to the person requesting it. Information can be “reasonably accessible” even if the person requesting it has to pay a fee.
22. This exemption serves two functions. Firstly, it helps public authorities to deal with requests more easily if they can refuse requests for information that the requestor could have found for themselves. Secondly it acts as an incentive for public authorities to be more proactive in publishing information which is not sensitive – before a request is received.
23. Information will still be reasonably accessible if it is more accessible to the public authority than it is to the requestor. Just because a requestor has to sift through larger, published documents to find the particular

information that is of interest to them does not mean that that information is not still reasonably accessible.

24. When seeking an internal review, the complainant argued that the information was not reasonably accessible to him as the relevant information formed only a part (and a relatively small part at that) of the document the ICO had identified.
25. Whilst the Commissioner accepts that the complainant may have found it frustrating to have had to search through the documents to find the section(s) of interest, he (the Commissioner) still considers that the information was reasonably accessible.
26. The documents in question were in the public domain at the time the request was responded to as they were hosted on the ICO's website. The ICO provided direct links to each document and the complainant's later interactions demonstrate that he had been able to open each document.
27. Secondly, the Code of Conduct was only six pages long, so the complainant should not have had to spend an excessive amount of time searching through it. Whilst the Service Guide is longer (79 pages in total), the document starts with a table of contents setting out the various section and sub-section headings. Whilst this table did not include page numbers, it should still have assisted the complainant in navigating to the sections of the document that were most of interest.
28. The Commissioner does not consider that the complainant has put forward any persuasive arguments to explain why the documents in question are not reasonably accessible to him. The Commissioner therefore considers that the ICO was entitled to rely on section 21 of FOIA to withhold this information.

C – Has the ICO correctly identified the information within the scope of the request?

29. In his letter of 20 January 2022, the complainant said:

"What information did ICO actually have falling within the scope of the request. Has the ICO carried out a search of its internal databases to identify unpublished information. Was the content of the published information sufficient addressing the issues of the request (conflicts of interest) to even qualify. On the balance of probabilities will the ICO hold information particularly relevant to how it will address the need for an independent transparent complaint by the ICO as Regulator of complaints about itself."

30. The Commissioner notes that the salient part of the complainant's request read:

"It is expected that the ICO will already **have a documented policy which lays out how such complaints about ICO's own responses under the DPA & FOIA/EIR legislation are to be handled.** Please provide the Complainant with a copy by return."
[emphasis added]

31. Section 15 of the ICO's Service Guide is titled "Other casework-related matters" and the first sub-heading is "cases about the ICO."¹ The document then goes on to describe some slight differences in the way that the ICO deals with complaints when it is either the data controller or the public authority being complained about. However the document also stresses that such cases should, for the most part, be dealt with "in line with our usual procedures." Those "usual procedures" are set out elsewhere in the Service Guide.
32. The Commissioner does not consider that the lack of a more distinctive policy for dealing with complaints about itself indicates that the ICO is likely to hold further information within the scope of the request. Indeed it is likely that the more the process for ICO complaints diverges from the norm, the more opportunities there might be for a conflict to arise.
33. In any case, it is not for the Commissioner to determine, as part of a complaint arising under the FOIA, whether the ICO's internal processes are fit for purpose. His role is to determine whether the ICO has identified the information that it holds. The request sought a copy of the policy and the ICO has shown that the policy is already reasonably accessible to the complainant.
34. The complainant appears to believe that the policy the ICO has is inadequate. He is entitled to that opinion, but not entitled to claim that he cannot access a copy of the policy. There are other avenues, both internal and external, for the complainant to explore if he is dissatisfied with previous ICO decisions and the Commissioner considers that he (the complainant) is well aware of the options that are available.
35. The Commissioner is satisfied that the ICO has identified the information falling within the scope of the request and has therefore complied with its duty under section 1(1)(a) of the FOIA.

¹ <https://ico.org.uk/media/about-the-ico/policies-and-procedures/1876/ico-service-guide.pdf>

D – Procedural Matters

36. Section 17(1) of the FOIA requires a public authority wishing to rely on an exemption to withhold information to issue a refusal notice, citing that exemption, within 20 working days of the date the request was received.
37. The ICO explained in its internal review that, whilst it had received the complainant's letter of 18 May 2021, it had not identified the information request the letter contained. That error had resulted in the correspondence not being passed to the Information Access team until the Commissioner's intervention and hence the request was not processed in a timely fashion. The ICO offered an apology for the error.
38. Whilst the Commissioner notes that the request itself formed just one paragraph of a four page letter, it was included near the beginning of that letter. The request should have been recognised as such (especially considering that the letter had been sent to the ICO) and referred accordingly.
39. As the ICO did not issue its refusal notice within 20 working days it therefore breached section 17 of the FOIA.

Right of appeal

40. 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

41. 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.
42. 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

Roger Cawthorne
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