

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2011

Public Authority: Financial Services Authority
Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Decision (including any steps ordered)

1. The complainant has requested information relating to the nationality of employees recruited by the Financial Services Authority (FSA) for the ten years preceding the request. The FSA refused the request on the basis that compliance would be cost-prohibitive and therefore it did not have a duty to retrieve the requested information under section 12(1) of FOIA.
2. The Commissioner's decision is that the FSA correctly claimed a reliance on section 12(1) of FOIA. However, the Commissioner finds that the FSA breached section 16(1) (advice and assistance) by its handling of the request.
3. The Commissioner does not require the public authority to take any steps as a result of this notice.

Request and response

4. On 23 August 2010, the complainant wrote to the FSA and requested information in the following terms:

"...please tell me what proportion of hires are not UK nationals by year of hiring at the FSA for the last ten years."

5. The complainant extended his request on 30 August 2010 by additionally asking that:

"On the FOI request, please provide the analysis by grade of employee. Therefore your response would show the proportion of non-UK nationals relative to UK nationals by pay grade each year for the last ten years. I am only interested in hires at a professional level."

6. The FSA responded on 21 September 2010. It stated that it was refusing to comply with the request on the basis that section 12 applied, estimating that the cost of compliance would exceed the appropriate limit. In forming its estimate, the FSA clarified that it had aggregated together the requests of 23 and 30 August 2010 in respect of the total time required to provide the requested information.
7. Following an internal review the FSA wrote to the complainant on 15 April 2011. It stated that it had upheld its original decision to refuse the requests under section 12 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that the requested information was of particular importance because it referred to the possibility that "preference [was] given to hiring economic migrants by the FSA at professional levels rather than UK nationals as the Race Relations Act specifically permits."
9. The Commissioner has considered whether the FSA was correct to rely on section 12(1) (the relevant subsection of section 12) as grounds for refusing the request, looking also at whether the FSA complied with the express requirement to provide advice and assistance set out by section 16 of FOIA.
10. However, the Commissioner has been mindful that there is no public interest test attached to the application of section 12. Therefore, where section 12 is found to be engaged, a public authority would not be obliged to consider retrieving the information, irrespective of the assumed importance of that information.

Reasons for decision

11. Section 12(1) provides 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 would exceed the appropriate limit. This limit is specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").

12. The Regulations state that an estimate can only take into account the costs a public authority reasonably expects to incur in: determining whether it holds the information; locating the information; retrieving the information; and extracting the information. The Regulations further clarify that the costs associated with these activities should be worked out at a standard rate of £25 per hour.
13. The appropriate limit is £600 for central government, legislative bodies and the armed forces and £450 for all other public authorities, which includes the FSA. This is equivalent to 18 hours work.
14. Section 12(4) of FOIA provides that in certain cases a public authority can aggregate the cost of complying with requests. Section 5 of the Regulations sets out the circumstances in which it may be appropriate to aggregate requests, stating that two or more requests can be aggregated if they are:
 - by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - for the same or similar information to any extent; and
 - the subsequent request is received by the public authority within 60 working days of the previous request.
15. The Commissioner is satisfied that the FSA was entitled to aggregate the two requests made by the complainant for costs purposes because they clearly meet each of the conditions set out above. He has therefore gone on to consider the FSA's reliance on section 12(1) in relation to the aggregated requests.

Section 12(1) – cost of compliance

16. When considering the application of section 12(1), the Commissioner accepts that a public authority only has to provide an estimate rather than a precise calculation. The task for the Commissioner is therefore to consider whether an estimate is sensible, realistic and supported by cogent evidence.
17. Upon receipt of a request, the Commissioner would expect a public authority to read the request objectively. In this case, there seems to be little ambiguity regarding the nature of the information sought by the complainant. However, the FSA has clarified that it interpreted the "professional level" referred to in the complainant's later request as meaning:

"...individuals with a professional qualification (any higher education award (degree, diploma, or other type of formal certification) issued by

a competent, registered authority following the testing and successful completion of a course programme).

18. The complainant has not at any stage disputed this interpretation. The Commissioner has therefore proceeded on the basis that the FSA had a correct understanding of the scope of the requests.
19. The FSA has argued that the time needed to locate and retrieve all of the relevant information captured by the requests would greatly exceed 18 hours. To provide context to its estimate, the FSA has initially informed the Commissioner of the information it is required to record when recruiting new employees, before going on to explain how relevant information is stored.

The recruitment process

20. Citizens of any country in the European Economic Area (apart from Romania and Bulgaria) and of Switzerland are entitled to work in the UK without special permission, although citizens from eight of the 10 countries that joined the EU on 1 May 2004 are required to register with the Home Office. The FSA is required by the Immigration and Asylum Act to confirm if an applicant has permission to work in the UK. This legal obligation though does not extend to the FSA needing to retain proof of the right to work in the UK.
21. The FSA complies with the Immigration and Asylum Act in two ways:
 - An applicant is required to indicate on the FSA's application form whether they have permission to work in the UK.
 - Successful candidates are required to provide proof of identity by producing an original birth certificate or passport.
22. The FSA does not record nationality in either its HR or recruitment system. Instead, HR only retains a scanned copy of proof of identity in an electronic employee file.

23. Similarly, the FSA has advised the Commissioner that professional qualifications are not a prerequisite for employment at the organisation. Therefore, each employee's CV or application form would have to be reviewed in order to confirm whether they were of "professional level".

The management of records

24. The FSA has clarified that in 2003 it introduced its 'iGrasp' database system to aid the FSA's recruitment process. All CVs and application forms are uploaded by applicants or recruitment agencies. Prior to the introduction of iGrasp, CVs and application forms were kept in hard copy format.

25. In 2005 the FSA undertook a records management project where each employee's paper file was scanned into an electronic folder. However, this administering of information only went so far as contractual information, with any other original documents such as CVs destroyed. Consequently, the Commissioner has been informed that a typical employee's records now consist of:
- Application form/CV stored in iGrasp
 - Information relating to salary, job grades and other HR information, which is stored in the FSA's Chrysalis HR database
 - Contractual information
26. As a result of the records management project the FSA has claimed, and the Commissioner has seen no reason to doubt, that it only holds application forms and CVs dating back to 2003 (when iGrasp was introduced) for those individuals. This is contrary to an earlier indication to the complainant that it holds records dating back to 2000.

Breakdown of costs

27. For the reasons set out above, the FSA considers that it would have to check every employee's personnel records in order to determine:
- if that employee has a professional qualification, as stated on a CV or application form; and if so
 - the nationality of the employee, which would be recorded on the employee's proof of identity.
28. The FSA has confirmed that it has recruited 4521 individuals via iGrasp since 2003. The FSA has estimated that in order to review each application form or CV (which could be made up of up to 20 pages) to determine if the applicant has a formal qualification would take 2 minutes per individual. It has therefore estimated that on this basis alone compliance would take 150.5 hours.
29. Based on what it considers to be a conservative estimate, the FSA anticipates that, of the 4521 total, approximately 50% of staff (2260) will have professional qualifications for the period in question. The FSA has allowed 30 seconds to inspect each of the 2260 professionally qualified employees' files to check their proof of identity, finding that this process would also exceed the costs limit, although only narrowly in this instance (18.5 hours).
30. By combining these estimates, the FSA has estimated that compliance with the requests would take a minimum of 169 hours. However, the Commissioner notes that this total does not include the time needed to

check and extract each employee's job grade – a further component of the complainant's request. This is because the FSA considers it is unable to construct a meaningful estimate in regards to the number of employees that are non-UK nationals.

The Commissioner's position

31. The Commissioner is prepared to accept as reasonable the FSA's explanation that the bulk of the requested information is stored in the employees' personnel files. He is therefore satisfied that the FSA's estimate should focus on the time needed to extract information from each file.
32. The Commissioner does, however, have some reservations with respect to the FSA's overall estimate. In particular, he would query the time required to check whether an employee has a professional qualification.
33. The Commissioner considers that most, if not all, CVs and presumably all application forms will clearly demarcate a 'qualifications' section. This is because of the recognised importance that qualifications hold when applying for a job. The Commissioner therefore observes that in most cases it should not be a difficult, or time-intensive, process to locate the relevant part of an application form or CV. As a consequence, he considers there are legitimate grounds for assuming that it would take less than the average of two minutes per file that the FSA estimate.
34. Yet, while making this point, the Commissioner is also mindful of the significant number of files (4521) that would need to be interrogated in order to comply with this stage of the request. Even if the original estimate of 2 minutes was halved, the Commissioner recognises that the time needed to retrieve the professional qualifications information would significantly exceed the appropriate limit. This, it should be remembered, does not take into account the other activities required to produce the remaining aspects of the request.
35. In making this finding, the Commissioner has borne in mind the arguments made by the complainant against the FSA's application of section 12:
 - The possibility that FSA could employ an alternative method to retrieve the requested information.
 - The requirement of the FSA to hold the information in a readily accessible form, not least because of the important strategic role it plays and the application of the Race Relations Act 1976.
36. Regarding the first point, the complainant has suggested that the FSA could easily obtain the relevant information by asking its staff to provide

their UK passport numbers via email. A sample of the passport numbers could then be checked to ensure accuracy.

37. The Commissioner, though, respectfully disagrees with this line of argument. This is because the proposal put forward would necessitate the FSA producing information – namely the staff emails confirming their UK status – for the purposes of the request. In contrast, FOIA will only apply to recorded information held at the time of the request and does not contain powers compelling a public authority to create information. The Commissioner does not therefore consider the complainant's argument will have any material bearing on his consideration of section 12(1).
38. Turning to the second point, the complainant has argued that he should not be penalised for the 'inadequate' systems employed by the FSA that prevent the extraction of the requested information. To reinforce this view, the complainant has suggested that the vital role that the FSA occupies in relation to the interests of the UK should be reflected by a high degree of vigilance in relation to the nationalities of the staff that it employs.
39. Again, however, the Commissioner does not find this argument compelling. To paraphrase the Tribunal's decision in *Robin Williams v the Information Commissioner and Cardiff and Vale NHS Trust* (EA/2008/0042), the Commissioner considers that it is not open to him to disallow reliance upon section 12 on the basis that the FSA could have organised its records more efficiently.
40. In any event, the Commissioner has not seen any evidence to suggest that the records management system of the FSA is indeed 'inadequate'. Neither is he aware that the FSA has in any way breached its legal obligations by failing to store the requested information in a different format.
41. The Commissioner does not therefore consider that either argument would militate against finding that section 12(1) is engaged. Nevertheless, the Commissioner acknowledges that where section 12(1) is applied by a public authority, section 16 imposes a duty to provide advice and assistance to an applicant in order to help them access at least some of the information they seek.

Section 16 – advice and assistance

42. Section 16(1) of FOIA places a duty on a public authority to provide advice and assistance to applicants who have made or are planning make requests for information. The Commissioner recognises that this is not an exact science and the section itself is constrained by the condition that advice and assistance should only be offered "as far as it would reasonable to do so".

43. However, where a request exceeds the appropriate costs limit, the Commissioner would typically expect a public authority to consider ways in which an applicant could refine their request to enable it to be brought under the costs threshold.
44. The Commissioner notes that when originally citing its reliance on section 12 the FSA did not either suggest ways that the complainant could revise his request or confirm that it was unable to offer advice and assistance in the circumstances. The Commissioner, however, has asked the FSA to consider its section 16(1) responsibilities as part of his investigation. In particular, he has pointed to the complainant's clarification that, if the entire range of the requested information could not be provided, he would be prepared to limit his request to the 2009 and 2010 period.
45. The FSA has confirmed that it recruited 630 employees in 2009 and 649 employees from January to August 2010. Using the breakdown of costs set out previously in this notice, the FSA has found that compliance would again significantly exceed the appropriate limit.
46. Regarding the broader principle of what advice and assistance could be offered in the alternative, the Commissioner considers there is a lack of detail in the FSA's claim that it would be unable to offer any constructive advice in response to the request. Yet, the Commissioner is aware that the complainant is now in possession of the FSA's detailed breakdown of costs that has informed its decision to apply section 12(1). This breakdown would, in the Commissioner's view, allow the complainant to draw his own conclusions on if, and how, he could revise his request to meet the cost limit.
47. Although the provision of such a breakdown is not a statutory requirement under section 12 of the Act, as a matter of good practise a public authority should provide a breakdown of how it arrived at its estimate so that the applicant can consider refining his request to come within the cost limit and also to enable the public authority to meet its obligations under section 16.
48. In the circumstances of this case however the Commissioner does not feel that there would be any practical benefit to the complainant in considering whether any remedial steps could be taken as a result of this notice.

Procedural Issues

49. The Commissioner finds that the FSA breached section 16(1) by failing to inform the complainant when responding to his request of, either, what information could be provided within the costs limit, or, the fact that no information could be provided within this costs ceiling.

Right of appeal

50. 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 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

51. 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.
52. 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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