

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2012

Public Authority: HM Revenue & Customs
Address: Millbank Tower
25th Floor
21/24 Millbank
London
SW1P 4XL

Decision (including any steps ordered)

1. The complainant has requested information from HM Revenue & Customs (HMRC) relating to responses it sent to subject access requests (SARs) made under the Data Protection Act 1998 (DPA).
2. The Commissioner's decision is that HMRC correctly applied section 12(1) of the FOIA to the request. However, he also finds that it breached section 16 by failing to provide advice and assistance and section 17 by failing to communicate to the complainant its reason for refusing the request.
3. The Commissioner does not require HMRC to take any steps with regard to this case.

Requests and responses

4. On 26 September 2011, the complainant wrote to HM Revenue & Customs (HMRC) and requested information in the following terms:

'the number of DPA requests HMRC have received in each of the last 4 years

'the number of DPA requests HMRC failed to deliver a response within 40 days in each of the last 4 years.'

5. HMRC responded on 10 October 2011. It explained it did not hold all of the information requested. Specifically, it stated that it held information for 2010 and 2011, but not 2008 or 2009.
6. HMRC stated that it had received 16,475 SARs in 2010 and 12,924 in 2011 (up to 31 August 2011). It further stated that of those processed in 2010 1,682 were answered after the fortieth day and of those processed in 2011 (up to 31 August 2011) 1,260 were answered after the fortieth day.
7. The complainant requested an internal review on 13 October 2011 and clarified his request. He stated that in his view there was a distinction between responses posted and those which were delivered. He further explained that in his view:

'If HMRC posted responses 2nd class mail it is reasonable to assume that they were not delivered/received within at least 4 working (not calendar) days after the date of posting -Second Class mail aims to deliver your letter or packet by the third working day after posting, including Saturday.'

8. On 14 November 2011 HMRC provided its internal review to the complainant. It explained that if the complainant's request had sought information on when SARs were not received by recipients at their address within 40 calendar days then HMRC did not hold the information. It further stated that in order to comply with the request in that form HMRC would have to create new information and that it would not be able to provide accurate information because of the way that the post system functions.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he complained that HMRC had not provided the information requested. During the course of the Commissioner's investigation, HMRC informed him that it was relying upon section 12(1) of the FOIA (costs exceeding appropriate limit) to not comply with the request.

Reasons for decision

Request of 26 September 2011 - objective meaning

10. The complainant informed HMRC that the meaning he gave to the phrase 'failed to deliver a response' was that where responses were sent by post then the total numbers should be higher. Specifically, he was of the view that where a response was sent by second class post it would be reasonable to assume that it was not delivered within four working days. Therefore he thought that any response issued within this time frame should be classed as not delivered and therefore included in the scope of the request.
11. HMRC confirmed to the Commissioner that initially it had read the request as being for instances where it had not issued a response within 40 calendar days.
12. The Commissioner considers that whilst the request is capable of encompassing 'failures of issue' by HMRC as well as 'failures of receipt' by the addressees, the complainant's reading of the request goes further. This is because the complainant apparently based his meaning of the request on his reading of Royal Mail's service standards and brought this into his meaning of 'deliver'.
13. The Commissioner has referred to those standards and has noted that Royal Mail states it aims to deliver second class post *within* three working days, including Saturday. He is also aware that there is information in the public domain which indicates it is possible for second class post to be delivered on the next working day after posting. The Commissioner therefore is of the view that the complainant's reading of the meaning of 'failed to deliver' in this regard is not an objective one.
14. The Commissioner considers HMRC's reading of the request was an objective one and that the complainant's was not. Further, as HMRC was not aware of any other interpretation of the request at the time, he considers that there was no breach of the FOIA in this regard.

Refined request

15. The Commissioner's position is that a clarified request constitutes a new request. Therefore, whilst the Commissioner has found the complainant's reading of the request not to be objective, he does consider that the complainant clarified his request when asking for an internal review on 13 October 2011, therefore generating a new request under the FOIA.

16. HMRC has informed the Commissioner that to comply with this request, as specified by the complainant, would exceed the appropriate limit as set out in section 12 of the FOIA.

Section 12(1)

17. Section 12(1) 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 would exceed the appropriate limit.
18. When considering whether section 12(1) 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').
19. Paragraph 4(3) of the Regulations states:

"In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in -

 - (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.
20. The Regulations state that the appropriate cost limit is £600 for central government, legislative bodies and the armed forces, and £450 for all other public authorities. As HMRC is a central government department, the cost limit in its case is £600, which is equivalent to 24 hours' work.
21. Section 12 of the FOIA makes it clear that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation.

The Commissioner's investigation

22. The complainant's refined request specified that:

'If HMRC posted responses 2nd class mail it is reasonable to assume that they were not delivered/received within at least 4 working (not calendar) days after the date of posting.'

23. HMRC informed the Commissioner that, to comply with the request and provide additional recorded information held, it would need to look through individual electronic records. HMRC argued that this would engage the section 12 limit.
24. It further explained that this was because it would first need to establish how each response was sent to the addressee. HMRC explained that in most instances it provided SAR responses to requesters via second class post. However, it also stated that responses were occasionally sent out using tracked next day delivery, or at times via fax or email. It informed the Commissioner that it was not possible to run a report from its computer system which would detail how responses were sent. The records would have to be checked individually to establish the method of dispatch.
25. In relation to the above, HMRC provided further information about its teams that deal with SARS. It explained that four teams within HMRC dealt with approximately 97% of requests in 2010.
26. It explained that the first team dealt with national insurance records and responded to 46% of SARs in 2010. The team would normally send out responses by second class post but occasionally by tracked next day delivery. It explained that this was done where the information was required in order to secure employment with a prospective employer, where there had been problems with receipt of post to that individual in the past or where the volume of information being provided warranted it. HMRC stated that information on whether tracked mail was used would be recorded on the individual case record in a free text box.
27. HMRC detailed that the second team dealt with requests for copies of telephone calls and accounted for 27% of SARs in 2010. It again explained that most responses from this team were sent by second class post but that where the information was in the form of a number of CDs tracked next day delivery would be used.
28. The third team dealt with 16% of SARs in 2010 in the area of personal tax. It issued responses usually by second class post and occasionally tracked next day delivery used. HMRC also said that this team sent out some responses by fax or email.
29. The fourth team dealt with 8% of SARs in 2010 in relation to Tax Credit records. HMRC said that for this team responses were sent out by tracked next day delivery. However, as this team did not send out responses by second class post the Commissioner would not consider that they need to be subjected to the same level of scrutiny for the purposes of the cost calculation.

Evidence

30. HMRC provided evidence to the Commissioner detailing why it considered the section 12 limit would be exceeded in complying with the request.
31. It provided him with the number of responses HMRC issued to addresses on certain days following the date of receipt of each SAR for two of the above teams. For the purposes of explaining the Commissioner's decision in this case, the figures for one of the teams are discussed below.
32. HMRC explained that the second team provided 5,387 SAR responses in 2010. It provided a sample breakdown of those responses as set out below for those issued between 35 and 40 calendar days following receipt:

Calendar day response issued following receipt of SAR	40	39	38	37	36	35
Responses	405	335	457	388	293	152
Cumulative Total	405	740	1197	1585	1878	2030

33. HMRC has stated that the records corresponding to each of the responses would need to be checked to establish the method of delivery. It has informed the Commissioner that it would take approximately 1 minute to check each individual electronic record to identify information on the method of delivery and whether there was information detailing a receipt date, or both. This appears to the Commissioner to be a reasonable estimate for this task.
34. At 1 minute per record this translates to a time of over 26 hours for this team alone to check responses issued between days 37 to 40 following receipt of a SAR. Further, it may be necessary to search outside of this time period in order to address the discrepancy in the complainant's request between calendar and working days. The Commissioner therefore considers that HMRC's estimate is a reasonable one and that section 12(1) has been applied correctly.

Section 16

35. Section 16(1) imposes an obligation on a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the section 45 Code of Practice in relation to the provision of advice and assistance in that case.
36. Whenever the cost limit has been applied correctly, the Commissioner must consider whether it would be possible for the public authority to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit, in accordance with paragraph 14 of the Code.
37. The Commissioner notes that HMRC did not provide advice and assistance to the applicant to narrow his refined request in relation to section 12 of the FOIA at the time of that request. However, the Commissioner is aware that the complainant has subsequently made a further request to HMRC substantially similar to the refined request in this case. The Commissioner notes that HMRC provided advice and assistance to the complainant in that case. Specifically, it advised the complainant on options to narrow his request. The Commissioner therefore considers that HMRC has now discharged its responsibility to provide reasonable assistance to the complainant in respect of his request and that no further action is required.

Section 17

38. Section 17 of the FOIA requires a public authority to accurately convey its position as to why it is refusing a request, if it does so, within the time for complying with section 1(1), ie within 20 working days.
39. In this instance HMRC only relied upon section 12 of the FOIA after the Commissioner's involvement and outside of the statutory time for compliance. 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: 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

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

Rachael Cragg
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