

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2014

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested correspondence sent or received by the Home Secretary relating to information that was leaked to a newspaper and dating from a period preceding the publication of the story stemming from that leak. The Home Office stated initially that it did hold information falling within the scope of the request, but refused to disclose it on the grounds that it was exempt. At internal review it changed its position and stated that it did not hold any information falling within the scope of this request.
2. The Commissioner's decision is that the Home Office stated correctly and in accordance with section 1(1)(a) of the FOIA that it did not hold information falling within the scope of the complainant's request.

Request and response

3. On 16 December 2013 the complainant wrote to the Home Office and requested information in the following terms:

"Please reveal all correspondence sent/received by Theresa May in a period 01/11/2013 - 15/12/2013 regarding leak to Sunday Times - 75,000 cap on EU migration.

Please note: this request is about correspondence regarding leak, not about the policy itself."

4. The Home Office responded on 29 January 2014, outside 20 working days from receipt of the request. At this stage it stated that it did hold information falling within the scope of the complainant's request, but refused to disclose this information under the exemption provided by section 31(1)(g) (prejudice to law enforcement) of the FOIA.
5. The complainant responded to this on 30 January 2014 and requested an internal review. After a very lengthy delay and, as recorded below, only following the intervention of the ICO, the Home Office responded with the outcome of the internal review on 30 May 2014.
6. The conclusion of the internal review was that the position of the Home Office had changed and, where previously it had stated that the requested information was held, it now stated that this information was not held. It explained that the request had been misinterpreted and that the information it had identified previously post-dated the timeframe specified in the request and so was not within the scope of the request. Its new position was that it held no relevant information from the timeframe specified by the complainant.

Scope of the case

7. The complainant contacted the Commissioner initially on 22 January 2014 to complain about the failure by the Home Office to respond to his request. As recorded above, following receipt of the delayed response to this request, the complainant responded to the Home Office and asked it to carry out an internal review.
8. The complainant contacted the ICO again on 27 February and 5 March 2014 to complain about the delay by the Home Office in the completion of the internal review and confirmed on 23 April 2014 that he had still not received the outcome of that review. Owing to this delay, this case was progressed at that stage without waiting for the outcome of the review.
9. As recorded above, the Home Office eventually provided the internal review outcome on 30 May 2014. Following receipt of this the complainant confirmed that he wished the ICO to investigate whether the Home Office was correct to state that it did not hold the information he had requested. The analysis below therefore covers whether the Home Office stated correctly that it did not hold information falling within the scope of the complainant's request.

Reasons for decision

Sections 10 and 17

10. Section 10 of the FOIA provides that a response to an information request must be sent within 20 working days of receipt. Section 17 relates specifically to a response that states why a request is being refused and also requires that such a response is provided within 20 working days.
11. In this case the Home Office failed to respond to the request within 20 working days of receipt and in so doing breached sections 10 and 17 of the FOIA. The Commissioner comments further on this breach in the "Other matters" section below.

Section 1

12. Section 1(1)(a) of the FOIA provides that a public authority is obliged to confirm or deny whether it holds information that has been requested. Clearly this means that a public authority is required to establish accurately whether it holds information that has been requested.
13. In this case the complainant alleges that the Home Office has stated incorrectly that it does not hold the information he requested, which would be a breach of section 1(1)(a). The task for the Commissioner here is to make a decision as to whether the Home Office was, on the balance of probabilities, correct and in compliance with section 1(1)(a) to state that it did not hold the information requested by the complainant. Making this decision on the basis of the balance of probabilities is in line with the approach taken by the First-tier Tribunal (Information Rights).
14. During the investigation of this case, the Home Office was asked to provide to the ICO an explanation of the searches that were carried out in response to the complainant's request, as well as any other reasons it had for concluding that it did not hold the requested information. Initially the Home Office relied on an explanation as to why it should not be expected to hold that information. That explanation was that as the dates specified in the request were prior to the publication of the story in the Sunday Times that revealed that this leak had taken place, the Home Office was not aware at that time that this leak had occurred and so could not hold any information falling within the scope of the request.
15. The Commissioner's view was that this was a relevant factor and would be taken into account, but that this was an insufficient basis alone upon which he could conclude that, on the balance of probabilities, the requested information was not held. This was particularly the case given that the Home Office had initially confirmed that it did hold the requested information, before its change in position. The Commissioner

noted that the possibility that information within the scope of the request could be held had the leak been planned within the Home Office required addressing. In view of this, the Home Office was asked to also provide an explanation of the searches it had carried out for this information.

16. In response to this, the Home Office stated that the request was forwarded to relevant senior officials within the Home Office and these officials were asked to indicate whether they held any information falling within the scope of the request. Whilst these searches did not locate any information within the scope of the request, it was this search that led to the initial incorrect confirmation that the requested information was held, as one of the contacted officials confirmed that relevant information was held, but it later transpired that this information was from outside the timeframe specified in the request. This search did not locate any information that originated during the timeframe specified in the request.
17. A search was also carried out for emails relevant to the subject matter of the request. This search also did not locate any information falling within the scope of the request.
18. The evidence available to the Commissioner is the reasoning of the Home Office as to why it should not have been expected to hold information falling within the scope of the request and the description of the searches that it in any event carried out for relevant information. Whilst the Commissioner would not have accepted in isolation the reasoning of the Home Office – which was that the timeframe specified in the request pre-dated the publication of the newspaper story revealing that the leak had taken place – that reasoning is combined with the description of the searches that were carried out.
19. Taking the above into account, along with the absence of any evidence that contradicts the Home Office, the Commissioner concludes that, on the balance of probabilities, the information requested by the complainant was not held. The Home Office therefore complied with section 1(1)(a) of the FOIA and is not required to take any further action in relation to this request.

Other matters

20. As well as his finding above that the Home Office breached the FOIA by failing to respond to the request within 20 working days, he would note here his concern at that delay, along with the delay in the completion of the internal review. The result of the delays and the inaccurate initial response was that it was over five months from the date of the request before the complainant received a response that was accurate for the purposes of section 1(1)(a) of the FOIA.
21. A record of the poor handling of this request has been made. The Home Office must ensure that there is no repeat of this in relation to other requests. These issues may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

22. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

23. 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.
24. 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

Jon Manners
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