

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2015

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

Decision (including any steps ordered)

1. The complainant requested a file listed by the National Archives, but retained by the Home Office, that concerned Scottish devolution. The Home Office initially refused the request under section 22(1) (information intended for future publication) of the FOIA, but withdrew that exemption at internal review. Although it was not relying on any grounds from the FOIA to continue to withhold the information, it stated that circumstances meant that it was unable to disclose this information, but that it would imminently be available at the National Archives (TNA). This information remained unavailable by the date of this decision notice.
2. The Commissioner's decision is that in failing to disclose the requested information within 20 working days of receipt of the request, the Home Office breached sections 1(1)(b) and 10(1) of the FOIA. The Commissioner has also found the Home Office in breach of the section 16(1) duty to provide advice and assistance and it is now required to take action to remedy that breach.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - Provide advice to the complainant on how his request can be progressed with the appropriate public authority in the current circumstances.
4. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 15 April 2014, the complainant wrote to the Home Office and requested information in the following terms:

"I would like to request access to a file which is listed on the National Archives as being retained by the Home Office.

The file is listed with the reference HO 287/2018 and is about Scottish devolution: Home Office view on possibility of passing of legislative control from UK Parliament to a Scottish assembly."

6. After a very lengthy delay and only following the intervention of the ICO, the Home Office responded substantively to the request on 18 November 2014. The request was refused under the exemption provided by section 22(1) (information intended for future publication) of the FOIA. In this refusal notice the Home Office stated that *"at [the] time of your request the Home Office had already taken a decision to transfer the information you requested to The National Archives"*.
7. The complainant responded on 22 November 2014 and requested an internal review. The Home Office responded with the outcome of the review on 19 December 2014. It withdrew the citing of section 22(1) and stated, in contradiction of the refusal notice, *"the decision to release the information was not made prior to the request being received"*.
8. However, despite there now being no grounds cited for the continued withholding of it, the requested information was not disclosed. The Home Office stated that the file in question had been transferred to the National Archives and this meant that *"there is no further action that we can take"*.

Scope of the case

9. The complainant contacted the Commissioner initially on 3 November 2014 to complain about the failure by the Home Office to respond substantively to his request. As covered above, the ICO intervened at that stage to ensure that the Home Office responded to the request.
10. Following the completion of the internal review, the complainant contacted the ICO again on 19 December 2014. At this stage he

complained about the time taken by the Home Office to respond to his request and about the continued failure to disclose the information.

11. At the date of this decision notice, TNA's website (nationalarchives.gov.uk) continues to list the file in question as "*closed and retained by the Home Office*".
12. The Commissioner has found in this notice that the Home Office failed to disclose information and also failed to cite any appropriate exemption from the FOIA as justification for this. He has not, however, ordered disclosure of this information, as such a step could not be complied with by the Home Office, now that they have transferred the file to TNA. Such a step would not be enforceable. In these circumstances, the Commissioner has considered whether section 16(1) was complied with.

Reasons for decision

Sections 1 and 10

13. Section 1(1)(a) of the FOIA requires public authorities to confirm or deny whether requested information is held. In relation to any information that is held, section 1(1)(b) requires that this information should be disclosed, unless any provision of the FOIA that removes that obligation applies. Section 10(1) provides that this action must be taken within 20 working days of receipt.
14. In this case the Home Office confirmed that the requested information was held, but failed to disclose it and cited no provision from the FOIA in support of this non-disclosure. In failing to disclose the requested information within 20 working days of receipt of the request, the Home Office has breached sections 1(1)(b) and 10(1) of the FOIA.

Section 16

15. Section 16(1) imposes a duty on a public authority to provide advice and assistance to any person who proposes to make or has made an information request to it. In this case the view of the Commissioner is that the Home Office failed to carry out this duty and so was in breach of the requirement of section 16(1).
16. Simply informing the complainant that, whilst the initial exemption was withdrawn and no replacement cited, there was nothing further it could do was clearly in line with neither the letter nor the spirit of the FOIA. The Home Office apparently ignored its obligation under section 16(1). At the very least, on transferring the file to TNA, the Home Office should have advised the requester to submit his request to that public

authority. At paragraph 3 above the Home Office is now required to remedy this breach; when complying with this step it should provide practical advice that will lead to the complainant making his request to the appropriate public authority.

Other matters

17. The Commissioner wishes to note his concern at the manner in which this request was handled by the Home Office. That it took seven months to provide a response that was subsequently admitted to be inaccurate represents very poor practice. It also was not acceptable for the Home Office to suggest that there was nothing further it could do once it had passed the file to the TNA; these circumstances did not alter its obligations under the FOIA.
18. Whilst different branches of government are separate public authorities under the FOIA, the Commissioner considers that citing the processing of the transfer of the requested information from one branch of government to another as an explanation for being unable to comply with the request is not only a technical breach of the FOIA, but also a regrettable failure to comply with the spirit of the legislation. This also does not appear to be in line with the Government's avowed transparency agenda and the effect was to simply put an obstacle in the way of the complainant. The Commissioner notes that the requester in this case is a journalist and very frequent user of his FOIA rights. However that does not excuse such a basic failure on the part of the Home Office to fulfil its obligations under the legislation. It must ensure that the poor handling of this request is remedied by complying with the step required by this notice and that the issues in this case are not replicated in future.

Right of appeal

19. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

20. 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.
21. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF