

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2015

Public Authority: Attorney General's Office
Address: 20 Victoria Street
London
SW1H 0NF

Decision (including any steps ordered)

1. The complainant submitted five questions about the Attorney General's Office (AGO) and the European Convention on Human Rights.
2. The AGO did not treat the questions as requests for information under the FOIA however the Commissioner considers that it should have done. During the Commissioner's investigation the AGO confirmed that it did not hold any recorded information in relation to the requests. The Commissioner considers that, on the balance of probabilities, the AGO does not hold any of the requested information. In failing to inform the complainant that no information was held within twenty working days the AGO breached sections 1(1)(a) and 10(1) of FOIA.
3. However, in light of his findings above the Commissioner does not require the AGO to take any steps as a result of this decision.

Request and response

4. On 16 December 2014, the complainant wrote to the Attorney General's Office (AGO) and requested information in the following terms:

"Q1 Are the references in EAT S:33 'Restrictive Proceedings Order' application UKEAT/0277/14/RN, Treasury Solicitor Reference Z1318919/IIS/A4, to an ECHR application as 'an example of vexatious behavior', [sic] a breach of Protocol 18, Article 34? Being a breach of EU Law by the Attorney General.

Q2 Are the references in High Court S:42 "All Proceedings Restriction Order" claim CO/4940/2014, Treasury Solicitor Reference

Z13189/IIS/A4, to an application as 'an example of vexatious behavior', [sic] a breach of Protocol 18, Article 34? Being a breach of EU Law by the Attorney General.

Q3 What actions have been taken, and will be taken, to address these two breaches of Protocol 18, Article 34, by the Attorney General.

Q4 How many times has the UK Attorney General breached ECHR Protocol 18, Article 34, since 1998?

Q5 What actions have been taken to address other breaches of Protocol 18, Article 34, by the Attorney General."

5. The AGO responded on 9 January 2015. It explained that it considered that the requests did not fall under the FOIA regime. With regard to questions 1 and 2, it considered that the complainant was asking whether applications made against him for orders to restrict vexatious proceedings were in breach of Article 34 of the European Convention on Human Rights (ECHR). The AGO also confirmed that it considered that the complainant was asking for legal advice rather than making a request for recorded information. It explained that the applications against the complainant under section 33 of the Employment Tribunals Act 1996/section 42 of the Senior Courts Act 1981 were each properly brought and that it was now for the court to determine what orders should be made.
6. With regard to question 3, the AGO considered it was not a request for recorded information. Furthermore, with regard to questions 4 and 5, the AGO explained that it considered that these questions were not requests for recorded information and that, in any case, it did not accept that the Attorney General's functions in relation to vexatious litigants were in breach of the ECHR.
7. Following an internal review the AGO wrote to the complainant on 5 February 2015. It explained that it was unaware of any evidence that suggested there was anything in the relevant UK legislation or in the conduct of the Attorney General, to suggest there has been a breach or an attempted breach of either European Union law or the ECHR.
8. Furthermore, the AGO explained that whilst the Attorney General's application did not affect the complainant's right under the FOIA, this did not mean that a public authority had to deal with vexatious requests. The AGO also explained that it considered requests to be vexatious where they did not seek access to its records, but instead were made up of questions about its legal position in relation to current litigation to which the Attorney General and the requester were both parties. The AGO explained these questions should be raised, if at all, in the course of those proceedings. However, AGO did not state that it was refusing to comply with the requests on the basis that section 14(1) of the FOIA applied.

Scope of the case

9. The complainant contacted the Commissioner on 12 February 2015 to complain about the way his requests for information had been handled.
10. The Commissioner's investigation considered:
 - whether the requests were valid under section 8 of the FOIA; and
 - whether the AGO held any recorded information relevant to any of the requests.

Reasons for decision

Section 8 – valid request

11. Section 8 provides the definition for what constitutes a request for information under the FOIA:

"(1) In this Act any reference to a "request for information" is a reference to such a request which –

(a) is in writing

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested."

12. As the questions were in writing and provided both the complainant's name and an address for correspondence, the Commissioner considers that the requirements under sections 8(1)(a) and (b) were met. The Commissioner has therefore gone on to consider whether the complainant's requests met the requirement under section 8(1)(c).
13. The Commissioner's guidance "Recognising a request made under the Freedom of Information Act (Section 8)"¹ states that a request in the form of a question will be valid under section 8(1)(c), provided it describes the distinguishing characteristics of the information. There are various distinguishing characteristics that can help to set the requested information apart from any other information held by the authority for

¹ <https://recognising-a-request-made-under-the-foia.pdf>

example, the subject matter of the information. The guidance also states that, "authorities should therefore treat any description that allows the requested information to be distinguished from other information held by the authority as valid under Section 8(1)(c)".

14. The Commissioner's view is that all of the questions are legible and clear and that each specifies the subject sufficiently so that the information sought could be distinguished from other information held by the AGO.
15. During the Commissioner's investigation the AGO explained that, in particular, it did not consider requests 1-3 to be valid under the FOIA because they were, in effect, asking the AGO to create new information. As indicated above, the Commissioner's position is that requests framed as questions are valid. However, public authorities are only required to consider whether they hold any recorded information which would be relevant when responding. In a letter to the Commissioner the AGO suggested that this would mean that it would have had to interpret the requests as seeking any information it held assessing whether the applications were contrary to Article 34 ECHR and any related principles of EU law (and what steps the AGO planned to take in light of that assessment). The Commissioner considers that this is an objective interpretation of requests 1-3. The AGO also indicated that if it had interpreted the requests in this way it would have responded that it did not hold information within the scope of the request.
16. Having concluded that all five requests are valid under the FOIA the Commissioner has gone on to consider whether the AGO was correct to say that it did not hold any recorded information in relation to the requests.

Section 1 – information held

17. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have the information communicated to him.
18. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any reasons offered by it to explain why the information is not held. In addition, the Commissioner will consider any reason why it is inherently likely or unlikely that the information is not held.

19. Having taken the above into account the Commissioner will then make a judgement on whether, on the balance of probabilities, the information is held or not.
20. During the investigation the Commissioner indicated his view to the AGO that all of the requests were, in fact, valid. Subsequently, whilst it maintained its position that the requests were invalid under the FOIA, the AGO indicated that, in any event, it did not hold any of the requested information.
21. The Commissioner enquired whether the information had ever been held, and about the scope, quality, thoroughness and results of the searches carried out by the AGO. The Commissioner also enquired whether the information had been deleted and whether copies of information may have been made and held in other locations.
22. The AGO explained that it maintained a shared electronic folder system which contained working versions of electronic documents. It also explained that if it held the requested information, there would be a record in its paper files (or a record of the relevant file's destruction), or on its electronic folder system. Furthermore, the AGO explained that it had searched "cardbox", which is an electronic database of its paper records.
23. The AGO also explained that its lead lawyer on ECHR had searched information held on his computer, including his outlook folders, and these searches did not identify any relevant paper or electronic files.
24. With regard to whether the information had ever been held and subsequently destroyed, the AGO confirmed that there was no record of the relevant information being deleted or destroyed.
25. The Commissioner asked the AGO whether there was any legal requirement or business need for the AGO to hold the information. The AGO confirmed that there was no business need for it to hold the requested information, or any statutory requirements.
26. Taking everything into account, the Commissioner is satisfied that, on the balance of probabilities, the AGO does not hold any information in relation to the requests.
27. The AGO breached section 1(1)(a) and section 10(1) of the FOIA in failing to inform the complainant that it did not hold any information falling within the scope of the requests within twenty working days.
28. However, in view of his findings in the paragraph above the Commissioner has not ordered the AGO to take any steps.

Right of appeal

29. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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

Jo Pedder
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