

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 March 2017

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant made a freedom of information request to The National Archives (TNA) for a full and uncensored version of a TNA file. TNA took 108 working days to refuse the request.
2. The Commissioner's decision is that TNA breached section 17(3) in its handling of the request but she requires no steps to be taken.

Request and response

3. On 18 April 2016 the complainant made a freedom of information request to the TNA for a full and uncensored version of TNA file FCO 99/1694. He asked for the following closed folios.
FCO 99/1694/1 – closed extracts: Folios 79A, 107B, 122A, 131
FCO 99/1694/2 – closed extracts: Folios 81, w91, 91
4. On 19 April 2016 TNA informed the complainant that the requests were being handled under FOIA and that he would receive a response by 17 May (20 working days from the date of the request).
5. On 17 May 2016 TNA informed the complainant that it would be making use of the extra 10 working days allowed under FOIA section 10, because of its duty to consult with other government departments:
<http://www.legislation.gov.uk/uksi/2004/3364/contents/made>

6. TNA contacted the complainant again on 1 June 2016 and explained that some of the information within FCO 99/1694/1 was covered by the section 38 exemption and that a public interest test was required. It also explained that some of the information within FCO 99/1694/2 was being considered under section 27, and that a public interest test was required. It said that it would let the complainant know the result of the public interest test by 29 June 2016.
7. On 29 June 2016 TNA explained to the complainant that it was still considering the public interest test and that under FOIA it was allowed a reasonable period of time to conduct the test and permitted to extend the time allowed to reach a decision.
8. TNA provided a substantive response to the request on 20 September 2016 and explained that the extracts within FCO 99/1694/1 were withheld under section 38(1)(b) and section 40(2), and the extracts within FCO 99/1694/2 were withheld under section 27(2). For each qualified exemption TNA said that it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
9. TNA subsequently carried out an internal review which upheld its response to the request.

Scope of the case

10. On 1 August 2016 the complainant contacted the Commissioner to complain about the delay in completing the public interest test in response to his request.
11. During the course of the Commissioner's investigation TNA completed its response and carried out an internal review. The Commissioner agreed with the complainant that the scope of her complaint would be to consider whether TNA had breached FOIA due to the delay in responding to the request.
12. The complainant has also asked the Commissioner to clarify the maximum amount of time TNA may take to respond to a request where a qualified exemption applies and it needs further time to consider the public interest test. The Commissioner has considered this issue under the 'other matters' section.

Reasons for decision

Section 10 – Time for compliance

Section 17 – Refusal of a request

13. Section 10(1) of FOIA provides that a public authority must respond to a request for information promptly and in event within 20 working days. In the case of TNA, where a request relates to a transferred public record, in accordance with section 10(4) of FOIA and The Freedom of Information (Time for Compliance with Request) Regulations 2004 it has a further 10 working days to respond.
14. In addition, under section 10(3)(b), where a qualified exemption applies to the request a public authority need not comply with the duty to disclose information until such time as is reasonable in the circumstances.
15. However a public authority must still issue the applicant with a refusal notice in accordance with section 17(1) of FOIA, stating which exemptions apply to the request and containing an estimate of when it expects to have reached a decision on the public interest test.
16. Where a public authority is relying on a qualified exemption to refuse the request, it must also, within such time as is reasonable in the circumstances, provide the applicant with a notice stating the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure.
17. In this case the complainant made his request for information on 18 April 2016. TNA issued an initial refusal notice on 1 June 2016 but did not complete its public interest determination until 20 September 2016.
18. The Commissioner's guidance on Time limits for compliance under the Freedom of Information Act states that:

"...our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional."¹

¹ <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

19. TNA took 108 days to inform the complainant of its decision on the public interest test. In the Commissioner's view this is clearly excessive and, as TNA has itself acknowledged, unreasonable. Therefore the Commissioner finds that TNA breached section 17(3) in its handling of the request.
20. The Commissioner would stress that since she is not making a decision on whether the information was exempt from disclosure, the delay amounts to a breach of section 17(3) of FOIA rather than section 10(1). Breaches of section 10 are related to section 1, i.e. whether the authority had an obligation to confirm whether information was held or to disclose the information. Section 17, on the other hand, relates to the authority's duty to be prompt and transparent in explaining its reasons for refusal to the applicant, whether or not the Commissioner ultimately agrees with those reasons.

Other matters

21. As required by section 50, this notice is limited to considering whether TNA dealt with the request in accordance with the requirements of part I of FOIA. Having found that TNA breached section 17(3) the Commissioner has discharged her duty to make a decision. However, the Commissioner is aware that the complainant is anxious that she clarify her position on how long a public authority may take to consider the public interest test and in particular whether TNA was entitled to take 70 working days, as it claimed it was, or 50 working days which the complainant argued was more appropriate. The Commissioner has considered this issue under the 'other matters' section which does not form part of this decision notice.
22. The Commissioner's view is that depending on the circumstances of a particular case TNA would be entitled to take up to an additional 40 working days to carry out a public interest test, and therefore 70 working days in total. Whilst the Commissioner's guidance referred to above suggests that an additional 20 working days will be the maximum allowed in most cases, it clearly highlights the potential to go beyond this depending on the circumstances of the case. The Commissioner would take the view that in exceptional cases a maximum of an additional 40 working days would be appropriate. This does not necessarily mean that TNA can take up to 70 working days for all cases that require a public interest test. The Commissioner will look at complaints on a case by case basis and each case would need to be decided on its own merits.

23. Where a request involves a transferred public record section 66(4) of FOIA requires that the application of the public interest test is determined by the responsible authority (Foreign and Commonwealth Office) and not TNA. Furthermore, the public interest test requires independent evaluation. This occurs through consultation with the Secretary of State, via the Advisory Council on National Records and Archives (ACNRA), in accordance with section 66(5) FOIA.
24. In this case TNA explained that because of the need to carry out the public interest test it had to consult the responsible authority (the Foreign and Commonwealth Office) whose responsibility it is to actually carry out the test in consultation with the Advisory Council on National Records and Archives. This contributed to the delay in responding to the request. It also said that during the summer of last year there were considerable pressures on TNA's FOI Team due to a significant increase in requests and a decline in the number of staff working on these cases. Due to the need to consult externally and the resource pressures placed on TNA the Commissioner considers it reasonable to take the additional 40 working days. In any event, TNA took 108 working days and the Commissioner has already found that this amounted to a breach of section 17(3).

Right of appeal

25. 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

26. 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.
27. 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

Paul Warbrick
Senior Case Officer
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Wycliffe House
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Wilmslow
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SK9 5AF