

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about the tier 1 visa policy from the Home Office ("HO"). The HO told the complainant that it did not consider the request to be valid under the terms of the FOIA but provided a response 'outside' the provisions of the FOIA.
2. The Commissioner's decision is that the HO should have dealt with the request under the terms of the FOIA. In failing to do so it breached sections 1 and 10 of the FOIA.
3. The Commissioner requires the HO to provide the complainant with a formal response under the terms of the FOIA. It should either disclose any recorded information held or issue a valid refusal notice.
4. The HO 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 2 December 2018 the complainant wrote to the HO and requested information in the following terms:

"I would like to make a Freedom of Information request. Attached to this e-mail is the Tier 1 (Exceptional Talent) Policy Guidance (version 07/18), as published by UKVI. Point 41 of this document, highlighted in the attachment, states: 'You must submit a copy of

your endorsement letter that was emailed to you when your stage 1 application was approved unless you have submitted stage 1 and stage 2 simultaneously (in which case these will be linked by the Home Office)'. My freedom of information request relates specifically to this policy.

Could you please provide the following information, by point:

- 1. Is this policy, as stated in the attached document, correct?*
 - 2. If a commercial partner of UKVI contradicted point 41, would they be correct in doing so?*
 - 3. If a commercial partner failed to uphold the policy, as stated in point 41, would they be correct in doing so?*
 - 4. If stage 1 and stage 2 of a Tier 1 (Exceptional Talent) visa are being done at the same time, is an applicant required to 'submit a copy' of their endorsement letter when submitting stage 2?*
 - 5. Assuming the answer to point 1 is 'yes' and point 4 is 'no', could you please state that an endorsement letter is not required to be submitted with a stage 2 application for a Tier 1 visa if stage 1 and stage 2 are being done simultaneously".*
6. On 3 December 2018 the HO replied. It advised the complainant that it did not consider it to be a valid request under section 8 of the FOIA, adding that it would, however, provide a response 'outside' the provisions of the FOIA.
 7. The complainant chased a response on several occasions. A response, 'outside' the terms of the FOIA, was eventually provided on 29 March 2019.
 8. No internal review has been undertaken.

Scope of the case

9. The complainant contacted the Commissioner on 4 March 2019, prior to receiving his response from the HO, to complain about the way his request for information had been handled. The Commissioner advised him that she was not able to consider requests which were not for recorded information and that she could not request a public authority to respond 'outside' of the FOIA.
10. The complainant responded on 28 March 2019, explaining why he did consider the request to be valid. The Commissioner accepted this complaint for investigation on 29 March 2019.

11. The Commissioner will consider below whether or not the request was valid under section 8 of the FOIA.
12. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is to do with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 8 – request for information

13. Section 8 of the FOIA states:

(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.*

14. In this case, the complainant made his request in writing, stated his name and gave an address for correspondence. Therefore the requirements of section 8(1)(a) and (b) were satisfied.
15. The Commissioner considers that a request will meet the requirements of section 8(1)(c) as long as it contains a sufficient description of the information required. Each request has to be judged on its individual merits as to whether there were sufficient indicators provided to enable the information requested to be adequately described for the purposes of section 8. As long as a request attempts to describe the information it is likely to meet the requirements of section 8(1)(c) as it is always open to the public authority to seek further clarification to identify the information.

The Commissioner's view

16. In her guidance¹ for organisations on what they should do when they receive a request, the Commissioner states:

"Any genuine attempt to describe the information will be enough to trigger the Act, even if the description is unclear, or you think it is too broad or unreasonable in some way...."

"This is not a hard test to satisfy. Almost anything in writing which asks for information will count as a request under the Act. The Act contains other provisions to deal with requests which are too broad, unclear or unreasonable".

17. The Commissioner has considered the wording of the request in this case. She accepts that parts (1) to (4) are phrased as questions designed to obtain a 'yes' or 'no' type response from the HO, while part (5) requires a response based on the responses to the other parts.
18. She considers that, although phrased as questions, the wording of all parts was sufficiently descriptive to allow the HO to identify the information sought. Furthermore, she considers that it is highly likely that there are written policies, procedures or contracts that would be likely to hold details of the processes concerned.
19. As part of her investigatory questions to the HO, the Commissioner referred to her guidance and asked the following:

"Under the Act, if you have information in your records that answers the questions you should provide it in response to the request. You are not required to answer a question if you do not already have the relevant information in recorded form".

20. In response to this specific question the HO advised:

"When taking this guidance into consideration, [the complainant]'s phrasing of the questions in a way that required either a 'yes' or 'no answer', leads us to ask whether these 'yes' or 'no' answers could be found in any recorded information that may be held by the department. If this question had been asked at the time, then it is possible that it would have been logged as a valid request".

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

21. It seems clear to the Commissioner that 'the question' referred to should properly have been asked at the time by those who received the request – and those who dealt with the complainant on the numerous times that he chased a response. The way the HO has phrased its response here indicates to the Commissioner that, had it properly considered the wording of the request, then it should have handled it differently and responded to it under the terms of the FOIA. Despite this response to her, to date it has failed to do so.
22. It follows that the Commissioner is satisfied that all parts of the request are valid requests for information as per section 8 of the FOIA. The HO is therefore required to respond to it in accordance with the terms of the FOIA.

Section 1 – general right of access
Section 10 - time for compliance

23. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
24. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
25. From the information provided to the Commissioner in this case it is evident that the HO did not deal with the request for information in accordance with the FOIA. In this case the HO has breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days. The HO is now required to respond to the request in accordance with the FOIA.

Other matters

26. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Handling of request

27. Given the resources available to it, and its familiarity with the requirements of the FOIA, the Commissioner is disappointed that this request was handled so poorly. Not only was it considered invalid under the FOIA, but when the Home Office offered to deal with it 'outside' the terms of the FOIA it took almost four months for it to provide a response.

28. Furthermore, the Commissioner is also disappointed that the HO did not proactively remedy its position when this was reconsidered as part of her investigation. Had the HO written to the complainant at this stage and given a proper response under the terms of the FOIA then this decision notice may not have been necessary.
29. The Commissioner would like to remind the HO that she routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.
30. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by design strategy² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her Regulatory Action Policy³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

31. 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@justice.gov.uk

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

32. 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.
33. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF