

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2022

Public Authority: Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant requested correspondence relating to a draft letter and made a "meta-request" for correspondence generated as a result of that earlier request. The Department for Environment, Food and Rural Affairs ("DEFRA") disclosed the content of the emails, but redacted the names and contact details of some of the recipients, relying on section 40(2) of FOIA (third party personal data) in order to do so – although it subsequently disclosed one of the previously-withheld names.
2. The Commissioner's decision is that DEFRA is entitled to rely on section 40(2) of FOIA to withhold the remaining names. He is also satisfied that DEFRA holds no further information. As DEFRA did not disclose all the information, to which the complainant was entitled, within 20 working days, it breached section 10 of FOIA in respect of both requests. As it failed to issue a refusal notice in respect of the Meta-request within 20 working days it also breached section 17 of FOIA when responding to that request.
3. The Commissioner does not require further steps.

Request and response

4. On 24 April 2021, the complainant wrote to DEFRA and made a request for information ("the Substantive Request") in the following terms:

"I refer to the minutes of the Canal and River Trust Quarterly Grant Agreement Meeting Wednesday 9 December 2020, Section 8 Any Other Business -

"CRT sought Defra's views on a draft letter to the Secretary of State explaining the absence of Heritage asset data in the required Publication Data in the Annual Report, which was due to Covid-19 disruption to surveys usually conducted to collect the data. Defra agreed to respond with any comments in due course.

"Action: Defra to provide CRT with comments on the draft Heritage data letter to the Secretary of State, and then CRT to issue this letter'

"Please provide a copy of -

- the draft letter
- your comments
- the "final" letter
- any other recorded information related to the above."

5. DEFRA responded on 17 May 2021. It provided a copy of the draft letter that it had received and two emails. It redacted most of the recipients of the emails as it stated that these were the names of junior officials and that there was no lawful basis for disclosing such information.

6. The complainant sought an internal review of the Substantive Request on 18 May 2021. He alleged that DEFRA had altered the dates on the emails and that it had failed to provide a document which was attached to one of the emails. He also, referring to the Substantive Request, made a further request for information ("the Meta-request") in the following terms:

"please provide copies of any communication with [the Canal and River Trust] related to this request."

7. On 20 May 2021, the complainant contacted DEFRA again. This time he argued that the name of a particular director had been redacted from the information DEFRA had disclosed in respect of the Substantive

Request. He argued that section 40(2) would not apply to the name of this particular director because of their seniority.

8. Following an internal review DEFRA wrote to the complainant on 7 July 2021. It upheld its position that it had applied section 40(2) of FOIA correctly in respect of the Substantive Request. In relation to the meta-request, it disclosed five emails, but again relied on section 40(2) of FOIA to redact the names of junior officials.
9. The complainant attempted to engage further with DEFRA to resolve his complaint, but DEFRA declined to do so once the Commissioner had accepted the complaint for investigation.

Scope of the case

10. The complainant contacted the Commissioner on 12 July 2021 to complain about the way his request for information had been handled.
11. The Commissioner commenced his investigation on 24 December 2021, asking DEFRA to justify its use of section 40(2) to withhold the names of officials. He also drew DEFRA's attention to the discrepancies that the complainant had alleged existed between the disclosed information and other information in the public domain.
12. DEFRA responded on 25 January 2022. Having reviewed its position, it maintained that it had identified all the information that it held within the scope of both requests, but it accepted that it had incorrectly redacted the name of a director from the information it had disclosed in response to the substantive request. DEFRA confirmed that it would disclose this information to the complainant – which it subsequently did on 26 April 2022.
13. Following the further disclosure, the Commissioner invited the complainant to withdraw his complaint – but he declined to do so. The complainant argued that the “discrepancies” in respect of the Substantive Request had still not been explained to his satisfaction and he was also not satisfied that DEFRA had applied section 40(2) of FOIA correctly in respect of the Meta-request. In particular, he alleged that DEFRA had withheld the name of a particular deputy director – whose name, the complainant argued, should be disclosed because of the individual's seniority.
14. The Commissioner considers that the scope of his investigation is to:
 - a) Determine whether DEFRA has correctly relied on section 40(2) to redact information in respect of both requests.

- b) Determine whether DEFRA holds further information within the scope of the Substantive Request.
- c) Assess the procedural handling of both requests.

Reasons for decision

A – Section 40(2) of FOIA

- 15. Section 40(2) of FOIA allows a public authority to withhold any information, which is the personal data of a third party, if its disclosure, outside of FOIA, would breach any of the data protection principles.
- 16. In particular, information will be exempt under section 40(2) if its disclosure would breach the first principle – that personal data cannot be processed unless there is a specific lawful basis for that processing.
- 17. The Commissioner is satisfied that disclosing the withheld information would reveal personal data about identifiable individuals. In this case the withheld information itself is a list of names. Not only would this list identify those individuals, but it would reveal that they were employed by DEFRA and had been recipients (or authors) of the emails in question.
- 18. As none of the individuals appears to have consented to the disclosure of their personal data (and DEFRA is under no obligation to seek their consent, nor are the individuals obliged to provide such consent), the Commissioner considers that disclosure would only be lawful if it could be demonstrated that disclosure was necessary for pursuing a legitimate interest.
- 19. The Commissioner accepts that there is a broad public interest in transparency and accountability in general, particularly when relating to decision-making. There is also a legitimate interest in understanding whether particular matters have been brought to the attention of senior staff within an organisation.
- 20. In relation to the Substantive Request, DEFRA provided the Commissioner with a list of the recipients whose names continued to be redacted. All were below Senior Civil Servant level and none were either directors or deputy directors.
- 21. In relation the Meta-request, DEFRA supplied the Commissioner with the unredacted email chain and a list of the job titles of each of the recipients. Each was below Senior Civil Servant level and none were either directors or deputy directors.

22. In order for processing of such personal data to be lawful, the processing must be "necessary" for the pursuit of a legitimate interest. That means that if the interest can be achieved by something less intrusive, disclosure to the world at large (which is what FOIA requires) will not be necessary.
23. In respect of the general principles of transparency and accountability, the Commissioner considers that this is achieved by disclosure of the contents of the various emails – as this shows the discussion and decision-making process. Disclosing individual names would not make the process any easier to understand than it already is. Therefore disclosure is not necessary to meet this legitimate interest.
24. In terms of understanding the degree of seniority, the Commissioner considers that this legitimate interest is already met by DEFRA disclosing, both in this case and as a general rule, the names of Senior Civil Servants, which includes anyone holding a title of deputy director or above. The public can therefore already see which of the items of correspondence were brought to the attention of the most senior ranks of the organisation – as their names will be left in. The Commissioner does not therefore consider that disclosing the names of junior staff members would be necessary in order to achieve this legitimate interest. The fact that DEFRA originally redacted the name of a director does not alter the Commissioner's conclusion on this point.
25. The complainant alleged that DEFRA had incorrectly redacted the name of a deputy director from the information disclosed to him in response to the Meta-request. It is not clear on what basis he believed this to be the case and he provided no evidence to support this assertion. However, for the avoidance of doubt, having viewed the withheld information, the Commissioner can confirm that the individual in question was not a recipient of any of the emails.
26. The Commissioner is therefore satisfied that DEFRA is entitled to rely on section 40(2) of FOIA in the manner that it has done.

B – Has DEFRA provided all the information it holds?

27. The complainant provided two reasons why he considered that DEFRA held further information within the scope of his request. Firstly, he noted that the emails provided in response to the Substantive Request indicated that an attachment had been included – which he said had not been provided. Secondly, he claimed that the dates on the emails had been altered from 9 December 2020 to 2 December 2020 and therefore there must be further correspondence and, hence, a further draft.

28. The Commissioner put both these points to DEFRA and asked it to explain why no further information was held. DEFRA responded to say that:

"The attachment to the email of 2 December 2020 is the final draft letter dated 27 November 2020, and which has already been provided to [the complainant]. As explained in Defra's response to [the complainant] of 17 May 2021, Defra did not at the time respond to CRT with any comments on the draft, and the CRT did not consequently issue the letter as there is no legal requirement under the terms of the Grant Agreement for the CRT to do so. Instead, the CRT amended the Annual Report with respect to the entry on heritage data as set out in the draft letter, which was then filed with the Charity Commission...

...Defra did not in the end make any comments on the draft of the CRT letter to the Secretary of State, so there are no Defra comments held on the draft of the letter."

29. In respect of the dates of the emails, DEFRA noted that in the first email, the Canal and River Trust ("the Trust") had been referring to a different meeting due to take place on 2 December 2020. However, the second email had noted that it would be better to discuss the draft letter at the Grant Review meeting due to take place in a week's time (9 December) which is what in fact happened.

The Commissioner's view

30. The Commissioner is satisfied with the explanations provided by DEFRA and considers that these are corroborated by information in the public domain.
31. The "missing" attachment is the draft letter. If the first email (which does refer to an attached letter) was not sharing the draft letter from the Trust to DEFRA, it is not clear why it would fall within the scope of the request. The first email only makes sense if it was inviting DEFRA's comments on the draft letter that forms the subject of the complainant's request. The draft letter was provided to the complainant when DEFRA first responded to the request
32. It is not clear to the Commissioner what other attachment the complainant believes exists and he (the complainant) has provided no evidence to support the belief that any other attachment exists.
33. The Commissioner is satisfied that both the content and the context of the emails support DEFRA's assertions and no contrary evidence has been supplied. He is therefore satisfied that the attachment has been provided and no further comments from DEFRA exist.

34. Turning next to the issue of dates, the Commissioner notes, once again, that the complainant has provided no evidence that the dates of the emails have been altered. Nor has he explained what possible advantage either DEFRA or the Trust would have gained from manipulating the information in this way.
35. The Commissioner would remind the complainant that deliberately altering information due to be disclosed under FOIA is a criminal offence and hence not an allegation to make lightly or without evidence. The Commissioner will return to this subject in the Other Matters section.
36. Having carefully examined the information in the public domain, the Commissioner is of the view that, once again, the available evidence strongly supports DEFRA's version of events.
37. The first email, dated 2 December 2020 and already disclosed to the complainant, states that:

"Can I suggest we deal with this [draft letter] as AOB at **today's meeting.**" [emphasis added]
38. However, the second email (also disclosed to the complainant), whose timestamp records that it was sent just 4 minutes later, states that:

"Also, to clarify, this is probably dealt with better **at next week's regular Grant review meeting.**" [emphasis added]
39. As the wording of the request (which was based on a published Trust document) notes, Trust and DEFRA representatives held a Quarterly Grant Agreement Meeting on 9 December 2020 – exactly one week after the second email (which refers to a "Grant review" meeting taking place "next week") was apparently sent.
40. If the emails were in fact, as the complainant alleges, sent on 9 December, the second email would not make sense. The Grant Meeting would not have been scheduled for the following week, it would have been that same day.
41. On the one hand, the Commissioner is presented with a narrative from DEFRA, in which the Trust asks for a draft letter to be discussed under Any Other Business at a meeting taking place on 2 December, before realising that it would be better discussed at a meeting the following week – which is known to have taken place. That is a narrative that is coherent and consistent with the content and context of the disclosed information.
42. On the other hand, the complainant presents a narrative in which DEFRA has altered the timestamps of the emails (for some unknown purpose)

in a manner that makes an otherwise incoherent (if it had been created when the complainant alleges) email chain coherent.

43. The Commissioner is satisfied that there is no evidence beyond mere assertion that supports the complainant's narrative – which amounts to little more than a conspiracy theory. Nor is it clear why DEFRA would seek to manipulate the information in this way. The Commissioner is therefore more than satisfied on the balance of probabilities that DEFRA has disclosed, to the complainant, the information it holds within the scope of the request.

C – Procedural matters

44. Section 10 of FOIA requires a public authority to comply with its section 1 duty (to communicate all non-exempt information) within 20 working days.
45. Section 17 requires a public authority that wishes to withhold information, either in part or in full, to provide the requestor with a refusal notice, stating the reasons for withholding the information, within 20 working days of receiving the request.
46. The Commissioner notes that DEFRA's response to the Substantive Request was issued within 20 working days. However, this response did not communicate all the non-exempt information – which was only provided to the complainant during the course of the Commissioner's investigation.
47. The Commissioner therefore finds that DEFRA breached section 10 of FOIA in respect of the Substantive Request.
48. In respect of the Meta-request, DEFRA received the request on 18 May 2021, but it did not provide the non-exempt information it held or issue a refusal notice until 7 July 2021. Therefore the Commissioner finds that DEFRA breached both section 10 and section 17 of FOIA in responding to the Meta-request.

Other matters

49. Whilst the complainant has not explicitly raised section 77 of FOIA in respect of this particular complaint, he has stated that DEFRA has (presumably deliberately) "altered" the information it has disclosed to him. Deliberately altering or defacing information that has been requested under FOIA is a criminal offence under section 77 of FOIA. The Commissioner also notes that the complainant has made an explicit section 77 allegation against the Trust – which provided him with the

same emails discussed here in response to a similar request for information. The Commissioner further notes that he considered that section 77 allegation to be unsubstantiated.

50. The Commissioner notes to the complainant (as he has already done in private correspondence) that allegations of a criminal nature are, by definition, a serious matter and should not be made lightly.
51. In order for the Commissioner to substantiate a criminal offence, he must be satisfied that there is evidence that a deliberate act has, beyond reasonable doubt, taken place.
52. A public authority does not commit a criminal offence simply because it does not answer requests to the complainant's own satisfaction.
53. In this case, the Commissioner has not been provided with any additional evidence to support the complainant's claims that information has been altered (deliberately or otherwise). Nor has the complainant put forward any reason why either DEFRA or the Trust would wish to act in such a way, or what they might gain from doing so. The complainant has relied on the information in the public domain which, as the Commissioner has discussed above, does not even support an assertion that the information has been altered at all – let alone that it was done with deliberate intent.
54. Whilst DEFRA could perhaps have done a better job of explaining the information it had disclosed, there is simply no merit whatsoever to the complainant's claim of deliberate alteration. In fact, the disclosed information, when cross-referenced with known facts, points strongly to its own authenticity.
55. The Commissioner has previously set out, to the complainant, the tests for making a section 77 offence and the burden of evidence needed to substantiate an offence. There is no valid reason for him to continue to make allegations that are so lacking in merit or supporting evidence.
56. If the complaint continues to make unsubstantiated and unmeritorious allegations of criminal offence, the public authorities on the receiving end of such allegations may well take the view that his future requests are likely to incur a disproportionate burden and are thus vexatious.
57. If the complainant continues to make such complaints, the Commissioner also reserves his right to rely on section 50(2)(c) of FOIA to refuse such complaints, in their entirety, as frivolous or vexatious.

Right of appeal

58. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

59. 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.
60. 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

Roger Cawthorne
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