

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2023

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested specific legal advice. The ICO denied holding the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the ICO doesn't hold the requested information.
3. The Commissioner does not require further steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority. The complainant has the same right of appeal against the Commissioner's decision as they would any other public authority, details of which are at the end of this notice.

5. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request and dealing with previous complaints brought under FOIA. It uses the term "the Commissioner" when referring to the Information Commissioner dealing with this complaint.

Request and response

6. On 7 April 2023 the complainant made the following request:

"Please provide me with all the legal advice that the ICO possess (sic) with regard to section 14 FOIA (vexatious) and post-request events (beyond the legally stipulated 20 working days for response)..."
7. On 2 May 2023 the ICO responded, explaining that it didn't hold any information within the scope of the request.
8. The complainant requested an internal review on 4 May 2023. On 2 June 2023 the ICO provided its internal review outcome, upholding its previous position.
9. The complainant wishes to challenge the ICO's position that it doesn't hold any information that would fall within the scope of the request.

Reasons for decision

Section 1 – information held/not held

10. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request at the time that the request was received.
11. The complainant's rationale as to why the requested information is held is 'In a recent appeal of mine, currently with the First-tier Tribunal, I made extensive submissions on the issue of post-request events and section 14 FOIA. The ICO's solicitor has made replies to these submissions. I find it inconceivable that the ICO has not had legal discussions/advice provided on the subject of post-request events and section 14 FOIA.'

12. The Commissioner asked the ICO to address the complainant's specific concerns and it explained; 'The fact that the requester has made an appeal and an ICO appeals solicitor has responded to those submissions does not necessarily indicate the existence of legal advice on that subject, so we do not agree with the requesters position that the ICO holding no in scope information is 'inconceivable'.'
13. However, to ensure this was the case the ICO consulted the relevant ICO solicitor dealing with the appeal in question. Both the ICO solicitor and their colleague in legal services confirmed that 'they did not provide or hold any legal advice on 'post-request events'.' The ICO solicitor explained that 'whilst they responded to the complainant's submissions, they did not provide bespoke legal advice on the issue, nor did they require it, instead utilising existing ICO guidance on Section 14. The solicitor also confirmed that legal advice was not provided to the ICO's 'client' on the issue (FOI Complaints and Advice Department).'
14. In order to make his determination as to whether the requested information is or isn't held, the Commissioner asked the ICO to explain the searches it had undertaken to locate any information that would fall within the scope of this request and to explain why these searches would have been likely to locate all of the information in scope.
15. The ICO explained that, upon receiving the request, it consulted the following departments: FOI Policy, Policy Legal and Knowledge Services. When the ICO received the details of this complaint, it consulted the Policy Legal and Knowledge Services further.
16. The ICO explained why these departments would be likely to hold the requested information:

"We considered these to be the most appropriate departments to consult with given that FOI Policy are the department responsible for the Section 14 guidance, and therefore any legal advice given on the subject would most likely have been requested by them. Policy Legal were consulted as they would be likely to hold records of or be aware of any legal advice provided on the subject. Knowledge Services were consulted as they too provide advice on request, and as part of this they may require legal advice."
17. The Commissioner is satisfied that, if the information were held, it would be within these departments. The ICO also explained in more detail the searches that were undertaken in each of these department.
18. Firstly, 'searches were undertaken by a Senior Policy Officer (SPO) within FOI Policy. This SPO had carried out the most recent review of the ICO's Section 14 guidance and was therefore an appropriate officer

to undertake the searches.' The Commissioner understands that this SPO searched their own files and the FOI Policy SharePoint page, specifically the files that relate to the guidance review and found no legal advice relating to the guidance review.

19. The ICO confirmed 'The SPO confirmed they didn't seek any legal advice to carry out their review of the Section 14 Guidance. A draft of the guidance was circulated to the solicitors in the FOI / EIR Appeals Team, who did not include any comments on the relevant section of the guidance (this was the section entitled 'The cut off point for evidence that a request is vexatious') nor did they add any other comments on the draft that would be in scope of this request.'
20. The ICO also explained that 'a Principal Lawyer in our Policy Legal department carried out relevant searches and did not find any information in scope of the request.'
21. It finally explained 'Searches were also carried out by an SPO in our Knowledge Services department. They carried out relevant searches in Knowledge Services logs and their SharePoint / EDRM area and did not find any material in scope.' Knowledge services identified requests for internal advice on section 14, but none of the responses included legal advice on post-request events. The Commissioner has verified that this is the case.
22. The Commissioner is satisfied that the ICO conducted appropriately targeted and logical searches in order to locate any information within the scope of the request and that, on the balance of probabilities, no information within scope of the request is held.

Right of appeal

23. 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

24. 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.
25. 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

Alice Gradwell
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Wycliffe House
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SK9 5AF