

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2024

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

Decision (including any steps ordered)

1. The complainant requested "information rights" information held in relation to "a:gender". The Home Office initially cited section 12(2) of FOIA – the cost of compliance. During the course of the Commissioner's investigation, the Home Office revised its position and said that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the Home Office does not hold the information requested by the complainant.
3. No steps are required as a result of this notice.

Background

4. a:gender has a website¹ which states that its role is one of "supporting all trans and intersex staff across government".

¹ <https://www.agender.org.uk>

Request and response

5. On 14 August 2023, the complainant wrote to the Home Office and requested information in the following terms:

“Can you please disclose any recorded information held in relation to a:gender, specifically relating to information rights?

By this I mean, whether the network is subject to data protection and freedom of information law, and if so which organisation is responsible for considering requests for information under the associated access regimes. Is this the Home Office or another public authority?

Recorded information could be any terms of reference, privacy notices, policies and guidance.”

6. The Home Office responded on 12 September 2023. It cited the cost exclusion in section 12(2) of FOIA, namely that to determine whether the requested information was held would in itself exceed the cost limit.
7. The complainant requested an internal review on 14 September 2023. In the absence of an internal review outcome, the complainant complained to the Commissioner.

Scope of the case

8. The complainant contacted the Commissioner on 2 February 2024 to complain about the way his request for information had been handled and the outstanding internal review.
9. The Commissioner exercised his discretion and accepted the complaint without the internal review having been completed. He commenced his investigation on 30 April 2024.
10. On 24 May 2024 the Home Office revised its position and wrote to both the complainant and the Commissioner. It now said that it did not hold the requested information.
11. On 3 June 2024 the complainant confirmed he remained dissatisfied and asked the Commissioner to investigate the Home Office’s revised position.
12. In this case, the Commissioner has considered whether, on the civil standard of the balance of probabilities, any recorded information is held in respect of the request.

13. 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 FOIA.
14. FOIA is concerned 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. 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 1 – general right of access

15. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

16. The Commissioner is mindful that when he receives a complaint alleging that a public authority has stated incorrectly that it does not hold any further requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether more information is held.
17. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether any further information is held and any other reasons offered by the public authority to explain why no further information is held. He will also consider any reason why it is inherently likely or unlikely that additional information is not held. For clarity, the Commissioner is not expected to prove categorically whether any further information is held; he is only required to make a judgement on whether further information is held on the civil standard of proof of the balance of probabilities.

18. The complainant has argued that:

"I do not believe that you [the Home Office] hold no information. It is not credible and you have offered no explanation as to why you don't, for example, the network is hosted by another Government Department."

19. The Commissioner has sought to determine whether, on the balance of probabilities, the Home Office holds any recorded information within the scope of the request. Accordingly, he asked the Home Office to explain what enquiries it had made in order to reach the view that it did not hold any information. It said:

'On its website, a:gender have an address which is a Home Office email address, however a:gender is not part of the Home Office. The email address is for general administration and processing of membership matters. The Home Office does not have access to this information and neither do we control access to it, but personal data is processed via Home Office servers (see lift from the website below).

"Where is your personal data is held?
a:gender uses Wix.com Ltd to host our website. Membership forms completed on the website are held on Wix.com secure servers. Wix.com treat this as 'Users-of-users Personal Information', with a:gender as the Data Controller and Wix.com as a Data Processor (see the Wix.com Privacy Notice Section 6 for more details)².

Where needed, members of the a:gender Executive Committee may download data held on Wix.com and store it on secure servers or cloud services managed by the Home Office, HMRC, or DWP. This will also be the storage location for membership data when a paper form has been completed and then digitised, with the paper form being destroyed afterwards. a:gender use data minimisation practices to ensure only the data that is needed is stored in any given location, for example personal identifiers such as names and email addresses are not required for statistical purposes so they are removed from these datasets."

² <https://www.wix.com/about/privacy>

20. The Home Office provided the Commissioner with details of the searches it had undertaken in order to respond to this request. In response, the Home Office said:

'A member of HR who focuses on Equality, Diversity and Inclusion (EDI) did a search of their email and storage with the search term "a:gender". This did not yield a result, possibly because a:gender is not part of the Home Office.'

21. The Home Office told the Commissioner that it does not retain paper records and that any information in scope of the request, if held, would be held electronically. It said that a search by an HR EDI specialist of their email inbox and hard drive storage had not yielded a result that would provide the requester with a response to their question, setting out that:

"It may also help if I explain that 'a:gender' is a civil service staff support network for trans and intersex staff across government, with members all across the Civil Service. Please note that we do not have a policy for the retention of records by a cross civil service staff support network that we do not manage or fund. The Home Office provided an email account to a:gender as a way to facilitate the network to become contactable directly by interested parties, and more specifically for membership requests. The Home Office may facilitate the network by providing an email address but we do not have access to any data stored within the mailbox or data that passes through it; data is held on Home Office servers on behalf of a third party (a:gender). Therefore, we are not the data controller of any information that is sent to or from that specific mailbox."

22. The Home Office also explained that:

"a:gender information is not used for any business purpose by the Home Office. Because the Home Office does not have access to this data, and it is not used for any business purpose by the Home Office, there is no requirement for the Home Office to hold information about a:gender's information rights responsibilities. Therefore, it is our view that the information being requested by the complainant is not held by the Home Office for the purposes of the FOIA."

Conclusion

23. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed the information that a complainant believes it must hold, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in

the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.

24. Having considered the explanation provided by the Home Office, whilst taking account of the points raised by the complainant, the Commissioner is satisfied, on the civil standard of the balance of probabilities, that no recorded information within the scope of the request is held.

Other matters

Internal review

25. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
26. Part 5 of the section 45 Code of Practice³ (the 'Code') states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
27. The Commissioner is concerned that no internal review was carried out in this case (it was requested by the complainant on 14 September 2023). Despite the Commissioner asking the Home Office to explain why it failed to undertake an internal review, it did not provide any response.
28. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual⁴.

Home Office's revised position

29. The Home office provided the Commissioner with its explanation as to why it revised its position from section 12(2) of FOIA to the requested information not being held. The Commissioner notes that the Home Office did not provide the complainant with any rationale when informing him of its revised stance. The Commissioner finds this to be an unhelpful approach and he would remind the Home Office that it has a duty to explain why its position has changed. For the benefit of the complainant, the Commissioner has reproduced the Home Office's explanation below:

"The reason why we initially cited section 12(2) was because we did not know which members of Home Office staff are members of a: gender to ask about the FOI request (This because we do not have access to their systems, and neither do we use their data for our own purposes, as per our arguments above).

There is no requirement to record this information so having to locate and identify Home Office members of a:gender across the Department would be a significant undertaking and would clearly exceed the appropriate limit, hence our initial section 12(2) position. Having carefully considered the context and circumstances of this request again, and having taken into account the IC's [Information Commissioner's] guidance, we have decided that on the balance of probabilities, the requested information is 'not held' by the Home Office, and that this is the 'correct' position, rather than section 12(2)."

⁴ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

30. 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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carol Scott
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