

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2010

Public Authority: Information Commissioner
Address: Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner's Office (the "ICO"). Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 (the "Act"), he is unusually under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this Notice.

Summary

The complainant requested information from the ICO arising from a complaint he had made to the ICO under the Privacy and Electronic Communications Regulations 2003. The complainant was provided with the recorded information the ICO held that answered the request. The complainant continued to consider that the ICO held more information than had been provided. The Commissioner's decision in this case is that no further recorded information is held which addresses the complainant's request.

The Commissioner's Role

1. 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 Act. This Notice sets out his decision.

Background

2. The complainant had made a complaint to the ICO under the Privacy and Electronic Communications Regulations 2003 (PECR) about unsolicited

marketing emails he had received from British Telecommunications plc (BT). The case officer had advised him that “if after this time the emails continue and BT can be shown to be persistently breaching the Regulations we can take more formal action to compel them to comply”.

The Request

3. On 21 August 2009 the complainant wrote to the ICO and requested the following information:

“Under FOI please state how many complaints re BT have been made in each of the past 3 years and whether any persistent breaches have been identified in those years”.
4. The ICO responded on 11 September 2009. It provided the complainant with details of the number of complaints made over the last three years and details of the most frequent grounds for complaint.
5. The complainant responded on 12 September 2009 and stated that he had “asked whether any persistent breaches had been noted. Please answer in numbers”.
6. On 15 September 2009 the ICO wrote to the complainant and explained that it did not hold a specific record which showed BT’s ‘persistent breaches’. The ICO provided further explanation to put the information it did hold and had provided in context.
7. The complainant replied later that same day. He stated that his question to the ICO was “‘whether any persistent breaches have been identified in those years’ and you (sic) saying your organisation does not know! Your facile response is not acceptable. It defies logic that your organisation can have a category re persistent breaches and yet fail to maintain records thereof”.
8. The ICO responded, again on the same day, and invited the complainant to submit an application for internal review if he was not satisfied with the response.
9. On 16 September 2009 the complainant requested an internal review.
10. The ICO completed the internal review on 30 September 2009. It confirmed that it did not hold recorded information of the type requested by the complainant, as its electronic case management system did not have a fixed category of ‘persistent breaches’ that he could search against. Nor was this information held elsewhere by the ICO.

The Investigation

Scope of the case

11. On 1 October 2009 the complainant contacted the Commissioner under section 50(1) of the Act to complain about the way his request for information had been handled. The complainant described the ICO's internal review response as "bureaucratic nonsense" and asked for his correspondence to be treated as a formal complaint. He also made further requests for information under the Act, however these are not dealt with as part of this Notice.
12. At the internal review stage, the complainant raised only the issue of the second part of his request, regarding 'persistent breaches'. The Commissioner has therefore limited this Decision Notice to that part of the request.

Chronology

13. The Commissioner discussed this case with the ICO's internal compliance team and other relevant staff within the ICO. Written material was prepared on 15 December 2009 to assist with these discussions.

Analysis

Substantive Procedural Matters

14. The ICO's view in this case is that it does not hold recorded information which answers the complainant's request. The ICO has explained its obligations with regard to the Act in light of this position below.
15. Section 1(1) provides -

"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. Upon receipt of a request, the ICO is required to consider what recorded information it holds at the time of the request that is relevant to it. The ICO is not required to create new information in response to requests, or to provide its opinion.
17. The ICO has explained to the complainant that he records complaints about organisations on an electronic case management system. This system allows staff at the ICO to search for cases in a number of different ways, such as the unique reference number the case has been given, the name and address of the

person who made the complaint or the name of the party that has been complained about. Further, ICO staff may search for cases on the basis of the broad nature of the complaint, but only against certain fixed criteria structured around the main sections of the legislation he regulates. 'Persistent breach' is not one of these categories.

18. In relation to information held otherwise than in the Commissioner's case management system, the Commissioner has explained that he monitors trends in complaints made to him. The Commissioner explained to the complainant that he monitors broad data protection and PECR issues, rather than dealing with individual complaints and organisations. Again, 'persistent breaches' is not a category against which information is recorded.
19. The Commissioner has recorded evidence on the case file that key individuals involved with the casework process have confirmed that there is no further recorded information held by the ICO which would answer the complainant's request.
20. At the time of responding to the complainant's request, the ICO provided an explanation of how 'persistent' breaches are escalated. It also explained to the complainant the category against which breaches of PECR are most frequently recorded in order to put the information provided into context.
21. Further, during the course of the investigation, the ICO provided the complainant with a copy of his 'PECR casework and referrals process' procedure. This procedure describes the action the ICO will take at various stages of the complaints process. It refers to 'multiple', 'likely' and 'probable' breaches however at no time is the phrase 'persistent breach' used. The Commissioner considers that this procedure supports his assertion that no further recorded information is held that is relevant to the complainant's request.
22. The ICO has published its strategy for dealing with complaints made under the Data Protection Act 1998 (the 'DPA') and associated legislation (for example, PECR). This strategy is available online at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_regulatory_action_strategy.pdf

It explains that the ICO will consider a variety of factors before deciding to take action against an organisation, and that action itself will vary depending on the specific issues arising.

23. The Commissioner is satisfied that he has provided the complainant with all of the relevant information he holds in response to the request. Further, he considers that the term 'persistent breaches' was a turn of phrase used by a case officer in the processing of a complaint and that no recorded information is held regarding the number of such breaches made by BT.

The Decision

24. The Commissioner's decision is that he dealt with the request for information in accordance with the Act.

Steps Required

25. The Commissioner requires no steps to be taken.

Other matters

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

Section 38 of the Code of Practice issued under section 45 of the Act provides -

“Any written reply from the applicant...expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint... These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application.”

The complainant's first communication on 15 September 2009 was the first expressing dissatisfaction with the response provided. The Commissioner invited the complainant to submit a request for internal review, however he should have commenced the internal review in any event.

Right of Appeal

27. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 2nd day of March 2010

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides 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.”

Section 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”