

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 April 2011

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

Summary

The complainant made a request under the Freedom of Information Act 2000 (the 'Act') to the Information Commissioner's Office (the 'ICO') for information relating to employees' associations with and declarations of interest in Common Purpose. The ICO initially decided that it could not confirm or deny whether the requested information was held because to do so would exceed the cost limit. At the internal review stage the ICO overturned the decision to apply the cost limit argument and instead confirmed it did not hold any information in relation to the request in accordance with section 1(1)(a) of the Act. The Commissioner has investigated and has found that section 12 did apply. The Commissioner has found a breach of section 1(1)(a) of the Act. He has also found the ICO in breach of section 16(1).

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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Common Purpose is an independent not-for-profit organisation that runs leadership development courses for people from across the private, public and not-for-profit sectors.

The Request

3. On 10 May 2010 the complainant submitted a request to the Information Commissioner's Office (the 'ICO') for the following information:

"Please supply the names and ranks/grades, departments and job titles of all employees in your organisation who are IN ANY WAY associated with Common Purpose.

Please also supply copies of any Declarations of Interest your employees may have made relating to an association with Common Purpose."

4. The ICO provided a response on 8 June 2010 in which it stated that it would not be able to provide the first part of the requested information because the cost of complying with the request would exceed the 'appropriate limit'. It explained that the appropriate limit for the ICO, as determined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, is £450, advising that it had determined that £450 would equate to 18 hours work. It explained that in order to establish whether any staff member has an association in any way with Common Purpose, it would need to look at all employees' personnel files to determine whether an association was mentioned on a job application file and provided details of its estimate which can be found at paragraphs 24 and 25 of this Notice.
5. The ICO provided the complainant with advice and assistance as required by section 16 of the Act suggesting that he might be able to narrow the scope of his request so that it could provide the information within the limit.
6. In response to the second part of the request, the ICO provided the complainant with a link to its "*ICO Register of Interests*" document on its website, explaining that the Register is completed by the Information Commissioner and members of his management board. It confirmed that the entries on the Register make no reference to

Common Purpose and, as such, confirmed that no information was held in relation to the second part of the request.

7. On 8 June 2010 the complainant requested an internal review of the ICO's decision, including a suggestion that the ICO email all its employees to provide the information requested.
8. The ICO wrote to the complainant on 28 June 2010 with the result of its internal review, explaining that it had been incorrect to apply section 12 (costs limit) because the ICO did not hold the requested information. It further explained that it was under no obligation to create new information in order to respond to the request.

The Investigation

Scope of the case

9. On 28 June 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider that the ICO was initially prepared to provide him with the information but for the costs, but was now stating that the information was not held and that it was not obliged to create new information to respond to the request.
10. The Commissioner has taken an objective interpretation of the request; it is clear that the first request should not be read as linked to the second request for any declarations of interest not formally recorded on the ICO's Register of Interests. The interpretation taken by the ICO, that the first request was narrowed to information related to declarations of interest, by virtue of the second request was incorrect. The Commissioner does not believe that the request itself or the subsequent internal review correspondence suggested such a narrow interpretation. The objective reading of the request was: for any recorded indication that ICO staff had an association with Common Purpose and the names, grades, departments of those staff. Association would mean any direct contact with Common Purpose. The investigation initially focussed on whether the ICO held the requested information, given the outcome of the internal review. At the latter stages of the investigation, the ICO reverted to its original decision to apply the cost limit argument to the first part of the request. The Commissioner also considered the ICO's change in position and thereby explored whether the ICO had properly applied section 12 to the first part of the request.

Chronology

11. The Commissioner wrote to the ICO on 10 August 2010 seeking further details to ascertain whether the information was held by the ICO, advising that he would subsequently seek further details about the ICO's application of section 12 of the Act should the information be held.
12. The ICO provided a response on 17 August 2010 in which it stated that the requested information was not held and supplied further details about its Declaration of Interests register and what information it requires from its employees.
13. On 24 August 2010 the Commissioner wrote to the complainant advising his preliminary view that the requested information was not held and that the ICO was under no obligation to create new information to respond to the request. As such, the Commissioner asked the complainant whether he would be prepared to withdraw his complaint.
14. On 7 September 2010 the complainant confirmed to the Commissioner that he wished to proceed to a Decision Notice.
15. On 27 October 2010 the Commissioner sought further clarification from the ICO as to whether its initial decision to apply section 12 to the request had intended to specify that it would exceed the costs limit to confirm or deny whether the information was held in accordance with section 12(2) of the Act. The ICO confirmed that this was its intention.

Analysis

Substantive Procedural Matters

Section 1 – Is the information held (second part of the request)?

16. Section 1(1) of the Act 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."

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

17. Section 1(1) therefore creates two obligations on the public authority: the duty to confirm or deny to the applicant whether the information is held, and the duty to communicate the information to the applicant.
18. As explained in the Scope section of this Notice, the Commissioner has considered whether the ICO holds any recorded information about employees' associations with Common Purpose.
19. The Commissioner notes that the complainant had received some information in response to previous requests, which asked about ICO staff who had attended Common Purpose courses. As well as checking relevant records this information was searched for by emailing staff within the ICO for any information they may hold. It was therefore clear that the ICO did hold some information that fell within the scope of the request in this case, which was broader.
20. As there was clearly some information that fell within the request but clearly many other possible sources of information within the ICO the Commissioner has gone on to consider whether section 12(1) applies not section 12(2) as originally stated.

Section 12 - Cost of compliance exceeds appropriate limit (first part of request)

21. As outlined in the Scope section of this Notice, the Commissioner then explored further the ICO's change in position from its initial decision to that of the internal review and its decision during the investigation to revert to its original position. In so doing, he considered whether section 12(1) applied to the first part of the request.
22. Section 12(1) provides that:

Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
23. Section 4(3) of the Fees Regulations sets out the basis upon which an estimate can be made:

“(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”

24. The appropriate limit for the ICO, as determined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, is £450, which would equate to 18 hours work. The ICO explained that in order to establish whether any staff member has declared an interest in Common Purpose, it would need to look at all employees' personnel files to determine whether an association was mentioned on a job application file. The ICO explained that it would need to read through all application forms from new employees and existing employees who had applied for internal job vacancies to ascertain whether there is any declaration of interest in Common Purpose. The ICO clarified that because there is no statutory or business need for it to record this information from its employees, other than the Board, any search would need to be of the whole application form(s) on the personnel files as there is no particular section or part of the form where the information is likely to be located. As such the ICO explained there may or may not be references to Common Purpose contained within the application forms.
25. The ICO further advised that there were 349 employees at the time of the request and, based on an estimate of five minutes to manually search each file (whilst recognising that some searches would take longer), that would equate to 29 hours of searching, thereby exceeding the cost limit. Given that the search of the application forms would need to be undertaken manually because it is not possible to carry out an electronic search, and because such a search would require reviewing the entire application form the Commissioner is satisfied that there is no way to narrow the search and thus reduce the time required.

26. Although the ICO did not give further evidence it is clear to the Commissioner that the request would require searches beyond HR records. Taking the Commissioner's objective reading of the request information could be held on the wide range of systems across the ICO, including email, personal drives and other corporate record systems. The Commissioner notes that an email to staff to gather information in response to a previous request had already elicited information that had been supplied to the complainant about Common Purpose course attendance. However, given the broad nature of the request the Commissioner does not believe that it is reasonable to accept that contacting staff to ask for details of any associations would have constituted a full search. The wider searches listed above would have been necessary. The Commissioner would stress that the rights under the Act only cover recorded information and a public body is not obliged to create information e.g. information which known but not recorded in response to a request. Section 84 of the Act states: *"information (subject to sections 51(8) and 75(2)) means information recorded in any form"*. The complaint appeared to be demanding a right to ask questions to ICO staff, a request under the Act can only require the ICO to objectively consider what recorded information it holds. The Commissioner therefore finds that the costs associated with the objectively read request would vastly exceed the 29 hours related to the ICO's narrow reading of the request and the 18 hour limit.
27. Having considered the ICO's explanation as to why the cost limit would be exceeded in determining whether or not relevant information was held, the Commissioner is satisfied that the ICO that section 12(1) applies to the request.

Procedural Requirements

Section 16 - Duty to provide advice and assistance

28. Section 16(1) provides that:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

29. Section 16(2) provides that:

"Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case".

30. Where a public authority refuses a request because the appropriate limit has been exceeded, paragraph 14 of the *“Secretary of State for Constitutional Affairs’ Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000”* recommends that the public authority should consider providing an indication of what, if any, information could be provided within the appropriate limit, and also consider advising the applicant that a narrowed or refocused version of the request could be handled within the limit.
31. The ICO invited the complainant to refine this request with a view to bringing it within the appropriate limit; the complainant did not do so. However the Commissioner is mindful that, given the change in the decision at the internal review stage, the complainant may have been deterred from pursuing refinement of his request. The ICO subsequently provided advice and assistance again on 31 March 2011, towards the end of the investigation. The Commissioner considers that no further action is necessary to comply with section 16.

The Decision

32. The Commissioner’s decision is that section 12(1) applies to part of the request. He finds that the public authority erred in its decision at the internal review stage and was incorrect in its conclusion that the requested information was not held. The ICO therefore breached section 1(1)(a) of the Act.
33. Whilst noting that the ICO did offer advice and assistance to the complainant through inviting him to narrow the scope of his request, the Commissioner’s decision is that the complainant was deterred from pursuing refinement of his request by the incorrect substitution of the decision at the internal review that the information was not held. The ICO therefore also breached section 16(1)(a) of the Act. The ICO subsequently provided advice and assistance towards the end of the Commissioner’s investigation and he does not require any further steps to be taken.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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 sent.

Dated the 5th day of April 2011

Signed

**Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Act - 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”.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Section 16 - Duty to provide advice and assistance

Section 16(1) provides that:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

Section 16(2) provides that:

"Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case".