

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 2011

Public Authority: Department of Environment, Food and Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW9P 3JR

Decision (including any steps ordered)

1. The complainant requested from DEFRA the conflict of interest register for its top thirty civil servants by pay grade for 2010, 2005 and 2000 limiting his request to information relating to declared financial interests.
2. DEFRA replied that it did not hold any relevant recorded information. After an internal review, the complaint was then referred to the Information Commissioner (the Commissioner) and the complainant agreed to withdraw the parts that concerned the 2000 register.
3. The Commissioner finds that:
 - For the 2010 register – it held a register, but that it had no relevant entries and no other information that was relevant; and
 - For the 2005 register – it did not hold a register. However, it potentially did hold the components that make up a register, but it would exceed the costs limits to determine whether it does. The Commissioner therefore has accepted that DEFRA has applied section 12(2) appropriately to the 2005 information.
4. The Commissioner has found procedural breaches of sections 1(1)(a) and 17(5), but requires no remedial steps to be taken in this case.

Request and response

5. On 4 October 2010 the complainant sent a detailed request as an attachment to an email. This request was worded as follows:

'We are informed by the Cabinet Office that the permanent secretary of each department of state maintains a register of conflicts of interest raised by civil servants within the department of state. This register is the subject of some provisions in the Civil Service Management Code. We ask for disclosure of the register only insofar as the information relates to financial interests, including shareholdings... '

6. The request was qualified by the covering email in the following way:

'To make this [the attached request] specific and manageable, please could I ask for the following:

Register for the top thirty civil servants [by pay grade];

Snapshots for 2010, 2005, and 2000 respectively.'

7. DEFRA replied on 27 October 2010. It indicated that it did not hold any relevant recorded information. It explained that it held a register for 2010 but that it contained no relevant entries. It did not retain a copy of the 2005 or 2000 registers.
8. On 1 November 2010 the complainant requested an internal review. He chased a response on 20 January 2011. On 25 January 2011 DEFRA provided its internal review response. It upheld its position that it did not hold any relevant recorded information. It explained its position in more detail.

Scope of the case

9. On 22 February 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said he didn't believe that DEFRA did not hold the information requested.
10. During the course of the investigation, DEFRA agreed to disclose the headings of 2010 conflict of interest register to provide the complainant with some information and show the format in which any information would have been held.
11. On 29 July 2011 the complainant agreed that the scope of the Commissioner's investigation would be to determine the following:

'[1] Whether DEFRA was correct in stating that it does not hold any relevant recorded information (apart from the empty register) for [his] request dated 4 October 2010;

[2] If not, whether this information can be disclosed to the public; and

[3] To consider any procedural issues about DEFRA's compliance with the Act.'

12. On 19 September 2011, the complainant also agreed to withdraw the part of the request that concerned the entries for the year 2000. This was because he accepted that DEFRA did not exist until 2001 and therefore it would not have any relevant recorded information. The Commissioner's analysis will therefore focus on the 2010 and 2005 registers.
13. The complainant has also made a number of allegations about DEFRA under section 77 of the Act. The Commissioner's power under section 50(1) of the Act only allows him to make formal decisions about compliance with Part 1 of the Act. The Commissioner has referred these allegations to his investigations team and both parties will receive the result of their enquiries outside of this decision notice. This matter will not be considered further in this decision.
14. The Commissioner has considered all the information that was before him and asked for and received arguments from both parties. While he has considered all this evidence, he will only include material that is relevant to his reasoning in this decision notice.

Reasons for decision

15. This case requires detailed consideration of the situation of the 2010 and 2005 registers. The Commissioner will consider each in turn:

2010 register:

Section 1(1)(a) – General right of access

16. Section 1(1)(a) 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,"

17. The Commissioner has considered whether DEFRA has complied with this section of the Act in stating that it did not hold any relevant information on the 2010 register (excluding the empty register that has been provided).
18. In determining whether DEFRA does hold any more requested information, the Commissioner considers the standard of proof to apply is the civil standard of the balance of probabilities.
19. In deciding where the balance lies in cases such as this one, where the complainant has asked him to consider the public authority's response with regard to whether or not the requested information is held, the Commissioner may look at:
 - explanations offered as to why the information is not held; and
 - the scope, quality, thoroughness and results of any searches undertaken by DEFRA.
20. The complainant explained that his view was that the Civil Service Management Code provided an obligation to keep a register. While the Commissioner accepts that the complainant was right in stating that the Civil Service Management Code in 2009 provided obligations on civil servants to declare their interests – including financial interests (4.1.3c) and business interests (4.3.1)¹, he notes that it did not prescribe how a government department would do this. The complainant also explained that he would expect that an appropriate register was kept by DEFRA and that this register would be populated with relevant entries. He explained that he viewed it as impossible that no entries exist.
21. DEFRA confirmed that it did indeed create a register at the end of 2010. However, it explained that none of its 30 top civil servants had declared any relevant interests. DEFRA provided the Commissioner with a list of the 30 top civil servants and a copy of the register as it was.
22. DEFRA also explained that prior to the end of 2010, its system was different. Before then, it ran a system where its senior servants would report any interests it had to their manager in each individual business unit who would then manage those interests. DEFRA explained that this had now changed and that the issues would now be managed centrally in its Strategic Human Resources department.

¹Cf: <http://webarchive.nationalarchives.gov.uk/20100416132449/http://civilservice.gov.uk/about/resources/csmc/CSMC-4.aspx>

23. DEFRA explained that it had anticipated the possibility that a previous conflict of interest may have not have been transferred to the new register. It therefore asked its Permanent Secretary and its Director Generals whether either they or the staff they were managing directly had declared relevant conflict of interests. All searches were negative. DEFRA believed that these searches were proportionate given that its system depended on the conflict of interest being reported to the manager (in line with the Code) and the manager managing that conflict.
24. The Commissioner considers that the searches that have been conducted by DEFRA are proportionate and would have uncovered any relevant recorded information that was held in this case. He considers that on the balance of probabilities DEFRA holds no further relevant recorded information that constitutes relevant declarations of interest. He therefore upheld DEFRA's position.

2005 register:

25. As noted above, DEFRA did not maintain a centrally based conflict of interest register in 2005. It explained that at that time it was still running its system where its senior servants would report any interests it had to their manager in each individual business unit who would then manage those interests.
26. The complainant expressed surprise and disbelief that this is so. He explained that he had received similar information from other public authorities and that in his view the Civil Service Code required it to maintain one. The complainant explained that he also could not believe that this information was not kept because he believes that conflicts of interest are of incredible organisational and public importance.
27. The Commissioner considers that a conflict of interest register would be something that DEFRA would know that it had. The Commissioner accepts that on the balance of probabilities, DEFRA did not hold a single conflict of interest register for the situation in 2005. He finds DEFRA's arguments about why it doesn't have one convincing.
28. However, from previous decisions, the Commissioner considers that where components (or 'building blocks') are held of information, then the composite information will also be held providing it does not require a high degree of judgment about how to manipulate that information. This follows the Information Tribunal's judgment in *Johnson v ICO and MOJ* [EA/2006/0085]. In this case, the collation of the information requested would not take a high degree of judgment and the Commissioner considers that the information is held by the DEFRA (providing it can find all the components with the costs limit).

29. The Commissioner finds a breach of section 1(1)(a) for DEFRA wrongly denying that it holds relevant recorded information when it does not know whether this is so.
30. DEFRA has now acknowledged that it may hold the components of the information, but explained that it would take work beyond the costs limit to determine whether there is any information that is relevant to the request and it was excluded from doing this work. It was therefore applying section 12(2). DEFRA explained that even with the work outlined below, it wouldn't be able to guarantee that the register was accurate as some components may have been deleted.
31. Firstly, the Commissioner records a breach of section 17(5) because DEFRA did not tell the complainant that it was relying on section 12(2) within 20 working days of receiving the request.

Section 12(2) – the costs limit

32. The Commissioner will now explain why he considers that DEFRA have applied section 12(2) appropriately in this case. Section 12(1) and (2) of FOIA state that:

'(1) 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.'

(2) 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.'

33. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") provide that the cost limit for central government public authorities is £600. This must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours.
34. Therefore, if a public authority reasonably estimates that in order to confirm or deny whether it held relevant information it would take longer than 24 hours' work doing the relevant activities, then section 12(2) provides that the request may be refused on that basis. The Commissioner's role is to consider how a public authority has come to an estimate and whether or not it can be said it is reasonable while taking into account the requirements of the Regulations.
35. A public authority can only include the work done to undertake activities listed in Regulation 4(3) which are:

“(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.”

What is DEFRA's estimate in this case?

36. DEFRA explained that the way the request is worded means that the only way it could confirm or deny whether it held relevant recorded information was by checking a very considerable number of records. The request asks only for certain sorts of declared conflicts and it could not definitively confirm whether or not they existed without checking all of these records. The Commissioner considers that the purpose of section 12(1) is to prevent the possibility of a disproportionate level of search and that it is reasonable in these circumstances to adjudicate on the basis of a reasonable estimate of the worst case scenario.
37. DEFRA explained that the process of determining whether it holds the information and locating that information should be split into two parts:
 1. Identifying who the relevant senior civil servants were; and
 2. Considering all the relevant HR and email records.
38. The Commissioner will consider each part in turn:
39. For part one, DEFRA explained that it was able to identify the relevant individuals using its HR system. However, it would not be able to say who constituted its 30 most senior staff, because it had 36 staff at Senior Civil Service Band 2 level and above and the 27 least senior of these staff all were at the same grade. The only equitable approach would be to slightly expand the request to cover all 36 individuals. DEFRA explained that it took 15 minutes to identify the 36 individuals. These 15 minutes can be taken into account for the costs estimate.
40. DEFRA explained that part two, as defined in paragraph 37, is a much more difficult process. It explained that any 2005 information on this subject matter would be held on individuals personal files, locally by their managers or both. It would therefore need to check the following sources:
 1. the personal files of the members of staff concerned;
 2. the email accounts of the members of staff concerned;

3. the email accounts of their managers in 2005 (it is noted that some of the staff managed others and those accounts would not need to be checked twice);
 4. the email accounts of any previous line managers;
 5. local electronic records held by the member of staff; and
 6. local paper records held by the member of staff, their manager or their previous line managers.
41. DEFRA explained that the next step would be to identify the previous line managers of the relevant members of staff. It explained that this would not be easy and that it estimated that it would take about 2 hours to do so for this grade of staff. The Commissioner accepts that these 2 hours can be included as an activity under Regulation 4(3)(a) [the total estimate so far is 2 hours 30 minutes].
42. DEFRA then explained the work that would be required for each of the six sources identified above.
43. For the first category, DEFRA explained that the ease of obtaining the information would depend on whether the staff were still employed by it. It could confirm that 9 were and 27 were not:
- For the 9 staff that were employed by it, DEFRA believed it would take 15 minutes total to locate the files and because the files relate to senior staff (whose size tend to be larger than average) it estimates that it will take 30 minutes a file to check this information. That leads to an estimate of 4 hours 45 minutes for these staff [and a total estimate so far of 7 hours 15 minutes].
 - For the 27 that were not, it would need to contact its offsite storage specialist, Iron Mountain through its Shared Services Directorate. It explained that Iron Mountain estimated 5 minutes per file and therefore 2 hours 30 minutes of time. It explained that the same time would be needed to check through the files adding 13 hours 30 minutes to the estimate [and a total estimate so far of 23 hours 15 minutes].
44. For the second, third and fourth categories, DEFRA explained that it only has retained email information about those who it employs. It explained that to search in relatively wide terms and to ensure that the search was complete, it estimated 30 minutes for each of those nine staff adding 4 hours 30 minutes to the estimate [and a total estimate so far of 27 hours 45 minutes].

45. For the fifth category, DEFRA explained that it estimated it would take 30 minutes for each of the nine employed staff to look for relevant recorded information. This added 4 hours 30 minutes to the estimate [and a total estimate so far of 32 hours 15 minutes]. It explained that the records for those who had left its employment would have been unlikely to have been retained.
46. For the sixth category, DEFRA also explained that it estimated it would take 30 minutes for each of the nine employed staff to look for relevant recorded information. This added 4 hours 30 minutes to the estimate [and a total estimate so far of 36 hours 45 minutes]. It explained that the records for those who had left its employment would have been unlikely to have been retained.
47. DEFRA confirmed that all of these estimates took into account the use of all relevant search tools when considering the electronic information and also when considering what paper information may be archived.

Was the estimate reasonable?

48. The Commissioner must consider the estimate provided in this case to establish whether it was reasonable and related to the activities that are allowed to be included in the estimate.
49. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
 - *"Only an estimate is required"* (i.e. not a precise calculation);
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be *"sensible, realistic and supported by cogent evidence."*
50. DEFRA has provided the Commissioner with its estimates. DEFRA have not included any activities that do not fall within Regulation 4(3) and have not charged for redactions or validations.
51. The Commissioner accepts that because DEFRA is looking for a complete record and it is not in one set place, that it is reasonable for it to check

all the files in the way that it has specified, because it would not be sure it had found all the information even if it found one entry.

52. From the Commissioner's experience with personal files, he is satisfied that for senior staff 30 minutes is a reasonable estimate for each HR file.
53. He is also satisfied that given the quantity of information that will need to be looked at for the other files that 30 minutes for each is also reasonable to ensure that a complete search has been done.
54. DEFRA have also confirmed that there are no reasonable alternatives and that a complete search of the relevant paper records cannot be circumvented. Without a register, there was no other way of finding all the recorded information that may be relevant.
55. The Commissioner considers that there is no inconsistency between the approach DEFRA took in relation to the 2010 information and the 2005 information because the only way it could obtain information about those who had left its employment would be to check the records that it has considered above.
56. Given the above, the Commissioner accepts DEFRA's estimate that it will take more than 24 hours of work to determine whether or not it holds relevant recorded information for 2005. As this is so, it can apply the costs limit found in section 12(2) and it is excluded from complying with the request. It does not need to provide any more information to the complainant.

Other matters

57. While not part of Part 1 of the Act, the Commissioner also wishes to raise the following matter of concern. In its internal review response, DEFRA apologised for not meeting its 40 working day response deadline when conducting its internal review. While there is no provision in the Act that provides a time limit for conducting internal reviews, the Commissioner's view stated in his publicly available guidance is that 20 working days should be that deadline, unless the request is very complex, where 40 working days may be permissible. This was not a very complex request and DEFRA still took beyond the absolute deadline. The Commissioner wishes to record this fact.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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