

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 28 October 2022

Public Authority: His Majesty's Revenue & Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested copies of all e-mails to/from HMRC's press office on specific dates which contain specific strings of text, and copies of all e-mails in the thread(s) of those e-mail(s).
2. The Commissioner's decision is that His Majesty's Revenue & Customs (HMRC) is entitled to rely on section 14(1) to refuse to provide the requested information.
3. The Commissioner does not require HMRC to take any steps.

Request and response

4. On 27 August 2021, the complainant wrote to HMRC and requested information in the following terms:

"1. Please advise whether any of the present Commissioners (or any Commissioner holding office since 2018) has, in order to discuss any matter relating to official HMRC business, used any form of non-oral electronic communication other than by way of e-mail from an address bearing (in some recognisable form) the Commissioner's name and concluding with a combination of "hmrc" "gov" and "uk."

2. Please send me a copy of the MPs' monthly digest sent on or around 22 January 2019 (as referred to in an e-mail to John Ingle (and others) on 2 January 2019 timed at 16.57) and the equivalent digest(s) sent in February 2019 and March 2019.

3. Please advise me when such digests were first sent to MPs (if the precise month or year are not known, please specify the earliest known date).
4. Please supply me with a copy of all e-mails to/from HMRC's press office on the listed dates which contain the specified strings of text Please also send me a copy of all e-mails in the thread(s) of such e-mail(s) (i.e. both those before and after the specified e-mail). Date String(s) of text..."
5. HMRC responded on 28 September 2021 and provided information relating to parts one, two and three of the request. With regard to part four of the request HMRC refused to provide the requested information citing section 14(1) FOIA as its basis for doing so.
6. Following an internal review the public authority wrote to the complainant on 11 November 2021 and maintained its position.

Reasons for decision

Section 14(1) – vexatious requests

7. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. There is no public interest test.
8. The term 'vexatious' is not defined in the FOIA. Considering what makes a request a vexatious request in *Information Commissioner vs Devon County Council & Dransfield* [2012], the Upper Tribunal discussed four broad themes:
 - the burden (on the public authority and its staff)
 - the motive (of the requester)
 - the value or serious purpose (of the request); and
 - any harassment or distress (of and to staff).
9. However, the Upper Tribunal emphasised that: "All the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA."
10. Where relevant, public authorities need to take into account wider factors such as the background and history of the request.

11. In his published guidance on section 14(1)¹ the Commissioner notes that these themes provide a useful structure to start analysing whether a request is vexatious. However, he advises that a public authority should keep in mind that it needs to adopt a holistic approach. The authority may identify other factors which are relevant to its circumstances, and it should make sure it considers those as well.

The complainant's position

12. The complainant provided a detailed background of what led up to this request, and stated that following HMRC's partial disclosure in response to a subject access request (SAR) they identified key quotes and the dates from the SAR compilation and sought disclosure of the documents (and related exchanges) from which these quotes had been taken.
13. In their complaint to the Commissioner they stated:

"In short, I do not consider that a bona fide request such as mine can ever be described as vexatious so as to trigger the exemption within section 14.

In any event, I do not consider that my particular request is vexatious and I note that HMRC have felt capable to disclose in redacted form 150 page disclosures without considering the redaction process vexatious.

Furthermore, I consider that HMRC are taking a disingenuous approach to the FOIA requests so as to avoid potential embarrassment from what their own chief executive has called a "debacle". Such an approach runs against the policy of the FOIA."

HMRC's position

14. In its correspondence to the complainant HMRC explained it considered that to comply with this part of the request would impose an unreasonable burden. It further stated that a public authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information.
15. Nonetheless, it may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

organisation. In this instance, due to the volume and nature of information requested HMRC considered that to comply with the request would create a burden by requiring it to spend an "inordinate amount of time considering any exemptions and redactions."

16. In its internal review HMRC further explained:

"For a request to be seen as vexatious based purely on the burden it would impose it needs to be shown that:

- The requester has asked for a substantial volume of information and,
- The authority has real concerns about potentially exempt information and.,
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material."

17. It went on to provide the following arguments in support of its position:

Substantial volume of information

18. HMRC stated that the response to the SAR involved the disclosure of 117 extracts of personal information from 103 individual emails. The subsequent FOIA request has asked for full copies of these emails, to include those sent both before and after the specified emails. Compliance with the previous SAR involved the consideration of approximately 2,500 emails, with duplicates removed HMRC was required to review approximately 1,450 emails. It is these 1,450 emails which are within scope of this FOIA request. On this basis, it considered that this constitutes a substantial volume of information.

Concerns about potentially exempt information

19. As the emails requested are known to the complainant following HMRC's response to the SAR, it is patently clear that were such information to be considered under the FOIA then it would constitute the personal data of the applicant and be exempt by virtue of section 40(1) FOIA.
20. As the request seeks copies of emails it is also clear that details of both the sender and any recipients of such emails would constitute third party personal data and would need to be considered with reference to section 40(2) FOIA.
21. From the information which has already been provided it is known that the requested information contains various references to named entities and legal action against them involving HMRC. This information would

have to be considered with reference to section 23 CRCA and section 44(1)(a) FOIA.

22. The emails requested are specific to those circulated within HMRC's Press Office and discuss press handling strategies for a number of different issues. Disclosure of this information may inhibit the free and frank provision of advice or exchange of views. This would therefore have to be considered by one of HMRC's Commissioners with reference to section 36(2)(b) FOIA. Given the above, HMRC considered that it there were legitimate concerns that there is exempt information within the scope of the request.
23. Considering the number of exemptions that potentially apply and the volume of relevant information, HMRC was also satisfied that this task is likely to require a considerable amount of resources.

Potentially exempt information cannot easily be isolated

24. Whilst some of the information would be easily identifiable – such as the personal information previously disclosed – some of it would not be. The information contains internal discussions regarding the department's response to cases involving identifiable persons.
25. This correspondence would need to be checked in order to identify references to potentially exempt information. Further, the correspondence would contain explanations about the withheld information which in itself would be potentially exempt from disclosure, and this would need to be identified with a manual search.
26. HMRC considered that, due to the volume of information within the scope of the request, any information that may be disclosed could not easily be isolated from exempt information.

Assessing purpose and value

27. Serious purpose and value will often be the strongest argument in favour of a requester when a public authority is deliberating whether to refuse a request under section 14(1). The key question to consider is whether the purpose and value of the request provides sufficient grounds to justify the distress, disruption or irritation that would be incurred by complying with that request. This should be judged as objectively as possible.
28. In this instance, the request is for a large number of emails, the only common denominator between which is the complainant. The requested information does not focus on a particular issue or theme and in many cases the emails are circulated daily press briefings on all matters connected to the department. HMRC was therefore only able to conclude

that any value or serious purpose to this request is applicable only to the complainant and does not serve any wider public interest.

The Commissioner's decision

29. The Commissioner has considered the views of both parties. He notes that the complainant refers to unredacted information being provided to them previously in response to a SAR. The Commissioner does not consider this to be of significance. The DPA and FOIA are entirely separate pieces of legislation save for section 40 FOIA, which relates to personal data.
30. The DPA has a limited number of 'exemptions' when responding to a SAR, one of which relates to third party data. This is why the complainant only received certain parts of the emails in question, as to provide them in their entirety would likely disclose third party personal data.
31. Similarly, if the emails were disclosed under FOIA, which is in effect, to the 'whole world', it would disclose that third party data. Consequently, that information would need to be redacted under section 40(2) FOIA.
32. HMRC explained that the emails would also be likely to contain information exempt by virtue of section 36(2)(b) - prejudice to effective conduct of public affairs, which would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation.
33. In addition section 44(1)(a) provides an exemption to the disclosure of information where it is prohibited by or under any enactment (statutory bar), in this case section 23 of the Commissioners for Revenue and Customs Act (CRCA).
34. The section 45 Code of practice² explains the interaction between section 12 (cost limit) and 14(1) as follows:

"In some cases, responding to the request is so burdensome for the public authority in terms of resources and time that the request can be refused under section 14(1). This is likely to apply in cases where it would create a very significant burden for the public authority to:

- prepare the information for publication;

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

- redact the information for disclosure;
- consult third parties;
- apply exemptions.

It is not possible to use section 12 (cost limit) to refuse a request based on the above factors. In these cases, public authorities may want to instead consider using section 14 to refuse to respond to the request based on the burden that responding to the request would create.

Public authorities should avoid using section 14 for burdensome requests unnecessarily. On this basis they should always consider whether section 12 applies in the first instance. For example, if a public authority considers that locating and extracting the information in scope would exceed the cost limit, section 12 is likely to be most appropriate.

However, if, for the reasons set out above, section 12 cannot apply they should consider refusing the request using section 14(1). An example of when this may happen may include the burden of redacting multiple entries on a large database as, although it may be possible to locate the database easily, redacting relevant entries (if there are thousands of entries) may create an unsustainable burden for the authority."

35. Given the significant amount of information identified within the scope of the request; that the information would need to be manually reviewed and redacted and, the limited wider public interest the Commissioner considers HMRC would be placed under a significant burden.
36. Accordingly, he finds that HMRC are entitled to rely on section 14(1) FOIA to refuse to provide the requested information.

Section 16 – duty to provide advice and assistance

37. Section 16(1) of FOIA provides that a public authority should give **reasonable** advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice³ in providing advice and assistance, it will have complied with section 16(1).

38. The complainant stated:

"... HMRC took no steps whatsoever (despite the ICO's own guidance) to suggest how the request might be cut down so as to make the redactions less onerous. This failure was pointed out to HMRC on 16 November.

On 23 November, HMRC replied saying that they would consider a narrowed-down request but gave no guidance as to how much narrower the request would have to be.

I sought further clarity from HMRC on 24 November but despite nearly three months elapsing, no response has yet been received."

39. Section 16 aims to ensure that a public authority communicates with an applicant or prospective applicant to find out what information they want and how they can obtain it.

40. The Commissioner's guidance⁴ states:

"Generally, there are three main circumstances in which this duty arises.

- The first is that you have reason to believe that the applicant has not given their real name. In this case, you should ask the applicant for it.
- The second circumstance is when the request, read objectively, is ambiguous and requires clarification as to the information sought. In this case, you should contact the applicant to ask for more details to help you identify and locate the information they want.

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-16-advice-and-assistance/#section16>

- The third circumstance is when the request would exceed the appropriate limit beyond which you would not be required to provide the information. In this instance, you should provide the applicant or prospective applicant with advice and assistance to help them reframe the request in a way that would bring it within the appropriate limit.”
41. A key case in applying section 16 is [Berend v the Information Commissioner and London Borough of Richmond upon Thames \(LBRT\) EA2006/0049 & 0050 \(12 July 2007\)](#). In this case, the Tribunal concluded that failure to comply with the Code does not necessarily become a breach of section 16 of FOIA.
 42. Among other grounds of appeal, the appellant said the LBRT had breached section 16 of FOIA by failing to initiate contact with him and by failing to help him reframe his request to include a request for all relevant documents in scope.
 43. The Tribunal rejected the appellant’s arguments. As for LBRT’s failure to provide assistance to the applicant to reframe his request, the Tribunal argued that – under the Code – the public authority can ask for more detail about a request for information only as far as this is necessary to enable them to identify and locate the information sought if the request is ambiguous. In this case, the Tribunal noted that, read objectively, the request was clear enough to enable the LBRT to know what information the applicant wanted.
 44. Therefore, in its findings on section 16, the Tribunal concluded that:

“where the public authority has complied with the Code, they will be held to have fulfilled their obligations [under section 16], however, failure to comply with the Code does not inevitably mean that a public authority has breached section 16 FOIA.” [para. 40]
 45. This accords with the Commissioner’s view that the section 16(1) duty to provide advice and assistance ‘so far as it would be reasonable to expect the authority to do so’ is limited by section 16(2). While a public authority might choose to go beyond what the Code says, it doesn’t have to do so to comply with section 16.
 46. Furthermore, the duty to provide advice and assistance does not extend to section 14 FOIA. Therefore the Commissioner is satisfied that HMRC has complied with its obligations under section 16.

Other matters

Section 45 - Internal review

47. The complainant has highlighted that HMRC took six weeks to provide its internal review having requested a review on 29 September 2021 and HMRC's response being provided on 11 November 2021. They further stated:

"It is unclear why it should take so long to refuse the request on that basis unless (as remains my suspicion) HMRC are simply playing for time."

48. 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.

49. The code states that, where offered, internal reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.

50. There does not appear to be any 'exceptional circumstance' relating to this case and the Commissioner considers that HMRC's handling of the internal review, taking 33 working days to complete, was not in accordance with good practice under the Section 45 code.

Right of appeal

51. 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

52. 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.
53. 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

Susan Duffy
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