

DECISION NOTICE

Section 42

Decision Number: 2016/0002

Public Authority: Cabinet Office

Address: Third Floor
Government Office
Bucks Road
DOUGLAS
ISLE OF MAN
IM1 3PN

Decision Date: 23 September 2016

Decision & steps to be taken by the Public Authority

1. The review applicant made a request to the Cabinet Office for: *"All information held by the Cabinet Office concerning its registration for data protection purposes as the Chief Secretary's Office/Cabinet Office."* That request was subsequently clarified.
2. The Cabinet Office gave the review applicant all the information that it had gathered through the searches undertaken in response to the request.
3. The Cabinet Office confirmed its decision to the review applicant following an 'internal review'.
4. The review applicant applied for a review of Cabinet Office's decision by the Information Commissioner.
5. Although there was undue delay by the review applicant in applying to the Commissioner, the Deputy Information Commissioner investigated and her decision is that the Cabinet Office complied with the provisions of Part 2 of the Freedom of Information Act 2015.
6. **The Deputy Information Commissioner does not require the Cabinet Office to take any steps, but has issued good practice advice.**

Reasons for the Decision

Background

7. The review applicant made a request to the Cabinet Office on 22 February 2016 for:

"All information held by the Cabinet Office concerning its registration for data protection purposes as the Chief Secretary's Office/Cabinet Office."

8. The Cabinet Office sought clarification in order to identify and locate the information requested. In particular, the Cabinet Office sought clarification of *"the period in which you are requesting information pertaining to the registration, for data protection purposes, as the Chief Secretary's Office/Cabinet Office – as this is an annual process."*

9. The review applicant provided the additional information and, as a result, the request was considered to be:

"All information held by the Cabinet Office concerning its registration for data protection purposes as the Chief Secretary's Office/Cabinet Office – the dates for the purpose of my request are from the 1st March 2014 to the 31st December 2015."

10. On 4 March 2016, the Cabinet Office responded to the review applicant and provided all the information it had gathered through the searches undertaken in response to the request. No refusal notice was given.

11. On 27 March 2016, the review applicant requested a review by the Cabinet Office.

12. On 29 March 2016, the review applicant submitted a second request for review.

13. The combined reviews submitted to the Cabinet Office were considered to be:

"I am unhappy with your response because it is my belief that you have not provided me with all of the information which should be available relating to my request."

With regard to the documents which you have attached, I note in particular that in an undated email from John Christian to Nicola Whiting, Mr Christian refers to "both appropriate legal delegations from Treasury/Chief Secretary and a data sharing agreement with Treasury.....". Since those documents relate to the registration of the Cabinet Office for data protection purposes they fall within the information which I requested and ought, therefore, to have been provided to me.

Also, I have a raft of correspondence with Ian McDonald [and two other named officers] concerning the registration of the Cabinet Office for data protection purposes and documentation from the Chief Secretary which relevant to my request also."

14. On 12 May 2016, the Cabinet Office responded to the review applicant and confirmed its original decision.
15. On 28 June 2016, the review applicant made an application for a review of the decision of the public authority by the Information Commissioner ('Commissioner').

Initial consideration of the request for review made to the Commissioner

16. It was noted that more than 28 days had elapsed between the date the Cabinet Office confirmed its decision to the review applicant and the date the application was made to the Commissioner for a review of the Cabinet Office's decision.

17. Section 42(3)(d) states:

"the Information Commissioner need not make a decision if he or she is satisfied that ... (d) there has been undue delay in applying"

18. The Commissioner's guidance on the website states:

"Your complaint should be made to the Commissioner as soon as possible - waiting longer than 28 days after receipt of the last meaningful correspondence from the authority would, in general, be considered as undue delay."

19. In addition, the front cover of the Commissioner's "Complaint Form: Application for a Decision Review" completed by review applicants, states:

"The Commissioner is not required to make a decision if there has been an undue delay in applying for a decision. Complaints should, unless there are exceptional circumstances, be raised no later than 28 days since the last meaningful communication from the authority."

20. On 6 July 2016, the review applicant was therefore advised that there appeared to be undue delay in applying and was requested to submit details of any exceptional circumstances for that delay within 28 days.
21. The responses provided by the review applicant did not indicate any exceptional circumstances.
22. Although there had been undue delay in applying, the Commissioner determined to make a decision as there appeared to be an obvious opportunity to improve information rights practice.
23. On 9 August 2016, the application for review by the Commissioner under section 42 of the Freedom of Information Act 2015 ('FOIA') was accepted.
24. Information was sought from the Cabinet Office on 9 August 2016, which was provided on 24 August 2016 together with additional information provided on 15 September 2016.

Commissioner's Analysis and Findings

25. The Commissioner considered he was conflicted and could not make a decision in this case. The Deputy Information Commissioner has therefore made the decision and any reference to the 'Commissioner' should be read as referring to the Deputy Information Commissioner.

26. Section 42(1) states:

*"A person (a "review applicant") may apply to the Information Commissioner for a decision on —
(a) whether a public authority has responded to a request for information in accordance with the requirements of Part 2 (access to information held by public authorities); or
(b) whether a public authority was justified in refusing to give information requested."*

27. In this instance, the Cabinet Office did not refuse to give any of the information that it held in relation to the request and the Commissioner is not required to consider section 42(1)(b).

28. The Commissioner's considerations are limited, therefore, to sections 42(1)(a), i.e. compliance with the requirements of Part 2.

29. Section 61 of FOIA states:

"A public authority is taken to comply with a requirement imposed by this Act if the public authority conforms with the provisions of the code of practice in relation to the requirement (if any)."

30. The Commissioner, therefore, must take the public authority's compliance with the Code of Practice into account when issuing a decision notice.

Compliance with Part 2 (access to information held by public authorities)

31. The review applicant's application to the Commissioner stated:

"[Cabinet Office] didn't provide me with all of the information which I requested – see my request for a Review"

32. The review applicant's combined review requests to the Cabinet Office began:

"I am unhappy with your response because it is my belief that you have not provided me with all of the information which should be available relating to my request."

33. In essence, therefore, the review applicant did not believe that the search for the information undertaken by the Cabinet Office was sufficient.

34. Section 1.4 of the Council of Minister's Code of Practice ("Code of Practice") requires a public

authority to undertake a “reasonable search” to locate the information requested.

35. The Commissioner must, therefore, consider the scope of the request in deciding whether the Cabinet Office carried out reasonable searches for the information requested.

Consideration of the scope of the request and the reasonableness of the searches

36. The nature of a request and the reasonableness of searches was considered by the UK Information Tribunal (as it was then) in EA2006/0049 & 50 (“Berend”)¹ at paragraphs 46-47:

“The Tribunal is satisfied that the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request. Indeed the section 45 Code at paragraph 9 specifically warns against consideration of the motive or interest in the information when providing advice and assistance. Additionally section 8 FOIA appears to provide an objective definition of “information requested”.

8(1) In this Act any reference to a “request for information” is a reference to such a request which- .. (c) describes the information requested.

There is no caveat or imputation of subjectivity contained within that section.

Section 1(3) FOIA provides for a situation where the request is not clear and further information is sought in order to comply with the request for information.”

37. Paragraph 91 of Berend additionally states:

“... if the request read objectively appears clear there is no duty to search out an alternative meaning”.

38. Although Berend refers to the Freedom of Information Act 2000 and the “Code” made under that legislation as it applies in England, Wales and Northern Ireland, FOIA and the Code of Practice contain similar provisions.

39. The form for making a request, specified by the Chief Secretary under section 9 of FOIA, requires the applicant, amongst other things, to provide “an adequate description of the information requested”.

40. Paragraph 4.1(c) of the Council of Minister’s Code of Practice, indicates that requests should be applicant- and motive-blind, as far as possible, and states:

“There is no requirement for an Applicant to explain why they need the information requested and only in limited circumstances can an Authority take into account an Applicant’s identity or

¹ UK Information Tribunal EA2006/0049 & 50 <http://www.informationtribunal.gov.uk/DBFiles/Decision/i141/Berend.pdf>
All URL’s correct at the date of issue of this Notice

motives for requesting the information."

41. Requests should be read objectively and there is no duty to clarify the request if the request appears clear and is not capable of more than one objective interpretation.

42. Where a request is not clear, section 14(1) states that a public authority may, by notice:

"request from an applicant information that ... the public authority reasonably requires to identify the information requested".

(a) The scope of the request

43. The request sought:

"All information held by the Cabinet Office concerning its registration for data protection purposes as the Chief Secretary's Office/Cabinet Office."

44. Notwithstanding paragraph 41, Cabinet Office did clarify the request with the review applicant and sought:

"the period in which you are requesting information pertaining to the registration, for data protection purposes, as the Chief Secretary's Office/Cabinet Office – as this is an annual process."

45. The reference to an *"annual process"* suggests that Cabinet Office were clear, on an objective interpretation of the request, as to what information was being sought by the review applicant and only sought clarification of the time period.

46. The review applicant confirmed to Cabinet Office: *"the dates for the purpose of my request are from the 1st March 2014 to the 31st December 2015"*.

47. The Commissioner is satisfied that Cabinet Office scoped the request appropriately.

(b) The reasonableness of the searches

48. The Code of Practice states at paragraph 1.4:

"What will amount to an Authority taking reasonable steps to find the information that an Applicant has requested will be determined on a case by case basis depending on the facts."²

49. Examples of envisaged considerations are also listed, including:

"Whether an Authority knows what it is looking for and where it is logical to search to identify if the information exists."

² <http://www.tynwald.org.im/business/opqp/sittings/Tynwald%2020142016/2015-GD-0068.pdf>

50. In respect of searches, the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)³ states:

"Searches should be proportionate and focus on systems (whether paper-based or electronic) where staff with a working knowledge of the records relating to the information request consider what information might be held."

51. The Commissioner requested details of the searches undertaken and Cabinet Office confirmed that searches had been made of the "DP Registry files" and emails of the relevant staff with responsibility for that registration using the criteria "Data Protection Registration 2014-2016".

(c) Other matters taken into account in respect of the searches

52. The Commissioner has also considered the searches in the context of the two statements made in the review applicant's review request to the Cabinet Office:

Statement 1

"With regard to the documents which you have attached, I note in particular that in an undated email from John Christian to Nicola Whiting, Mr Christian refers to "both appropriate legal delegations from Treasury/Chief Secretary and a data sharing agreement with Treasury.....". Since those documents relate to the registration of the Cabinet Office for data protection purposes they fall within the information which I requested and ought, therefore, to have been provided to me."

53. The "legal delegations" and "data sharing agreement" referred to were mentioned in one email contained within the 129 pages of information given by Cabinet Office.

54. The Commissioner has statutory functions under the Data Protection Act 2002 (DPA). Of particular relevance is the requirement, under section 16 of the DPA, for the Commissioner to maintain a register of data controllers.

55. This is the "registration for data protection purposes" referred to in the review applicant's request to Cabinet Office which is an "annual process" as per the Cabinet Office's clarification email sent to the review applicant on 22 February 2016.

56. The Commissioner is, therefore, cognisant of the registration (notification) and renewal processes under the DPA.

57. Neither "legal delegations" nor any "data sharing agreement" form part of those processes that, in the Commissioner's view, explains why that information was not gathered by the Cabinet Office's searches.

³ Paragraph 6.1.3 <http://www.gov.scot/Resource/0046/00465757.pdf>

Statement 2

"Also, I have a raft of correspondence with Ian McDonald [and two other named officers] concerning the registration of the Cabinet Office for data protection purposes and documentation from the Chief Secretary which relevant to my request also."

58. The Commissioner is aware of the "raft of correspondence" referred to by the review applicant. That correspondence relates to a complaint made to the Chief Secretary by the review applicant against the now Information Commissioner, Iain McDonald, who, at the time was the "Data Protection Supervisor" and a Governor in Council appointment.
59. That information, if held by Cabinet Office, would be held on behalf of the Lieutenant Governor, who is not a public authority for the purposes of FOIA.
60. The Commissioner does not therefore consider that the "raft of correspondence" would be held by Cabinet Office in relation to "registration for data protection purposes" which explains why, in the Commissioner's view, it was not gathered by the Cabinet Office's searches.
61. In the event that the information was held by Cabinet Office, it would be likely to contain personal data relating to Mr McDonald in the context of that complaint. Further, the review applicant has sought to access their own correspondence through the use of the regime provided by FOIA.
62. The Commissioner has already issued a Decision Notice⁴ in respect of a request for information about a complaint against a named officer⁵ and the use of FOIA by a review applicant to seek their own correspondence⁶.
63. The purpose of FOIA is to allow residents to access information held by public authorities "to promote the public interest".
64. In the Commissioner's view, the use of FOIA by a review applicant to access their own correspondence with the public authority, whilst it may be of interest to the review applicant, does not "promote the public interest" envisaged by FOIA.

Conclusion on the reasonableness of the searches and whether the information was held

65. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a review applicant believes may be held, the Commissioner, in common with the UK Information Commissioner and the Scottish Information Commissioner, applies "the normal civil standard, namely, the balance of probabilities ... [since] there can seldom be absolute certainty that the information relevant to a

⁴ Decision Notice 2016/0001 issued on 26 August 2016 - https://www.inforights.im/media/1285/2016_0001_cabinet-office_260816.pdf

⁵ Ibid. Paras 41-46

⁶ Ibid. Paras 47 - 50

request does not remain undiscovered somewhere within the public authority's records..."⁷

66. The Commissioner is satisfied, on the balance of probabilities, having "*consider[ed] the scope, quality, thoroughness and results of the searches carried out by the public authority*"⁸, that the searches undertaken by the Cabinet Office were reasonable in respect of the request.

67. The UK Information Commissioner's decision FS50613094 issued on 8 September 2016 states, in respect of whether information is 'held', that the standard required

*"... is not the criminal standard that requires proof beyond a reasonable doubt. The standard is satisfied if the Commissioner accepts that there is a greater than fifty percent chance that the public authority does not hold any further information."*⁹

68. The Commissioner, having taken into account the request and the reasonableness of the searches undertaken, is satisfied that on the balance of probabilities the Cabinet Office did not hold any other information that was relevant to the request at the time the request was made.

Decision

69. The Commissioner's decision is that the Cabinet Office complied with the provisions of Part 2 of FOIA.

70. The Commissioner does not uphold the review applicant's complaint.

Promoting good practice

71. The Commissioner has a duty under section 54 to "*promote good practice*" with respect to the performance of the functions of a public authority, including compliance with the Act and the Code of Practice.

Clarity of requests

72. Guidance on making requests is available to the public on the Commissioner's website¹⁰ and on the Isle of Man Government website¹¹.

⁷ Paragraph 13 <http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i64/Bromley.pdf>

⁸ Scottish Information Commissioner Decision <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501301.aspx>

⁹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624985/fs50613094.pdf>

¹⁰ <https://www.inforights.im/information-centre/freedom-of-information/your-right-to-ask/how-do-i-make-a-request/make-the-most-of-your-request/>

¹¹ <https://www.gov.im/about-the-government/freedom-of-information/how-to-make-a-freedom-of-information-request/#accordion>

73. Individuals making requests for information from public authorities are encouraged to *“Keep it simple, specific and focused”* and *“the more specific you can be, the easier it will be for the authority to find the information, and send it to you quickly”*.
74. Public authorities cannot be expected to ‘second-guess’ what information is being sought and section 14(1)(a)(i) provides that a public authority may *“request from an applicant information that the public authority requires to identify the information requested”*.
75. Public authorities also have a duty under section 15 to *“give reasonable advice and assistance to persons who wish to make, or who have made, requests for information held by the public authority”*.
76. Clarification is important for both the applicant and the public authority so that the scope of a request is understood by both parties and should be sought by the public authority if the request is not clear when read objectively, or could be read in more than one way.

The purpose of a review by a public authority (“internal review”)

77. FOIA makes no provision for a public authority to undertake an internal review.
78. However, under section 42, the Commissioner need not make a decision if *“the review applicant has not exhausted any complaints procedure provided by a public authority that is responding to requests for information”*.
79. Section 9 of the Code of Practice refers to *“procedures for dealing with complaints about the handling of requests for information”* and states in paragraph 9.1:

“The aim of a review is to allow an Authority to take a fresh look at its response to an information request, to confirm the decision, with or without modifications or if appropriate to substitute a different decision. The review procedure should be fair and impartial and allow decision makers to look at the request afresh”
80. Therefore, in the view of the Commissioner, internal review does not provide a method by which a review applicant may widen the scope of the request.
81. If a review applicant, having been given information in response to a request, finds additional information that they wish to access, the public authority should, provided they have undertaken ‘reasonable searches’, advise them to make another request for that additional information under section 9 of FOIA.

Consideration of section 8(3) of Part 2 of FOIA

82. The purpose of FOIA is set out in section 3 which states:

“The purpose of this Act is to enable persons who are resident in the Island to obtain access to information held by public authorities in accordance with the principles that —

*(a) the information should be available to the public to promote the public interest; and
(b) exceptions to the right of access are necessary to maintain a balance with rights to privacy, effective government, and value for the taxpayer."*

83. However, in dealing with requests, section 8(3) states:

*"Nothing in this Act requires a public authority to —
(a) create or derive information from information that it holds;
(b) undertake research into, or analysis of, information that it holds; or
(c) undertake substantial compilation or collation of information that it holds."*

84. The review applicant appears to believe that Cabinet Office should have analysed all the information it had gathered to ascertain whether there was any reference to any other information that may have been 'related' to the information sought in the request, which *"ought, therefore, to have been provided"*.

85. Notwithstanding paragraph 80, the Commissioner's view is that the provisions of sections 3 and 8(3) are clear: a public authority is not required to undertake the sort of analysis of the information gathered for responding to a request to the extent envisaged by the review applicant.

86. However, public authorities will be required to satisfy the Commissioner that the searches undertaken were reasonable, proportionate and properly focused in respect of the particular request.

87. Public authorities should maintain an appropriate record of searches conducted, including details of who carried out the searches, the systems¹² checked and the search criteria used.

88. If a review applicant identifies additional information that they wish to access, they may make another request under section 9 for that information.

Appeal

89. Section 50(1) provides that either party has the right to appeal against this Decision Notice to the High Court on a point of law. An Appeal must be filed within 28 (calendar) days from the date of this Decision Note. Further information about the Appeal process can be found on the General Registry's web site at: <https://www.courts.im/courtprocedures/AppealsCivil/>

An appeal should be filed at or sent to:

The Court Office
Isle of Man Courts of Justice

¹² Paragraph 6.1.3 - <http://www.gov.scot/Resource/0046/00465757.pdf> "[r]eference to "systems" do[es] not relate only to IT systems but may include any other system, including paper records, informal systems such as officers' notes, and temporary records. Authorities should think beyond conventional places where information might be held to satisfy themselves that full and robust searches have been undertaken."

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Enforcement

90. Section 48 provides that if the Cabinet Office fails to comply with this Decision Notice by not taking the steps it is required to take, then the Commissioner may certify in writing to the High Court that the Cabinet Office has failed to comply. The Court must inquire into the matter and may deal with the Cabinet Office as if it had committed a contempt of court.

Publication

91. Unless the Commissioner is informed in writing by either party that an Appeal against this Decision Notice has been filed with the High Court, the Commissioner will publish this Decision Notice as soon as practical after the period for an Appeal has expired.

Nicola Whiting
Isle of Man Deputy Information Commissioner

23 September 2016