Current lines to take

LTTs are in numerical order.

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FOI/EIR FOI **Section/Regulation** s44 **Issue** Functions and statutory bars

Line to take:

Where functions are defined in the relevant statutory bar legislation, then that statutory definition should be followed irrespective of whether it is a wide or narrow definition. The Commissioner accepts that this may prevent the disclosure of a large amount of information where functions are defined widely.

However, where the relevant function is not defined in the legislation, the Commissioner would expect the public authority to set out which function is being relied upon and then consider its application in light of Lord Templeman's comments in Hazell v Hammersmith & Fulham London Borough Council (see below).

Further Information:

Section 44(1) states:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

is prohibited by or under any enactment

- *is incompatible with any Community obligation, or*
- *would constitute or be punishable as contempt of court"*

A number of statutory bars cited in connection with s44 refer to the term 'function' and thus it is important to understand what the term means.

Some enactments define functions, for example, section 5(1) of the Commissioners for Revenue and Customs Act 2005 states that the Commissioners shall be responsible for:-

> *(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,*
>
> *(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and*
>
> *(c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.*
>
> .....
>
> *(4) In this Act "revenue" includes taxes, duties and national insurance contributions.*

Section 9 of the CRCA also allows the Commissioners to do anything which they think is necessary, expedient, incidental or conducive to the exercise of their functions and section 51 confirms that the term 'function' means "*...any power or duty (including a power or duty that is ancillary to another power or duty)*". The CRCA therefore provides for a wide interpretation of the term 'functions' and this could potentially mean that a lot of information is caught by the exemption.

The Commissioner has also considered case-law on the subject and looked at the House of Lords case of Hazell v Hammersmith & Fulham London Borough Council which questioned whether 'swap transactions' facilitated, were conducive to or incidental to the Council's acknowledged function of borrowing under s111 of the Local Government Act 1972. At page 23, Lord Templeman said:

".....in section 111 the word 'functions' embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions...."

This provides for a wide interpretation of the term 'functions' to include an authority's powers and duties and although Lord Templeman was speaking with specific reference to s111 LGA 1972, the Commissioner considers that this interpretation can be applied to other legislation which refers to functions such as s31(1)(g) FOIA. However, the Commissioner considers that this wide interpretation has been limited by the phrase – *"the sum total of the activities Parliament has entrusted to it".*

Firstly, Lord Templeman has referred to *"activities"*. The Commissioner considers that this refers to a positive duty on a public authority rather than an obligation imposed on all public authorities, for example, the Health and Safety Executive's activities involve promoting health and safety, investigating accidents etc. Therefore material regarding these activities would constitute information about its functions. In contrast, the HSE also has obligations, as do other public authorities, to manage its human resources but this could not be said to be its (main) activity and therefore one of its functions.

Secondly, Lord Templeman referred to the sum total of the activities that Parliament had entrusted to *"it"*. This goes to suggest that the relevant functions are only those which are specifically entrusted to that particular authority rather than general activities entrusted to all authorities i.e. HMRC is specifically entrusted with revenue collection and enforcement activities but is not specifically entrusted with managing, for example, its human resources.

The Commissioner's Approach

In cases where the functions are expressly set out and defined in the relevant legislation then the definition within the legislation should be followed, irrespective of whether this is a wide or narrow interpretation. The Commissioner accepts that this may prevent the disclosure of a large amount of information where functions are defined widely, for example, the CRCA.

However, where the relevant function is not defined in the legislation, the Commissioner would expect the public authority to set out which function is being relied upon and then consider its application in light of Lord Templeman's comments.

Thus, the Commissioner would expect the public authority to provide the following (or if they fail to provide, should be prompted to):-

- explain the nature of the relevant function
- point to the relevant legislation imposing this function upon the public authority but if this is not possible, to explain how it has been specifically tasked with the function e.g. a government department may derive its legal authority to carry out certain functions from the Crown rather than statute.

Note (1)

The term 'function' is often used as a gateway to disclosure and thus a wide definition of the term would suggest that a lot of information could be disclosed under this provision, for example, the Financial Services and Markets Act 2000 says as follows:-

(3)(1) A disclosure of confidential information is permitted when it is made to any person—

> (a) by the Authority or an Authority worker for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Authority or (if different) of the Authority worker;
>
> (b) by the Secretary of State or a Secretary of State worker for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Secretary of State or (if different) of the Secretary of State worker;
>
> (c) by the Treasury for the purpose of enabling or assisting the Treasury to discharge any of their public functions.

(349) (1) Section 348 does not prevent a disclosure of confidential information which is—

> *(a) made for the purpose of facilitating the carrying out of a public function; and*

(5) "Public functions" includes—

(a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;

(b) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument;

(c) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;

(d) functions exercisable in relation to prescribed disciplinary proceedings.

However, as these gateways usually operate at the discretion of the public authority, the Commissioner would not seek to question the public authority's application of their discretion unless this is specifically raised by the complainant or where the question is strikingly apparent on the circumstances of the case. The Commissioner would then consider whether the application of the discretion was unreasonable based on the Wednesbury unreasonableness principles. See for example FS 50212106 at para 14 which says that:

"...the Commissioner reads regulation 3(1)(a) as being permissive rather than mandatory. It provides the FSA with a "gateway" that permits the disclosure of confidential information where that will enable or assist the FSA in discharging any of its public functions. However nothing in regulation 3(1)(a) requires the FSA to disclose confidential information on every occasion that such disclosure might enable or assist the FSA to discharge its public functions".

Note (2)

In some cases, complainants will argue that that complying with an FOIA request meets one of the relevant gateways and thus that the statutory bar does not apply. Alternatively, some public authorities try to argue that the exemption is engaged because it is one of their functions to respond to FOI requests. On this point, the Commissioner will follow the Tribunal's approach in Slann v Financial Services Authority where it was said at paragraph 38:-

"…. The Tribunal respectfully agrees with the FSA when it contends that section 349(5)(a) with its reference to public function is referring to and is directed to functions and powers conferred on the FSA by statute or by statutory instrument other than the FSMA and not legislation such as the 2000 Act to which other persons including the FSA are or might be subject. Even if that view were wrong, section 44 on its face makes it clear beyond doubt that disclosure under the 2000 Act is to be ignored for this purpose by virtue of the dispensing words "otherwise than under this Act".

PREVIOUS / NEXT

Source	**Details**
Policy Team	Hazell v Hammersmith & Fulham London Borough Council (24 January 1991)
HL decision	Slann v Financial Services Authority (11 July 2006)

Related Lines to Take

LTT158

Related Documents

[1991] 2 WLR 372 & [1992] 2 AC 1 (Hazell), EA/2005/0019 (Slann), FS 50212106

Contact	HD		
Date	19/11/2010	**Policy Reference**	**LTT184**

FOI/EIR	FOI / EIR	Section/Regulation	s40(2) / Regulation 13	Issue	Condition 5 Schedule 3 Data Protection Act 1998 (condition for processing sensitive personal data)

Line to take:

The Commissioner does not consider that where a defendant chooses to plead mitigating circumstances in open court in an effort to reduce their sentence and thereby makes certain information public condition 5 of Schedule 3 of the DPA will be satisfied.

Further Information:

In the case of Bryce v IC [EA/2009/0083], the Tribunal considered a request to Cambridge Constabulary for information contained in a report into the investigation of the death of the appellant's sister. The requested information comprised the personal data of the offender, some of which in turn was sensitive personal data as it related to the commission or alleged commission by him of an offence or to his physical or mental health.

Having considered fairness and the conditions in schedule 2, the Tribunal went on to consider schedule 3 and found that condition 5 was met in relation to some of the sensitive personal data (specifically the information that had previously been disclosed to the court). Condition 5 is met where "the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject." The basis for this view was that the information was already in the public domain in the form of a court transcript and that it was put there by the offender himself. The information in question was disclosed to the court by the offender in an effort both to reduce the charge from murder to manslaughter and to mitigate his sentence.

Although a transcript of crown court proceedings may have entered the public domain, we do not agree that information provided to the court in such circumstances can be considered to have "been made public as a result of steps deliberately taken by the data subject." The data subject may well have been aware that information disclosed in open court would enter the public domain, although this is not necessarily the case. In any event, as he had no option but to make the information available to the court in order to defend himself, this cannot be characterised as deliberately placing the information in the public domain. Moreover, even if it is established that information which has been disclosed in open court has entered the public domain, it is not necessarily the case that it will remain in the public domain (see LTT139) and this will also call into question whether the information can be described as "being made public."

The Commissioner considers that there are also potential human rights implications if he were to follow the Tribunal's approach as it could result in individuals being deterred from saying things in court in order to defend themselves. It is not considered acceptable that the use of Condition 5 of Schedule 3 should act as a disincentive to individuals being able to exercise their human rights.

PREVIOUS / NEXT

Source	**Details**		
Policy Team	Content		
Related Lines to Take			
LTT86, LTT139			
Related Documents			
EA/2009/0083			
Contact		DC	
Date	19/11/2010	**Policy Reference**	**LTT185**

FOI/EIR	FOI	**Section/Regulation**	s14; s17(5); s17(6)	**Issue**	When a refusal notice is not required in respect of a vexatious request

Line to take:

- A public authority wishing to rely on s17(6) and avoid the need for a refusal notice must have previously given the applicant a timely refusal notice under s17(5), stating its reliance on s14.
- It must in all the circumstances be unreasonable for the authority to issue a further notice.
- We would also expect the authority to have told the applicant that it would not respond to further requests of a similar nature or on the same topic.

Further Information:

Where a public authority deems a request vexatious and hence relies on s14, under s17(5) it must still issue a refusal notice stating that fact within the s1(1) timescale for compliance.

However where there are any further vexatious requests, s17(6) states that there is no need to issue a refusal notice under s17(5) in the following specified circumstances:

> *(a) the public authority is relying on a claim that section 14 applies,*
>
> *(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and*
>
> *(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.*

Therefore in order for an authority to rely on s17(6) and avoid the need to issue a further refusal notice in response to any further vexatious requests from the same applicant, all the above criteria (a),(b) and (c) must apply.

Example

Our decisions in three linked cases involving the same applicant and public authority illustrate our approach, looking at the circumstances of the particular case:

- In FS50274648 we found that the authority breached s17(5) because it had issued the s14 refusal notice late.
- In FS50308738 and FS50308744 we found that the authority had applied s17(6) appropriately since it had already issued a refusal notice under s17(5) in relation to vexatious requests on the same subject matter, and we agreed that in all the circumstances it would be unreasonable for the authority to have to issue a further notice.

  We are unlikely to accept that s17(6) applies unless the authority has warned the complainant that further requests on the same or similar topics will not receive a response.

Example

In FS50306071 we found that s17(6) had been incorrectly applied in relation to a further request for information from the same applicant. Although the authority had issued a refusal notice under s17(5) in relation to a previous request, it had not indicated that it would treat any request of a similar nature or on a similar topic as vexatious. We considered that it would not have been unreasonable in the circumstances for the authority to have informed the applicant of that. Therefore it was in breach of s17(5).

PREVIOUS / NEXT

Source **Details**

Decision Notices	FS50274648, FS50308738, FS50308744, FS50306071

Related Lines to Take

LTT123

Related Documents

FS50274648, FS50308738, FS50308744, FS50306071

Contact		VA	
Date	13/01/2011	**Policy Reference**	**LTT186**

FOI/EIR	FOI/EIR	**Section/Regulation**	s.1(1), s.10, s.17 reg. 5 (1), 5(2), 11, 14	**Issue**	Finding procedural breaches: gateway line

Line to take:

Where a full investigation has been carried out, including consideration of any exemptions or exceptions claimed, procedural breaches are specified in LTT29.

In other circumstances, where we are issuing a DN without a full investigation, then this gateway line to take should be used to identify which line to read for the correct approach.

For background explanation of this approach, please read the briefing note.

Further Information:

Approach to be followed

Fully investigated case - in fully investigated cases, the Commissioner seeks to determine whether a breach of s.1(1)(b) of the FOIA or reg.5(1) of the EIR has occurred. In order to do this he will need to establish whether or not there was the duty, as at the date of the request, to provide information. This normally requires consideration of any exemptions or exceptions claimed by the public authority, and may result in steps requiring the authority to disclose the disputed information. In these cases, any breaches of s.1(1)(b), 10 or 17 of the FOIA or reg 5(1), 5(2) and 14 of the EIR should be determined in accordance with **LTT29**.

Fully investigated for s.1(1)(a) duty only case - In cases where the public authority is relying on an exclusion from the duty to confirm or deny, the Commissioner will investigate the application of 1(1)(a) only. If the Commissioner finds that the authority did have a duty under 1(1)(a) at the time of the request, then the steps in the decision notice will be:

- to confirm or deny whether information is held, and
- in relation to any information which is held either to provide it or to issue a valid refusal notice citing exemptions from section 1(1)(b).

Any breaches should be determined in accordance with **LTT29**.

This approach will also apply in the (relatively rare) circumstances in which a public authority is claiming an exception from the duty to confirm or deny under the EIR, i.e. reg.12(6) or reg.13(5).

In other circumstances, the line to consult is indicated below.

- The requested information has been disclosed in full by the time of the complaint to the Commissioner – **see LTT188**
- The requested information has been disclosed during the Commissioner's investigation – **see LTT188**
- The public authority has not provided any response to the request – **see LTT189**
- The public authority has provided a substantially inadequate response, e.g. refusing without referring to exemptions/exceptions under either piece of legislation – **see LTT190**
- The public authority has provided a refusal notice referring to the FOIA when the request should have been considered under the EIR (or vice versa) – **see LTT190**
- The body receiving the request has claimed that it is not a public authority but the Commissioner has found that it is. – **see LTT190**
- The request has been considered under the EIR but no internal review has been carried out – **see LTT191**

- The Commissioner has rejected the authority's reliance on s.12 or s.14 of the FOIA or regulation 12(4) (a), (b) or (c) of the EIR. – **see LTT192**
- The public authority has claimed that no (or no further) information is held but the Commissioner has found that on the balance of probabilities further information is held. – **see LTT193**

Cases in which only part of the request / information is fully investigated

In some cases, part of the information covered by the case will be covered by one of the lines 187 - 192 above, and part will not. For example, a request may cover some information which should have been considered under the EIR and some which should not, or some information may have been refused under a procedural exemption and some under an exemption from Part II.

The usual approach will be to include our findings on all the information in the same decision notice (except for any part of the case which the requester has withdrawn). In some cases, however, it may provide a speedier outcome for the complainant to issue a short decision notice in respect of certain information whilst other information is still under consideration. For example, if some of the information is environmental, the authority may be required to reconsider this information under the EIR and a short DN could be issued to address this point whilst other non-environmental information was still under investigation.

This approach should be used with caution as in some cases it would cause additional delay or confusion for the complainant. Early input from a signatory is advisable if you are considering this option.

PREVIOUS / NEXT

Source	**Details**		
AL/SW			
Related Lines to Take			
29, 188, 189, 190, 191, 192, 193			
Related Documents			
Briefing note			
Contact		KP	
Date	18/01/2011	**Policy Reference**	**LTT187**

FOI/EIR	FOI / EIR	Section/Regulation	s.10 / reg.5(2)	Issue	Issuing a DN in relation to information already disclosed

Line to take:

Where information has been provided to a complainant prior to the issue of a DN, then our normal approach will be to get the complainant's agreement to withdraw the complaint, or to exclude the provided information from the scope of the Commissioner's decision.

However, where the complainant does not agree to this then, if the information has been disclosed outside the time for compliance, but by the time of the DN, the DN will normally find a breach of s.10 / reg.5(2) only.

This line applies whenever the information in dispute has been disclosed to the requester prior to the issue of the DN.

Further Information:

Where the disputed information has been disclosed in full before or during the Commissioner's investigation, it is not an efficient use of resources to make a full investigation of whether obligations under s.1(1)(a) and (b) or reg.5(1) existed at the time of the request. Previously, such cases were dealt with under the "Robust policy" whereby the Commissioner would not issue a DN if he considered that it would serve no practical purpose. This policy was open to legal challenge and there has therefore been the need to agree a new approach.

The approach is now as follows:

Information disclosed during our investigation

Where the disputed information is disclosed during the Commissioner's investigation, e.g. as a result of informal resolution, we will encourage the requester to withdraw their complaint. If they refuse to do so, we will issue a short, standard DN recording the late disclosure of the information.

This will normally record a breach of s.10(1) or reg.5(2) *only* – there will be no recorded breach of s.1(1) or reg.5(1). We will not generally investigate other potential breaches such as s.17. However, the case officer should use their discretion in cases where the complainant's main concern is around a particular procedural breach, especially a failure to provide advice and assistance. The case officer may also make a referral to the Enforcement team even where the matters raised are not recorded in the DN.

Where a partial disclosure is made we will attempt to get the complainant's agreement that the DN will only address any outstanding information. If they do not agree to this then, in relation to any disclosed information which has not been fully investigated, the DN will take the same approach as outlined above, i.e. briefly recording the late disclosure. In relation to other potential breaches, e.g. s.16 or s.17, whilst we would not normally consider these in relation to the provided information alone, where the issues also relate to outstanding information then they may be included.

Information disclosed outside the time for compliance but prior to a complaint being made to the ICO

In some circumstances a requester may complain to the Commissioner solely about late disclosure of information. In this case there would appear to be no point in asking the requester to withdraw their complaint. Instead, we will proceed immediately to the short DN as described above.

PREVIOUS / NEXT

Source	Details
Policy / Operations	

Related Lines to Take

LTT29, LTT187

Related Documents

link

Contact		KP	
Date	18/01/2011	**Policy Reference**	**LTT188**

FOI/EIR FOI/EIR **Section/Regulation** s.10 / reg.5(2) **Issue** Non-response cases

Line to take:

Where a public authority has not responded to a request for information, the Commissioner will issue a DN specifying a breach of s.10(1) or reg.5(2), with steps to either comply with the request or issue a valid refusal.

Note that this is not a change of line but clarifies the existing situation.

Further Information:

Where a public authority has not responded to a request for information, the Commissioner will issue a DN specifying a breach of the time limits. This will be s.10(1) in most cases, or reg.5(2) if it is obvious from the nature of the request that it should be considered under the EIR. The steps will be for the public authority to either comply with section 1(1) / reg.5(1) or issue a valid refusal notice. The DN should state that the public authority failed to deal with the request in accordance with the Act /EIR in that it failed to respond to the request within the statutory time limits.

This is an exception to the normal scenario described in LTT29, which is that a breach of s.10 or reg.5(2) can only be found after the duty under s.1(1)(a) and (b) or reg.5(1) has been established.

This approach applies **only** where the authority has completely failed to respond to the request. Where the response has been inadequate or has referred to the wrong piece of legislation then the relevant line is LTT189.

It has been noted that in some cases a "non-response" will not involve any breach of the FOIA. This is because an authority which has previously issued a refusal notice referring to s.14(1) (vexatious request) is not always required to issue further refusal notices in respect of similar requests from the same requester. If it appears from the correspondence submitted by the complainant that this is the reason for the non-response, it should be dealt with as a normal s.14(1) case.

Further investigation after the response

If the public authority issues a response in accordance with the decision notice, but the requester remains dissatisfied, this may result in a further complaint to the Commissioner. The Commissioner may then be required to undertake a full investigation, considering any exemptions or exceptions which are now being claimed by the authority.

The outcome of this investigation will not be affected by the previous decision notice. In other words:

- the date of the request will remain the date on which the authority received the request, not the date of the initial decision notice
- application of exemptions and the public interest test will be as at the time of the request
- procedural breaches will be as at the time of the internal review (if one was provided) or the time for compliance as per LTT29

This means that the second DN may find additional or different breaches from the initial decision notice. For example, where the final investigation determines that the authority had no obligation under section 1(1) at the time of the request, the final decision notice may find no breach of s.10(1) even though this was included in the earlier non-response DN.

PREVIOUS / NEXT

Source **Details**

Policy / Operations

Related Lines to Take

LTT29, LTT187

Related Documents

Contact	KP		
Date	18/01/2011	**Policy Reference**	**LTT189**

FOI/EIR FOI/EIR **Section/Regulation** n/a **Issue** Decision notices ordering the PA to reconsider the request

Line to take:

There are three circumstances in which the Commissioner may not fully investigate a case as he receives it but will instead require the public authority to reconsider the request:

- the public authority has considered the request under the FOIA and has issued a refusal, but the request in fact falls to be considered under the EIR (or vice versa)
- the public authority has issued an inadequate response which does not permit the Commissioner to identify which exemption / exception (if any) it seeks to rely on
- the Commissioner has rejected a claim by the body concerned that it is not a public authority in relation to the information requested, or in relation to the relevant regime.

In these circumstances, the DN will not specify any breaches but will state that the authority has an obligation to comply with the relevant piece of legislation.

Further Information:

This line sets out different scenarios in which it is appropriate not to fully investigate a case but to issue a decision notice requiring the authority to reconsider the request. For ease of reading, this line refers to "cases" or "requests". However, it is also possible for this line to apply to only some of the information covered by a case.

Wrong regime

Where the authority has initially considered the request under the FOIA, but the Commissioner determines that the information in question is environmental, then the normal approach will now be to issue a short, standard DN rather than to ask the authority informally to provide arguments relating to the EIR. The same approach will apply if the authority has considered the request under the EIR when the information is not environmental, however this scenario is likely to arise more rarely.

This DN will not specify any particular breaches. It will simply state that the authority did not deal with the request for information in accordance with the Regulations in that it did not apply the correct legislation when handling the request. The step ordered will be to consider the request in accordance with the EIR and either to disclose the information or to issue a valid refusal notice.

Points to note in relation to this approach:

- This approach does not change our current position that we will generally need to see the information before making a determination as to whether it is environmental. Only where this is not possible or practicable will we make a decision based on the nature of the request (see LTT80 for further details of our line on this issue). How much analysis of this point will need to be included in the DN will depend on whether the authority accepts the Commissioner's conclusion.

- Note that this line is a departure from the approach we have previously taken, based on Archer v The information Commissioner and Salisbury District Council [EA/2006/0037], of finding a breach of reg.14 or s.17 where a public authority has failed to consider a request under the correct regime. This is because it is not generally possible to determine which exemptions or exclusions (if any) the authority is trying to rely upon. If the same case is later subject to a full investigation, a breach of reg.14 or s.17 will still be recorded in any subsequent DN in accordance with LTT63.

- This line should be applied flexibly in order not to significantly disadvantage complainants. It is hoped that in the majority of cases it will have been established that the wrong legislation has been applied at an early stage of our investigation. However, where the information is only determined to be environmental after a significant investigation, and where the authority is deemed likely to co-operate with a more informal approach, it may provide better customer service to ask the authority to reconsider the request under the appropriate legislation rather than using a DN to achieve the same purpose. For advice on this issue you should consult with your group manager (or if you do not have a group manager ask for advice from another signatory via a CR07 form)

Inadequate response

This refers to cases where an authority provides such a vague or poor response to a request that the Commissioner is unable to determine what provisions of the legislation it is relying upon. In such cases, it would pose an unacceptable risk for the Commissioner to order disclosure without further investigation, but it would also be unreasonable and an inefficient use of the Commissioner's resources to attempt an investigation which would amount to doing the authority's work for it.

This requires a measure of judgement and discretion on the part of the case officer. Circumstances in which the type of decision notice described below may be appropriate would be:

- the authority does not refer to either the FOIA or the EIR, or appears unaware of its obligations under the legislation;
- it is unclear whether the authority is actually trying to refuse the request;
- the authority has refused the request but the arguments given do not obviously relate to any particular exemption or exception; and/or
- the authority appears unlikely to provide a more coherent or legally-informed response as a result of a more informal approach, or not without significant delay to the complainant and repeated input from the case officer.

In such cases, the Commissioner will consider issuing a notice which does not find any specific breaches of the legislation but reminds the authority of its obligations under the FOIA and / or the EIR and requires it to either comply with section 1(1) / reg.5(1) or issue a valid refusal notice. The decision would state that the public authority did not deal with the request for information in accordance with the Act or Regulations in that it did not explain which provisions of the legislation (if any) it was relying upon.

Note that these DNs should only be used where the Commissioner is essentially unable to begin his investigation, not as a substitute for investigation. Where the authority has identified which provisions it wishes to rely on but is failing to formulate arguments, or not engaging with the Commissioner, consider whether the use of an information notice would be more appropriate.

Public authority claims it is not covered by the legislation

In some cases, the reason the authority has not considered the request under the right regime, or under either regime, is because it maintains that it is not a public authority within the meaning of the legislation.

In this case the Commissioner will first need to issue a decision notice making this determination, and confirming that the public authority has an obligation to respond to the request under the FOIA or the EIR as appropriate. Again there will be no specific breaches, but the steps will be to reconsider the request under the relevant legislation and to issue an appropriate response.

Internal review

The FOIA and the EIR both allow the public authority a second chance to reconsider the request at internal review and correct any (non-time-related) breaches. The authority does not forfeit this right by virtue of having failed to consider the request under the correct (or any) legislation prior to our intervention. If, having received the authority's revised response, the complainant remains dissatisfied, it would still be normal practice to require them to ask for an internal review. However as in other cases the Commissioner has discretion to accept a complaint without an internal review.

Under the EIR, an internal review is a legal requirement (unlike in the FOIA where it is good practice). See LTT191 for how to approach such cases.

Further investigation after the response

If the public authority issues a response in accordance with the decision notice, but the requester remains dissatisfied and makes a further complaint to the Commissioner, the Commissioner may then be required to undertake a full investigation, considering any exemptions or exceptions which are now being claimed by the authority.

The outcome of this investigation will not be affected by the previous decision notice. In other words:

- the date of the request will remain the date on which the authority received the request, not the date of the initial decision notice;
- application of exemptions and the public interest test will be as at the time of the request; and
- procedural breaches will be as at the time of the internal review (if one was provided) or the time for compliance as per LTT29.

PREVIOUS / NEXT

Source	**Details**		
Policy / Operations			
Related Lines to Take			
29, 187, 188, 189, 191, 192, 193			
Related Documents			
Contact		KP	
Date	18/01/2011	**Policy Reference**	**LTT190**

FOI/EIR	EIR	Section/Regulation	Reg 11	Issue	Internal review under the EIR – issuing a DN requiring an internal review

Line to take:

Unlike the FOIA, the EIR contain a legal obligation on a public authority to provide an internal review. Where an authority has failed to provide an internal review in relation to a request which falls to be considered under the EIR, the Commissioner will issue a decision notice requiring it to do so.

In order to trigger the obligation in regulation 11, the requester must express their dissatisfaction in writing within 40 working days of becoming aware of grounds for complaint.

Further Information:

Regulation 11 of the EIR states that a public authority must reconsider its decision in the light of any representations made by the applicant. The time limit for this review is 40 working days. The authority is also obliged by regulation 14(5) to notify the applicant of this opportunity in its refusal notice.

This means that there is a legal obligation to provide an internal review under the EIR.

Where the authority has failed to comply with this requirement, the normal approach will now be to issue a short DN finding a breach of reg.11 and ordering steps to carry out an internal review (see for example FER0311883).

However, this approach should not be used if it would lead to undue delay for the complainant in the particular case. Likewise, it may not be appropriate to use this approach for hybrid FOIA/EIR cases, as the same legal obligation to carry out an internal review does not apply under FOIA. For advice on how best to proceed in such cases you should consult with your group manager (or if you do not have a group manager ask for advice from another signatory via a CR07 form)

If the authority has never considered the request under the EIR, the appropriate action is to require the authority to reconsider it under the correct legislation (following LTT190).

Accepting complaints without internal review

The Commissioner's normal practice is not to accept a complaint if the requester has not exhausted any internal review procedure offered by the authority. Therefore this line applies only in those cases where the authority has stated that it does not offer an internal review, or has refused or failed to carry out a reconsideration in spite of being asked by the requester.

Timing of representations

There is a limitation on the obligation to provide an internal review under regulation 11, which is that it applies only if the requester has made representations to the authority in writing and within 40 working days of "the date on which the applicant believes that the authority has failed to comply with" a requirement of the EIR.

The phrase "the date on which the applicant believes..." does not lend itself to a blanket approach. It suggests that the representations do not necessarily need to be made within 40 days of the refusal, but that the right to make representations is nevertheless not unlimited. Note also that reg.11(2) refers to "the requirement" about which the requester is making representations, rather than any breach of the Regs; the requester is not required to make their representations as soon as they are aware that the authority has exceeded the time limits for response.

In most cases, the requester's representations will be in response to a refusal notice issued by the authority. The Commissioner would therefore expect that such representations would usually need to be made within 40 working days of the refusal. This should give the requester sufficient time to assess the response made (including any information disclosed) and determine whether they are satisfied. However there may be some circumstances in which we might accept that representations could be made later than this. More details about possible scenarios can be found below; if this is an issue in your case you may wish to seek policy or signatory advice.

Further details

The following are circumstances in which we might consider that the authority had a duty to reconsider the request, even though the requester's representations were not made within 40 working days of the authority's refusal.

1. Where there was some ambiguity about whether the authority had issued a final refusal or whether it was still considering the request.

> It would not be reasonable to make the requester's right to make representations dependent on the authority's issuing a timely and comprehensive refusal notice. A requester cannot be expected to make representations about non-disclosure or the application of exceptions if they reasonably believe that the authority has not yet come to a final conclusion about these matters. In these cases we can say that the requester did not "believe" a breach had taken place until later. There is a parallel here with the Commissioner's approach to "undue delay" which refers to the time which has elapsed since the authority's last "meaningful contact" with the requester.
>
> The code of practice under reg.16 of the EIR states, as with the s.45 code under the FOIA, that any written expression of dissatisfaction should be treated as a complaint. The "representations" do not need to be in any particular form, although they must be in writing (in contrast with the provision for verbal requests under the EIR). Therefore, if there has been further correspondence subsequent to the refusal, it is likely that the requester has in fact exercised their right under reg.11 even if it has not been recognised as such by the authority.

2. Evidence that the authority has failed to comply has only emerged after the refusal, for example, it has become apparent that more information may be held.

> This does not mean that the right to make representations remains "open" indefinitely, simply because the requester may at some point come to believe that the request has not been properly handled. Rather, there must be some reason, other than a mere change of heart or reconsideration on the part of the requester, why they did not previously believe the authority to have mishandled the request but have subsequently come to think so.
>
> This is most likely to occur in cases where the authority's response is based on factual claims (rather than judgement) which the requester initially has no reason to challenge but later discovers to be false or open to question.
>
> We would envisage that this situation should be exceptional, and we should be careful to avoid eroding the 40-day time limit for making representations by allowing requesters to rely on this argument too often. If you are considering finding a breach of reg.11 or requiring the authority to carry out an internal review in such a scenario, seek advice from a senior signatory first.

3. Where the authority has failed to offer an internal review procedure, either by failing to notify the requester of their right to make representations or by specifying explicitly that no internal review is available.

> Reg. 11 can be read as requiring an authority to have an internal review procedure for environmental information requests, and again it would be unfair to deprive the requester of their right to make representations by virtue of the authority's failure to issue a compliant refusal notice. In this case there will also be a breach of reg.14(5) in that the authority has failed to include reference to the reg.11 right in its refusal notice.

Countering alternative interpretations of regulation 11

Reg.11 states:

"Representations under paragraph (1) shall be made [...] no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement."

A public authority may argue that this should be read to mean "40 working days after the date on which the

public authority has allegedly failed to comply with the requirement", rather than 40 working days after the date on which the requester comes to believe that such a failure has occurred.

The Commissioner accepts that both interpretations are possible. However, he considers that the interpretation given under "further details" above is more plausible in practice for the following reasons:

- It is not possible to state that a failure to comply (other than with the time limit provisions) has occurred on a particular date; rather it has occurred because the authority has not yet complied.
- If the authority has not responded at all, responds late, or considers the request under the wrong legislation, the requester may not initially be aware of a reason to complain. This could lead to them being deprived of their right to make representations because of delays on the part of the authority.
- The Commissioner reads the legislation purposively (in line with its origins in European law). The purpose is clearly to give the requester an opportunity to complain, and this should not be undermined by the actions of the authority. An authority which gives a full and clear refusal notice within the time for compliance will not be disadvantaged by this approach.

PREVIOUS / NEXT

Source	**Details**		
SW			
	FER0311883		
Decision notice			
Related Lines to Take			
LTT187, LTT190			
Related Documents			
EIR Code of Practice			
Contact		KP	
Date	18/01/2011	**Policy Reference**	**LTT191**

FOI/EIR	FOI / EIR	Section/Regulation	s.1, s.12, s.14 reg.12(4) (a), (b) and (c)	Issue	Rejecting procedural exemptions / exceptions

Line to take:

When the Commissioner has not accepted an authority's reliance on a procedural exemption / exception then he will issue a decision notice stating that the authority is not relieved of its obligations under the FOIA / the EIR and ordering steps to either comply with s.1(1) / reg.5(1) or issue a valid refusal notice.

Further Information:

Where an authority has claimed that s.12 or s.14 of the FOIA (or the EIR equivalents) apply, then it will not generally have examined the information in question. Therefore it will not generally be in a position to make arguments in relation to any exemptions or exceptions which are dependent on the nature and content of the information*. Expecting an authority to consider the application of exemptions when it is relying upon such provisions would also seem to defeat the object of them being claimed in the first place.

Where, therefore, the Commissioner has rejected an authority's reliance on a procedural exemption or exception, he will not necessarily be in a position to determine whether a breach of s.1(1) or reg.5(1) has occurred.

The correct approach in this case is therefore to:

- issue a decision notice giving the determination on the procedural exemption or held / not held issue;
- find only those breaches which can be determined without establishing whether there was a duty to disclose the information at the time of the request, e.g. s.17 or reg.14 (this may mean that no breaches are specified at all); and
- include steps requiring the authority to either comply with s.1(1) / reg.5(1) or to issue a new refusal notice giving a valid grounds for refusal.

If no breaches are found, the decision notice may contain wording such as "the public authority is not relieved of its obligations under the FOIA by virtue of section 12" or as appropriate. It should also state that the public authority failed to deal with the request in accordance with the Act / EIR in that it incorrectly claimed that section 12 / 14 / EIR equivalent was engaged.

*Note: in rare cases an authority may have cited both a procedural and another exemption for the same information, for example, it has refused the information under s.36 but subsequently determined that it wishes to treat the request as vexatious. In such cases the case officer may investigate both exemptions rather than following the approach in this line.

Further investigation after the response

If the public authority issues a further refusal notice in accordance with the decision notice, but the requester remains dissatisfied and makes a further complaint to the Commissioner, the Commissioner may then be required to undertake a second investigation, considering any exemptions or exceptions which are now being claimed by the authority.

The outcome of this investigation will not be affected by the previous decision notice. In other words:

- the date of the request will remain the date on which the authority received the request, not the date of the initial decision notice;
- application of exemptions and the public interest test will be as at the time of the request; and
- procedural breaches will be as at the time of the internal review (if one was provided) or the time for compliance as per LTT29.

This will mean that different breaches may be found in the final decision notice.

PREVIOUS / NEXT

Source	Details		
Policy / Operations			
Related Lines to Take			
LTT29, LTT187, LTT190, LTT193			
Related Documents			
Contact		KP	
Date	18/01/2011	**Policy Reference**	**LTT192**

FOI/EIR FOI **Section/Regulation** s1 **Issue** Finding that further information is held:approach to decision notices

Line to take:

Where the public authority has claimed that no (or no further) information is held, but the Commissioner's investigation determines otherwise, one approach will be to issue a decision notice ordering the authority either to disclose the information or to issue a refusal notice.

However, there is a wide variety of scenarios, and this approach may not be suitable in every case. This line seeks to identify the different scenarios which may occur and explain the approach the Commissioner will take.

This line does not apply to the EIR, because in the EIR "not held" is an exception. When rejecting an authority's reliance on reg.12(4)(a) you should refer instead to LTT192

Further Information:

This line lists a number of scenarios in which the Commissioner may reject a public authority's claim that no (or no further) information is held falling within the scope of the request.

General approach

The Commissioner's approach to determining whether information is held is covered by LTT121. You must only issue a decision notice once you have come to a decision (on the balance of probabilities) as to whether any or any further information is held. It is not acceptable to issue a decision notice on a "held / not held" case stating that further information "may" be held, and ordering further searches as a step. If the Commissioner is not satisfied with the quality of the searches carried out by a public authority, he will usually ask the authority to undertake further searches as part of the investigation rather than issuing a decision notice.

If it becomes apparent that the searches necessary to determine whether information is held would exceed the cost limits, then we would suggest to the public authority that it may wish to rely on s.12 to refuse the request without confirming or denying whether information is held. The Commissioner may also consider pro-actively whether s.12 may apply. In this situation it is acceptable for a decision notice to say that the Commissioner has not determined whether information is held; in all other held/not held cases, the Commissioner will come to a conclusion on the balance of probabilities.

Information discovered during the investigation

In this circumstance, the authority cannot deny that the information was in fact held. Therefore, a decision notice will not always be necessary.

- If the authority is happy to disclose the information, **follow LTT188.** If a DN is issued, this can include a breach of s.1(1)(a) if the authority previously denied that the information was held, as well as a breach of s.10(1).

- If the authority wishes to withhold the newly-discovered information, and this is the only information still in dispute, we will **issue a short DN** asking them to consider the newly-discovered information and either disclose or refuse. This is in keeping with our approach to cases in which the authority has failed to address the request at all or has done so inadequately (LTT189 and 190). Again, a breach of s.1(1)(a) and an associated breach of s.10(1) can be found if the authority previously denied that the information was held.

- If the information is similar to other information which we are investigating as part of the case, and the PA wishes to withhold it under the same exemptions, then the best approach is to **continue with the investigation** until you are able to issue a decision in relation to all the information falling within the scope of the request.

- However, the priority is to speed up the outcome for the complainant and so the rest of the investigation should not be delayed whilst the newly discovered information is considered. Therefore, if the investigation on the other information is nearing completion, and the authority is likely to need time to formulate different arguments applying to the new information, it may be best to **consider**

issuing a DN. This would make a finding on the information which has already been fully considered, and include a step requiring the public authority to either disclose the newly-discovered information or issue a refusal notice for this information. Again, there would be a breach of s.1(1)(a) and s.10(1) if the authority had previously denied holding such information.

If the discovery of the new information raises the possibility that there is yet further information not yet identified, you must **continue the investigation** until you are able to determine (on the balance of probabilities) whether further information is held.

Information held on the balance of probabilities

It should generally be rare for the Commissioner to determine that information is held when the information has not actually been discovered. As explained above, the Commissioner will usually ask the authority to undertake further searches as part of the investigation, rather than determining that further information is held simply because the authority has failed to demonstrate that it is not held.

If however the Commissioner considers that the public authority holds information which has not been located, and the authority continues to dispute this and will not carry out further searches, the Commissioner may **issue a DN ordering disclosure or refusal** of any further information. In reality, such steps may be difficult to enforce so it is recommended that you get advice from a signatory before following this approach. If the public authority's reason for refusing to carry out further searches is because of cost, then he may suggest considering s.12.

A more common scenario is where the Commissioner considers that further information was held at the time of the request but is no longer held. In such a case, he may find breaches but will be unable to order steps.

The authority has been working on a mistaken interpretation of the request

Where the Commissioner disagrees with a public authority's interpretation of a request, he may consider that the authority has not identified and considered all the information falling within the correct scope. In most cases, an authority will accept the Commissioner's understanding of the request and identify the relevant information as part of the investigation. In this case, the scenario is the same as the one on "information discovered during the investigation" above.

However, if the authority continues to dispute the interpretation of the request, the Commissioner will **issue a DN** ordering it to identify the information within the scope as explained and disclose or refuse. This is consistent with our approach to cases in which the authority has given an inadequate or no response, since in effect the authority is failing to address the actual request made. In such cases it is vital to be clear and unambiguous as to the correct scope of the request.

LTT89 discusses further how to approach cases where the authority's interpretation of the request differs from that of the complainant.

The authority claims information is not held for the purposes of the Act

There are three situations in which this may arise:

- the public authority accepts that it holds the information but states that it is held only on behalf of another;
- the public authority accepts that the information exists but considers that it is held by another body not on behalf of the authority; or
- the public authority claims that responding to the request would constitute the creation of new information.

In all three cases, if the Commissioner rejects the authority's arguments, then he would **issue a decision notice** ordering the authority to either disclose the information or issue a valid refusal notice. Again, breaches of s.1(1)(a) and s.10(1) may be included if the authority previously denied holding the information. The Commissioner will not be able to find a breach of s.1(1)(b) in these circumstances as the investigation will not have covered whether the information was disclosable at the time of the request. This may be the subject of a future investigation if the requester remains dissatisfied with the authority's subsequent response.

PREVIOUS / NEXT

Source	Details		
Policy			
Related Lines to Take			
187, 188, 189, 190, 191, 192			
Related Documents			
Contact		KP	
Date	18/01/2011	**Policy Reference**	**LTT193**