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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, this approach is less suitable if the information is only determined to be environmental after a significant investigation. In this case it may provide better customer service for the case officer to ask the authority to reconsider the request under the appropriate legislation and provide arguments to the ICO so that a Decision Notice considering any EIR exemptions can be issued. 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.

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Source

Details

Policy / Operations

Related Lines to Take

[29](#), [187](#), [188](#), [189](#), [191](#), [192](#), [193](#)

Related Documents

Contact

KP

Date

04/08/2011

Policy Reference

LTT190

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- Information Commissioner's Office intranet