

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2013

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request for copies of the last email sent from and received at any non-GSI email addresses used by the Prime Minister. The Cabinet Office determined that the request was not a valid request for information under section 8(1)(c) as it did not describe the information being sought. The Information Commissioner's decision is that the request is a valid request under the FOIA and that the Cabinet Office incorrectly applied section 8(1)(c) and is obliged to respond to the request under FOIA.
2. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:
 - issue a fresh response under the FOIA, treating the request as a valid request for the last email sent from and received at any non-GSI email addresses used by the Prime Minister.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The complainant had originally requested copies of the last official email sent from and received at non-GSI email addresses, for every minister

and special adviser in the Cabinet Office and Number 10 Downing Street.

5. The Cabinet Office refused the request, citing section 12 of the FOIA. It advised the complainant to refine his request so that it might be answered without exceeding the £600 costs limit.
6. There followed a protracted exchange of correspondence, during which the complainant refined his request several times, but each time failed to do so in such a way that the costs limit would not be exceeded.

Request and response

7. On 3 August 2012, the complainant agreed to refine his request a further time.

"As a reminder, the irreducible core of my current request was that I asked for the last email received by the PM personally on government business via a private non-GSI account. I also want the last government email sent by the PM via such an account.

I am, once again, giving you further permission to cut my request to that core if the other things I sought were too dear. If, inexplicably, this is too big a task (I do not see how - I basically just want the last of them - but you asked for it, so...), please refine by performing a keyword search on the word "Gove"."

8. The Cabinet Office responded in writing on 30 August 2012. It stated that it did not consider this to be a valid request for recorded information under the FOIA.

"Your e-mail of 3 August does not describe the information requested as required by section 8(1)(c). It merely requests documents (e-mails) without reference to (for example) a policy or event and seeks to refine the requests (by instructing us to perform a keyword search on the word "Gove") in a manner which is illogical and unhelpful for the purposes of locating whatever information is being sought...

To be clear, in line with our duty in section 16(1) to provide advice and assistance, the advice is that you should formulate your request so that it seeks some specific information - in relation to a particular topic (for example a policy or event)."

9. It invited him to submit a refined request, or to complain to the Information Commissioner.

Scope of the case

10. The complainant forwarded the exchange of correspondence to the Commissioner on 30 August 2012, and asked that it be investigated under section 50 of the FOIA.
11. The complainant had refined his request several times during the exchange of correspondence. Where a public authority refuses a request under section 12, and the applicant submits a refined request, the refined request should be treated as a new request, with the statutory time period for compliance commencing on the date of receipt of that new request.
12. The Commissioner notes that on each occasion the complainant agreed to refine his request. He has therefore taken this to be a complaint about the Cabinet Office's response to the final refined request, dated 3 August 2012.
13. The Commissioner considers that the complainant's instruction to refine the request further if the appropriate limit was exceeded, by using the search word "Gove", is a conditional request. He considers that conditional requests (requests which 'bite' only if something specific happens) are not technically valid. In this case, the instruction to revert to the search term "Gove" is conditional on the refusal of the wider request under section 12, and so cannot be considered to have been made yet. Conditional requests should instead be viewed as an indication that the requester intends to make that request in future, should certain conditions prevail.
14. The Commissioner has therefore scoped out from his investigation the instruction to refine the search using the term "Gove". He has interpreted the request as being for the last official email sent and received via any non-GSI email account used by the Prime Minister, as at 3 August 2012.
15. The complainant had not asked the Cabinet Office for an internal review of its decision in respect of this request. Although the Commissioner would normally expect a complainant to exhaust any internal review procedures prior to investigating such a complaint, in view of the exchanges which led to this request and the issue in dispute, he considered it appropriate in this instance to proceed with an investigation without further ado.

Reasons for decision

Section 1 and section 8 FOIA – valid requests for information

16. Section 1(1) of the FOIA states:

“Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request...”

17. Section 8(1) provides that –

“In this Act any reference to a “request for information” is a reference to such a request which ...

(c) describes the information requested.”

18. Therefore, requests for information under the FOIA have to fulfil the requirements of section 8, which include a description of the information requested.

The Cabinet Office’s view

19. The Cabinet Office considers that the request was not a valid request for information under section 8(1)(c) of the FOIA because the complainant had not described the information being sought.

20. The Cabinet Office argued that in order for a request to be valid it should be reasonably clear from the request what the information is – or at least what the nature or subject matter of the information recorded in the document is – that the applicant is seeking.

21. It cited *Sugar v BBC* [2009] UKHL 9¹, stating that the House of Lords made it clear that a request framed by reference to a copy of a document (in that case, “a copy of the report by Mr Michael Balen regarding the BBC’s news coverage of the Middle East”) was within the

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<http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090211/sugar-2.htm>

ambit of the FOIA. It further stated that the House of Lords endorsed the view of the Information Tribunal that such a request “*was a request for information that was properly made*” under section 1 of the FOIA.

22. It used this as a standard against which it compared the complainant’s request. It argued that the request was not for a particular report or even for emails sent or received by a particular individual on a particular topic (it commented that such cases clearly referred to specific documents as a way to describe the information requested). Rather, the complainant was asking the Cabinet Office:

“...to provide unidentifiable emails, when he has no idea of the nature of the information that may be contained in such emails, if indeed such emails even exist. Put another way, [the complainant] is not asking for identifiable information (eg minutes of a specific meeting), such that we can meaningfully search relevant locations to find that information (eg email accounts or note books); rather, he is simply asking for a copy of a medium for recording information (here emails, but compare notebooks, post-it notes, tape recordings etc) without reference to any identifiable information which may or may not have been recorded in the relevant medium. It therefore follows that the request cannot be a request for information at all within either the meaning or the spirit of the Act”.

23. It went on to assert:

“For a request for a document to be valid, it needs to describe (if it would not otherwise be apparent) the nature of the information recorded in the document. The Cabinet Office does not accept that asking a public authority to undertake a search for emails without any subject matter, or reference to any topic or policy, sent using a particular type of account can satisfy the requirement on the application to ‘describe the information requested’”.

24. The Cabinet Office also took issue with the complainant’s instruction to focus the search for information on a particular location (non-GSI email accounts used by the Prime Minister for government business). It hypothesised that a request to see all the information located in a particular physical location, such as a manual file store or even a particular room, could legitimately be categorised as not a valid request for information. It then extended this analogy to a request for all information held on non-recycled rather than recycled paper, which it also suggested would not be a valid request under section 8(1)(c). It expressed the view that the same principle governs requests for

electronic information, in that a request for all the information held on a particular file server would clearly not be a valid request. It summarised its position thus:

"Therefore I am strongly of the view that a request for information held on a particular individual's email account, without reference to a specific area of policy or subject, and without otherwise describing the content of the information cannot be considered a valid request under the Act".

25. The Cabinet Office went on to quote from the Commissioner's guidance on official information held in private email accounts². It stated that the guidance lends weight to its view that a valid request for information must include a description of the content of the information.

"The factors that public authorities may need to take into account in deciding whether it is necessary to ask someone to search their private email accounts include 'the subject matter of the information which falls within the scope of the request' and 'how the issues to which the request relates have been handled within the public authority'. This recognition that the subject of the information requested is a determining factor demonstrates that [the complainant's] request is not a valid request for information as it does not identify any 'subject matter' or 'issues'."

26. However, this extract from the Commissioner's guidance does not address the question whether a request is valid but whether a private email account needs to be searched in certain circumstances. There is no recognition that an identifiable subject matter is a determining factor when considering whether a request meets the requirements of section 8(1)(c).

The Commissioner's view

27. The Commissioner considers that requests for information made under section 1 of the FOIA have to fulfil the requirements of section 8, which include a description of the information requested.

²

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx

28. The Commissioner considers that the purpose of section 8(1)(c) is to enable the public authority to narrow down what information the requester wants. However, the FOIA does not prescribe how the information sought must be described or what constitutes a sufficient description. The description will enable the public authority to apply the provisions of the FOIA to the request. If further clarification is needed to enable the public authority to identify and locate the information requested, then clarification may be sought under section 1(3).
29. On access to documents, although it is the case that the FOIA provides a right of access to information rather than to copies of documents, requests may refer to specific documents as a way to describe the information requested. A request for a particular document, such as an email, should generally (unless the context makes clear that this is not the case) be interpreted as a request for all of the information that may be recorded in that document.
30. The Cabinet Office has argued that the request is for "*unidentifiable emails when [the complainant] has no idea of the nature of the information that may be contained in such emails*".
31. The Commissioner disagrees with this assessment of the request. The complainant specified that the emails he required should have been sent from and to non-GSI accounts used by the Prime Minister.
32. The Commissioner considers that this constitutes a sufficient description of the location, origin and type of the information, if such information were held, which would enable the Cabinet Office to understand what the complainant required. The Commissioner accepts that the emails have not been specifically identified by the complainant and that he is unlikely to have any idea of the nature of the information they may contain. However, he rejects the argument that the emails are "*unidentifiable*".
33. It is important to note that there is no requirement in the FOIA that those intending to make requests for information have any prior knowledge of the information they are requesting. Such a position would contradict the purpose of the legislation, which was introduced on the basis that it would provide the public with a "right to know". For instance, the Commissioner would not consider a request for information held under a specified file reference at The National Archives to be invalid simply because the requester did not know or was unable to describe what information the file contained.
34. It is also important to note that the right to know, as embodied in section 1 of the FOIA comprises two distinct elements, namely, subject to certain exemptions, the right to know whether the public authority

holds the information requested and, if it does, the right to have it communicated to him. The idea of a requirement of prior knowledge that the relevant information exists is itself contrary to the very purpose of the legislation, let alone prior knowledge as to what it comprises.

35. The Commissioner considers that the wording of section 8(1)(c) is clear and should bear its plain meaning. This provision simply requires the request to "*describe the information requested*". It does not specify that the request must describe the subject matter of the information. A description relating to origin, date and type of document can still, in the everyday meaning of those words, describe the information requested. For example, a request for the minutes of the last Cabinet meeting would clearly describe the information requested, even though it does not describe the content by reference to the matters discussed. The Commissioner considers that request in this case sufficiently describes the information requested. He is concerned that the Cabinet Office has adopted an interpretation of section 8(1)(c) which would impose unreasonable expectations on those making requests.
36. Turning to the Cabinet Office's parallel argument, that a request framed only by reference to the contents of a physical location would not be regarded as a legitimate request, the Commissioner considers that this is not a valid analogy. The description in this case is by reference to a store of recorded information (an email account) and type of document, which is identifiable by reference to a discernible time and date. A better analogy would be a request for "*the private secretary's notebook for date x*" which also identifies a fixed location, type of document, likely authorship and date. This would clearly be a sufficient description of the information requested for section 8 purposes. The issue is one of whether the description corresponds in any way to the nature of the recorded information, or merely refers to its physical location at a particular point in time (or other purely physical 'unrecorded' characteristics, such as paper type, print medium or ink brand). The Commissioner contends that in this case, the former applies.
37. Turning, finally, to the Cabinet Office's claim that the complainant is asking for a copy of the medium for recording information, rather than for information itself, the Commissioner again refers to the fact that the complainant has specified a particular sphere of interest (emails to and from a private account used by the Prime Minister) as the means of describing the information requested. This indicates that the complainant is interested in specific identifiable information, albeit he might not know what the subject matter of that information is. Whilst public authorities might find such requests irritating, the FOIA does not legislate against so-called "fishing expeditions", although this may be very relevant when considering whether a request is vexatious for the purposes of section 14.

38. For the reasons given above, the Commissioner has concluded that the complainant's request (without the later refinement by reference to a specified key-word search) did sufficiently describe the information requested for the purposes of section 8(1)(c). It must therefore be dealt with in accordance with the provision of the FOIA. That does not, of course, mean that the information (if held) has to be disclosed.

Section 12 – cost of compliance exceeds appropriate limit

39. The Cabinet Office had refused earlier incarnations of this FOIA request from the complainant under section 12. It informed the Commissioner that it did not propose to advance arguments under section 12 in respect of this request, as it did not consider the request to be valid under the FOIA. The Commissioner makes no determination on that issue.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Graham Smith
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SK9 5AF**