

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2017

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (DFID) for information about its decision to suspend payments to Development Aid People to People Malawi. DFID refused to answer the request on the basis of section 12(1) of FOIA because it estimated that fulfilling the request would exceed the appropriate cost limit. The Commissioner has concluded that DFID is entitled to rely on section 12(1) to refuse this request. She has also concluded that DFID complied with its obligations under section 16(1) of FOIA by providing the complainant with advice and assistance to allow him to submit a revised request.

Request and response

2. The complainant submitted a request to DFID on 10 November 2016 seeking the following information:
 - '1. Any determination or evaluation by DfID relating to the accreditation or status of Development Aid People to People UK ("DAPP"), Humana UK or Planet Aid.
 2. Any determination or evaluation by DfID regarding the continuation, suspension, or termination of payments by DfID to DAPP, Humana UK, or Planet Aid UK.
 3. Any investigation, inquiry, inquest, report, or findings by DfID regarding the operations, funding, financial accounting,

organizational structure, or affiliations of DAPP, Humana UK, or Planet Aid UK'.

3. DFID responded on 9 December 2016 and explained that it did not hold any information falling within the scope of part 1 of the request and although it held information falling within the scope of parts 2 and 3, it considered this information to be exempt from disclosure on the basis of the following sections of FOIA: 27(1)(a) to (d) and 27(2) (international relations); 31(1)(a), (b) and (g); 31(2)(a) and (b) (law enforcement); 35(1)(a) (government policy); 40(2) (personal data); and 43(2) (commercial interests).
4. The complainant contacted DFID on 2 February 2017 and asked it to conduct an internal review of this response.
5. DFID informed the complainant of the outcome of the review on 17 March 2017. The review explained that given the broad scope of the complainant's request, DFID had determined that fulfilling this request would exceed the appropriate cost limit. DFID therefore refused the request on the basis of section 12(1) of FOIA. DFID suggested that the complainant submitted a refined request that could potentially be answered within the cost limit by focusing on a much narrower period of time and for information relating to a specific entity.
6. The complainant submitted the following refined request to DFID on 24 March 2017:

'The undersigned hereby requests copies of records in the possession, custody, or control of the Department for International Development ("DfID") as follows:

Documents created during the period 1 March 2016 to 1 September 2016 that constitute or support the DfID's factual findings with respect to the DfID's decision on or about 2 August 2016 to suspend payments to Development Aid People to People Malawi and its affiliate organisations ("DAPP Malawi")...

...Please note that, if the DfID takes the position that this request would exceed the cost limits under the FOI law, the undersigned will accept a partial search for and/or production of responsive documents so as to avoid exceeding the cost limit. In the event that a partial search or production is made, please produce documents in the following descending order of priority:

1. Memoranda, reports, or evaluations by the DfID setting forth the factual findings or conclusions that support the DfID's decision on or about 2 August 2016 to suspend payments to DAPP Malawi (highest priority);

- 2. Any exhibits, appendices, or addenda to the above-described memoranda, reports, or evaluations;*
- 3. Any documents referring to DAPP Malawi that are referenced in the above-described memoranda, reports, or evaluations; and*
- 4. Any documents referring to DAPP Malawi that support or were relied upon by the DfID in drafting the above-described memoranda, reports, or evaluations, whether or not referenced in such memoranda, reports or evaluations (lowest priority)'*
7. DFID contacted the complainant on 26 April 2017 and confirmed that it held information falling within the scope of the request. However, it considered this information to be exempt from disclosure on the basis of section 43 of FOIA and it needed additional time to consider the balance of the public interest test.
8. DFID sent a number of further public interest test extension letters with the substantive response being issued on 7 July 2017. In this response DFID explained that it considered the requested information to be exempt from disclosure on the basis of the exemptions contained at the following sections of FOIA: 27(1)(a) to (d) and 27(2); 31(1)(a), (b) and (g); 31(2)(a) and (b); 35(1)(a); 40(2); 41(1) (information provided in confidence); and 43(2).
9. At this stage, given the background to the refined request and DFID's delays in completing the public interest test, the Commissioner agreed to take on the complainant's complaint about DFID's refusal of the refined request rather than insist that DFID complaint an internal review of its response of 7 July 2017.
10. The Commissioner therefore contacted DFID on 27 July 2017 and asked to be provided with a copy of the information it held falling within the scope of the refined request along with detailed submissions to support its reliance on the various exemptions cited in its letter of 7 July 2017.
11. DFID responded to the Commissioner on 1 September 2017. DFID explained that in order to comply with the refined request within the cost limit, it had focused its searches on information relating to the complainant's highest priority, *'Memoranda, reports, or evaluations by the DfID setting forth the factual findings or conclusions that support the DfID's decision on or about 2 August 2016 to suspend payments to DAPP Malawi (highest priority)'*. DFID noted that unfortunately this had not been made clear to the complainant in the response of 7 July 2017 and, given that no internal review had been conducted, this had not been picked up until now. DFID explained that it had located two documents falling within this category of information. The Commissioner was provided with these documents and submissions to support DFID's application of the exemptions.

12. At this stage the complainant explained to the Commissioner that he did not accept that DFID could only locate two documents within the cost limit.
13. The Commissioner contacted DFID again on 25 September 2017 and asked it to provide further details to explain how it had determined that only two documents could be located within the cost limit.
14. DFID responded on 13 October 2017. DFID clarified its position in relation to this request and explained that it should have cited section 12 not only for the entire request, but simply to the first category of information, i.e. the highest priority one, and also therefore to categories 2, 3, and 4 given that these parts were dependent on locating the information falling within the scope of part 1.

Scope of the case

15. In light of DFID's revised position in respect of this request, the scope of this decision notice is limited to considering whether DFID is entitled to rely on section 12(1) to refuse to comply with the request and whether it has provided advice and assistance in line with section 16(1) of FOIA.
16. The decision notice does not therefore consider whether DFID is entitled to rely on the exemptions cited above to the two documents provided to the Commissioner on 1 September 2017.
17. The complainant has also explained to the Commissioner that he is dissatisfied with the DFID's general handling of this request. More specifically the complainant highlighted DFID's delays in processing the revised request; the fact that this revised request was ultimately refused on the basis of section 12(1) despite this being submitted on the basis of advice and assistance previously provided by DFID; and DFID's delays in confirming its final position in respect of the revised request. Whilst these concerns are not ones which result in breaches of FOIA, they are ones of good practice and the Commissioner has commented on them in the Other Matters section of this notice.

Reasons for decision

18. Section 12(1) of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit".

19. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case.

20. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

21. A number of Information Tribunal decisions have made it clear that an estimate for the purposes of section 12 has to be 'reasonable' which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence.

DFID's position

22. DFID explained that that its searches for relevant information focused on its Internal Audit Department Case Management system as this is where information about this subject was primarily located. DFID explained that it also had to consider a range of information held on its corporate records management system to cover information held by other DFID departments, particularly the Inclusive Societies Department, which managed the projects involving DAPP Malawi, and DFID Malawi.

23. DFID explained that the aforementioned case management system is a basic electronic system with its functionality and purpose being to assist effective case management. Consequently, DFID explained that it is not easy to identify individual documents that may be required, for example

to respond to requests for information. In practice DFID explained that all the information potentially relevant to this case had to be printed off and the exercise carried out in hard copy.

24. DFID explained that it had identified over 700 documents using the search term 'DAPP' covering the period of this request. DFID explained that these 700 documents ran into thousands of pages, which it would need to retrieve, check for relevance then extract any information relevant to the request given that the request specifically sought information that constituted or supported DFID's factual findings with respect to its decision to suspend payments to DAPP.
25. However, DFID explained that it was very conscious of the delays in handling this request and the earlier related request. DFID acknowledged that this seems to have clouded its judgment and resulted in it persevering through all of the material to try and identify at least some relevant information and in doing so focused on the material described in category 1 of the request, i.e. *'memoranda, reports, or evaluations by the DFID setting forth the factual findings or conclusions that support the DFID's decision on or about 2 August 2016 to suspend payments to suspend payments to DAPP Malawi'*.
26. DFID explained that even using a very conservative estimate of 5 minutes per document, it took almost 60 hours to identify, retrieve (including printing) and extract information relevant to this category of the request. DFID therefore argued in trying to fulfil even this category of the request it went significantly over the cost limit.
27. Therefore, DFID explained that with the benefit of hindsight, there is absolutely no doubt that it should have followed its normal approach of citing the cost limit to the entirety of the request, as opposed to trying to provide the information sought by category 1 of the request, giving advice and assistance to help the complainant submit a narrowed request.

The complainant's position

28. The complainant emphasised that the refined request of March 2017 was very clear and relatively narrow in its ambit and written after DFID's invitation to submit a narrower request. The complainant argued that it was not credible for DFID to argue that it was too costly for it to locate the two documents passed to the Commissioner on 1 September 2017. Rather the complainant suggested that a diligent researcher could have located the material falling within the first category of the request within a few minutes rather than hours, and categories 2 and 3 only covered documents annexed to or referred to the documents in category 1, of which DFID argued there was only two such documents. The complainant suggested that it was implausible that a central

government department was operating an IT system which did not allow for searching information other than by printing out and manually searching every document.

29. Furthermore, the complainant argued that where information is not readily available purely as a result of incompetence of the public authority, that incompetence constitutes an interference with the right of access to information contrary to Article 10 of the European Convention and contrary to the purpose of FOIA.¹

The Commissioner's position

30. The Commissioner can understand why the complainant would question the plausibility of DFID's application of section 12(1). It does, the Commissioner accepts, seem unlikely that a government department's search for information would have to be dependent on reviewing manual records.
31. However, in the particular circumstances of this case the Commissioner accepts that such a search is necessary in order to fulfil this request. It is the Commissioner's understanding that DFID's IT systems, and in particular the case Internal Audit Department Case Management system, can be searched electronically to find information concerning DAPP and the date range of the request. This search returned the 700 plus documents referred to in DFID's submissions to the Commissioner.
32. However, the Commissioner understands that it is not possible, using electronic searches on the case management system, to then identify information within these 700 documents which falls within the scope of the request. This is due in part to the limitations of the case management system but also due to the wording of the request and the actual information sought. That is to say, the request did not simply seek **all** information about DAPP and DAPP Malawi for a particular period 1 March 2016 to 1 September. Rather, the request was more specific in nature seeking as it did information which '**constitute**[ed] or **support**[ed] the DfID's factual findings with respect to the DfID's decision on or about 2 August 2016 to suspend payments to Development Aid People to People Malawi and its affiliate organisations ("DAPP Malawi")' (emphasis added). It is the Commissioner's understanding given the limitations of the case management system, DFID is not able to interrogate this system to locate information which

¹ The complainant referred the Commissioner to Vereinigung, Application no. 39534/07, as cited in the Grand Chamber decision in *Magyar Helsinki Bizottság v. Hungary*, 18030/11, paragraphs 169 – 170.

constituted or supported DFID's findings in relation DAPP. Rather, in order to locate such information DFID would have to review each document individually in order to determine which it contained such information and thus fell within the scope of the request. As a result the Commissioner accepts that it is reasonable for DFID to argue that it is necessary for it to review each of the 700 documents in order to ascertain whether they fall within the scope of the refined request and indeed whether they fall within the first category of information. Furthermore, the Commissioner accepts that given that these 700 documents comprise many thousands of pages she is persuaded that it is not unreasonable to suggest that it would take 5 minutes to review each document. In accepting this estimate, the Commissioner also considers it relevant to note that DFID has based this estimate on work it has already undertaken. In the Commissioner's view this adds to the credibility of DFID's estimate.

33. On this basis the Commissioner is satisfied that DFID has demonstrated that complying with this request – and even providing simply the first category of information specified in the request – would exceed the appropriate cost limit. DFID are therefore entitled to rely on section 12(1) to refuse to comply with this request.
34. With regard to the complainant's line argument of concerning Article 10 of the European Convention, the Commissioner's position in respect of *Magyar* decision is that it is not yet clear whether the UK courts will follow this decision. The Commissioner therefore remains of the view that Article 10 ECHR does not provide a general right of access to information from public authorities which was the finding of Supreme Court in *Kennedy v The Charity Commission [2014] UKSC 20*.

Section 16 – advice and assistance

35. Section 16 of FOIA states that:

'16. – (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'

36. Paragraph 14 of the section 45 Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

'...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.'

37. Where a public authority has satisfied the requirements of the section 45 Code of Practice; it will be deemed to have complied with section 16.
38. As noted above, on 13 October 2017 DFID informed the Commissioner that it considered section 12(1) to apply to the entirety of the request. At this point the Commissioner contacted DFID and explained that she expected it to provide the complainant with advice and assistance to assist him to submit a refined request which could be answered within the cost limit. DFID subsequently held a telephone conference with the complainant to discuss the wording of a potential new request. The Commissioner understands that the parties have now agreed the wording of a new request that DFID should be able to fulfil within the cost limit, albeit that the information in the scope of this request may be subject to the exemptions contained within Part II of FOIA. In light of this, the Commissioner is satisfied that DFID has complied within the requirements of section 16(1) of FOIA.
39. The Commissioner recognises that the complainant is dissatisfied with the DFID's handling of this request for the reasons noted in the 'Scope of the case' section of this notice and as discussed below, she agrees that the complainant has understandable and legitimate reasons to be dissatisfied with how this request was handled. However, in the Commissioner's view the manner in which DFID handled this request does not mean that it has failed to provide the complainant with sufficient advice and assistance in order to meet its duties under section 16(1) of FOIA.

Other matters

40. As noted above, the complainant has also explained to the Commissioner that he is dissatisfied with DFID's general handling of this request.
41. The Commissioner shares the complainant's concerns with regard to how DFID handled this request. Whilst these concerns are not ones which result in breaches of FOIA, they are ones of good practice and she considers it appropriate to comment on them in the Other Matters section of this notice.
42. Firstly, DFID took 72 working days to complete its public interest test considerations in respect of the refined request. Whilst FOIA allows

public authorities to extend their public interest considerations for a reasonable period of time, in the Commissioner's view any such extension should be limited to a total of 40 working days consideration. Any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

43. Secondly, when DFID informed the complainant of the outcome of its public interest test considerations on 7 July 2017, it failed to explain to the complainant that it had only considered the first category of information described in the refined request.
44. Thirdly, as it transpired DFID was not in fact able to fulfil any part of the refined request without breaching the cost limit, but DFID did not confirm that this was its position until 13 October 2017, over six months since the complainant first submitted his request. This delay obviously meant that there was also a delay in DFID recognising the need to provide the complainant with advice and assistance so that he could submit a request which could be answered within the cost limit.
45. The Commissioner acknowledges that DFID considers the request to be a complex and sensitive one. She also recognises that DFID accepts that its approach to this case did not reflect best practice albeit that it has explained its efforts were a genuine attempt to comply with the request.
46. Nevertheless, in the Commissioner's view it is not at all surprising that the complainant feels considerably frustrated at DFID's handling of the refined request, not least because this request follows on from the original request which DFID had already refused on the basis of section 12.
47. The Commissioner would encourage DFID to ensure that if it believes that complying with a FOI request would exceed the appropriate cost limit, then section 12 of FOIA is cited at the earliest opportunity in the request process. Furthermore, the Commissioner would encourage DFID to ensure that when section 12 is cited to refuse a request any advice and assistance provided to a requester is, as far as possible, specific enough to ensure that any follow-up refined request is not also refused on the basis of section 12 of FOIA.

Right of appeal

48. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.

50. 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

**Jonathan Slee
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SK9 5AF**