

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2019

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted eight requests to the Ministry of Defence (MOD) seeking information about the nuclear defence programme. The MOD argued that the costs of complying with these requests could be aggregated in line with section 12(4) of FOIA and that having done so the aggregated cost of complying with them exceeded the appropriate cost limit. It therefore sought to refuse to comply with all of the requests on the basis of section 12(1) of FOIA. The complainant argued that the MOD was not entitled to rely on section 12(4) to aggregate the requests and that the MOD did not give him sufficient guidance to allow him to submit refined versions of his requests. The Commissioner has concluded that the MOD is entitled to aggregate the costs of the requests in line with section 12(1) and furthermore that the aggregated costs of complying with them exceeds the appropriate cost limit. The Commissioner has also concluded that the MOD provided the complainant with sufficient advice and assistance to meet its duty under section 16(1) of FOIA.

Request and response

2. The complainant sent the MOD two emails on 1 and 2 May 2018 which together contained eight requests for information. The text of these requests is set out in an annex at the end of this notice.
3. The MOD responded to these requests on 31 May 2018. It explained that section 12(4) of FOIA allowed public authorities to aggregate the costs of complying with requests if the conditions within The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (The Fees Regulations) were met. The MOD explained why it considered that these conditions were met in relation to all eight of the complainant's requests and therefore it was aggregating the cost of complying with them. The MOD also explained that in relation to complying with part 3 of the request FOI2018/06030 it estimated that that this alone would exceed the appropriate cost limit set at £600 (which equates to 24 hours work). It was therefore seeking to refuse to comply with all of the complainant's requests on the basis of section 12(1) of FOIA based on the aggregated cost of complying with them. The MOD provided the complainant with an indicative schedule demonstrating how he could submit his requests to them over the following 18 months so that they would not be refused on the basis of the aggregated cost of complying with them.
4. The complainant contacted the MOD on 14 June 2018 in order to express his dissatisfaction with its response. He explained why he did not accept that the MOD was entitled to aggregate the cost of complying with these requests and in light of this he outlined a different schedule by which the MOD could process these requests. The complainant also noted that with regard to request FOI2018/06030 the MOD's explanation as to why complying with this request alone would exceed the appropriate cost limit did not take account of the ICO's guidance in terms of providing an explanation as to why this was considered to be the case. The complainant also asked the MOD to provide some further details of the search for information falling within part 3 of this request so that he could attempt to refine it so that it could be answered within the cost limit as well as suggesting a potential refinement to the request.
5. The MOD responded on 29 June 2018. It maintained its position that it was entitled to aggregate all of the complainant's requests in line with the provisions of the Fees Regulations. It also explained that even with the complainant's suggested refinement to FOI2018/06030, complying with it would still exceed the appropriate limit cost.

6. The complainant contacted the MOD on 30 July 2018 and re-iterated his view that it was incorrect to aggregate the cost of complying with his requests and that it had still failed to provide details of the searches needed to fulfil these requests as recommended by the ICO's guidance.
7. In light of the complainant's email of 30 July 2018 the MOD conducted an internal review of its handling of the requests he submitted to it on 1 and 2 May 2018. The MOD maintained its position that it was entitled to aggregate the cost of complying with all of these requests. It provided him with some details as to why it estimated that the cost of complying with these requests would exceed the appropriate cost limit. The MOD also explained that it was content that it had complied with its duty under section 16 of FOIA as it had provided the complainant with adequate advice and assistance to allow him to understand the costs involved in answering these requests and also suggested how these requests could be submitted in smaller segments.

Scope of the case

8. The complainant contacted the Commissioner on 26 July 2018 in order to complain about the MOD's handling of his requests. More specifically, the complainant argued that:
 - (i) The MOD was incorrect to argue that the requests identified by him as (a) to (f) in the annex could be aggregated in line with regulation 5(4) of the Fees Regulations, with the exception potentially of requests (e) and (f); and
 - (ii) The MOD had failed to provide him with any information about the way it had estimated the costs of complying with these requests or the search methods involved and thus it is not possible for him to submit a refined version of request (d) that is likely to fulfil his research needs, even if it is possible that such a refined request would be answered within the cost limit.

Reasons for decision

Complaint (i)

9. Section 12(1) of 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.'

10. Section 12(4) of FOIA states that:

'The Minister for the Cabinet Office may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.'

11. Regulation 5(2) of the Fees Regulations states such circumstances are as follows:

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

12. The effect of the above provisions mean that in order for a public authority to be entitled to aggregate the cost of complying with two or more FOI requests the following three criteria have to be met:

- The requests are made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
- Two or more requests relate, to any extent, to the same or similar information; and
- The requests were received by the public authority within any period of 60 consecutive working days.

13. There is no dispute between the MOD and complainant that the first and third criteria are met; rather the point at dispute is whether the second criterion is met.

The MOD's position

14. The MOD argued that the basis for determining whether information falls within the description of '*the same or similar information*' is very wide and that there only needs to be a loose connection between the sets of information, hence the inclusion of the words '*to any extent*' and '*similar*' in the Fees Regulations. In support of this interpretation of the Fees Regulations the MOD cited a number of Information Tribunal decisions.¹
15. In light of this approach, the MOD argued that the requests could clearly all be aggregated because they were all for information about the broad theme of the UK's Defence Nuclear Enterprise and that the complexity, scale and interdependencies of the specific subjects covered in the requests made it difficult to draw a boundary around them all individually. The MOD noted that National Audit Office's Defence Nuclear Enterprise landscape review in May 2018 recognised the complex interdependencies between the wider defence nuclear programmes:

'To maintain the deterrent, the Department coordinates programmes and organisations across the Enterprise. The complexity, scale and inter-generational timescale of these programmes make it difficult to draw a boundary around them all, but understanding them is important for identifying and managing interdependencies and costs.'

The complainant's position

16. In his submissions to the Commissioner the complainant emphasised that the Fees Regulations specifically refers to '*the same or similar information*'. He argued that the key word in this part of the legislation is '*information*'; that is to say section 12(4) of FOIA is not concerned with whether there are thematic links between requests or whether they relate to the same or similar aspects of the public authority's work. Rather, in the complainant's view for requests to be correctly aggregated they have to be seeking the same, or similar, *information*; public authorities cannot aggregate tangentially related requests. In order to support this position, the complainant suggested that a basic

¹ Fitzsimmons v The Information Commissioner & DCMS EA/2007/0124; IPPC v The Information Commissioner EA/2011/0222.

working definition of 'information' is that it tells you something, and building on that, the nature of information can be defined as the kind of thing that it tells you. Consequently, the complainant argued that information could be about a similar topic without the nature of the information itself being related.

17. Furthermore, the complainant argued that the nature of the information sought by his requests (a) to (d) (as identified in the annex) was fundamentally:
 - Request (a) sought a list of contract amendments (FOI2018/06013);
 - Request (b) sought a list of titles and page lengths of documents governing a different MOD contract (FOI2018/06027);
 - Request (c) sought a list of programmes and work streams that are the responsibility of an internal MOD agency (FOI2018/06028); and
 - Request (d) sought information about budgets and milestones in a number of different MOD projects (FOI2018/06030).
18. Moreover, although the complainant accepted that requests (e) and (f) could conceivably be seen as seeking similar information, it could not be argued that they sought the same or similar information as that requested by requests (a) to (d). The complainant explained that it was his understanding that reports which he sought in requests (e) and (f) give advice on the strategic management of the nuclear submarine propulsion programme in the UK. He suggested that while some of the advice may have informed the way that the project covered by request (a) was initially tendered, it is inconceivable that strategic advice from a decade or more ago would have any bearing on the budget, spending or project milestones of the project in its current form, let alone on any subsequent amendments to the contract.
19. The complainant noted that FOIA specifically provides a provision, namely section 14(1) vexatious, that allows public authorities to refuse requests that would take up a disproportionate period of time and his requests clearly not fall within this category. In his view the MOD was misapplying section 12 to use it to aggregate his requests about information that is not actually related and use this as a basis to refuse his requests on cost grounds.

The Commissioner's position

20. The Commissioner acknowledges that the wording of both regulation 5(2) and section 12(4) of FOIA could potentially be interpreted to support the complainant's position. However, in the Commissioner's view the Information Tribunal cases highlighted by the MOD, as well as her own guidance lend considerable support to the interpretation of the legislation adopted by the MOD. In the Commissioner's opinion, focusing

too narrowly on the particular format or type of requested information would fail to take account the wording of regulation 5(2)(a) which states that requests can be aggregated if the requested information is related 'to any extent'.

21. Furthermore, as the Commissioner's guidance states:

'A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.'

22. In the Commissioner's view considering whether there is an overarching theme between requests meaning looking at the nature of the information being sought and/or whether there is a topical or thematic link. In the Commissioner's opinion there is an overarching theme or common thread running through the information sought by requests (a) to (f), namely that they all concern aspects of UK's Defence Nuclear Enterprise. The Commissioner also agrees with the MOD that there does appear to be some interdependences between some of the information sought in a number of the requests. Therefore, in the Commissioner's opinion the MOD is correct to argue that the requests labelled as (a) to (f) can be aggregated for the purposes of section 12(1) of FOIA.

23. This of course leads on to the question as to whether compliance with requests (a) to (f) would in fact exceed the appropriate cost limit and thus whether section 12(1) can be applied to these requests.

24. The appropriate limit is set out in the Fees Regulations at £600 for central government departments such as the MOD. 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.

25. 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.

26. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.²
27. In its initial response to the complainant of 31 May 2018 the MOD explained that it had determined that complying simply with part 3 of request FOI2018/06030 would take more than three and half days. In its response to the complainant of 29 June 2018 it elaborated on this position by explaining that it estimated that it would take the combined effort of seven people over 80 hours to locate, retrieve and extract the relevant data as the information is not held centrally.
28. In its response of 29 August 2018 the MOD explained that with regard to requests F012018/06011, 06012, 06014, 06027, 06028 and 06033 the retrieval activities required to process these requests did not of themselves, individually exceed the appropriate cost limit if they were submitted separately. However, collectively, allowing seven hours per request, the amount of effort involved in locating and retrieving the information involved would exceed the cost limit.
29. In the case of F012018/06013, which sought information about contract amendments made to the Core Production Capability Programme since it was initially approved, the MOD explained that all contract amendments would need to be located and extracted. It estimated that this would involve the scrutiny of some 2700 pages of contract information taking in the region of 225 hours effort (which equates to £5625) if you allow 5 minutes per page. The MOD argued that a similar sizable burden also existed in relation to processing request FOI2018/06030. This is because the request was complex, seeking the following information for each of five named projects (or programmes):
 - a. The current whole-life budget for the programme;
 - b. The whole-life budget for the programme at the time of its initial approval by the Infrastructure Audit Committee (or whichever senior committee initially approved spending on the programme);

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> - see paragraph 12

- c. A list of all the budget headings under the programme where spending is expected to be greater than £50,000 and the budget currently allocated under each heading; and
- d. A list of the names and dates of the key milestones (past and future) for each programme.

30. The MOD explained that the subject matter experts had advised that the estimated search costs for parts (a) and (b) might not be high but the searches involved in obtaining the corresponding whole-life budget information presents more of a challenge as the information would be held across different areas of each delivery team. Similarly, to locate, retrieve and extract a list of the names and dates of all the past and future key milestones across the whole life of each programme would exceed the cost limit as it was estimated this work alone would involve 35 hours of effort, and as previously indicated the total time taken to process this request was 80 hours.
31. As part of her investigation, the Commissioner asked the MOD to provide her with more detailed submissions to explain how these various estimates had been arrived at. In response, the MOD explained that given the total costs of complying with the aggregated requests was considered to far exceed the appropriate limit it did not make an individual estimate for the smaller requests, ie those identified at paragraph 27, beyond establishing that notionally it would take 7 hours to process each request.
32. However, it did undertake detailed estimates in respect of requests FOI2018/06013 and FOI2018/06030. These estimates were as follows:
33. For FOI2018/06013:

The Initial Gate BC was approved in September 2007 and the Main Gate BC was approved in April 2012. Major Project Review Summary Sheets indicate around five significant contracts placed since 2007 (3x IGBC; 2x MGBC). Assuming 10 amendments per year, with each amendment having 10 pages. To review and extract the relevant "overview" information takes five minutes per page, which gives sums of:

IGBC

3 contracts at 5 years duration (2007-2012) at 10 amendments per year = 150 amendments
150 amendments each with 10 pages = 1500 pages.
To review/extract each at 5 minutes per page = 7500 minutes
Which = 125 hours

Total at £25/hour = £3,125

MGBC

2 contracts at 6 years duration (2012-2018) at 10 amendments per year = 120 amendments

120 amendments each with 10 pages = 1200 pages.

To review/extract each at 5 minutes per page = 6000 minutes

Which = 100 hours

Total at £25/hour = £2,500

GRAND TOTAL (£3,125 + £2,500) = **£5,625**

34. For FOI2018/06030:

The MOD explained that it was important to note that the estimated cost did not include the following: Submarine Dismantling Project as the project is in the concept phase, the process to refine stakeholders' needs, explore feasible concepts, or to propose viable solutions. Also, the Nuclear Warhead Capability Sustainment Programme was not included in the calculations as the cost estimate had already exceeded the £600 limit.

Searching for and locating any information that was in scope: 10 hours (£250 cost)

Retrieving the information or documents identified in these areas: 35 hours (£875 cost)

Extracting the information from a document containing it: 35 hours (£875 cost)

Total costs £2,000

35. The Commissioner is satisfied that the estimates that the MOD has undertaken in respect of requests FOI2018/06013 and FOI2018/06030 are logical and realistic ones and therefore that complying with each of these two requests would on their own exceed the appropriate cost limit. In light of her decision in respect of the aggregation of the request the Commissioner is satisfied that the MOD can therefore rely on section 12(1) to refuse to comply with the aggregated cost of complying with requests (a) to (e).

Complaint (ii)

36. As explained above, the complainant is dissatisfied with the level of detail provided by the MOD to explain why it considers that to comply with his requests would exceed the appropriate costs limit.
37. In his email to the MOD of 14 June 2018 the complainant pointed towards the Commissioner's guidance which explained that when a public authority cites section 12(1) of FOIA it is useful to provide a requester with details of how it has calculated its estimate that compliance with the request(s) would exceed the appropriate cost limit. However, this part of the guidance notes that providing details of such calculations is not a statutory requirement.
38. The Commissioner's recognises that the MOD's internal review appears to have addressed this point as it notes that there is no statutory requirement to explain why a request would exceed the cost limit; rather a simple declaration that it does will be sufficient for the purposes of FOIA. In any event, the Commissioner notes that the MOD's internal review *does* contain some details about the basis of its calculations for estimating that complying with some of the requests would exceed the appropriate cost limit.
39. The Commissioner appreciates that in the complainant's opinion the details of these calculations are not sufficient to allow him to re-submit a refined version of request (d) and furthermore fail to meet the level of details described in the her guidance. However, as noted above a public authority is not under a statutory duty to provide such calculations, and whilst the Commissioner would consider it a matter of good practice to do so, the she cannot compel the MOD to provide the complainant further details of its calculations or searches in question beyond those already provided to him.
40. That said, section 16(1) of FOIA does place a duty on public authorities 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.
41. 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.'

42. The Commissioner has therefore considered whether, having cited section 12(1) of FOIA to refuse the requests, the MOD has provided the complainant with sufficient advice and assistance, as far as is reasonable, to enable him to submit a refined version of the request(s) that could be answered within the cost limit. Having done so, the Commissioner is satisfied that the MOD has complied with its advice and assistance obligations in this case. Its response of 31 May 2018 provided the complainant with an indicative schedule of how it envisaged his requests could be answered without section 12(1) being triggered and paragraphs 13 to 15 of the internal review response provided additional information, including some calculations, to explain how the MOD had arrived at this prospective schedule.

Right of appeal

43. 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

44. 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.
45. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF

Annex – list of requests submitted on 1 and 2 May 2018

FOI2018/06011

I would like to request the initial gate business case prepared for the Dreadnought submarine programme. I envisage that some of the details in the business case will be subject to exemptions, but I would imagine that much of it will be too general in nature to be exempted. I do not envisage that this request will require an excessive amount of staff time, but in the unlikely event that it does please get in touch and we can discuss how best to narrow the terms of my request.

FOI2018/06012

I would like to request the main gate business case prepared for the Dreadnought submarine programme. I envisage that some of the details in the business case will be subject to exemptions, but I would imagine that much of it will be too general in nature to be exempted. I do not envisage that this request will require an excessive amount of staff time, but in the unlikely event that it does please get in touch and we can discuss how best to narrow the terms of my request.

FOI2018/06013 - request (a)

I would like to request details of all the contract amendments made to the Core Production Capacity programme since it was initially approved. My preference is for a document which gives an overview of the amendments, rather than the text of the contract amendments themselves.

Without knowing your exact holdings it's hard to be more specific, but I would be happy to receive a briefing on the amendments including a list of them in bullet points. I imagine that this would minimise the work involved in satisfying this request and would also reduce the likelihood that information in the request is subject to exemptions.

FOI2018/06014 – request (e)

I would like to request a copy of 'Review of the aspects of availability of Royal Navy Nuclear Steam Raising Plant', also known as the The Burdekin report, dated January 2002.

FOI2018/06027 – request (b)

I would like to request a list of the titles and page length of the governing documents for the contract between the MoD and AWE Management Ltd for the operation of the Atomic Weapons Establishment, as well as a list of the key performance indicators used in the contract.

I do not envisage that this request will require an excessive amount of staff time, but in the unlikely event that it does please get in touch and we can discuss how best to narrow the terms of my request.

FOI2018/06028 - request (c)

I would like to request a list of the names of the different programmes for which the Submarine Delivery Agency is responsible, as well as the names of the different 'work streams' or other areas of work which the Agency is responsible for that do not qualify as separate programmes in their own right.

FOI2018/06030 – request (d)

For each of a) the Dreadnought submarine programme, b) the Core Production Capability programme, c) the Nuclear Warhead Capability Sustainment Programme, d) the Astute submarine programme and e) the Submarine Dismantling Project I would like to request the following information:

1. The current whole-life budget for the programme
2. The whole-life budget for the programme at the time of its initial approval by the Infrastructure Audit Committee (or whichever senior committee initially approved spending on the programme)
3. A list of all the budget headings under the programme where spending is expected to be greater than £50,000 and the budget currently allocated under each heading.
4. A list of the names and dates of the key milestones (past and future) for each programme.

Thank you very much for your time. I do not envisage that this request will require an excessive amount of staff time, but in the unlikely event that it does please get in touch and we can discuss how best to narrow the terms of my request.

FOI2018/06033 – request (f)

I would like to request a copy of the Nuclear Propulsion Capability Review. I imagine that some details of the document that might describe sensitive details of the reactor construction will need to be redacted for national security reasons, but I would have thought that most of the document would not fall into that category.

Reference: FS50770108



If you anticipate that this request would be unnecessarily burdensome, please get in touch and we can discuss how best to narrow the terms of my request.