

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2019

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking details of any secondary employment undertaken by the Heads of British diplomatic missions. The FCO refused to comply with the request on the basis of section 12(1) (cost limit) of FOIA. The Commissioner has concluded that the FCO is entitled to rely on section 12(1) of FOIA. However, it breached section 17(1) of FOIA by failing to issue its refusal notice within 20 working days.

Request and response

2. The complainant submitted the following request to the FCO on 22 November 2018:

'I would like to be provided with:

1. A list of heads of British diplomatic missions (i.e. Ambassadors and High Commissioners) with Secondary employment. The Diplomatic Service Code states that diplomatic staff "must obtain written approval" from their manager before taking up secondary employment.

2. I would like the information in an Excel or CSV file format, including:

- *The name of the ambassador or high commissioner*
- *Whether they have taken up secondary employment*

- *The organisation at which they work*
 - *Their role*
 - *When they joined*
 - *Any financial remuneration'*
3. The FCO responded on 7 January 2019 and explained that complying with the request would exceed the appropriate cost limit of £600 and therefore the request was being refused on the basis of section 12 of FOIA. The FCO suggested to the complainant that he may wish to refine his request to bring it within the appropriate limit, perhaps by reducing it to the Heads of Mission (HoMs) in a particular region.
 4. The complainant contacted the FCO on 8 January 2019 and asked it to conduct an internal review of this response.
 5. The FCO informed him of the outcome of the internal review on 11 February 2019. The internal review upheld the application of section 12 of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 12 February 2019 in order to complain about the FCO's handling of his request. He disputed the FCO's position that complying with his request would exceed the appropriate cost limit. He was also dissatisfied with the length of time it took the FCO to comply with the request and the time taken to complete the internal review.
7. FOIA does not contain a time limit within which public authorities have to complete internal reviews. Therefore, the Commissioner has commented on the FCO's handling of the internal review in the Other Matters section at the end of this notice. The decision notice itself therefore simply focuses on the FCO's reliance on section 12 of FOIA and whether it responded to the request in the time period specified by the legislation.

Reasons for decision

Section 12 – appropriate cost limit

Section 12(1) – Cost of compliance

8. Section 12(1) of FOIA states that:

'(1) 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.'

9. The appropriate 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 such as the FCO. 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.

10. 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.

11. 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'.¹

12. Section 12(1) is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> - see paragraph 12

under FOIA to consider whether, despite this being the case, there is a public interest in the disclosure of the information.

The complainant's position

13. The complainant explained that in submitting his request for an internal review he noted that it was FCO policy that diplomats must inform their line managers of second jobs or other work and that it was his understanding that the various HoMs report to the Heads of the FCO's directorates, of which there are eight. If this were the case, the complainant suggested that complying with the request would not exceed the cost limit as these eight individuals would hold the relevant information and thus it could be easily collated. The complainant noted that in its internal review response, the FCO explained that its refusal *'was based on our assessment of the time it would take to search the records of 178 members of staff. The 178 heads of diplomatic missions are not managed by only eight people. Many are managed by senior staff in London while some may be line managed by a more senior head of mission in the region.'*
14. The complainant argued that the FCO's position that there is no central record of the information he requested is wholly inadequate. He argued that there is currently no public oversight because a register of interests is not published. The complainant explained that if he was mistaken, and the FCO did in fact hold the information in a uniform fashion, then in his view a search of 178 records would not exceed the appropriate cost limit and section 12(1) of FOIA did not apply.
15. The complainant argued that there was no doubt that there is an extremely serious and legitimate public interest in the disclosure and publication of the requested information because the public have a serious and legitimate interest in knowing whether diplomats are conflicted in their duties, in order to hold them accountable. These individuals are the most senior British officials in their respective countries with clear conflict of interest opportunities. The complainant argued that it is surprising that details of second jobs and other work is not already published periodically. He noted that most, if not all, public bodies, including Parliament, councils and the Mayor of London's Office, regularly update officials' register of interests, which includes second jobs.

The FCO's position

16. In its submissions to the Commissioner the FCO confirmed that it did not maintain a central record of staff with secondary employment. It also confirmed that any FCO member of staff who seeks to undertake such employment must obtain written approval from their line manager to do

so. The FCO explained that approval is sought and given (or denied) on an individual basis, and the information concerned will thus be held by the individuals themselves in their personal records. The FCO explained that whilst such information might also be held by the line managers giving approval, it should be noted that, if approval is granted by their current line manager, the officer concerned does not have to ask for approval again if their line manager changes. Therefore, the FCO considered that the quickest (and perhaps only) way to locate, extract and collate the requested information would be to contact the individuals covered by the request.

17. The FCO explained that there were 178 individual HoMs, ie Ambassadors and High Commissioners, including Heads of Sovereign Posts and Ambassadors to International Organisations. It explained that the first step in complying with the request would require it to contact all HoMs and ask them to provide the requested information. The FCO suggested that each individual would then have had to search their personal records to locate the information and forward this to the FCO's FOI team for collation. On the basis of a time limit of 1440 minutes (ie 24 hours x 60) the FCO estimated that this gave approximately 8 minutes (1440/178) per individual to complete the above steps (ie finding, extracting and forwarding the information), including the time required centrally to collate it into a suitable format.
18. The FCO argued that whilst some individuals may be in a position to locate and provide the information within 8 minutes, it considered it very likely that others would have required considerably longer to do so. This was because any written permission to take secondary employment may have been given some time ago, and may potentially only be held in hard copy.
19. In support of this position the FCO suggested that even if as many as 90% (ie 160) of the individuals concerned were able to provide the information within 8 minutes (giving a running total of 1280 minutes), this would still require the remaining 18 individuals to respond within 8.9 minutes (1440 - 1280/18). Therefore, the FCO argued that even a very high percentage of quick responses would have been very unlikely to impact significantly on the overall outcome.
20. In addition, the FCO considered it very likely that unavoidable issues such as absence from post on leave or official duties would delay the ability of some individuals to act on the request - other staff at post would not have access to such information so would be unable to provide it in their stead. The FCO argued that such factors would further impact on its ability to comply with the request within the time limit.

21. In light of this response, the Commissioner contacted the FCO and explained that its suggested approach to fulfilling the request presumed that all 178 HoMs would have to search their personal records for relevant information. However, the Commissioner suggested presumably it was the case that at least some of these HoMs would not in fact have sought approval for secondary employment and furthermore that such individuals would know this is the case straight away. The Commissioner suggested that presumably then, such individuals would not have to conduct any searches of their own personal records for the purposes of this request. Rather, they could simply respond to the officer collating the requested information with a simple, 'no information held' response, a process would be likely to take less than 8 minutes. The Commissioner asked the FCO whether it had conducted a sample exercise in order to establish what percentage of the 178 HoMs are in fact likely to have sought permission for secondary employment or whether it had any prior knowledge or insight suggesting that it was likely that HoMs would have sought such permission.
22. In response, the FCO acknowledged that any HoMs who did not have secondary employment would simply be able to say that when replying. However, the FCO explained it would still need to contact them all, monitor their replies and collate the resulting information before responding to the request. With regard to conducting a sample exercise, the FCO explained that given that the information concerned is essentially personal to each individual, it did not consider that a sample exercise would give it a clear indication of the overall outcome. Furthermore, the FCO explained although staff who wish to undertake secondary employment need to obtain permission from their line manager before doing so, there is generally no requirement for them to ask for wider permission or share that information further. Therefore, any thoughts/assumptions the FCO's FOI team might have regarding the number of HoMs engaging in secondary employment would, by definition, be based purely on assumption.

The Commissioner's position

23. The Commissioner accepts the FCO does not have a central record of HoMs who have applied for permission to undertake secondary employment. Therefore, she accepts that the logical, and indeed perhaps only way, to collate the information falling within the scope of the request is to ask each of the HoMs to provide any relevant information and such information can then be collated by the FCO's FOI team.
24. As suggested above, the Commissioner has some reservations about the basis of the FCO's estimate of the time involved in undertaking this work. That is to say, that for the HoMs who have never sought

permission for secondary employment it would presumably be less time consuming for such individuals to reply to the FCO's FOI team. However, the Commissioner acknowledges that even taking this into account, some small amount of time would still be incurred by the HoM in question providing a 'nil response' and moreover some time would still be incurred by the officer tasked with contacting them and collating their response. The Commissioner would be prepared to accept in such straightforward cases it would be still be reasonable to factor in a time of 5 minutes in total for this work. Furthermore, the Commissioner acknowledges that the FCO's point that the records held by HoMs who have undertaken secondary employment may date from some time ago and could be held in hard copy only, thus adding to the time it would take such individuals to locate any relevant information. Moreover, the Commissioner considers it important to note that the request does not simply seek confirmation as to whether a particular HoM has sought permission for secondary employment. Rather it also sought the organisation at which they work, their role, when they joined and details of any financial remuneration. The Commissioner accepts that given the range of the information requested, both providing this on the part of any relevant HoMs and then collating it centrally, is going to add to the time required to fulfil the request. Taking all of the above into account, the Commissioner accepts that on average it is likely to take more than 8 minutes to collate any relevant information for each of the HoMs and therefore the FCO is entitled to rely on section 12(1) to refuse to comply with the request. This is on the basis that if it took 8 minutes for each of the 178 HoMs then the total time taken would be 1424 minutes, ie more than 24 hours.

25. The Commissioner appreciates that the complainant has argued that it is in the public interest for the FCO to disclose the information that he requested. However, as explained above section 12(1) is a not subject to the public interest test and therefore the complainant's arguments as to why there is a public interest in the disclosure of the requested information do not affect the Commissioner's conclusions regarding section 12(1).

Time limit for complying with the request

26. Section 17(1) of FOIA requires a public authority that is seeking to refuse to comply with a request to issue a requester with a refusal notice stating that this is the case within 20 working days.
27. In the circumstances of this case the FCO took 29 working days to issue its refusal notice. It therefore breached section 17(1) of FOIA.

Other matters

28. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the FCO took 24 working days to complete its internal review. The Commissioner does not consider there to be any exceptional circumstances and therefore she would have expected the FCO to complete the internal review more swiftly.

Right of appeal

29. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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
Wilmslow
Cheshire
SK9 5AF