

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 15 October 2019

Public Authority: Cabinet Office
Address: 70 Whitehall
London SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested correspondence between Tony Blair and the then Attorney General regarding Extraordinary Rendition. The Cabinet Office refused to comply with the request on the grounds that it would exceed the cost of compliance to do so (section 12). It failed to conduct an internal review despite the complainant requesting one.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 12(2) as its basis for refusing to comply with the request.
3. No steps are required.

Request and response

4. On 1 July 2018 the complainant requested information of the following description:

"I would like to request the following information under the Freedom of Information Act.

[preamble with contact details]

Please do treat any environmental information as a request for information under the Environmental Information Regulations.

Please note that I am only interested in information which was generated between 1 November 2002 and 1 November 2003.

Please do redact the names of any military staff, intelligence operatives, diplomatic representatives and prisoners from any documentation supplied.

Please note that I am only interested in correspondence and communication exchanged between the two named individuals.

Please note that I have confined my request to a particular timeframe to ensure it stays with the financial and cost constraints laid down by the Act.

If you are aware of the existence of similar correspondence and communications which fall outside the chosen timeframe please let me know and I will submit a new request for the appropriate timeframe.

1. During the aforementioned period did Tony Blair write to the then Attorney General about any of the issues listed below:

a. The policy of extraordinary rendition carried out by the US Government and her allies either as part of the ongoing war on terror or during and following military operations in Iraq and Afghanistan.

b. The extent to which the British Government, its diplomatic representatives, armed forces and security services have supported assisted, financed, observed or facilitated the aforementioned extraordinary rendition operations and the subsequent interrogations which followed.

c. The treatment, alleged torture, wellbeing, whereabouts and interrogation of any individuals who have been renditioned.

d. The use of British airbases and ports at home and overseas as part of extraordinary rendition operations.

2. If the answer to question one is yes can you please provide copies of this correspondence and communications including emails.

3. During the aforementioned period did The Attorney General reply to any of this correspondence and communication. If the answer is yes can you supply copies of this correspondence and communication including emails.

4. During the aforementioned period did Tony Blair and the then Attorney General discuss over the telephone any of the issues outlined in question one. If the answer is yes can you please provide any sound recordings of these conversations. Can you also provide a transcript of the relevant conversations as well as any written notes relating to the conversations.

[5] If you have subsequently destroyed documentation relevant to this request can you please provide the following details:

[a] In the case of each destroyed piece of correspondence and communication can you please identify the relevant correspondents, recipients and the date the correspondence and communication was generated.

[b] In the case of each destroyed piece of documentation can you please provide an outline of its contents.

[c] In the case of each destroyed piece of documentation can you please state when it was destroyed and why it was destroyed and on whose authority was it destroyed.

[d] If the destroyed document continues to be held in another form can you please provide copies of it."

5. For ease of future reference, the Commissioner has added additional numbering.
6. On 30 July 2018 the Cabinet Office responded. It refused to provide a response citing section 12 (cost of compliance) as its basis for doing so.
7. The complainant requested an internal review on 1 August 2018 and, having received no reply, chased this on 18 October 2018. He did not receive a letter from the Cabinet Office setting out the outcome of any internal review.

Scope of the case

8. The complainant contacted the Commissioner on 17 January 2019 to complain about the way his request for information had been handled. He complained about the Cabinet Office's refusal to provide to disclose the information and disputed its reliance on costs as a basis for not doing so. He also complained about the Cabinet Office's failure to conduct an internal review.
9. Having determined via correspondence which provision of section 12 the Cabinet Office was relying upon, the Commissioner has considered the Cabinet Office's reliance on section 12(2) as its basis for not complying with the request. Further comment about the Cabinet Office's failure to provide an internal review are set out in the Other Matters section of this Notice.

Reasons for decision

10. Section 12 FOIA states:

“(1) Section 1(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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.²”

11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004³ (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that the public authority may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.

12. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that a public 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, or a document containing it.

13. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. However, the Commissioner considers that such an estimate

¹ Two duties are set out in section 1(1) FOIA; subject to other provisions in the FOIA (such as in section 12), to confirm or deny whether requested information is held and, to disclose requested information.

² The full text of section 12 FOIA - <http://www.legislation.gov.uk/ukpga/2000/36/section/12>

³ <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

must be one that is sensible, realistic and supported by cogent evidence.⁴

The public authority's position

14. The public authority argued that confirming or denying whether any information is held within the scope of the requests, ie complying with its duty under section 1(1)(a) ,would exceed the appropriate limit.
15. In response to the Commissioner's detailed questions about this on a related case, it had argued that it would need to search at least 75 files in order to determine whether it held information within the scope of these requests. It also explained that the majority of the files had at least 500 pages. In that related case it said that :

"It will take approximately 2.5 hours to review each file (given the average file size above) and determine whether there is information in scope of the request. Given that there are at least 75 files, we estimate it will take a total of around 187.5 hours to complete the search."

16. The Commissioner asked it separately to explain why, in this case, it was, in its view, entitled to rely on section 12(2) as its basis for refusing to comply with this request. It explained that "The search process for [the related case] an almost identical process to that set out in our reply to [this case], including using very similar search terms, and found an even larger number of files that could potentially hold information in scope. [Its Knowledge Information Management Unit] have confirmed that in their view both cases (separately) would breach the appropriate cost limit - so therefore the position we set out in our response to [the related case] is also applicable to [this case]."

The complainant's position

17. The complainant was extremely sceptical that this information would be held across so many files and that it could not be readily located.
18. He also argued that there was a strong public interest in making this information available. The Commissioner explained to him that section 12 is not subject to a public interest test and that therefore such arguments, however compelling in general terms, are not relevant to her decision in this case.

The Commissioner's considerations

⁴ Following the approach set out by the Information Tribunal in *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/004)

19. By virtue of section 12(2) FOIA a public authority is not required to comply with the duty in section 1(1)(a) FOIA (ie – confirm or deny whether requested information is held) if to do so would exceed the appropriate limit.
20. Therefore, as set out in the Fees Regulations the Commissioner has considered whether the estimated cost of responding to the requests would exceed the appropriate limit.
21. The Cabinet Office explained: "...we would have to search records between 2002-2003 for several individuals and organisations using various correspondence terms and that we have no way of identifying which files might contain information relevant to their request without conducting a full search of each file, which could potentially refer to very many thousands of documents".
22. The Commissioner is satisfied that although the Cabinet Office has identified likely location of sources of requested information, it has provided a reasonable explanation as to how long it would take to go through the files in question in order to determine whether they actually contain the information described in the request. The Commissioner concludes that its calculations are reasonable and supported by cogent evidence. She has considered the arguments in this case separately to the arguments considered in the related case.
23. In light of the above, the Commissioner therefore finds that the public authority was entitled to rely on section 12(2) FOIA.

Section 16 FOIA

24. Section 16 FOIA states:

"(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."⁵

25. Further to the above provision, so far as it would be reasonable to expect it to do so, a public authority relying on section 12 FOIA is

⁵ <http://www.legislation.gov.uk/ukpga/2000/36/section/16>

expected to provide advice and assistance to an applicant in order to enable the applicant narrow the scope of their request so that the work involved in complying with the refined request does not exceed the appropriate limit.

26. The Cabinet Office explained:

"We advised that the request exceeded the cost limit because of the time period covered and variety of subjects [it then described the searches that would be necessary as set out above]. We advised limiting the scope of the search to a single topic or department and a much shorter time period."

27. Having read the correspondence between the parties, the Commissioner is satisfied that the Cabinet Office has discharged its duty to the complainant under section 16(1) FOIA. That said, it had a further opportunity to provide advice and assistance at internal review which it did not take. The Commissioner makes further comment on this in the "Other Matters" section of this Notice.

Other matters

28. It is not a requirement of FOIA to undertake an internal review upon request although it is a recommendation in the FOIA section 45 Code of Practice.

29. The Cabinet Office failed to conduct an internal review at all despite receiving both a request for internal review and a chaser of that request from the complainant. When challenged on this failure, the Cabinet Office admitted its error and argued staffing changes had given rise to administrative difficulties during this period. The Commissioner acknowledges that this may have been the reason but finds it is a wholly unsatisfactory excuse given the age of the legislation and the Cabinet Office's experience of handling FOIA requests.

30. The Commissioner has logged this failure and will take it (and any further failings that are noted during the investigation of FOIA section 50 complaints) into account when considering what additional regulatory action is required in order to improve the Cabinet Office's handling of FOIA requests.

Right of appeal

31. 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

32. 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.
33. 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

Elizabeth Hogan
Senior Case Officer
Information Commissioner's Office
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