

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2019

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information related to five named individuals. The Ministry of Defence ("the MOD") refused to comply with the request citing section 12(1) of the FOIA (cost of compliance exceeds appropriate limit).
2. The Commissioner's decision is that the MOD is not obliged to comply with the request in reliance of section 12(1) of the FOIA. The Commissioner also considers the MOD to have fulfilled its duty to provide advice and assistance further to section 16 of the FOIA.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 23 April 2019, the complainant wrote to the public authority and requested information in the following terms:

"I am interested in the treatment of 5 people who have issued a legal claim against you and the FCO, [names redacted]."

Request.

1. Provide all information held regarding torture or other forms of ill-treatment of

[names redacted]

a) at the time of their capture and while in British custody

b) by US forces

2. When is this case scheduled for trial?

3. If you have settled any claims provide full details including, damages, costs and consent Orders."

5. The public authority responded on 9 May 2019. It initially refused the request under section 12(2) of the FOIA because it considered that determining whether or not the requested information was held would likely exceed the "appropriate limit" for central government departments as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations)¹.
6. Following an internal review the MOD wrote to the complainant on 7 June 2019. The MOD stated that, *"as the claims relate specifically to the treatment of the named individuals, the Department is able to make a declaration under section 1(1)(a) of the Act without exceeding the cost limit"*.
7. The MOD went on to refuse the request under section 12(1) of the FOIA as it estimated that the cost of complying with the request would exceed the appropriate limit.

¹ <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

Scope of the case

8. The complainant contacted the Commissioner on 10 June 2019 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the public authority has correctly cited section 12(1) of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance

10. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
11. 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.
12. 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 (3.5 working days).
13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - 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.
14. 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 Information Commissioner & 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 The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

15. 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 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

16. It is the complainant's position that his request is specific enough to locate information without the MOD needing to apply section 12.
17. At internal review, the complainant argued that the MOD's cost estimate for complying with the request was excessive. In particular, the complainant rejected the MOD's argument that it would involve 377 man hours of effort to locate information within the scope of his request.

The MOD's position

18. In its internal review response the MOD noted that, to locate, retrieve and extract all of the information it held for each named individual in part 1 of the request would exceed the cost limit alone.
19. The MOD explained that the information relating to each of these individuals is held over a number of years:

"a. [name redacted]: the operation took place in 2004; legal proceedings started in 2010 until present.

b. [name redacted]: the operation took place in 2003; legal proceedings started in 2010.

c. [name redacted]: operation took place in 2008; legal proceedings started in 2010."

20. The MOD went on to state that the information it held on these claims contained varying types of content in several depositories. MOD staff would first have to locate this information and then go through thousands of electronic and paper documents in order to provide the complainant with all of the information falling within the scope of the request, especially concerning "*torture or other forms of ill-treatment*".

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

21. The MOD explained that as part of the internal review process a sample search had been carried out with one staff email account which identified 1213 emails that may hold information falling within the scope of the request. From a further sample of 50 emails from the same account found at least 34 with attachments which could potentially fall within the scope of the request. Staff would be required to review each file individually to assess whether it possessed content that fell within the scope of the request.
22. In addition to the above sample exercise, the MOD noted that information relating to the relevant cases is held across other storage areas, such as Team Sites and in their record management system. According to the MOD other business areas, such as the military units which conducted the operations, also hold information relevant to these cases and so locating all of the information it held within the scope of the request would require a cross-departmental search. The MOD did not include the cost estimate for searching these additional business units as it stated that the cost of compliance for one MOD business unit alone would exceed the cost limit.

The Commissioner's position

23. The Commissioner is satisfied that complying with the request would clearly take the MOD more than 24 hours. In reaching this conclusion she has taken into account the broad scope of the request. The request in this case seeks information which held over a number of years and is specific to claims brought by five named individuals. The broad subject of interest captured by the request which is the '*torture and other forms of ill-treatment*' of these individuals also makes the request broad in scope.
24. The Commissioner considers the MOD to have conducted relevant and logical searches to locate some of the information captured by the request. With regard to part 1 of the request, the MOD has demonstrated that fulfilling this part of the request alone would require a complex search for information held over a number of years in order to locate all of the information captured by this part of the request. The Commissioner considers it reasonable to suggest that claims of this complexity would require numerous members of staff to search thousands of emails and documents in order for all of the information specific to each case to be located.
25. With regard to the sample exercise conducted by the MOD within one email account, the Commissioner takes the view that this would likely have identified 1213 emails that may hold information within the scope of the request. The Commissioner considers it reasonable to suggest that, out of a sample of 50 emails from this search, at least 34 contain

attachments and that each of these would need to be reviewed to identify information relevant to the request in this instance.

26. Beyond the searches carried out by the MOD of one relevant staff email account, the Commissioner accepts that wider searches of team sites, internal record management systems, and other business areas of the MOD would need to be carried out in order to locate all of the information captured by the request in this case.
27. As previously stated, a public authority does not have to make a precise calculation of the costs of complying with a request in order for section 12(1) to be engaged. This does not mean, as the complainant suggests, that the MOD can “release all the emails” without locating all of the information it holds within the scope of the request. By illustrating the nature of the information it holds when matched with the broad scope of the request the Commissioner is satisfied that the MOD have correctly applied section 12(1) to the request.
28. For the reasons stated above, the Commissioner is satisfied that the MOD can refuse to comply with the request on the basis of section 12(1) of the FOIA.

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

Mr Phillip Angell
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