

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2020

**Public Authority:** HM Treasury  
**Address:** 1 Horse Guards Road  
London  
SW1A 2HQ

### Decision (including any steps ordered)

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1. The complainant has requested copies of correspondence with the Department for Work and Pensions ("DWP") about a specific subject over a defined period. Her Majesty's Treasury ("the Treasury") initially denied holding some of the information and refused the remainder of the request, citing section 12 of the FOIA (cost of compliance exceeds appropriate limit) as its reason for doing so. It subsequently revised its position and applied section 12 to the entirety of the request.
2. The Commissioner's decision is that the Treasury has reasonably estimated that the cost of complying with the request would exceed the appropriate limit. The Treasury was therefore entitled to rely on section 12 of the FOIA to refuse the request. However, it failed to inform the complainant, within 20 working days, that it was relying on section 12 to refuse both parts of his request and the Commissioner therefore finds that the Treasury breached section 17(5) of the FOIA.
3. The Commissioner does not require any further steps.

### Background

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4. The Guaranteed Minimum Pension ("GMP") was introduced as part of the Government's reforms to the state pension which began to take effect in 2016.
5. In 2012, as the part of the preparatory work on the reforms, the DWP identified that new legislation would be likely to be required to amend the existing laws around the way pension entitlements are adjusted to

take account of inflation (indexing) to minimise inconsistency between various different cohorts of pensioners.

6. As the responsibility for this policy area was shared between the DWP and the Treasury, an official within the DWP emailed Treasury colleagues in January 2012 to seek views on how best to proceed.
7. On 17 March 2019, the complainant contacted the Treasury to obtain information about how the issues around GMP indexation were first identified. On 12 April 2019, the Treasury responded and provided some information – including a copy of the email identified in paragraph 6.
8. Referring to that email, the complainant then submitted a further request on 13 April 2019 seeking:  
  
*"a copy of your reply and copies of any other correspondence between the Treasury and the DWP regarding the same subject."*
9. The Treasury responded to this request on 14 May 2019. It refused the request because it estimated that the cost of compliance would exceed the appropriate limit. It offered the complainant some advice and assistance so that he could refine his request.

## Request and response

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10. On 17 May 2019, the complainant wrote to the Treasury once again and requested information in the following terms<sup>1</sup>:

*"[1] The first thing I would like you to send me is your reply to the email you received from DWP dated 18 January 2012 and then*

*"[2] any other correspondence you have sent to DWP and received from the DWP in connection with the email of 18 January 2012 say up to 6 April 2014 if it is within the 600 pound limit or up to the 600 pound limit if it is before April 2014.*

*"If this is going to take more than 20 days can you please send me your reply to the email of 18 January 2012 from the DWP which I requested on 13 April 2019."*

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<sup>1</sup> The Commissioner has added numbers to break the request into its component parts and thus make the analysis below easier to understand.

11. The Treasury responded on 14 June 2019. It split the request into the two component parts identified above. It denied holding any information within the scope of element [1] of the request. It refused element [2] of the request and cited section 12 of the FOIA as its reason for doing so.
12. The complainant sought an internal review on the same day, as he was of the view that the Treasury should hold information within the scope of element [1] of the request.
13. Following an internal review the Treasury wrote to the complainant on 16 July 2019. It maintained its position in relation to both elements of the request although it provided some further commentary as to why it did not hold information within the scope of element [1].

### **Scope of the case**

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14. The complainant contacted the Commissioner on 14 October 2019 to complain about the way his request for information had been handled.
15. At the outset of her investigation, the Commissioner wrote to the complainant offering her preliminary view of his complaint. She noted that the time parameters of element [2] of the request were very broad and that the Treasury had provided reasonably credible explanations as to why it did not hold information within the scope of element [1].
16. The complainant contacted the Commissioner again on 6 December 2019. He advanced several arguments which, he believed, demonstrated why information within the scope of element [1] of his request would be likely to exist – and thus held by the Treasury. Whilst he did not dispute the Treasury's estimate of the cost of compliance, he argued that the Treasury had used section 12 as "an excuse" to refuse to provide information within the scope of element [1].
17. The Commissioner wrote separately to both parties on the same day. Based on the complainant's earlier correspondence, she considered that her investigation should focus on determining whether the Treasury held information within the scope of element [1] of the request and she set out a series of questions about the searches the Treasury had carried out to establish that it held no relevant information.
18. The complainant responded to the Commissioner's confirmation of the scope of the investigation to say that he was no longer willing to accept that section 12 would apply to element [2] and that he wished the Commissioner to widen her investigation to incorporate this element of the request.

19. Shortly before the Treasury was due to provide its response, to the Commissioner's letter of 6 December 2019, it sought a short extension. The Commissioner instead offered the Treasury a much longer extension, but now asked it to re-consider and justify its use of section 12 to refuse element [2] of the request – in addition to the information already sought in respect of element [1].
20. The Treasury provided its final submission on 29 January 2020. It now stated that it wished to consider the aggregate cost of responding to both elements of the request and relied on section 12 to refuse the request in its entirety.
21. Whilst the Commissioner does not consider this change of approach to be desirable (particularly given that the Treasury had previously addressed both elements separately), she notes that it is an established principle of the FOIA that a public authority can change its position in relation to a request both prior to, during and even after her investigation. Furthermore, she notes that both elements seek correspondence between the Treasury and the DWP during the same period. Finally, the Commissioner also considers that, in declining to restrict the scope of his complaint, the complainant has "left the door open" for the Treasury to treat his correspondence of 17 May 2019 as a single request.
22. The Commissioner has not considered the extent of the information which the Treasury holds in relation to element [1] of the request alone. Section 12 of the FOIA relieves a public authority of its duty to comply with a request. If section 12 applies, as the Treasury has aggregated both elements of the request, it is not required to issue separate confirmations (or denials) that information is held.
23. The Commissioner therefore considers that the scope of her investigation is to determine whether the Treasury is entitled to rely on section 12 of the FOIA in the way that it has done.

## **Reasons for decision**

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### Section 12 – Cost of Compliance Exceeds Appropriate Limit

24. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.*

25. Section 12 of the 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.*

*(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.*

26. The "Appropriate Limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") and is set at £600 for a public authority such as the Treasury. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 24 hours.

27. Regulation 5 of the Regulations allows a public authority to aggregate (ie. consider the combined cost of) requests where the requests are:

- Submitted by the same person and;
- Submitted within 60 working days of each other and;
- For the same or similar information

28. The two elements of the complainant's request were indisputably submitted by the same person and on the same day. The Commissioner considers that both elements of the request seek correspondence, between the Treasury and DWP, between 18 January 2012 and 6 April 2014, relating to GMP indexation. By submitting his request in the way that he has done, the complainant is essentially asking for a single batch of information, divided into two subsets. The Commissioner is therefore satisfied that both elements of the request seek similar information and the Treasury is therefore entitled to aggregate them.

29. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,

- (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
30. 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".<sup>2</sup> 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.
31. The complainant's original request sought information within defined time parameters "if it is within the 600 pound limit or up to the 600 pound limit if it is before April 2014." The Treasury informed him that it was interpreting his request as though that final clause had not been added. The Commissioner's guidance<sup>3</sup> on the matter states that a request defined by the cost limit will not be valid because it does "describe" the information sought. The Treasury attempted to be generous to the complainant by choosing the interpretation which made the request valid – rather than refusing the request outright as invalid. The Commissioner considers that this was a pragmatic way forward and that the complainant had an opportunity to submit a narrower request, if he so chose, to avoid falling foul of the cost limit.

*The complainant's position*

32. In correspondence with the Commissioner, the complainant commented on the Treasury's use of section 12 in the following terms:

*"What I was expecting to see was the reply to the DWP's email of January 2012 which should not be difficult to find or take a long time as all they have to do is put into the search terms is say GMP indexation name of the person who sent the email and DWP and who it was sent to which should not take much longer than a couple of hours, possibly milliseconds to find reply to the DWP email of*

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

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

*January 2012 and not over 24 hours as stated by the treasury. Possibly two to four hours at the most.*

*"They are just using excuses as there is something in the information they don't want me to see. If the Chief Secretary of the Treasury or Parliamentary Ombudsman had asked to see the reply to DWP email I am sure they would have found it within an hour. It is only because I am a member of the public they don't want me to see it they are making these excuses." [sic]*

#### *The Treasury's position*

33. The Treasury explained to the Commissioner that its previous searches for information falling within the scope of element [1] had been restricted to searching for emails with the same subject line. It argued that it was a reasonable assumption that a direct reply to the DWP's email would have used the same subject line.
34. Having had the opportunity to review matters, the Treasury conducted more detailed searches amongst the relevant team, using the requested date parameters and the search terms: "GMP" and "DWP"; "PSP" and "DWP"; "Single tier pension" and "DWP". These searches together had yielded a total of 1,979 documents.
35. Whilst the Treasury accepted that some of these documents would be duplicated across more than one search, it nevertheless argued that each set of search results would need to be checked individually to establish what was within scope.
36. Although the Treasury did not provide an exact figure of the cost of complying with the request, it noted that, taking an average of 2 minutes to review each of the documents identified above would exceed the cost limit.
37. Furthermore, the Treasury stressed that its results were only from the team who had been most closely responsible for this particular policy. Whilst this team was the one most closely identified with the police, in order to ensure that it had identified *all* relevant information it would need to search other departments – particularly the ministerial private offices – which might hold other relevant correspondence.

#### *The Commissioner's view*

38. Whilst a public authority is, as noted above, able to change its stance in relation to a request, it is still required to justify that stance to the Commissioner.

39. In the Commissioner's view, the Treasury was entitled to consider the request as a whole and, having done so, has reasonably estimated that the cost of compliance would exceed the appropriate limit of £600 (or 24 hours of staff time).
40. When a public authority receives a request for information, it must search for *all* the information it holds which falls within the scope of the request – not just that which it thinks might be most relevant. Whilst it is not always possible to be certain that no document might have been misfiled or mislabelled, the public authority must be able to demonstrate that it has conducted reasonable and thorough searches to identify all the information it holds.
41. The Commissioner accepts that the search terms which the Treasury used to identify potentially relevant information were ones which were wide enough to encompass all relevant information but narrow enough as to minimise the amount of irrelevant information identified.
42. The complainant's argument that a computer could do the job in "milliseconds" are misconceived. The identification of *potentially* relevant information can be done reasonably quickly via a keyword search. It is the *sifting* of that potentially relevant information which takes time.
43. The Commissioner accepts that the Treasury would have been required to review each piece of correspondence in order to determine what would or would not fall within the scope of the request (the complainant did not just ask for all correspondence between parties, he specified that it had to relate the email of 18 January 2012). The mere fact that an email contains the phrases "GMP" and "DWP" would not necessarily mean that it fell within the scope of the request (for example, the abbreviation "GMP" is also used to refer to Greater Manchester Police).
44. The Commissioner notes that, in order to review all 1,979 documents identified in the Treasury's initial search within the cost limit would require each document to be reviewed in under 45 seconds which she does not consider to be reasonable. Whilst the Commissioner accepts that some short emails would take considerably less than 45 seconds, larger documents would take longer to review.
45. Finally, the Commissioner also accepts that the ministerial private offices would need to be searched for relevant information. When the time taken to search those records is added to the time taken to search the documents already identified and the time that the Treasury would need to spend extracting and collating the relevant information for disclosure, the Commissioner is satisfied that the cost limit would be exceeded.



46. The Commissioner therefore finds that the Treasury was entitled to rely on section 12 of the FOIA to refuse the request.

#### *Section 16 – Advice and Assistance*

47. When refusing the complainant's request, the Treasury informed him that it may be able to process the request if he narrowed down the time parameters or was more specific about the type of information he was interested in.
48. Whilst the Commissioner considers that this advice and assistance was rather generic, in this particular case it would have been likely to aid the complainant in refining his request – had he wished to do so. She is therefore satisfied that the Treasury met its obligations to provide the complainant with advice and assistance.

#### Refusal Notice

49. Section 17(5) of the FOIA states that:

*"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."*

50. Whilst the Treasury informed the complainant within 20 working days that it was relying on section 12 to refuse element [2] of the request, it initially informed him that it did not hold information within the scope of element [1]. It subsequently changed its stance in relation to that element and relied on an exemption instead. The Commissioner therefore finds that the Treasury breached section 17(5) of the FOIA in dealing with this element of the request.

## Right of appeal

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51. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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 .....**

**Phillip Angell  
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