

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2020

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 FCO seeking communications between the Foreign and Commonwealth Office (FCO) in London and the British Embassy in Moscow about the consequences of the Salisbury poisonings. The FCO refused to comply with the request on the basis of section 12(1) of FOIA. The Commissioner is satisfied that the FCO is entitled to rely on section 12(1) to refuse to comply with this request.
2. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant submitted the following request to the FCO on 13 March 2018:

'Please provide a copy of all communications between the Foreign and Commonwealth Office in London and the British Embassy in Moscow concerning the Salisbury poisonings from March 1st 2018 to March 13th 2018.'

4. The FCO contacted the complainant on 11 May 2018 and confirmed that it held information falling within the scope of the request but it considered this information to be exempt from disclosure on the basis of section 27 (international relations) of FOIA and needed additional time to consider the balance of the public interest test.

5. The FCO continued to send the complainant further public interest extension letters until it provided him with a substantive response on 17 January 2019. It explained that complying with the request would exceed the appropriate cost limit and therefore it was refusing to comply with the request on the basis of section 12 of FOIA. The FCO provided the complainant with a number of suggestions as to how his request could be refined.

6. In response, the complainant submitted the following refined request to the FCO on 17 January 2019:

'Thanks for this, I am happy to limit my request to communications concerning the consequences of the Salisbury poisonings, and to limit my request to the period 4th-8th March, and limit my request to email correspondence and attachments.'

7. The FCO contacted the complainant on 15 March 2019 and explained that his refined request would still exceed the cost limit and therefore this was also being refused on the basis of section 12(1) of FOIA. The FCO set out again a number of suggestions as to how his request could be further refined.

8. The complainant contacted the FCO on 29 March 2019 in the following terms:

'Thanks very much for this response. Please could you disclose your cost calculation and your methodology for calculating it? This will allow me to determine the best search method for a new request to bring my request within cost.'

9. The FCO responded on 25 July 2019 as follows:

'On consideration we believed the question to be neither a further Freedom of Information Act request, nor a request for an Internal Review of the response provided by 0073-19. It has therefore been dealt with as a general enquiry and outside of the Freedom of Information Act.'

In order to identify and locate the documents you are seeking to obtain the Foreign and Commonwealth office undertook a search of its IT system using key words and dates as set out in your Freedom of Information Act request. This search produced in excess of 11,000 items. We estimate that it takes an average of 3 minutes to search for, retrieve, read each item of information to review if it is within scope of a request. Following this criteria, the need to examine more than 480 emails that might be within scope (as in this case) would exceed the appropriate limit.'

Scope of the case

10. The complainant contacted the Commissioner on 29 July 2019 in order to complain about the way his request of 17 January 2019 had been handled.
11. The complainant explained to the Commissioner that he did not accept the FCO's position that complying with his refined request would exceed the appropriate cost limit. He argued that the FCO had not conducted a reasonable search or considered filtering material by keywords that would allow an assessment of relevant material without breaching the cost limit.
12. Furthermore, the complainant argued that the FCO should have treated his email of 29 March 2019 as a formal request for advice and assistance and should have provided a response more quickly than it did. He has also argued that he expected the FCO to provide a more detailed calculation than it did.

Reasons for decision

Section 12(1) – Cost of compliance

13. 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.'
14. 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.
15. 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.

16. 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

The FCO's position

17. As set out above, when the FCO contacted the complainant on 25 July 2019 it explained how it had estimated that the cost of compliance would exceed the appropriate cost limit, namely:

'In order to identify and locate the documents you are seeking to obtain the Foreign and Commonwealth office undertook a search of its IT system using key words and dates as set out in your Freedom of Information Act request. This search produced in excess of 11,000 items. We estimate that it takes an average of 3 minutes to search for, retrieve, read each item of information to review if it is within scope of a request. Following this criteria, the need to examine more than 480 emails that might be within scope (as in this case) would exceed the appropriate limit.'

18. As part of its submissions to the Commissioner, the FCO explained that it did not in fact undertake a restricted preliminary search using keywords or dates as specified in its response to the complainant of 25 July 2019. Instead the FCO explained that in reaching the decision to refuse this request it had actually based its estimate on the assumption that approximately 60 members of staff across the FCO in London and a further 60 members of staff in the British Embassy in Moscow (BE Moscow) were working on the response to the Salisbury poisonings. It was estimated that these members of staff sent approximately 20 emails per day, resulting in 2,400 emails per day and a total of 12,000 for the five day period of 4 to 8 March 2018. The final figure of 11,000 communicated to the complainant was chosen because it was halfway between the calculation of 12,000 and a rounded down figure of 10,000. This estimation included emails from all FCO departments and all communications, including those on higher tiers. The FCO offered its apologies for this confusion.

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

19. The FCO has explained to the Commissioner that in order to correct this error, it had now carried out an assessment of communications between the FCO and the BE Moscow between 4 and 8 March 2018. The FCO explained that due to the absence of a dedicated database of all FCO communications it asked four members of staff based in London, working in the Russia Unit, to search for communications on all relevant FCO IT systems between the specified dates using the keyword 'Salisbury.' The FCO explained that without a clearer definition in the request of the specific 'consequences' of the Salisbury poisonings it could not use any further keywords as part of its search. The result was a total of 374 emails, averaging 93 per person over the five day period covered by the request.
20. The FCO then estimated that there had been 25 members of staff in London and a further 15 staff in the BE Moscow were working on the Salisbury crisis at the time. The FCO explained that this estimate of the number of staff was based on discussions with colleagues working on the crisis at the time and informed by the number of staff working on a recent crisis to which the FCO responded. Therefore, the FCO estimated that 3,720 emails would potentially fall within the scope of the request (ie 93 average number of emails per individual x 40 individuals).
21. To calculate the amount of time it would take to assess these emails the FCO explained that it used the standard of three minutes per email to allow for a manual check that each email was (1) relevant to the request (i.e. that they referred to the 'consequences' of the Salisbury poisonings) and (2) it was between the FCO and a member of staff in BE Moscow. In the absence of a comprehensive list of staff working on the crisis at the time, the FCO explained that it relied on asking colleagues to confirm who (if anyone) on each email copy list was working in BE Moscow at the time. The FCO explained that carrying out these checks for the full 3,720 results, at three minutes per email, would have taken at least 186 hours, or 7.75 days, which is over the 24 hours, specified by FOIA.
22. In order to justify its approach to calculating this estimate, the FCO explained that it did not have a central database of communications between staff, nor did it keep a record of every single staff member involved in the response to a crisis. The FCO suggested that it would have been extremely time consuming and disproportionate, therefore, to attempt to identify and contact the many members of staff and ask them to carry out a search of their personal email accounts and folders for relevant communications. The FCO explained that to give an idea of how it handled other FOI requests relating to Russia, requestors usually ask for information on a specific issue which it can then use to task current staff in the Russia Unit to search their personal and shared email accounts and files for relevant information. However, it explained that in the circumstances of this request, the breadth of the request – covering

all communications on (unspecified) consequences between the entire FCO department and the BE Moscow – meant a call for information would have had to have been sent much wider than just the Russia Unit.

23. The FCO re-iterated its position that as set out in its response of 15 March 2019, that in order to refine his request so that it could potentially be answered within the cost limit, the complainant should consider refining this by specifying which consequence of the Salisbury event he would like to know if it held information on; which could be based on a country, location or event, along with a specific day and time frame to enable it to identify more specific search terms.

The complainant's position

24. The complainant argued that it seemed unlikely that complying with this request would breach the cost limit given the small time period covered by the request. Furthermore, he suggested that the FCO had not conducted a reasonable search or considered filtering the material by keyword in order to reduce the amount of information that needed assessing to determine whether it was in the scope of the request.

The Commissioner's position

25. The Commissioner accepts that in terms of the FCO's approach to determining an estimate on which to cite section 12 of FOIA, there were clearly some errors in how the it undertook this process. However, based upon the work that the FCO has now done, the Commissioner is persuaded that section 12 of FOIA applies to this request. Given that the FCO does not hold a record of staff involved in the crisis, she accepts that it would not, for the purposes of determining the cost of compliance, be practical to attempt to identify from the outset all relevant members of staff and then get them to conduct searches. Rather, the Commissioner is satisfied that the alternative approach taken by the FCO, namely to get four members of staff from the Russia Unit in the FCO to identify the number of emails they hold which are potentially relevant, is a reasonable one. Furthermore, she accepts that the FCO's estimate of the number of people likely to be involved in the dealing with this issue, ie 40, appears to be a reasonable one given the severity of the incident. The Commissioner also notes that this figure was based upon discussions with staff. On this basis, the Commissioner accepts that the FCO's estimate that there are 3,720 emails potentially in the scope of the request is a reasonable one.
26. Moreover, given that the request is limited to the consequences of the Salisbury poisoning, the Commissioner does not think that there is a clear way in which these emails could be easily or obviously filtered in order to only identify those concerning the 'consequences' of the poisoning, as opposed to broader issues relating to the

poisoning. Furthermore, the Commissioner does not accept that it could be argued that all of these estimated 3,720 emails would fall within the scope of the request; they could relate to the Salisbury poisoning but not the consequences it. Therefore, the Commissioner accepts that it is necessary to manually check each email to establish whether it is in scope. The Commissioner notes that the FCO's estimate of 3 minutes per email is based on its previous approach to similar requests which in her view gives this estimate some validity. In any event, even if this was considered to be an overly generous estimate and it took, for example, only 1 minute to assess each email, the cost limit would still be significantly exceeded; 3,720 minutes equals 62 hours, a figure still some way over the appropriate limit for the FCO of 24 hours.

27. On this basis the Commissioner has concluded that the FCO is entitled to refuse to comply with the request on the basis of section 12(1) of FOIA.

The complainant's email of 29 March 2019

28. As explained above, the complainant has argued that the FCO should have treated his email of 29 March 2019 as a formal request for advice and assistance and should have provided a response more quickly than it did. He also argued that he expected the FCO to provide a more detailed calculation than it did.
29. As noted in its response of 25 July 2019 the FCO explained that it did not consider the complainant's email to be a further information request nor a request for an internal review of its response to his request. Rather, it was treated as a general enquiry. With regard to the delay in providing a response, the FCO explained to the Commissioner that since it considered this question to be a general enquiry it was placed lower down the priority list. The FCO explained that this was exacerbated by a number of staff changes at the time that increased the processing period for all enquires. However, the FCO offered its apologies during the course of the Commissioner's investigation for not having responded sooner.
30. As the complainant suggested, he considered this to be a formal request seeking advice and assistance under FOIA. The Commissioner considers this to be a reasonable interpretation of this email given that section 16(1) of FOIA places an obligation on public authorities to provide advice and assistance to individuals who have made requests for information, and propose to make requests for information. It is clear from the wording of the complainant's emails that he was seeking assistance on how to frame a further request. Whilst there is no specific timeframe within the legislation for providing this assistance the Commissioner would have expected the FCO to respond to the complainant's email more swiftly than it did.

31. Furthermore, the Commissioner considers it concerning that the information provided to the complainant by the FCO in its response of 25 July 2019 was inaccurate. She would like to take this opportunity to remind the FCO that any decision to initially refuse a request on the basis of section 12 should be on the basis of reasonable grounds and moreover that any explanation of the rationale to support such a decision provided to the requester must be accurate.

Right of appeal

32. 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

33. 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.
34. 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

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