

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 January 2021

**Public Authority:** Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

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1. The complainant requested all documents and emails regarding the 63<sup>rd</sup> Session of the UN's Commission on Narcotic Drugs. The Home Office initially refused to provide the requested information citing section 35(1)(a) of the FOIA (the formulation or development of government policy). It subsequently revised its position and cited section 12(1) of the FOIA (cost of compliance) to refuse to deal with the request.
2. The Commissioner's decision is that the Home Office was not entitled to rely on section 12(1) to refuse to comply with the request. The Commissioner also finds that the Home Office breached section 10(1) of the FOIA by failing to respond to the request within 20 working days.
3. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:
  - Issue a fresh response to the request which does not rely on section 12 of the FOIA.
4. The Home Office must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 2 March 2020, the complainant wrote to the Home Office and requested information in the following terms:

*"I would like to make a freedom of information request for all HO documents and emails in regards to the 63rd Session of the UN's Commission on Narcotic Drugs (UN-CND).*

*I would like this to include all emails and documents that have either of these people involved:*

*Theresa May, Savid Javid, Priti Patel, Victoria Atkins, any ministers who were to be present at the now delayed meeting to discuss the World Health Organisations recommendation for the global classification of cannabis and any emails between civil servants that touch on this topic.*

*Can you please provide this in electronic copies and to this email address."*

6. The Home Office responded on 15 April 2020. It refused to provide the requested information on the basis that it was exempt under section 35(1)(a) of the FOIA (the formulation or development of government policy).
7. On 9 May 2020 the complainant wrote to the Home Office to request an internal review.
8. The Home Office wrote to the complainant on 30 June 2020 and stated that it was not satisfied that it was able to identify all relevant information within the scope of the request. The Home Office revised its position and confirmed that it was now refusing the request under section 12 of the FOIA (cost of compliance).

## Scope of the case

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9. The complainant initially contacted the Commissioner on 11 June 2020 as he had not received a response to his request for an internal review. He contacted the Commissioner again on 1 July 2020, following receipt of the internal review response, to complain about the Home Office's decision to refuse his request under section 12 of the FOIA.
10. The scope of this case and the following analysis is to consider whether the Home Office has correctly cited section 12(1) of the FOIA in response to this request.

11. This notice will also look at the Home Office's procedural handling of the request.

## Reasons for decision

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### Section 12 – Cost of compliance

12. 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.
13. 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 public authorities such as the Home Office.
14. 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 for the public authority.
15. 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.
16. A public authority does not have to make a precise calculation of the cost 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".
17. The Commissioner considers a sensible and realistic estimate to be one which takes into account the specific circumstances of the case. She advised the Home Office that it was useful for a public authority to set out how it had calculated its estimate by explaining:

- Its search strategy, for example:
    - whether it has carried out any searches for the requested information;
    - whether it has based its estimate on a random or representative sampling exercise;
    - which departments or members of staff have been contacted;
    - the search terms used when querying electronic records;
  - why it needs to search for the files/records it has referred to;
  - how many files, documents, records or emails need to be reviewed; and
  - how long it would take to determine whether the requested information is held or to locate, retrieve or extract it. For example, it is useful to detail the size of the relevant files; the average length of time it would take to review each file and the number of staff required.
18. The Commissioner asked the Home Office to provide a detailed estimate of the time/cost it would take to provide the information falling within the scope of the request. When providing these calculations she asked it to include a description of the nature of the type of work that would need to be undertaken in order to determine this estimate. She also asked the Home Office to provide details of any sampling exercise it had undertaken.
19. The Commissioner explained the importance of providing a detailed and well-reasoned response, saying:

*"In providing this estimate please be aware that a number of Information Tribunals have made it clear that an estimate for the purposes of section 12 has to be 'reasonable' which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence."*

### **The Home Office's view**

20. The Home Office argued that the scope of the request was very broad. It explained that when it had initially considered and responded to the request, it had not taken into account all of the information that was held that fell within the scope of the request.

21. When initially considering the request, the Home Office carried out a search which identified information within the scope of the request. The search was carried out by a staff member who was responsible for coordinating the Home Office engagement in the 63<sup>rd</sup> Session of the UN's Commission on Narcotic Drugs (the UNCND). This involved a search of the individual's email inbox and documents. The Home Office stated that the search produced approximately 170 emails and documents containing relevant information. However, no other staff members were asked to search their email inboxes or documents and no search of official records was undertaken. The terms used for the initial search were: "63rd Session of the UN's Commission on Narcotic Drugs", "global classification of cannabis", "CND63", "World Health Organisation" and "WHO cannabis recommendations".
22. During its internal review, the Home Office found that the initial search that had been undertaken was insufficient and had not identified all of the information it held which fell within the scope of the request. The Home Office therefore determined that a further search was required. The Home Office argued that this would require significantly more work than the original search and that it would exceed the cost limit.
23. With regard to the additional search which was required the Home Office stated:

*"To search for, and collate any information falling within scope of the request would involve a search of approximately 25 email accounts, this includes individuals who work in the relevant drug policy team, Home Office legal advisers, and individuals in Home Office Science. If each account were to contain 50 emails that could be relevant, we estimate it would take two minutes per email or document to review, locate and extract any information within scope. This means it would take 41 hours to complete the search. This is a conservative estimate, a sample exercise took 120 minutes to review approximately 40 emails and documents, as many had a substantive number of attachments.*

*An additional difficulty in responding to this request is that there was no time period specified for the information requested, this makes it difficult to give a definitive answer on the number of people that may hold the information as the WHO announced that they would be doing the review several years prior to the date of the request."*
24. The Home Office also advised the Commissioner that the complainant had submitted a revised request for information which it was able to consider within the appropriate limit.

### **The Commissioner's view**

25. 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.
26. The Commissioner was disappointed at the quality and detail of the Home Office's submissions in this case. The Commissioner considers that the level of information required to justify a public authority's reliance on section 12(1) is well established. The Commissioner has issued detailed guidance on section 12<sup>1</sup> and there are currently more than 600 decision notices setting out the Commissioner's position on section 12 on her website<sup>2</sup>.
27. The Home Office explained that in order to retrieve and locate the requested information it would need to search the email accounts of approximately 25 members of staff. It said that this included individuals who work in the relevant drug policy team, Home Office legal advisers, and individuals in Home Office Science.
28. It is not clear to the Commissioner how involved each of these individuals were with the 63<sup>rd</sup> session of the UNCND and therefore how many relevant emails were likely to be held in their accounts. However, the Home Office appears to have based its cost estimate on the assumption that each of the 25 email accounts would have retrieved 50 potentially relevant emails, as it stated "*if each account were to contain 50 emails that could be relevant [...] it would take 41 hours to complete the search*". The Commissioner notes that this amounts to a total of 1250 emails which the Home Office estimated potentially fell within the scope of the request. As no further details were provided regarding how the Home Office reached the figure of 50 emails per account, it is difficult for the Commissioner to understand how reasonable this is.
29. The Home Office estimated that it would take two minutes per email or document to review, locate and extract any information in scope. It argued that this was a conservative estimate as it took, on average, three minutes to review each email in a sampling exercise it undertook.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)

<sup>2</sup> <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query=&f.By+section|sectionOfLegislation=FOI%2012>

The Home Office stated that this was due to many of the emails having a substantive number of attachments.

30. The Commissioner considers it would have been helpful for the Home Office to have provided her with further details about its sampling exercise. For example, it could have told her which email account(s) were used for the exercise, how many emails had attachments, a description of the type of files that were attached and the average size and number of attachments there were.
31. Furthermore, it would have been useful for the Home Office to explain whether correspondence regarding the 63<sup>rd</sup> session of the UNCND was likely to be held amongst other correspondence which was not in the scope of the request. This would indicate whether or not it was likely to take a longer amount of time to review the emails and documents to locate and extract information.
32. The Commissioner is not convinced that the two minute time cited for each email is reasonable under the circumstances of the case. The Commissioner considers that a member of staff who is familiar with this subject matter would be able to easily identify whether or not an email fell within the scope of the request. Other than stating that there were a substantive number of attachments, the Home Office has not provided any evidence that demonstrates why this task would be particularly onerous.
33. The Commissioner has considered how the estimate would be affected if it took one minute to review each email to locate and extract any information within the scope of the request. In applying this to the 1250 emails the Home Office estimated were potentially in scope the Commissioner found that came to a total of 20 hours and 50 minutes, which is within the appropriate limit of 24 hours that applies to the Home Office.
34. The Commissioner recognises that the request in this case was quite broad, as it asked for all emails and documents on the matter. However, the refined request which the Home Office stated that the complainant had subsequently submitted was also broad in the way it was framed. Specifically, it asked for the following information:

*"I would like to make a freedom of information request for all HO documents and emails in regards to the HO's intentions towards the 63rd Session of the UN's Commission on Narcotic Drugs (UN-CND).*

*I would like this to include all emails from Theresa May, Victoria Atkins and any ministers who were to be present at, or contributed to the that policy for the delayed meeting to discuss the World*

*Health Organisations recommendation from 2018 for the global re-classification of cannabis."*

35. The Commissioner's view is that the first paragraph of the complainant's refined request is almost identical to the first paragraph of the request being considered in this case, as it also asked for all documents and emails relating to the 63<sup>rd</sup> session of the UNCND. The Commissioner understands that the Home Office was able to respond to the revised request within the cost limits. It is therefore unclear how the Home Office was able to respond to the revised request, but considers that responding to the request in question would exceed the appropriate limit by over 16 hours.
36. Taking all of the above into account, the Commissioner is not satisfied that she has been provided with cogent evidence to support the Home Office's costs estimate. As a result, the Commissioner is not persuaded that the cost estimate made by the Home Office was reasonable.
37. The Commissioner's decision is therefore that the Home Office was not entitled to rely on section 12(1) of the FOIA to refuse to comply with the request. The Home Office is now required to issue a fresh response to this request at paragraph three above.

## **Section 10 – Time for compliance**

38. 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."*

39. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt."*
40. From the evidence provided to the Commissioner in this case, it is clear that the Home Office did not deal with the request for information in accordance with the statutory time limits. She therefore finds that it breached section 10(1) of the FOIA.



## Right of appeal

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41. 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)

42. 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.
43. 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** .....

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**