

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2021

Public Authority: Home Office

Address: 2 Marsham Street
London SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information from the Home Office relating to the e-mail inboxes of four specified individuals. The Home Office refused to disclose the requested information, citing section 12(1) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Home Office has correctly applied section 12(1) of the FOIA to the requested information.
3. The Commissioner however finds the public authority in breach of section 16(1) FOIA (duty to advise and assist applicants).
4. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:-
 - the Home Office should consider whether it can comply with a narrower version of the request e.g. searching the inbox of one of the individuals for e-mails encompassing a shorter time period and attempting to filter out standard terms which would be included in emails such as press briefings. It should discuss this with the complainant further to its duty under section 16(1) of the FOIA.
5. The public authority must take these steps 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.

Background to request

6. "ETS/TOEIC" refers to the widespread cheating in tests used by migrants to prove their English language ability for the purpose of making immigration applications to the Home Office. In February 2014, BBC Panorama uncovered evidence of organised cheating in English language centres operating the Test of English for International Communication (TOEIC) on behalf of ETS (Educational Testing Service). The Home Office undertook a series of actions following the findings of the BBC Panorama programme.

7. On 10 June 2019 the complainant made the following request for information under the FOIA:-

"1. Notes of discussions and/or emails, including any attachments, recording Home Office requests made to ETS Global B.V and/or ETS in America to take steps to identify fraudulent/invalid/questionable Teaching of English for International Communication (TOEIC) tests taken in the UK between 2011-2014.

2. Notes of discussions and/or emails, including any attachments, between the Home Office and ETS Global B.V and/or ETS in America concerning and/or mentioning the BBC, BBC Panorama, and/or the Panorama investigation and/or the film 'Immigration Undercover: The Student Visa Scandal'.

3. Notes of discussions and/or emails, including any attachments, concerning the results of ETS' voice recognition analysis of the spoken English element of TOEIC tests taken in the UK between 2011-2014.

To limit this FOI request, please search for relevant material from 1st January 2014 to 31st December 2014 paying particular attention to communications between the relevant civil servants dealing with ETS and the then Home Secretary's Special Advisers Nick Timothy and Fiona Cunningham/Hill."

8. On 23 July 2019 the Home Office replied to the complainant confirming that it held the requested information but saying disclosure would exceed the £600 cost limit.

9. On 6 August 2019 the complainant submitted a refined request for:-
“1. All references in emails and attachments to ETS between 2011-2014. A simple email search using the search term ETS will produce a list of emails to disclose to me under the Freedom of Information Act.
2. All references to the BBC and/or Panorama in emails to/from former Home Office Special Advisors Fiona Cunningham/Hill and Nick Timothy between 2011-2014.”
10. On 13 November 2019 the Home Office responded stating that responding to the refined request would still exceed the cost limit. The complainant wrote again to the Home Office on 21 November 2019 narrowing the request again to the request which is the subject of this decision notice.
11. On 20 December 2019 the Home Office responded stating that it considered that the exemption as set out in section 31(1)(e) of the FOIA was applicable and that it needed further time to consider the public interest in disclosure balanced against that in maintaining the exemption. Following the Commissioner’s intervention by way of a decision notice, the Home Office then responded to the complainant on 21 September 2020, stating that responding to the complainant’s latest request would exceed the cost limit as set out in section 12(1) of the FOIA. It withdrew its reliance upon section 31(1)(e) of the FOIA.

Request and response

12. On 21 November 2019, the complainant wrote to the Home Office and requested information in the following terms:

“Under the Freedom of Information Act, I am requesting that you search the following four Home Office email accounts: Rebecca Collings, Peter Millington, Fiona Cunningham/Hill, Nick Timothy NEW, FURTHER SIMPLIFIED FOI REQUEST

1. All references in emails and attachments to/from ETS between 1/1/2014 and 1/1/2015 in the email accounts of Rebecca Collings and/or Peter Millington and/or Fiona Cunningham/Hill and/or Nick Timothy.
2. All references to the BBC and/or Panorama in emails to/from former Home Office Special Advisors Fiona Cunningham/Hill and Nick Timothy between 1/10/2013 and 1/1/2015.”

13. The Home Office responded on 21 September 2020. It stated that compliance with the request as it stood would go over the cost limit as set out in the FOIA at section 12(1). The Home Office offered the complainant the opportunity to narrow or refine his request.
14. The complainant sought an internal review of the Home Office's handling of his request on 22 September 2020. The result of that internal review was provided to him on 4 November 2020. The reviewer upheld the original decision.

Scope of the case

15. The complainant contacted the Commissioner on 4 November 2020 to complain about the way his request for information had been handled.
16. The request is in two parts. Part 2 of the request does not expressly refer to ETS/TOEIC. However, due to the history of the requests submitted by the complainant as outlined in paragraphs 6-11 above the Home Office interpreted part 2 of the current request as information in emails referring to BBC and/or Panorama to/from Fiona Cunningham/Hill and Nick Timothy related to the ETS/TOEIC.
17. The Commissioner has considered the Home Office's handling of the request.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

18. Section 12(1) of the FOIA states that: "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."
19. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 20041 ("the Regulations") sets the appropriate limit at £600 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 24 hours work in accordance with the appropriate limit set out above.

20. A public authority is only required to provide a reasonable estimate, rather than a precise calculation, of the cost of complying with the request, and in putting together its estimate it can take the following processes into consideration:
- 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.
21. The Home Office informed the Commissioner that, in responding to the complainant's request, in particular in relation to staff resourcing implications, it was of relevance that all four individuals had left the Home Office prior to receipt of the request of 21 November 2019. As a result, the relevant mailboxes had not been in active use and were thus not readily accessible for the purposes of complying with this request. As is the usual practice, the data constituting their mailboxes had been saved in off-site data storage, which necessitated retrieval by the IT department.
22. In order to gauge costs, a sampling exercise was undertaken, focusing on part 2 of the request. The IT department was asked to retrieve information from the mailbox of Fiona Cunningham using two keywords 'BBC' and 'Panorama' in two separate searches. These keywords were chosen as the request specifically asked for 'All references to the BBC and/or Panorama in emails...' The relevant date range criteria specified by the complainant in his request was also applied. The Home Office informed the Commissioner that the process to carry out the searches took relevant IT staff approximately 40 minutes.
23. The Home Office further stated that two separate search results were made available to an official as separate 'data files' which were not immediately accessible to a human reader. An official spent approximately 20 minutes uploading the data files, each in turn separately, to their Outlook mailbox where they became accessible. At this point, 2,158 emails were identified to have been generated as a result of the searches, the breakdown of which was provided to the Commissioner in an annex to the Home Office's correspondence.
24. The Home Office went on to state that not all of the emails identified by the search would necessarily fall within scope of the request, because not all will relate to the ETS/TOEIC. For example, Fiona Cunningham was a special adviser to the then Home Secretary and part of her role was to work with the Home Office Press Office when issuing statements

and responses to the media. She would have also received daily summaries of Government and Home Office stories in the media.

25. The Home Office clarified that it did not believe a more targeted search using additional keywords to be possible as it is likely emails in scope of the request will include any number of different terminology, words and phrases. For example, while it is possible an email in scope may additionally contain the words 'ETS' or 'TOEIC', it is equally possible it may not and is completely dependent on the language and phraseology of the author and the specific issues being discussed within the email. The Home Office considers that it is reasonably likely that a more targeted search using additional keywords would miss in scope information. Therefore, a manual review of each search result identified using the keywords 'BBC' and 'Panorama' would be required to identify information in the emails within scope of the request.
26. Based on the sampling exercise, the Home Office has estimated that it would take approximately 36 hours to identify any material within the scope of the request from the 2,158 emails identified in the sample search. This is based on a very conservative estimate of 1 minute to review each email/open any attachments, identify if it is in scope, and to separate the in scope material from the remainder.
27. Again based on the sampling exercise undertaken, the Home Office estimates that the time required to complete the work for both parts of the request, covering all four individuals, would be considerably higher. For example, with respect to the second limb of part 2, it is reasonably likely that Nick Timothy's mailbox will hold a similar high volume of emails as identified in Fiona Cunningham's mailbox, containing the words 'BBC' or 'Panorama', as they held similar positions.
28. On the basis of the Home Office's submissions, the Commissioner is satisfied that the Home Office has estimated reasonably that compliance with the request would exceed the appropriate limit, and that section 12 therefore applies. The Home Office was not, therefore, obliged to comply with the complainant's request.
29. The complainant stated that he believed disclosure of the requested information to be of significant public interest. However, the public interest is not a consideration when section 12 of the FOIA is applied to a request, as the Commissioner, according to her guidance, simply has to determine whether a public authority has reasonably demonstrated, by reference to the four activities in paragraph 20 above, that it has provided a sensible and realistic cost estimate based on the specific circumstances of the case. Therefore the Commissioner cannot comment on the public interest or otherwise in disclosure of the information.

Section 16(1) – Duty to provide advice and assistance

30. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the Section 45 Code of Practice (“the Code”) issued by the Secretary of State, it will have complied with section 16(1).
31. The Code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) and the regulations made for that section, the cost of complying would exceed the appropriate limit, it should provide the requestor with reasonable advice and assistance.
32. The Commissioner’s guidance states that the minimum a public authority should do in order to satisfy section 16(1) is indicate if it is able to provide any information at all within the appropriate limit. Communicating this to a complainant may avoid further and futile attempts to refine the request to bring it under the appropriate limit. If the requestor understands the way in which the estimate has been calculated to exceed the appropriate limit, it should help them decide what to do next.
33. In this case, the Home Office advised the complainant that, if he refined his request so that it is more likely to fall under the cost limit, it would be considered again. However, it explained that, due to the cost of staff time to locate and retrieve the information, it is unlikely that a similar request would fall below the cost limit and in any case another exemption may apply.
34. The Commissioner has considered the advice and assistance provided to the complainant by the Home Office and is not convinced by it. For example, Part 1 of the request covers a fairly short time period and the Home Office has not stated whether the complainant could have refined his request to just that information. Also, the search time estimated for Part 2 of the request in relation to one specified individual was 36 hours. The Home Office has not stated whether or not the complainant could have refined his request in relation to the time period to bring the search time under 24 hours, nor does it appear to have considered whether e-mails in relation to press briefings etc could be filtered out using standard search terms.

Right of appeal

35. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

Deirdre Collins
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