

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2021

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a schedule of information falling within the scope of two previous FOI requests he had made to it. The Cabinet Office refused to comply with the request for such schedules on the basis of sections 14(1) (vexatious) and 14(2) (repeated request) of FOIA.
2. The Commissioner has concluded that the request is neither vexatious nor repeated and therefore the Cabinet Office is not entitled to rely on section 14(1) or section 14(2) to refuse to comply with the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant's request of 6 May 2020 without relying on section 14(1) or section 14(2) of FOIA.
4. 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

5. The complainant submitted the following request to the Cabinet Office on 13 August 2019:

'As per the attached suggestion, I would now like to request under FOI information within category 4 in the Cabinet Office's letter of 24 October 2018 - 2016 to present day correspondence between the Cabinet Office and University [of Southampton] on additional closed archive records'¹

6. The Cabinet Office disclosed some information falling within the scope of the request but explained that some information had been redacted on the basis of sections 35(1)(a) (formulation and development of government policy), 38(1)(b) (health and safety), 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA. It explained that further documents were considered to be exempt from disclosure on the basis of section 21(1) (information accessible to the applicant) of FOIA. The Cabinet Office's handling of this request is the subject of a separate complaint, case reference IC-47499-X8X1.

7. The complainant also submitted the following request to the Cabinet Office on 5 November 2019:

'As per the attached suggestion [the Cabinet Office's letter of 24 October 2018], I would now like to request under FOI information within category 1 in the Cabinet Office's letter of 24 October - 1987-198[9], correspondence between the Cabinet Office and the University on additional closed archive records.'

8. The Cabinet Office explained that based on its interpretation of the request it only held one document that fell within the scope of the request, namely:

- A redacted copy of the Agreement No.1 for Deposit of Archives between the Trustees and the University of Southampton dated 16 March 1989.

¹ The Cabinet Office's letter of 24 October 2018 had provided the complainant with some advice and assistance on how to submit a refined request on this subject following its rejection of a previous request on the basis of section 12(1) of FOIA.

9. The Cabinet Office explained that it considered this information to be exempt from disclosure on the basis of section 21(1) of FOIA. The Cabinet Office's handling of that request is also the subject of a separate complaint to the Commissioner, case reference number IC-47493-J6J6.

Request and response

10. Following on from the two requests described in the background section above, the complainant submitted a request to the Cabinet Office on 6 May 2020 seeking a schedule of the information falling within the scope of the requests he had submitted to the Cabinet Office on 13 August 2019 and 5 November 2019. His request read as follows:

'Your letters dated 14 November 2019 (in the 2016-present category) and dated 31 January 2020 (in the 1987-1989 category) are ambiguous as to (1) whether the Cabinet Office is seeking to withhold in full additional documents which are not referred to in these letters – and, if so, which exemption(s) are said to apply to each of these additional documents; and (2) which of the exemptions referred to in the letters are said to apply to which of the document(s) which have been disclosed with redactions, or which part(s) of these document(s). For example, in the letter dated 14 November 2019 the Cabinet Office refers to "some of the information" being exempt under the various exemptions listed, but says nothing about the number or nature of totally withheld (or partly withheld) documents, or which exemptions are said to apply to each. We pointed out in our letter dated 13 December 2019 that "The covering letter of 14 November does not attempt to explain what exemption(s) are relied upon for each redaction, and whether there is other information being withheld".

Please therefore produce a schedule listing individually each of the withheld and partially withheld documents (including the nature, date, identity of sender/recipient, and broad subject/content) and the corresponding exemption(s) relied on for each document or portion of the document. For the avoidance of any doubt, if a document consists of a chain of emails, please list each email separately in the schedule.

It may assist you to note that in paragraphs 142-143 of Decision Notice FS50827458 the ICO found that your similarly ambiguous wording in your refusal notice in relation to the 2006-2011 category of information was a breach of section 17(1) of FOIA, and required you to provide a schedule of each document being withheld (either in full or in part) noting the sender and recipient of each item of correspondence along with the date and for documents that do not consist of correspondence listing the title of the document and/or an indication of

its form/format, and noting the exemptions within FOIA being applied to each document (see paragraph 152 of that Decision Notice)' (emphasis added)

11. The Cabinet Office responded on 15 June 2020, under reference number FOI2020/06207, and explained that it was relying on sections 14(1) (vexatious) and 14(2) (repeated request) of FOIA to refuse this request.
12. The complainant wrote to the Cabinet Office on 26 June 2020 and expressed his dissatisfaction with this refusal.

Scope of the case

13. The complainant also contacted the Commissioner on 26 June 2020 in order to complain about the Cabinet Office's refusal to fulfil the schedule request he had submitted to it. Normally, the Commissioner would require a requester to wait for the outcome of a public authority's internal review before considering any complaint. However, given the crossover between her ongoing investigation of requests dated 13 August 2019 and 5 November 2019, and the Cabinet Office's refusal of the 'schedule' request, the Commissioner decided to exercise her discretion and proceed with the complainant's complaint about the schedule request without the Cabinet Office completing its internal review.

Reasons for decision

Section 14(1) - vexatious requests

14. In the Commissioner's view section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
15. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority. Where relevant, this will involve the need to take into account wider factors such as the background and history of the request.

The Cabinet Office's position

16. The Cabinet Office emphasised that the request was submitted before the processes FOIA provides to resolve complaints had been completed and that the complainant acknowledged the ongoing litigation and his complaint to the Commissioner in his request. As such the Cabinet Office argued that it was a vexatious request as it seeks to inconvenience the Cabinet Office rather than being a genuine request for information.
17. The Cabinet Office explained that it had considered the request in the context of the Commissioner's guidance on section 14(1). It acknowledged that the guidance is not a 'tick box' exercise but it used it as a baseline to see if refusing a request on the basis that it was vexatious was reasonable.
18. The Cabinet Office argued that from using the guidance it had concluded that the request fell within the description of a request that had the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. In support of this position the Cabinet Office made the following submissions:

Futile requests

19. The issue at hand (the request for schedules) individually affects the applicant. It is subject to independent investigation, as noted above and as acknowledged by the requester. By making the present request, the Cabinet Office argued that the complainant is attempting to obtain information of the same type that is subject to an appeal.

Unreasonable persistence

20. The Cabinet Office argued that the complainant is attempting to reopen an issue which is or has been otherwise subjected to some form of independent scrutiny, either through an investigation by the Commissioner or the Tribunal appeal.
21. The Cabinet Office noted that a previous decision notice by the Commissioner, case reference FS50827458, dated 18 December 2019 is currently under appeal. That decision notice concerned an earlier request that the complainant had submitted to the Cabinet Office on the same subject of the Broadlands Archive. The Cabinet Office explained that at paragraph 143 of notice it states that '*In order to comply with the requirements of section 17(1), the Commissioner does not expect a public authority to annotate each redacted disclosure to show which exemptions have been applied. However, she does expect a public authority to accurately state which exemptions are being relied on.*' The Cabinet Office explained that the request of 6 May 2020 ignores this

statement, saying that *'We pointed out in our [ie the complainant's] letter dated 13 December 2019 that "The covering letter of 14 November does not attempt to explain what exemption(s) are relied upon for each redaction, and whether there is other information being withheld"'*. The Cabinet Office suggested that although the points made in the 13 December 2019 letter from the complainant may have been valid at the time, they were addressed in the subsequent Decision Notice. The Cabinet Office argued that the only reasons to include them in the request of 6 May 2020 was to implicitly criticise the Cabinet Office for not doing something that the Commissioner had concluded was unnecessary.

Intransigence

22. The Cabinet Office argued that the complainant had taken an unreasonably entrenched position. Whether the Cabinet Office is required to produce a schedule of information of the type requested will be determined by the Tribunal. The Cabinet Office noted that the complainant has cross-appealed the decision notice FS50827458, but has shown no willingness to wait for the appeal process to conclude before deciding whether to request such schedules.

Conclusion

23. In conclusion, on the basis of the above the Cabinet Office considered its refusal of the request as vexatious under section 14(1) to be reasonable in the circumstances of this case. It noted that the requests drain Cabinet Office officials' time and resources and it considered this to be disproportionate, especially as the Tribunal is covering the same subject. The Cabinet Office explained that in its view it would be better to wait until the Tribunal has delivered its judgment rather than engaging in nugatory effort in parallel.

The Commissioner's position

24. The Commissioner acknowledges that the schedule request was submitted before she had completed her investigation of the requests of 13 August and 5 November 2019. In fact the complainant submitted the schedule request to the Cabinet Office on the same day he submitted complaints to the Commissioner about the Cabinet Office's handling of the requests dated 13 August and 5 November 2019.
25. However, the Commissioner does not accept that this means that the request was designed to inconvenience the Cabinet Office and thus had no genuine purpose. Rather, the Commissioner's understanding is that the complainant's purpose in submitting the request of 6 May 2020 was to understand what documents the Cabinet Office held falling within the

scope of the requests of 13 August and 5 November 2019 and to understand what exemptions it was seeking to apply to each document in order to inform his complaint to the Commissioner in respect of his complaints about those requests. In the Commissioner's view if the complainant were to wait for the Commissioner's consideration of these section 50 complaints *before* submitting the schedule request this would undermine the purpose of the request.²

26. In terms of the specific categories cited by the Cabinet Office, the Commissioner has considered each in turn. With regard to the futile requests criterion, the Commissioner does not accept that the complainant is attempting to obtain information that is the subject of an appeal. The information which is the subject of the complainant's two appeals submitted to the Commissioner on 6 May 2020 are the actual documents falling within the scope of his requests of 13 August and 5 November 2019. The schedule request simply seeks the title and brief details of each document along with clarification as to which exemption(s) the Cabinet Office is relying on to withhold each document. The Commissioner acknowledges that the requested information is only really likely to be of interest to the complainant but this does not automatically make it a futile request. Moreover, for the reasons discussed above, the Commissioner is of the view that the request does have a clear purpose.
27. With regard to the unreasonable persistence criterion, the Commissioner agrees that the previous decision notice did indeed conclude that section 17 of FOIA did not require the Cabinet Office to issue a refusal notice explaining which exemption applied to each specific redaction. However, just because these are the limits of section 17, in the Commissioner's view this does not mean that a requester is subsequently barred from making a request for a schedule of information in order to better inform their understanding of a public authority's position in order to assist them in any future challenge or appeal in relation to an earlier request. The Commissioner also considers it worth acknowledging that the complainant has made a number of closely related requests to the Cabinet Office on this subject over a period of time as well as a number of subsequent complaints to the Commissioner. As result the situation and status of the various requests, and the status of the information falling within such requests, is somewhat involved and complicated. In such circumstances, in the Commissioner's view the complainant's

² It is under section 50 of FOIA that a requester can apply to the Commissioner for a decision as to whether a request made by them to a public authority has been dealt with in accordance with Part I of the legislation.

decision to seek a schedule of information falling within the scope of the requests of 13 August and 5 November 2019 in order to bring some clarity as to what information is in the scope of each request, and what exemptions are being applied by the Cabinet Office, is an understandable one.

28. The Commissioner also notes that in respect of both the request of 13 August and the request of 5 November 2019 it was not until the Cabinet Office provided her with submissions in the context of the section 50 complaints about those requests that it clarified what information was held and which exemptions were being applied to the information in scope. In the Commissioner's view this arguably supports the complainant submitting the schedule request in order to understand what information is actually held by the Cabinet Office and what exemptions are being applied to the same.
29. With regard to the point about intransigence, the Commissioner acknowledges that one of the issues to be considered by the First-tier Tribunal in relation to the Cabinet Office's appeal of decision notice FS50827458 is whether the Cabinet Office is obliged to provide a schedule of information. The Commissioner obviously respects the Cabinet Office's right to appeal that point in the context of that appeal. However, the Commissioner's position on the issue of requests that seek schedules is clear and well established.³ If a requester submits a request to a public authority for information, and the public authority withholds that information, then a subsequent request for a schedule of information falling within the first request constitutes a valid request for information under section 8 of FOIA.⁴ In view of this the Commissioner does not consider it to be intransigence on the part of the complainant to ask for a schedule of information at the point that he did. Moreover, for the reasons set out above, waiting for the Tribunal to rule on the schedule point which is the subject of the appeal to decision notice FS50827458 would undermine the purpose of the request itself as the Commissioner will have issued her decision notices in relation to the complaints about requests 13 August and 5 November 2019 prior to the Tribunal promulgating its decision on FS50827458.

³ See the guidance 'Determining whether information is held', paragraphs 11 and 12. https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

⁴ Section 8(1) of FOIA provides that a request is valid if it is in writing, states the name of the application and an address for correspondence, and describes the information requested.

30. Finally, the Commissioner is not persuaded that providing such a schedule would be that draining of time and resources for the Cabinet Office. For the request of 5 November 2019, the Cabinet Office's view is that it only holds one document falling within the scope of the request. In relation to the request of 13 August 2019 there are greater number of documents in scope. However, the Cabinet Office had already listed 14 of these in the refusal notice to the request of 13 August 2019 as being disclosed with partial redactions and listed a further ten as being exempt on the basis of section 21 of FOIA. The Commissioner cannot envisage how, in light of this work that has already been done by the Cabinet Office, providing the complainant with a schedule in relation to the information in the scope of the 13 August 2019 request would be in any way a significant drain on its time or resources.
31. Taking the above into account, the Commissioner is not persuaded that the complainant's request of 6 May 2020 is vexatious. Therefore, the Cabinet Office cannot rely on section 14(1) of FOIA to refuse to comply with that request.

Section 14(2) – repeated requests

The Cabinet Office's position

32. The Cabinet Office noted that the complainant's request of 6 May 2020 asked for schedules of the documents in scope that itemise the exemptions relied upon in the request of 13 August 2019 (which sought information from the period 2016-present day) and the request of 5 November 2019 (which sought information from the period 1987-89).
33. The Cabinet Office argued that the request for a schedule in relation to each of these requests was similar to, or overlapped with, a request for a schedule of information previously submitted by the complainant, even though the content of the schedule differed. The complainant's previous request for a schedule of information was submitted to the Cabinet Office on 29 January 2019 and this concerned the information falling within the scope of a request for information he had submitted to the Cabinet Office on 1 November 2018.
34. Again, the Cabinet Office noted that whether or not it was obliged to create such a schedule, ie the one sought by the complainant in his request of 29 January 2019, is the subject of an appeal to the First-Tier Tribunal. The Cabinet Office argued that pending the outcome of that appeal the provision of such a schedule in the present case does not form part of the Cabinet Office's obligations to the complainant.
35. The Cabinet Office therefore regarded the present request as a repeated request. It argued that the request is for information (a schedule, albeit

relating to different information) that is of the same type as that previously requested by the complainant. Since these earlier requests have not been resolved, in the Cabinet Office's view a reasonable interval cannot be said to have elapsed.

The Commissioner's position

36. Section 14(2) of FOIA states that:

'Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.'

37. In the Commissioner's view the key words in section 14(2) are '*previously complied with a request for information*' and that the term '*previously complied*' means complied with section 1 of FOIA.

38. This means that a public authority can only apply section 14(2) to a request where it has either:

- already provided the information to the same requester in response an earlier FOIA request; **or**
- previously confirmed that it does not hold the information in response to an earlier FOIA request from the same requester.

39. If neither of the above criteria applies, then the request is not repeated and a public authority must process it in the usual manner.

40. A request can be substantially similar if:

- the wording is different but the scope of the request is the same; or
- the scope does not differ significantly from that of the previous request.

41. The Cabinet Office's basis for refusing the complainant's request of 6 May 2020 is because it is similar, or overlaps, with the complainant's previous request for a schedule of 29 January 2019. However, as is clear from the Cabinet Office's submissions, the Cabinet Office has not complied with that request. Rather, the Commissioner issued a decision notice in which it ordered the Cabinet Office to comply with that request and it appealed the decision notice, amongst other grounds, on the basis that it was not obliged to create the information falling within the scope of the complainant's request of 29 January 2019.

42. Therefore, in the Commissioner's view the Cabinet Office has not already provided the complainant with the substantially similar

information in response to a previous request. It has therefore failed to fulfil the provision of section 14(2) to have 'previously complied' with an identical or substantially similar request.

43. The Commissioner has therefore concluded that the Cabinet Office cannot rely on section 14(2) to refuse to comply with the complainant's request of 6 May 2020.

Right of appeal

44. 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

45. 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.
46. 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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