

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested information about the settlement agreed between the Home Office and former Permanent Secretary, Sir Philip Rutnam. Although the Home Office provided some general information, it refused to comply with the request as a whole, citing section 12 (Cost of compliance exceeds appropriate limit) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 12 to refuse the request. It also complied with its duty to provide advice and assistance in line with the requirements of section 16 of FOIA. However, by failing to respond to the request within 20 working days, the Home Office breached section 1 and section 10 of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Background

4. Sir Philip Rutnam resigned from his post as Permanent Secretary of the Home Office on 29 February 2020 and began legal proceedings against the Home Office, citing "a vicious and orchestrated briefing campaign" against him.
5. On 4 March 2021, the Home Office and Sir Philip signed an agreement to settle those proceedings. As part of the settlement, the Home Office

made a special payment of £340,000. A contribution to his legal costs was also made of £30,000 plus VAT¹.

Request and response

6. On 5 March 2021, the complainant wrote to the Home Office and requested information in the following terms (numbering added by the Commissioner):

"I am writing to request information regarding the decision-making behind choosing to award Sir Philip Rutnam £340,000 settlement with a further £30,000 in costs as reported in our Newspapers regarding the alleged bullying he received.

My understanding was that our Prime Minister's conclusion was that no wrongdoing had occurred and no action taken as a result of his conclusion relating to the alleged bullying.

1. If the conclusion was that no wrong doing occurred why would a settlement offer made at all? What is the justification for a settlement to be agreed?
 2. If the conclusion there was some wrong doing on the part of Government, it's [sic] officers, leaders or ministers occurred, why it was felt to be better value for money to agree a six-figure settlement? If taken to employment Tribunal, it would have resulted (in the worst-case scenario where the Home Office lost the case) in a much smaller settlement of a maximum of £88,519?
 3. If the conclusion that there was some wrong doing on the part of Government, it's [sic] officers, leaders or ministers how this is to be tackled to ensure a repeat does not occur?"
7. The Home Office responded on 21 April 2021. It said that the Government did not admit liability in the matter and that it had rightly defended the case. It provided a link to the Ministerial Code enquiry into the then Home Secretary's conduct and the Government's statement on the matter.
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¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000127/HO_Annual_Report_and_Accounts_2020-21_FINAL_AS_CERTIFIED__accessible_.pdf

8. Addressing the question: "What is the justification for a settlement to be agreed?", it provided a narrative response, explaining that settlement, rather than an employment tribunal, had been judged to be in the best interests of both parties. It provided a link to Home Office guidance on managing public money, which it said had been consulted when making the decision on the settlement.
9. The complainant requested an internal review on 7 June 2021, saying that the response had not answered the questions he asked.
10. The Home Office responded on 16 August 2021. It said it had addressed the request to know why a settlement had been agreed (ie point (1) of the request). It acknowledged that it had not addressed points (2) and (3) of the request. It said this was because the Government did not accept liability in the matter.

Scope of the case

11. The complainant contacted the Commissioner on 9 September 2021 to complain about the way his request for information had been handled. He argued that the Home Office should have responded to each part of the request and it should have disclosed more information.
12. Having considered the wording of the request, the Commissioner agrees with the Home Office's position that parts (2) and (3) may be disregarded. This is because the questions in parts (2) and (3) of the request were conditional on the Prime Minister having concluded that there was wrongdoing by the Government, its ministers, or staff.
13. The Government statement on the Ministerial Code enquiry² makes it clear that the Prime Minister had concluded there was **no** wrong doing, and that the matter was closed.
14. That being the case, the Commissioner is satisfied that the conditions necessary for parts (2) and (3) of the request to become 'active' (ie the Prime Minister concluding there **was** wrong doing) were not present, and so his investigation is only concerned with the Home Office's response in respect of part (1) of the request.
15. During the investigation, the Home Office clarified that it was relying on section 12 of FOIA to refuse to comply with the request. This late revision has not been put to the complainant, to forego any further

² <https://www.gov.uk/government/news/ministerial-code-investigation>

delay in the investigation. The Commissioner does not consider the complainant has been disadvantaged by this.

16. The analysis below considers whether the Home Office was entitled to rely on section 12 of FOIA to refuse part (1) of the request. He has also considered the timeliness of the response under sections 1 and 10 of FOIA. He has commented on the delay in completing the internal review in the 'Other matters' section of this decision notice.
17. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on what information a public authority should hold, or how it should hold it. He is not concerned with how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate limit

18. The Home Office's position was that it had responded to the specific question the complainant asked, and that any request to see recorded information regarding the justification for the settlement agreement engaged section 12 of FOIA on grounds of excessive costs.
19. 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.
20. 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.
21. 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) of FOIA effectively imposes a time limit of 24 hours for the Home Office to deal with this request.
22. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs 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.
23. 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 decision 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”. 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.
24. Section 12 of FOIA is an absolute exemption and not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
25. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

26. The Home Office provided the following information about compliance with the request:

“The request itself is very broad and a search would need to be undertaken to identify all possible information (emails, notes, submissions etc) relating to the settlement. A further more detailed analysis of the information identified in the initial trawl would then need to take place to identify the information related to the specific terms of this request.

To capture all information that falls within the scope of this request we would need to confirm that we had identified all information dating back to 2020.

This case is further complicated by the amount of time that has passed since this Employment claim took place as key members of staff who were involved with this matter no longer work within the department.

We have a central repository relating to the Tribunal case. However, a number of officials were involved in the case and it is likely that not all information generated as a result of the case and settlement will be held in this one central repository.

Within this central repository alone there are in excess of 1100 documents, emails and attachments. The content of each record would need to be reviewed to identify all relevant in scope information. We estimate that it would take between five minutes to 15 minutes to review each record depending on the volume or complexity of the information contained in each one. Even taking as a conservative estimate five minutes to review each document, this would take over 92 hours to review the information held to identify any in scope material and to extract the relevant material.

As noted above, information is likely to be held in other sources outside this central repository and further searches would need to be undertaken by officials who were involved in the case."

27. The Commissioner agrees with the Home Office that the request is broad in scope. He considers that the Home Office has shown that it is likely to capture a great deal of recorded information from a variety of sources, and that the information is not stored centrally, or held in a readily retrievable format. He is satisfied that compliance with the request would exceed the upper limit of 24 hours work by a considerable way.
28. The Commissioner's decision is therefore that the Home Office is entitled to rely on section 12(1) to refuse the complainant's request as it has demonstrated to the Commissioner's satisfaction that attempting to compile the information required to respond to question (1) of the request would far exceed the cost limit under FOIA.

Section 16(1) – The duty to provide advice and assistance

29. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
30. On the question of whether adequate advice and assistance had been given to the complainant regarding how he could refine the request so that it might be complied with within the cost limit, the Home Office said that in view of the voluminous nature of the information in scope, it was difficult to see how the request could be refined in any meaningful way.

31. However, the Home Office told the Commissioner that it had attempted to assist the complainant by answering his overarching question, and explaining the justification for the settlement.
32. In its letter to the Commissioner, the Home Office provided further information on this point, which it said it hoped the complainant would find helpful:

“In addition, [the complainant] stated, “how it was in the public interest to settle the case for more money than would have been awarded in a worst [sic] case scenario if the case had gone to employment tribunal”.

This was addressed in Matthew Rycroft’s letter to the Home Affairs Select Committee dated 27 April 2021.

“You are correct that where a claim for unfair dismissal under section 98 of the Employment Rights Act 1996 (ERA) is brought, then damages are capped in accordance with subsection 124(1) of the ERA. However, in this case Sir Philip also alleged that his dismissal was unfair under an additional section of the ERA and a dismissal on those grounds is not subject to such a cap (subsection 124(1A)).”³

The information provided above will hopefully provide further details on the settlement without invoking the cost limit, or allow [the complainant] to refine the request to those points they have a particular interest in.”

33. The Commissioner notes that both the complainant’s request, and the Home Office’s refusal, pre-date the above letter, and so it could not have been referenced in its initial response. The letter was not made public until early May 2021⁴.
34. The Commissioner is therefore satisfied that the Home Office did provide appropriate advice and assistance to the complainant at the time of his request, although it is disappointing that it did not refer the complainant to Matthew Rycroft’s letter when it responded to his internal review

³<https://committees.parliament.uk/publications/5872/documents/66751/default/>

⁴ <https://www.civilserviceworld.com/news/article/rutnams-constructive-dismissal-payout-did-not-have-nda-attached-home-office-says>

request, in August 2021. The additional information it provided might have avoided the need for a complaint to the Commissioner.

Section 1 – general right of access

Section 10 - time for compliance

35. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
36. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
37. The complainant submitted his request on 5 March 2021 and the Home Office responded on 21 April 2021, 31 working days later.
38. By failing to respond to the request within 20 working days, the Home Office breached sections 1(1) and 10(1).
39. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"⁵ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁶.

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Other matters

40. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

41. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
42. The Commissioner considers that, where offered, internal reviews should be completed promptly. Although no explicit timescale is laid down in the code of practice, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer, but in no case should the time taken exceed 40 working days.
43. In this case, the complainant requested an internal review on 7 June 2021 and the Home Office responded on 16 August 2021, 50 working days later. It did not provide an explanation for the delay.
44. By failing to complete the internal review within the timescales specified above, the Commissioner considers that the Home Office did not conform with the Section 45 code of practice. This delay will be noted for monitoring purposes.

Right of appeal

45. 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

46. 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.
47. 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

Samantha Bracegirdle
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