

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2022

Public Authority: Foreign, Commonwealth & Development Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted two requests to the Foreign, Commonwealth & Development Office (FCDO) seeking briefings provided to Ministers about Julian Assange. The FCDO refused to comply with the requests on the basis of section 12(1) (cost limit) of FOIA but did provide some advice and assistance to the complainant to allow her to make a refined request.
2. The complainant challenged the FCDO's reliance on section 12(1) and also argued that the FCDO had failed to provide sufficient advice and assistance to her.
3. The Commissioner's decision is that the FCDO can rely on section 12(1) of FOIA to refuse the two requests. However, the Commissioner has also concluded that the FCDO could have provided the complainant with further advice and assistance and its failure to do so represents a breach of section 16(1) of FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with the additional advice and assistance described in paragraph 50 of this decision notice.
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.

Request and response

6. The complainant submitted the following requests to the FCDO on 23 September 2020:

'Please provide me with ministerial briefing papers containing any of the following terms "Julian Assange" or "Assange" or "Julian Paul Assange" "Prisoner no: A9379AY" or any other term identifying Mr Assange, from the year 2010 to the present date.

Please provide me with ministerial briefing papers of Mr Dominic Raab containing any of the following terms "Julian Assange" or "Assange" or "Julian Paul Assange" "Prisoner no: A9379AY" or any other term identifying Mr Assange, from the year 2019 and thereafter.'

7. The FCDO responded on 21 October 2020. It confirmed that it held information falling within the scope of the requests but explained that it estimated that locating, retrieving and extracting it would take more than 24 hours and therefore would exceed the appropriate cost limit. As a result the FCDO explained that it was refusing the requests on the basis of section 12(1) of FOIA. The FCDO suggested that the complainant may wish to refine her request to bring it within the cost limit, for example, it suggested that she refine the request to a much shorter period i.e. 12 months.
8. The complainant contacted the FCDO on 22 October 2020 and asked it to conduct an internal review.
9. The FCDO informed her of the outcome of the internal review on 1 November 2020. The review upheld the application of section 12(1) and concluded that the FCDO had provided adequate advice and assistance in line with section 16 of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 13 November 2020 in order to complain about the FCDO's handling of her request. She raised the following grounds of complaint:
1. She disputed the FCDO's position that processing the requests would exceed the cost limit.
 2. She argued that even if complying with the first request would exceed the cost limit, then the FCDO should still have processed the narrower second request.
 3. She was unhappy that the FCDO did not follow the Commissioner's guidance on section 12 and provide details of how it had estimated that complying with the requests would exceed the cost limit.¹
 4. She argued that the FCDO had not provided her with adequate advice and assistance and therefore had failed to comply with section 16(1) of FOIA.
 5. Finally, she argued that given the overwhelming public interest in disclosure of the information falling within the scope of her requests, the FCDO should not have relied on section 12(1).
11. With regard the third ground of complaint, the advice set out in the Commissioner's guidance is a matter of good practice rather than a statutory requirement. Therefore, the Commissioner has not considered this ground of complaint in the main body of this decision notice, albeit he has commented further on it in the Other Matters section at the end of the notice.

Reasons for decision

Complaints 1, 2 and 5

12. Section 12(1) of 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.'

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf - see paragraphs 37 and 38

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 central government departments such as FCDO. 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 effectively imposes a time limit of 24 hours.
14. 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.
15. 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'.²
16. Section 12 is 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, despite this being the case, there is a public interest in the disclosure of the information.
17. Furthermore, when a public authority is estimating whether the appropriate limit is likely to be exceeded, under section 12(4) of FOIA it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied. Those conditions require the requests to be:
 - made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - made for the same or similar information; and
 - received by the public authority within any period of 60 consecutive working days.

² Paragraph 12 of EA/2007/0004.

18. The Commissioner will therefore first consider whether the requests can be aggregated and if so will then consider whether section 12(1) applies to the aggregated requests.

The complainant's position

19. The complainant argued that she did not think it was unreasonable to assume that the FCDO has the necessary technological and human resources at its disposal to respond appropriately to her FOI requests, at well under the 'appropriate limit' of £600. She argued that any effort to locate the requested information should have been fairly simple; the FCDO's electronic management system could have been interrogated by using the terms 'Julian Assange' or 'Assange' or 'Julian Paul Assange' 'Prisoner no: A9379AY' or any other term identifying Mr Assange.
20. In any case, the complainant argued that even if the FCDO were justified in refusing the first request, it should have at least provided the information under the second request; i.e., the request spanning over a 22-month period. Given that a request spanning over a 10-year period was estimated to take more than at '3 ½ working days', ie more than 24 hours, a request spanning over a 22-month period should not be estimated at more than half a working day.

The FCDO's position

21. The FCDO explained that the complainant's first request sought ministerial briefing papers containing any of the following terms 'Julian Assange' or 'Assange' or 'Julian Paul Assange' 'Prisoner no: A9379AY' or any other term identifying Mr Assange, from the year 2010 to the present date. It explained that an electronic sampling exercise was carried out to determine whether information was held and to calculate an estimate of the overall cost of compliance.
22. The FCDO explained that in order to ascertain whether information was held, it had to establish where to search for information. It noted that information related to the request was held electronically but not held in one place or one system. Rather relevant information was dispersed across the shared area (used by departments in FCDO to share information within teams), held on the permanent electronic repository known internally as i-Records and held on emails in staff's FCDO Outlook accounts.
23. The FCDO explained that it carried out sample searches using the terms 'Julian Assange' or 'Assange' or 'Julian Paul Assange' 'Prisoner no: A9379AY' using the timeframe 01/10/2012 – 31/12/2019. The FCDO explained that it carried out searches on the shared area which was accessed by staff in the North America Department only. This sample search brought up 451 records – some of these records had attachments, estimated at around 50 attachments.

24. The FCDO explained that it used the same search terms and carried out searches on i-Records - the FCDO's permanent record repository. A sample search brought up 660 records, with an estimated 100 attachments.
25. The FCDO explained that in order to ascertain whether these records held ministerial briefing papers (and thus fell within the scope of the request), it tried to carry out further searches using the search terms 'ministerial briefing papers' on the records that its initial search brought up. However, it explained that the search capability was not sufficient to ensure that such records are identified. Therefore, in order to be reasonably confident that it had identified ministerial briefing papers, it explained that it would need to look at each of the documents and attachments individually that it searches had returned.
26. The FCDO explained that it estimated that this would involve the following costs:
27. With regard to the records in the shared area:
 - 451 records + 50 attachments = 501 records. The FCDO allowed three minutes to go through each document to check for relevance, it noted that this was a conservative estimate. It explained that some records can be opened quickly and reviewed within a minute. However, around 10% of the records in the shared area once extracted had to be re-saved and named in order to properly access and review. The FCDO estimated that for these records it would have taken around 5 minutes per document. Therefore for the purposes of this sample search, it allowed an average of three minutes per record.
 - 451 records + 50 attachments = 501 records
 - 501 x 3 mins = 25 hrs
28. With regard to records in i-Records:
 - 660 records + 100 attachments = 760 records. Again, the FCDO explained that it allowed three minutes to open up a record, take it off i-Records and put it into a spreadsheet in order to properly access and review. It estimated that for the larger records, it would have taken around 5 minutes per document to actually put into a readable format and have a brief look at the document to check for relevance.

660 records + 100 attachments = 760 records

 - 760 x 3 minutes = 38 hrs
29. Therefore, the FCDO estimated that it would take approximately 63 hours to search these two areas to locate relevant information falling

within the scope of the first request, an estimate which far exceeded the 24 appropriate cost limit.

30. The FCDO argued that this was a conservative estimate of the time taken as it did not include asking relevant staff (around 15) to check their FCDO Outlook accounts for information that might be in scope of the request and which might not have been put in the shared area or on i-Records. The FCDO also noted that the estimate covers a seven year period and not the full nine year period requested.
31. The FCDO noted that the requester had argued that even if complying with the first request would exceed the cost limit, then the FCDO should still have processed the narrower second request. The FCDO explained that it relied on section 12 to refuse the second request as it was asking for similar information, albeit for a much narrower time frame.

The Commissioner's position

32. With regard to the FCDO's estimate for the first request the Commissioner accepts that the searches conducted to locate any relevant information were logical and focused. He also accepts the FCDO's position that given the nature of its systems it was not possible to further refine these searches in order to locate only information consisting of Ministerial submissions. In light of this the Commissioner accepts that the FCDO would need to undertake analysis of each of the returned documents in order to locate any information that was in scope. Furthermore, the Commissioner is satisfied that the estimated average time to do so, given that it is based on sample exercise, is a reasonable one. Therefore, the Commissioner accepts that it would take approximately 63 hours to locate information falling within the scope of the request. The Commissioner also notes the FCDO's point that this estimate is a conservative one and does not include searching any the emails of relevant staff or other shared drives/repositories which were not part of the sample.
33. The Commissioner has therefore concluded that the FCDO can refuse to comply with the first request on the basis of section 12(1) of FOIA.
34. With regard to the second request, the Commissioner understands that the FCDO is seeking to rely on section 12(1) on the basis that the cost of complying with it, when aggregated with the cost of complying with the first request, would exceed the cost limit.
35. Although the FCDO has not provided the Commissioner with an estimate of the cost of complying with the second request, it does not need to demonstrate that the cost of complying with it this exceeds the cost limit if it can legitimately aggregate the cost of it with the first request. The Commissioner is satisfied that the conditions for aggregating requests as set out in paragraph 17 are clearly met: the two requests

are self evidently made by the same person within sixty days of each other. Furthermore, the Commissioner is satisfied that the requests were seeking similar information, indeed the second request is actually a subset of the first request.

36. In light of this the Commissioner is satisfied that the FCDO can aggregate the cost of complying with the requests and legitimately refuse to answer the second request on the basis of section 12(1) of FOIA because the cost of complying with the first one exceeds £600.
37. The Commissioner notes that in complaint 5 the complainant argued that the FCDO should have answered her requests, regardless of the cost of doing so, given the public interest in this subject. However, as noted above section 12 of FOIA is not subject the application of the public interest test contained at section 2 of FOIA. Therefore, the public interest in the disclosure of the information has no bearing on the FCDO's reliance on section 12(1) of FOIA.

Complaint 4

38. Section 16(1) of FOIA states that:

'(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'

39. The complainant argued that the FCDO had breached section 16(1) of FOIA as it had failed to provide her with adequate advice and assistance to allow her to refine her request. More specifically, she argued that the FCDO's approach failed to comply with paragraph 14 of the section 45 Code of Practice (the Code) and did not follow the approach set out at paragraph 62 of the Commissioner's section 12 guidance.
40. The section of the Code cited by the complainant is actually contained in a previous version of it, with paragraph 14 stating that:

'Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that

by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.³

41. The version of the Code which was in place at the point the complainant submitted her request, and had been since June 2018, includes the equivalent following sections:

'2.10 Where it is estimated the cost of answering a request would exceed the "cost limit" beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit.'

42. And:

'6.9 Where a request is refused under section 12, public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is narrowed. Any refined request should be treated as a new request for the purposes of the Act.'⁴

43. The part of the Commissioner's guidance cited by the complainant states that:

'A public authority should inform the requestor of what information can be provided within the appropriate limit. This is important for two reasons: firstly, because a failure to do so may result in a breach of section 16. Secondly, because doing so is more useful than just advising the requestor to 'narrow' the request or be more specific in focus. Advising requestors to narrow their requests without indicating what information a public authority is able to provide within the limit, will often just result in requestors making new requests that still exceed the appropriate limit.'⁵

44. In light of these provisions of the Code and the Commissioner's own guidance, the complainant argued that the FCDO should have indicated what information could be provided within the appropriate cost limit

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722476/Secretary_of_State_for_Constitutional_Affairs_Code_of_Practice.pdf

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁵ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf - paragraph 62

instead of just advising her to 'narrow' the request. The FCDO's advice in the refusal notice had been 'we would suggest you refine your request to a much short[er] time period i.e. 12-month period'.

45. As part of his investigation the Commissioner highlighted the complainant's concerns to the FCDO and asked it whether the advice and assistance it provided could be more specific in the particular circumstances of this case.
46. The Commissioner specifically asked the FCDO whether it was possible to limit a request to a specific Minister.
47. However, the FCDO explained that such a request as this would still involve reviewing all of the information returned by the searches. Nevertheless, the FCDO explained that, to a certain extent, it could have identified which years generated the most information returned as part of the initial search results. Albeit, the FCDO explained that it could not be sure that the volume would definitely indicate that there had been a ministerial briefing.
48. The FCDO further explained that on reflection, it could have identified documents with 'ministerial briefing' in the title and suggested to the complainant that she might wish to refine her request to a particular year where the FCDO knew that there were definitely briefings. It could then have reviewed all the information within that year to see if any other records contained ministerial briefing but had not got ministerial briefing in the subject title.
49. The Commissioner appreciates the FCDO's considerations regarding the issues of advice and assistance provided to her during the course of his investigation. However, the Commissioner has concluded that the FCDO did not fully conform with the requirements of the Code as there was, in his view, additional advice and assistance that could have been usefully provided to the complainant. That is to say, rather than instructing the complainant to simply restrict her request to a 12 month period, the FCDO could have pointed the complainant to particular years where more information relevant to the request was likely to be held, ie based on the initial search results it could have identified the years which returned a greater amount of information. The failure to provide such advice and assistance constitutes a breach of section 16(1) of FOIA because in the Commissioner's view it would have been reasonable for the FCDO to have provided such information to the complainant.
50. As a result, in order to meet its obligations under section 16(1) of FOIA the Commissioner requires the FCDO to advise the complainant of the years which generated the most information returned as part of the initial search results.

Other matters

51. In her third ground of complaint the complainant argued that the FCDO had failed to follow the advice in the Commissioner's advice at paragraphs 37 to 38 of his section 12 guidance that public authorities explain in their refusal notices how they have calculated that the cost of compliance exceeds the cost limit.
52. In its submissions to the Commissioner the FCDO acknowledged the referenced part of the Commissioner's guidance and explained that in the future it would consider providing more detail. However, it noted that in its internal review it did offer an explanation as to why the request exceed the cost limit: 'The first part of your request asks for information "from 2010 until the present date". The FCDO holds a very large amount of information on this subject and for this time span. The information is held electronically but searching for the requested information would exceed the cost limits.' The Commissioner notes the explanation that was provided but would encourage the FCDO to provide additional information when drafting section 12 refusal notices in the future so they these more closely following the advice set out in his guidance.

Right of appeal

53. 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

54. 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.

55. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF