

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested copies of particular emails from the Home Office. The Home Office cited section 12(1) (Cost of compliance) of FOIA to refuse the request.
2. The Commissioner's decision is that some of the request is for personal information and that the Home Office should have cited section 40(5B)(a)(i) (Personal information) to refuse to confirm or deny whether the information is held. In respect of the remainder, he finds that the Home Office properly relied on section 12(1) and that there was no breach of section 16 (Advice and assistance) of FOIA. No steps are required.

Request and response

3. On 10 February 2022, the complainant wrote to the Home Office and requested the following information:

"Can I have a copy of the following e-mails which the Home Office will have sent or received:

Date: 24th December 2018 approx 13:33

Title: C-UAV Capability UK Airports

Date: 28th December

Title: Actions from 9am conference call - drones - 28th December 2018

For the titles please include partial matches, replies etc. Please include any attachments”.

4. On 9 March 2022, the Home Office responded. It advised that to comply with the request would exceed the cost limit at section 12 of FOIA.
5. The complainant requested an internal review on 10 March 2022. He said:

“I've asked for literally just 2 e-mails and although those may include replies, other governments [sic] such as the DfT have dealt with requests for far greater volumes of data, literally dozens of e-mails for example. Generally it's only names in e-mails addresses that need redacting.

In such a rejection you should be making clear how you've come to the determination that dealing with 2 e-mails justifies such a cost, how many replies, etc. are involved with just these 2 e-mails? How many attachments are involved. You should at least give me the opportunity to pick specific e-mails within the replies or specific attachments if workload is an issue.

I'd be satisfied with just the attachments and the first e-mail in each chain if the volume of replies is significant”.

6. On the same day, he added the following clarification:

“I note there were 3 staff members at the Home Office dealing with the e-mails I've requested, one of those is shown on DfT FOIAs to be called [name redacted], the Home Officer [sic] had a single communication lead so this will either be [name redacted] or he'll know who it was. I trust this mitigates the effort in narrowing down who holds these e-mails should you not simply be able to get IT to search the e-mail server”.

7. Following the Commissioner's intervention, the Home Office provided an internal review on 25 July 2022 in which it maintained its original position, confirming reliance on section 12(1) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 7 July 2022 to complain about the way his request for information had been handled.

He complained about the time taken to conduct an internal review (which was outstanding at the time) and also said:

“I requested just 2 specific e-mails, this was initially rejected, which itself seemed unreasonable, to aid matters, I then used an FOIA I already had to the DfT to work out which staff member at the Home Office held the e-mails I needed, so I provided their e-mail. Despite the [sic] Home Office have neither provided the response nor conducted an internal review which I've asked for and have dragged the request out for several months”.

9. The Commissioner will consider the application of section 12 to the request below. As the complainant has also referred to a named party he will also initially consider section 40 of FOIA.

Reasons for decision

Section 40 – personal information

10. The Commissioner notes that in attempting to pinpoint the location of the requested information, the complainant has referred to a named party who he believes works with the Home Office, and whose name he has allegedly obtained from a different public authority in response to a different information request.
11. The Home Office has not formally cited section 40 in its response to the complainant. However, as the Commissioner is also the regulator for matters relating to the Data Protection Act 2018 (the 'DPA') he will consider this point first.
12. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information – this is referred to as the duty to confirm or deny.
13. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK GDPR.
14. For the Home Office to be entitled to rely on section 40(5B)(a)(i), the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the DPA 2018 defines personal data as:-

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

18. In his correspondence with the Home Office, the complainant has named an individual who he expects will either hold copies of the requested emails or will know their location. If the Home Office were to confirm or deny whether or not it holds any emails by reference to this individual, it would reveal to the world something about them, ie that they are / were a Home Office employee.

19. The Commissioner has therefore concluded that if the Home Office confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out in paragraph 14 is therefore met.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

20. Article 5(1)(a) of the UK GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

21. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR), be fair and be transparent.

Lawful processing: Article 6(1)(f) UK GDPR

22. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met

before disclosure of the information in response to the request would be considered lawful.

23. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:-

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”¹.

24. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

25. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test
27. The complainant has not specified any legitimate interests in knowing whether or not the named party is a Home Office employee. However, this is mitigated by the Home Office itself not advising him accordingly. The Commissioner notes a general legitimate interest in transparency.

(ii) Is confirming whether or not the requested information is held necessary?

28. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
29. The Commissioner does not consider it necessary for the Home Office to confirm or deny whether or not the named party is an employee, as the focus of the request is disclosure of some emails and those named within these emails does not seem to be of direct relevance to their complainant.
30. However, it does impact on the application of the cost limit at section 12 of FOIA. Were the Home Office able to approach that employee (if they are indeed an employee), this could significantly reduce the scope of any searches required to be made in order to locate the requested information. As such, confirmation or denial is necessary in order to potentially counter its reliance on section 12.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

31. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to an FOIA request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
32. It would seem that the complainant may have obtained the name he cited from another public authority as the result of a request under the FOIA, thereby placing it in the public domain at that time. However, if this is indeed the case, it does not mean that the Home Office is then obliged to perpetuate any such disclosure, especially if it was something which it would not have ordinarily disclosed itself; that a name may have been provided by one public authority does not mean that another public authority must necessarily follow suit.
33. The Commissioner has undertaken online searches to ascertain whether the named party has been publicly connected to the Home Office as one of its employees. He has not found any such connection and therefore concludes that the named party, if they actually are a Home Office employee, is either not sufficiently senior or does not have a public-facing role and would therefore not expect to be named.
34. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that confirming whether or not they are a Home Office employee held would not be lawful.

Fairness

35. Given the conclusion he has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the Home Office was entitled to refuse to confirm whether or not the named party is one of its employees on the basis of section 40(5)(B)(a)(i) of FOIA. As such, it was under no obligation to conduct a search for the requested information by reference to the named party.

Section 12 – cost of compliance

36. Section 12(1) 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 limit.
37. When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
38. The cost limit in this case is £600, which is equivalent to 24 hours' work.
39. Section 12 of FOIA makes it clear that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the Home Office was reasonable; whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, that section 12(1) therefore applied and that it was not obliged to comply with the request.
40. It is firstly noted that, although the complainant has tried to narrow the search criteria for his request by naming a party, the Commissioner has determined above that the Home Office was not obliged to confirm or deny whether this party is / was one of its employees. Therefore, this reduction in scope is not applicable to the Commissioner's considerations below.
41. The Home Office has explained:

"The key difficulty with completing the request, is the part of the request asking 'For the titles please include partial matches, replies etc.' The period and topic of these emails focusses on a national crisis which garnered international media attention. Within the Home Office, the issue itself extended beyond any single team and information would have been widely discussed and shared, including with all internal interested parties. As the wording of the request includes 'replies etc' and 'partial' email title matches this will include any emails shared internally or externally, including with an amended subject title. It would not be possible to confirm further information is not held across the department, within the

balance of probabilities, without conducting further detailed searches. This search would extend to Press Offices, Private Offices, Operational response leads, and more. There is the added complication that this took place over the festive period increasing the likelihood of wider sharing as many that would normally deal with such issues were likely to be on leave.

Given the scope of the request, and due to the passage of time, we do not believe it would be possible to simply rely on a search of the mailboxes of those who were copied into the original email, to identify any information held within a department from 4 years ago. It is possible and within the balance of probabilities, as so often happens, that email chains branch off and copy recipients can be dropped or added to”.

42. The Commissioner asked the Home Office to provide an estimate for the costs of complying with the request. It advised him as follows:

“Step One: Preliminary searches (this work has been carried out)

- To attempt to find the emails chains, we began by identifying an inbox which was likely to hold the emails in question for *C-UAV Capability UK Airports*. This individual inbox provided 69 results. This took 2 minutes.

Step Two: Extending the preliminary searches

- As noted above, it is within the balance of probabilities that colleagues will have sent or been copied into different emails and no one person is likely to hold the complete set. If we were to extend that search to each member of the team, both past and present, we would have to multiply that number by 17, the number of different team members over time.
- Based on the sample search, we have estimated that a search by each team member is likely to identify at least 69 results each (see ‘Step One’), the total number of results generated would be 1,173. If each search takes 2 minutes, then the total time we estimate to locate the 1,173 emails would be 34 minutes. This estimate does not factor in the time required to identify past team members, the location of any archived inboxes and the holders capable of undertaking the search and compiling them into a format to send to us.

Step Three: Identifying and extracting the information in scope

- Each email result (1,173 in total) will have to be checked to ensure it is in scope of the request and not an unrelated email with a similar title. If we assume checking each email to see if it is in scope of the request takes an average of around 2 minutes (this is a conservative estimate on low side, real-time review will possibly average on higher side), that would take 2346 minutes or 39.1 hours.
- This would exceed the 24-hour limit before we've extended the search out to wider Home Office inboxes likely to be included in the work that took place at the time.
- This process would have to be repeated for the second email "Actions from 9am conference call – drones" and as outlined above, for each email in scope we would then have to search through the inboxes and sent folders of each email in copy to ensure we captured every email in scope of the request as written. Conducting the search on the same inbox produced 68 results. Applying the same assumptions as above including reviewing each email to identify if it is in scope, adds another 2312 minutes or 38.5 hours to the search.

Step Four: Extending the search to the 'wider' Home Office

If we were to then extend the search to other parts of the Home Office, it would add considerably to the estimated time it would take to confirm on the balance of probabilities, the totality of information held within the scope of this request. As noted above, this will include Press Offices, Private Offices and Operational response leads and will add considerable time to the search. If we made the assumption of each one of these teams alone having a small team of five that may have been included at the time, that would add another 15 inboxes to the search essentially doubling our above estimate.

Final total estimate for all steps/work required:

In conclusion, we believe a conservative estimate of searches required is as follows:

- Preliminary searches: 34 minutes
- Extending preliminary searches: 1 hour
- Identifying/extracting information in scope – first search term: 2346 minutes or 39.1 hours
- Identifying/extracting information in scope – second search term: 2312 minutes or 38.5 hours

- Search of wider Home Office: precise estimate unknown but likely to be equal to internal searches.

Total estimated time: 157.2 hours

We believe to comply with this request would clearly exceed the appropriate limit under section 12”.

43. In the Commissioner’s view the Home Office has appropriately considered the scope of the request.
44. Having considered the detailed estimate provided, the Commissioner finds that it is realistic and reasonable. He therefore accepts that to provide the information would exceed the appropriate limit and that section 12(1) has been correctly applied in this case.

Section 16 – advice and assistance

45. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request, so far as it would be reasonable to expect it 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.
46. In its internal review, the Home Office explained to the complainant that if he refined his request, for example, by confining the request to the inboxes of senior officials only, such as “Director Generals, Directors or Chief Scientific Advisors” for the specified period, it may be able to comply with a future request.
47. The Home Office also advised the Commissioner:

“...if the requester were to submit a new request, removing the part which asks, ‘please include partial matches, replies etc.,’ then it is likely to fall within the limit and we would consider this as a new request. However, it is possible that further exemptions may apply. We are happy to provide this further advice to the requester”.
48. In this case, the Home Office did not provide a detailed breakdown of costs to the complainant and also did not explain why his suggestion of focusing a search around the party he named was not done. However, it did provide a general explanation regarding how the information was held and did make a suggestion on how he might refine his request; a further suggestion is also provided above.
49. The Commissioner therefore finds there was no breach of section 16.

Other matters

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

Internal review

51. 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.

52. However, the Commissioner has issued guidance in which he has stated that, in his view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.

53. In this case, the internal review was not completed in accordance with that guidance. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales he has set out in his guidance. This delay has been noted for monitoring purposes.

Engagement

54. The Commissioner has also noted the delays in the Home Office's engagement with his investigation in this case.

Right of appeal

55. 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

56. 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.

57. 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

Carolyn Howes
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