

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 May 2011

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HS

Summary

The complainant requested information relating to extraordinary rendition flights. The Commissioner finds that it was reasonable for the public authority to estimate that the cost of the request would exceed the appropriate costs limit and so it was not obliged to comply with the request. However, the Commissioner also finds that the public authority failed to comply with section 17(5) of the Act in that it did not cite section 12(1) within 20 working days of receipt of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Prior to the complainant's request of 3 July 2010 which forms the basis of both his complaint to the Commissioner and of this Decision Notice, he submitted a more broad-ranging request (for the period 1 January 2002 to 1 January 2005) on 18 May 2010. The Ministry of Defence (the 'MOD') responded on 17 June 2010 applying section 12 (cost of compliance) to the request, and offered the complainant advice and assistance as to how he might refine his request to narrow the scope. His subsequent request of 3 July 2010 then repeated the first part only of the original request but covered the same time period.

The Request

3. The complainant made his refined request to the MOD on 3 July 2010 – again for the period 1 January 2002 to 1 January 2005 – for the following information:

“For the aforementioned period does the Ministry of Defence hold information which relates to the use of airbases in the UK and or UK controlled airbases overseas for the purposes of rendition/extra-ordinary rendition flights. If so could the MOD please supply a schedule and or list of the documents which includes the relevant authors and or correspondents of the documents, a brief description of the document and the date it was generated. I am interested in all information irrespective of the role played by the airbase.”

4. On 13 August 2010 the MOD advised that section 12 would still apply on the basis that the files previously identified would still need to be searched to assess whether they contained the information relevant to the complainant’s refined request. The MOD explained that it had already determined an initial list of files within scope from the complainant’s earlier request and advised him to refine his request further, suggesting that if there was a particular event or location about which he was seeking information, it might be worth highlighting this to allow the MOD to refine its searches for documents.
5. On 17 August 2010 the complainant requested an internal review.
6. The MOD responded on 22 October 2010 upholding the application of section 12 to the request, advising that the only viable basis on which the complainant might refine his request would be to ask for information generated during limited time periods. It stated that without knowing which time periods the complainant might be specifically interested in, it was difficult to express with confidence a time-bound period within which a search of documents would not exceed the section 12 costs exemption. The MOD also provided the complainant with details about parliamentary statements on rendition.

The Investigation

Scope of the case

7. On 23 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider his

view that the MOD should be able to supply him with a list of documents within the financial and time constraints laid down by the Act.

Chronology

8. On 25 January 2011 the Commissioner wrote to the MOD seeking further details about its cost estimate and filing systems. The public authority was also asked to provide a sample of the type of record that it would be necessary to search in order to collate the information falling within the scope of the request.
9. The public authority responded to this on 22 February 2011 and provided further details of its cost estimate.
10. On 7 March 2011 the Commissioner wrote to the complainant outlining his preliminary view that the MOD had correctly applied section 12 to the request and inviting the complainant to withdraw his complaint.
11. The complainant confirmed that he wished to pursue his complaint on 8 March 2011.

Analysis

Substantive Procedural Matters

Section 1 - General right of access

12. Section 1(1) of the Act states:

“Any person making a request for information to a public authority is entitled –

a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

b) if that is the case, to have that information communicated to him.”

13. Section 1(1) therefore creates two obligations on the public authority: the duty to confirm or deny to the applicant whether the information is held, and the duty to communicate the information to the applicant.

Section 12 – Cost exceeds compliance

14. The public authority has cited section 12(1), which provides that a public authority is not obliged to comply with an information request where the cost of doing so would exceed the appropriate limit. The Freedom of Information and Data Protection (Appropriate Limit and

Fees) Regulations 2004 (the fees regulations) provide that the appropriate limit is £600 for central government public authorities, and this equates to 3½ days work or £25 per hour.

15. The fees regulations also specify the tasks that may be taken into account when forming a cost estimate as follows:
 - determining whether the information is held;
 - locating the information;
 - retrieving the information;
 - extracting the information.
16. Section 12(1) is specific that a public authority is required to *estimate* the cost of compliance with a request, rather than give a precise calculation. The task for the Commissioner here is to reach a decision as to whether the cost estimate made by the public authority is reasonable.

Determining whether the information is held

17. The MOD advised that it took approximately 2 hours (£50) to determine what files were held by the Ministerial Support Unit (MSU), which was the department that would be likely to hold information that was in scope in relation to the original request of 18 May 2010. The MOD explained that as this activity had already been completed, it did not include this cost in the estimate for the complainant's refined request of 3 July 2010.
18. The MOD estimated that it would take a further two hours to contact leads in the other four Secretariats and for them to determine who would be most likely to hold this type of information in parts of their organisations, and whether there might be any files that would require searching. These four Secretariats were Permanent Joint Headquarters (PJHQ), Air Command, Operations Directorate and Directorate of Judicial Engagement Policy (DJEP). As Operations Directorate were already the lead branch, they were disregarded for the purposes of the estimate, and 6 hours, or £150, was therefore taken as appropriate to determine whether information was held.

Locating the information, or a document which may contain the information

19. The MOD assumed that it would take each secretariat a further hour for each lead to conduct a search of their electronic records. However, for the purposes of this estimate, the MOD assumed that none of the four Secretariats would identify any electronic areas that they would need to search (a highly conservative assumption) and therefore no additional cost was included in the cost estimate.

Retrieving the information or a document which may contain the information

20. The MOD originally estimated that the 23 hard copy files that were initially identified as possibly containing in-scope information would each contain approximately 40 documents. The original estimate was based on a detailed review of each document taking 10 minutes, aggregated to a total of 6 hours 40 minutes per file. This estimate was adjusted downwards at the internal review stage as it was estimated that a "scan read" only of each file could be achieved in two hours per file at a cost of £1,150. However, the MOD has pointed out there is clearly a significantly increased risk in this "scan read" approach in that information in scope, contained in the detail of documents but not identified in document subject heading or sub-headings, could be missed.
21. The Commissioner contacted the MOD to check whether the estimated 40 documents on the 23 files would consist of single sheets or bundles of papers. The MOD confirmed that MOD files typically contain a mix of emails and letters, some of which may be a single page, and reports which may run to many pages.

Extracting the information from a document containing it

22. The MOD confirmed that no cost estimate has been made against this heading.
23. The Commissioner asked whether the MOD had carried out a sampling exercise in relation to its cost estimate, and it confirmed that it had, in that it had examined a number of the 23 files mentioned above and determined that the average contents amounted to 40 documents.
24. The Commissioner explored whether the estimate was based upon the quickest method of gathering the requested information. The MOD confirmed that it was, stating that, whilst the initial list of files was identified through an electronic search, and although the MSU operates a database of correspondence, this was not in use during the period covered by this request for information. The MOD advised that the database was only in use from late 2004 and was still "work in progress" even then, such that electronic records relating to holdings of information created prior to that time did not exist and for some time afterwards were incomplete and unreliable.
25. The Commissioner requested more information about the MOD's filing system. It has confirmed that, whilst corresponding 'RESTRICTED' electronic files for each of the listed paper files do exist, they were only created around 2005. Having checked the electronic files corresponding

to the file list the MOD informed the Commissioner that it had found nothing pre-dating May 2005, explaining that prior to this date the hard copy file was often the only permanent record.

26. The Commissioner questioned the MOD about the type of information which is typically held on these files, how the files are divided/split and why they are held across a number of Secretariats. In response, the MOD explained that once the subject matter of a document has been identified, documents are filed on the appropriate file in date order. It stated that the files identified so far are primarily concerned with Ministerial correspondence and notes relating to previous requests for information about rendition flights. The MOD stated that, because it is a very large and diverse organisation, information covering such a topic inevitably will be held in a number of areas where there is the relevant expertise and differing business requirements, for example, the Air Command Secretariat, PJHQ, DJEP, etc.
27. The estimate made by the public authority of the time and cost that would be incurred through compliance with section 1(1)(b) in relation to this request is 52 hours / £1,300, well in excess of the limit.
28. Having considered the complainant's point that the MOD should be able to provide a list of the documents it holds within the cost limit, the Commissioner's view is that in order to produce such a list, the MOD would need to review the estimated 40 documents on each of the 23 hard copy files it has identified as potentially falling within the scope of his request. To do so would exceed the prescribed cost limit given that a scan read of each of the 23 files would take two hours. The conclusion of the Commissioner is that, for the reasons given above, it was reasonable for the public authority to estimate that the cost of the complainant's request would exceed the appropriate limit. Section 12(1) provided, therefore, that the public authority was not obliged to comply with section 1(1)(b) in relation to this request.

Procedural Requirements

Section 16

29. Section 16(1) provides that:

"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."

30. The Commissioner notes that, in both its refusal letter of 13 August 2010 and its internal review outcome letter of 22 October 2010, the

MOD advised the complainant how he might refine his request if he wished to pursue the matter without engaging the cost limit. There is no evidence that the complainant provided any refined request after 3 July 2010. The Commissioner therefore accepts that the MOD acted in accordance with its obligations under this section of the Act.

Section 17

31. In failing to cite section 12(1) within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 17(5).

The Decision

32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it was reasonable for it to estimate that the cost of compliance with the request would be in excess of the appropriate limit and so section 12(1) provided that it was not obliged to comply with the request. The Commissioner also finds, however, that the public authority failed to comply with section 17(5) in that it did not advise the complainant that section 12(1) was believed to apply within 20 working days of receipt of the request.

Steps Required

33. The Commissioner requires no steps to be taken.

Right of Appeal

34. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 9th day of May 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**

Legal Annex

Section 12 - Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides 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.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.”

Section 16 - Duty to provide Advice and Assistance

Section 16(1) provides that -

"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."

Section 16(2) provides that –

"Any public authority which, in relation to the provision of advice and 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.

Section 17 - Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (c) states that fact,
- (d) specifies the exemption in question, and
- (e) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

- (f) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (g) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(h) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(i) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

(j) the public authority is relying on a claim that section 14 applies,

(k) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(l) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

(m) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(n) contain particulars of the right conferred by section 50."