

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2013

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information in relation to staff appraisals. The Commissioner's decision is that DEFRA has not provided sufficient reasons for applying the exemption where the cost of compliance exceeds the appropriate limit. The Commissioner has also decided that DEFRA did not provide adequate advice and assistance. However, the Commissioner does not require the public authority to take any steps to ensure compliance with the legislation as the complainant is already in possession of the information he required.

Background

2. The Commissioner understands that the complainant launched a grievance and a claim for Judicial Review in early 2009 against DEFRA's strategy in designing and implementing Individual Performance Management ('IPM') which was done under the 'Renew Programme'. The grievance and subsequent appeal were rejected and the claim for Judicial Review failed at the permission stage. A disciplinary hearing then took place in mid 2009 as a result of the complainant using the office email system to draw colleagues' attention to the issue. The disciplinary hearing resulted in a conviction of serious misconduct and the complainant was given a final written warning. He lodged an appeal against the conviction along with complaints to the Solicitors Regulation Authority and the Civil Service Commissioner and an allegation that

contempt of court had been committed. The complainant was dismissed by DEFRA in December 2009. Proceedings in the Employment Tribunal followed in May 2010 with a settlement reached in January 2011. In March 2012 the complainant submitted a dossier to the police alleging fraud against certain individuals who had been involved in the issue.

3. The complainant believes that a particular set of minutes within the scope of the request that is the subject of this decision notice would have been relevant to his grievance, grievance appeal, judicial review and disciplinary proceedings. He received the minutes on 14 August 2009, as a result of a subsequent request, and asked for his disciplinary hearing to be reconvened so he could make appropriate submissions about them but this was refused. He has stated that it was the increased intensity with which he pursued the issue of apparent concealment of the minutes that directly led to his dismissal. He believes the particular set of minutes were deliberately withheld because DEFRA feared that they would support his grievance and judicial review cases and undermine the disciplinary charge brought against him in June 2009. He also believes that his claim for interim relief would have succeeded if he had been correct to allege that DEFRA breached the FOIA in its handling of the minutes.

Request and response

4. On 9 January 2009 the complainant wrote to DEFRA and requested information in the following terms:

"I would like to see copies of the following:

- The Staff Survey results referred to in Tab 1
- MB and EB minutes since September 2006 (I note MB minutes are only available online back to May 2008)
- The CIPD Research Report from May 2003
- The Capability Reviews carried out in relation to DCA, DfES, DWP and HO
- Cabinet Office guidance on rewards for poor performers
- The Levers Report
- The Towers Perrin Report

- Minutes of all the Staff Appraisal Working Group meetings since September 2006
- Minutes of all the Delivery Board meetings since September 2006
- Minutes of all ASE meetings since September 2006 (I have no idea what the ASE is or was, however – it is referred to in the documents at Tab 6)
- Minutes of all Defra Renew meetings since the inception of Renew
- Correspondence with PCS and FDA about the new staff appraisal scheme, including in particular correspondence documenting the “resistance” mentioned in Tab 11 and the “engagement” mentioned in Tab 14

I would also like to see any documents evidencing the “pockets of resistance” and “lack of corporate commitment” amongst senior management referred to in Tab 14.

5. On 28 January 2009, DEFRA wrote to the complainant inviting him to narrow down his request. It explained that the amount of information requested was very substantial, and gathering it together would be likely to involve a significant cost and diversion of resources from the Department’s other work and therefore likely to exceed the £600 cost limit set for dealing with freedom of information requests.
6. The complainant responded on the same day and narrowed the request down as follows:

“Here is a narrowed down list of what I think is essential:

- MB and EB minutes since September 2006 to April 2008 *at which staff performance assessment issues were considered*
- Cabinet Office guidance on rewards for poor performers
- The Levers Report
- The Towers Perrin Report
- Minutes of all the Staff Appraisal Working Group meetings since September 2006
- Minutes of all the Delivery Board meetings since September 2006 *at which staff performance assessment issues were considered*

- Minutes of all ASE meetings since September 2006 *at which staff performance assessment issues were considered*
 - Minutes of all Defra Renew meetings since the inception of Renew (the only one I have already is the Renew Executive Meeting of 25 February 2008)
 - Docs evidencing the "pockets of resistance" and "lack of corporate commitment" amongst senior management referred to in Tab 14 ("IPM Story")"
7. DEFRA provided its response on 6 February 2009. It explained that even taking into account the narrowed down request of 28 January 2009, the requested information exceeded the appropriate fees limit of £600. The letter enclosed minutes of the Management Board meeting of January 2007 where staff performance was discussed and stated that all other 'management Board and Directors' General meetings between September 2006 and April 2008' had been read and confirmed that there were no other occasions when staff performance assessment issues were considered. Also enclosed with the response were extracts of the minutes of the Review meeting of 26 June 2007 and notes of the performance management working group (which it stated were outside the scope of an earlier request, that being DEFRA reference RFI 2420 for 'What research was carried out, what studies were commissioned and what other information was considered before concluding that the current methodology was appropriate for DEFRA? What management papers were prepared before launching the new system?'). The response also explained that pay arrangements for staff below G6 are delegated to departments and attached a link to DEFRA's guidance dealing with unacceptable performance.
8. On 9 February 2009, the complainant wrote to DEFRA as follows;
- "Bearing in mind what you say in your covering letter, and having regard to the fact that the Department is already under a duty of candour in the context of the judicial review letter before claim (which should cover all relevant notes and minutes of meetings) perhaps you can revisit the following requests:
- The Levers Report
 - The Towers Perrin report
 - Docs evidencing the "pockets of resistance" and "lack of corporate commitment" amongst senior management referred to in tab 14 ("IPM Story")."

9. DEFRA responded on 11 February 2009 stating that the Towers Perrin report and the levers report would be sent by post that day as they were in hard copy only. It also stated that there is no documentation of "pockets of resistance" or "lack of corporate commitment" amongst senior management and explained that the view referred to in tab 14 ("IPM Story") was based on anecdotal evidence from informal conversations.
10. On 23 July 2009, the complainant made another request for the minutes of all DEFRA Renew meetings since the inception of Renew (DEFRA reference RFI 2831) which were provided on 14 August 2009.
11. On 14 August 2009, the complainant wrote to DEFRA stating that the minutes of 18 January 2008, received in response to his request of 23 July 2009, has given him a number of new 'leads' which he would have liked to have had back in January 2009 when he launched his grievance and asked for an explanation as to why the minutes of 18 January 2008, in particular, were not provided in February 2009. He stated that DEFRA's initial reason that cost prevented the minutes being disclosed in January/February 2009 seemed to be undermined by the fact that DEFRA found it reasonably straight forward to provide electronic copies of 12 sets of 'Renew' minutes of the Renew executive in response to the 23 July 2009 request. He further stated that DEFRA had said it had checked the documents and concluded there was nothing relevant in them but this proposition was contradicted by the contents of the 18 January 2008 minutes which contain a record of an extensive discussion relating to the new IPM system.
12. DEFRA treated the correspondence of 14 August 2009 as a request for an internal review of the response provided on 6 February 2009. It responded on 18 September 2009 stating that;

"We have concluded that Defra dealt with your request in a procedurally correct manner within the terms of FOIA. The minutes of the 18 January were not supplied to you in answer to your narrowed down request of 28 January 2009 because determining whether the totality of the information in scope of your request was held; locating that information and retrieving it was estimated to exceed the appropriate fees limit as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 [SI 2004/3244] based on a reasonable estimate made at the time the request was received.

Consequently since the information was never retrieved and considered no decisions were taken to withhold these minutes or any other part of the information you requested."

It further stated that it had taken account of section 16(1) of the FOIA by asking the complainant to narrow his request and had provided certain documents in an attempt to be helpful and under its general duty under section 16 to assist requesters.

Scope of the case

13. The complainant contacted the Commissioner on 17 April 2013 to complain about the way his request for information had been handled. He acknowledged the delay in bringing the complaint to the Commissioner and said that it was due to new evidence which he received in response to an information request to the Commissioner.
14. The complainant also provided further details of his complaint on 1 May 2013, 27 June 2013 and 11 September 2013. He also made an information request to the Commissioner for DEFRA's response to the Commissioner enquiries on this case and then provided detailed counter arguments to DEFRA on 11, 12 and 13 September 2013. The Commissioner has not found it necessary to take these arguments into account. The Commissioner's role is restricted to making decisions as to whether DEFRA has responded to an information request in accordance with the FOIA and not to adjudicate on the complainants wider issues as detailed in the background section of this decision notice.
15. Both DEFRA and the complainant have sometimes referred to the relevant minutes as the '14 January 2008' minutes and at other times the '18 January 2008' minutes. The Commissioner understands that the minutes are in fact from a meeting dated 14 January 2008 and there was no such meeting on 18 January 2008.
16. The Commissioner has considered whether DEFRA was entitled to rely on section 12 as a basis for refusing to provide the information requested and whether it was in breach of its obligation under section 16 to provide advice and assistance.
17. As the complainant has made it clear that he has now received the information he required, the purpose of this decision is to determine whether the response provided by DEFRA in relation to sections 12 and 16 was correct at the time rather than to consider ordering the disclosure of information.

Reasons for decision

Section 12 – Exemption where cost of compliance exceeds appropriate limit

18. Section 12 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 which, in this case, is £600 as laid out in section 3(2) of the fees regulations.
19. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would exceed the appropriate limit, can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or documents containing it;
 - retrieving the information, or documents containing it; and
 - extracting the information from any documents containing it.
20. As the costs are calculated at £25 per person per hour for all authorities regardless of the actual cost or rate of pay, in this case the limit will be exceeded if the above activities exceed 24 hours.
21. 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 and what amounts to a reasonable estimate has to be considered on a case by case basis. The Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency*¹ said that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".

¹ Appeal number EA/2006/0004, 30 October 2007

22. In his guidance on this subject², the Commissioner states that a sensible and realistic estimate is one which is based on the specific circumstances of the case and should not be based on general assumptions, for example, that all records would need to be searched when it is likely that staff in the relevant department would know where the requested information is stored.
23. In the aforementioned guidance, the Commissioner also states that;
- “A public authority is not obliged to search for, or compile some of the requested information before refusing a request that it estimates will exceed the appropriate limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate. It is good practice to give these arguments or evidence to the requestor at the outset to help them understand why the request has been refused. This reasoning is also likely to be required if a complaint is made to the Information Commissioner.
- However, it is likely that a public authority will sometimes carry out some initial searches before deciding to claim section 12. This is because it may only become apparent that section 12 is engaged once some work in attempting to comply with the request has been undertaken. ”
24. DEFRA did not provide the complainant with a breakdown of its estimate that responding to the request would exceed the appropriate limit. In its internal review response it stated that ‘conducting a comprehensive search for the full set of these minutes in addition to the other information contained in this request would have exceeded the appropriate limit.’”
25. The Commissioner sought further information from DEFRA, specifically in relation to the costs estimate and the searches undertaken, in order to assess whether its estimate was reasonable and based on cogent evidence.
26. DEFRA provided the Commissioner with a table detailing how long it estimated it would take to response to the request, broken down into

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx

the separate elements of the request, for example the breakdown detailed that it would take 3 hours to 'find, check and extract relevant parts' for the request for 'Minutes of all Defra Renew meetings since the inception of Renew'. It stated that the total estimated time was 26 hours which equates to a total estimated cost of £650. It confirmed that the estimate of time and costs was created at the time of dealing with the narrowed-down request and that this estimate has not been refreshed. It stated that owing to the length of time that has passed since the request was received, it is not possible to provide a more detailed and accurate estimate now.

27. The Commissioner requested that an estimate should include a description of the nature of work undertaken for example, searching x number of files would take x amount of hours. He notes that in this case the estimate merely stated how long it would take to respond to each element of the request without breaking the estimate down any further.
28. DEFRA confirmed that there is no record of any sampling exercises conducted at the time of handling the original request. It said that this does not necessarily mean to say that a small-scale sampling exercise was not conducted and explained that given the scale of the request (the request consisted of a number of bullets requesting items of information and some bullets themselves included multiple items of information) and the team's knowledge of the way information relating to the general subject matter of the request was filed, it would have been obvious with little effort of a calculation/sampling exercise that the information could not be supplied within the FOIA cost limit. It confirmed that a sampling exercise has not been conducted for the purposes of the response to the Commissioner's investigation.
30. DEFRA also confirmed that the estimate was based on the quickest method of gathering the requested information and this was based on using electronic searches rather than searching through manual files. DEFRA pointed out that a subsequent manual search was also undertaken, which located a paper copy of the Levers report and the Towers Perrin report, which was disclosed to the complainant. It did not time how long this search took, but stated that the figure in the estimate is its best guess and one which it believes to be very conservative.
31. DEFRA noted that the complainant's request covered several areas of work (e.g. the Renew programme, Cabinet Office guidance on rewards for poor performers, correspondence with Unions on the new appraisal system and minutes for meetings of the Management Board, Executive Board, Staff Appraisal Working Group and the Delivery Board, etc), which are not all related to each other and some of which are quite

separate subjects. Therefore, responsibility for the requested information did not rest in a single place with a single person or team, and so if the requested information were held, it would be held by a number of different teams in DEFRA. It said that in some cases it was not known where the information was held or who held it, thus making it difficult to estimate how long it would take to find but it considered it was obvious, without physically undertaking searches, that the inevitable searching to try to locate the requested information would take a considerable amount of time and together with the time needed to extract the information our complying with the request would exceed the FOIA cost limit.

32. The Commissioner notes that, although a public authority is not obliged to search for information before refusing a request that it estimates will exceed the appropriate limit, it is likely to carry out some initial searches before deciding to claim section 12. In this case, as stated above, DEFRA confirmed that no searches have been conducted for any information that has not since been provided to the complainant.

33. DEFRA pointed out that the Management Board and Directors' General minutes will not have been held in the Renew folders and said that without checking the Renew folders, it is not known whether any of the remaining items were also not held there. It said;

"Renew folder is of a vast size: it contains more than 2,100 folders, including multiple sub-folders, which themselves contain multiple sub-folders, and more than 14,000 files. The names of the files, folders and sub-folders are not precise enough in relation to the terms of the request to enable the quick search or identification of the requested information that the complainant believes could be conducted. For example, a search for "meeting" finds 72 folders (several are simply called "Meetings") and 551 files. A search for "Renew meetings" or "Renew minutes" does not find the Renew Executive meeting minutes. DEFRA said that this refutes any suggestion that locating the requested information would be an easy and straightforward task that could be completed within the FOIA cost limit."

34. The Commissioner has considered DEFRA's position as detailed above and the table detailing how long it estimated it would take to respond to the request. In that table, two hours are included for 'Correspondence with PCS and FDA about the new staff appraisal scheme, including in particular correspondence documenting the "resistance" mentioned in Tab 11 and the "engagement" mentioned in Tab 14'. As this element of the request was not included in the complainants narrowed down request of 28 January 2009, this should not have been included in the costs estimate. As DEFRA also stated that it knew there were no

'documents evidencing the "pockets of resistance" or "lack of corporate commitment" amongst senior management referred to in tab 14' it should not have included an hour for this in the costs estimate.

35. Without these three hours, the costs estimate would be reduced to 23 hours at a total cost of £575. As this revised estimate does not exceed the costs limit of £600, the Commissioner considers that the exemption at section 12(1) of the FOIA is not engaged.

Section 16 - Duty to provide advice and assistance

36. Section 16 of the FOIA states that it shall be the duty of a public authority to provide advice and assistance to requesters, so far as is reasonable, and where a public authority conforms with the code of practice under section 45 in relation to the provision of advice and assistance, it will be taken to comply with the duty imposed.
37. Where a public authority cites section 12, paragraph 14 of the section 45 code of practice indicates that the authority should consider providing an indication of what, if any, information could be provided within the costs limit. This allows the applicant to choose how to refine the request to successfully obtain a more limited piece or section of the requested information.
38. As stated in paragraph 7, DEFRA wrote to the complainant inviting him to narrow down his request. It explained that the amount of information requested was very substantial, and gathering it together would be likely to involve a significant cost and diversion of resources from the Department's other work and therefore likely to exceed the £600 cost limit set for dealing with freedom of information requests.
39. The Commissioner enquired as to whether DEFRA considered providing the complainant with any indication of what information could be provided within the costs limits. DEFRA confirmed that it didn't provide any specific indication of what would be provided but instead it provided the complainant with the information that was available without carrying out extensive and time-consuming searches. DEFRA believes that this fulfils its section 16 FOIA duty of 'providing advice and assistance' and was more helpful to the complainant than it suggesting parts of his request that could be provided within the cost limit. It said;

"Moreover, given the number of items that the complainant had requested, there would be quite a number of permutations of what could be provided within the cost limit, which made it very difficult, if not impossible, to provide a simple, definitive list of the information that could have been provided within the cost limit. Therefore, it was

far better for the complainant and more in line with our duty to provide advice and assistance that we suggested to him general ways in which he could narrow down his request.”

40. The complainant has provided the Commissioner with various arguments as to why DEFRA should have known it was the minutes of 14 January 2008 he was specifically interested in as they were directly related to his grievance and therefore should have provided more focused advice and assistance. However, the Commissioner notes that even though certain individuals within DEFRA would have been aware that the complainant was seeking information in relation to his grievance, neither the request itself nor the narrowed down request states that he is looking for such information and each request under the FOIA should be treated as applicant blind. The Commissioner has not considered the complainants arguments as he has instead focussed on DEFRA’s response to the request as a whole, rather than individual elements of the request, and whether DEFRA was in breach of its duty to provide advice and assistance under section 16.
41. The Commissioner considers that DEFRA did not fulfil its duty to provide advice and assistance by disclosing certain information in response to the narrowed down request. DEFRA had, in effect, removed the choice from the complainant as to what information was of most interest to him and the Commissioner considers that the choice of where to direct limited resources should always be made by the requester.
42. The Commissioner considered that it would have been reasonable for DEFRA to provide the complainant with its costs estimate breakdown which would have allowed him to then express a preference as to which part or parts of the request he may wish to receive which could be provided under the appropriate limit. As stated in the Commissioner’s guidance on this subject³;

“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.”

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http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx

43. By not sufficiently indicating what information could be provided within the appropriate limit, the Commissioner considers that DEFRA breached section 16 of the FOIA.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF