

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2015

Public Authority: The Cabinet Office
Address: 70 Whitehall
London SW1A 2AS

Decision (including any steps ordered)

1. The complainant made requests to the Cabinet Office for information relating to the Denning Report (published in 1963 following Lord Denning's inquiry into the Profumo Affair). The Cabinet Office refused to comply with these requests citing section 12 (Exceed Costs Limit). It upheld this position at internal review. Having considered the Cabinet Office's submissions, the Commissioner does not agree that to ascertain whether or not the information is held would in itself exceed the appropriate limit in this case. He therefore does not uphold the Cabinet Office's use of section 12 in this case. He also finds that the Cabinet Office contravened its obligations under section 16 (Advice and Assistance) in respect of these requests.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that does not rely on section 12 as its basis for refusing to confirm or deny whether the information is held.
3. 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

4. On 3 December 2013 the complainant requested information of the following description:

- "1. Does the Cabinet Office hold material and or documents which was evidence for Lord Denning's report: "The Circumstances Leading to the Resignation of the Former Secretary of State for War, JD Profumo". This material which was referred to by Lord Wallace of Saltaire in the House of Lords on Thursday 28 July 2013 will include but not be limited to written and oral submissions to Lord Denning's enquiry as well as relevant correspondence, memos, telephone transcripts, internal communications, taped interviews and photographs.
2. If the answer to this question is yes can you please provide copies of all the documents and evidence held by the Cabinet Office which was classed as evidence to the aforementioned report.
3. Does the Cabinet [sic] hold documentation which relates to its future plans for this evidence including its possible retention and or destruction. If the answer is yes can you please provide copies of this documentation. As far as question 3 is concerned, I am only interested in material which has been generated since 1 January 2012."
5. On 2 January 2014 the Cabinet Office responded. It said it was not obliged to provide a response and cited section 12 (costs limit) as the basis for its refusal. It invited the complainant to refine his request and suggested he might wish to amend the timeframe.
6. The complainant requested an internal review on 14 January 2014. The Cabinet Office sent him the outcome of its internal review on 12 March 2014. It upheld its original position.

Background

7. In 1963, the then Prime Minister, Harold Macmillan, asked the Master of the Rolls, Lord Denning, to conduct a judicial inquiry into the circumstances leading to the resignation of John Profumo (who was Secretary of State for War), including any security implications. Mr Profumo had conducted a brief relationship with a woman who had, at the same time, had a similar relationship with a Soviet naval attaché. Although Mr Profumo at first denied the relationship in a personal statement to Parliament, he later admitted it and subsequently resigned. In his report, Lord Denning did not find any risk to national security arising from the Profumo Affair.

Scope of the case

8. The complainant contacted the Commissioner on 22 March 2014 to complain about the way his request for information had been handled.

He disputed the Cabinet Office's reliance on section 12 and drew attention to calls from a number of sources to publish the information. He also drew attention to publicly available information which, in his view, confirmed that the Cabinet Office held the requested information. He supplied the Commissioner with a document he had obtained from The National Archives ("TNA"). This had the TNA reference PREM 16/1453.¹ This was a letter of 7 May 1977 from the then Prime Minister's Private Secretary. The letter stated that the information described in his request was, at the time the letter was written, held in one place, namely "under special security arrangements in the Cabinet Office".

9. The Commissioner wrote to the Cabinet Office to ask for its arguments and to draw its attention to PREM 16/1453. The Cabinet Office confirmed that it still intended to rely on section 12 as its basis for refusing to provide a response to the request.
10. The Commissioner has therefore considered whether the Cabinet Office is entitled to rely on section 12 as a basis for refusing to provide a response to the request.

Reasons for decision

11. By virtue of section 1(1)(a) the Cabinet Office is obliged to confirm or deny whether it holds information described in a request unless it is exempt from its obligation to do so.
12. By virtue of section 1(1)(b), the Cabinet Office is obliged to provide this information, if held, unless it is exempt from its obligation to do so
13. The Cabinet Office's position that it is not obliged to comply with the request by virtue of section 12 means, in practical terms, that it is arguing that it is not obliged to provide confirmation or denial as to whether it holds the requested information by virtue of section 12.
14. 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.
15. Section 12(2) states that section 12(1) does not exempt the public authority from its obligation to comply with section (1)(1)(a) unless the

¹ <http://discovery.nationalarchives.gov.uk/details/r/C11435342>

estimated cost of complying with that paragraph alone would exceed the appropriate limit. This is the Cabinet Office's position.

16. The appropriate limit in this case is £600, as laid out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). This must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours' (or 3.5 days') work for a central government public authority such as the Cabinet Office.
17. When estimating whether confirming or denying whether it holds the requested information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in determining whether it holds the information. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.
18. Another factor to consider in this case is the Cabinet Office's assertion that there are three separate requests, the cost of complying with which can be aggregated. Regulation 5(2) of the Fees Regulations states that a public authority can aggregate the cost of compliance across a number of requests if the requests are thematically linked or follow the same overarching theme. The application of this Regulation turns on whether the requests which are to be aggregated relate "*to any extent*" to the same or similar information. Normally, a public authority must consider each request separately even if they are contained in the same correspondence. If it can aggregate the cost of compliance and where it would exceed the appropriate limit to comply with one of the requests, the Cabinet Office does not have to comply with any of the requests.
19. The first point to make is that, in the Commissioner's view, there are only two requests and not three as the Cabinet Office asserts. The first asks the Cabinet Office to provide, if held, "material and or documents which was evidence for Lord Denning's report"; the second asks the Cabinet Office to provide, if held, "documentation which relates to its future plans for this evidence including its possible retention and or destruction" and specifically for documentation "which has been generated since 1 January 2012". The Commissioner accepts that, strictly speaking, the complainant has separated his requests out in a manner that suggests there are three of them but, looking at what is actually described in the requests, the Commissioner is satisfied that there are only two. The requests, as set out by the complainant, are clearly sequential. The Commissioner will therefore now refer to them as the first request and the second request.
20. The first request is for information of the following description: material and or documents which was evidence for Lord Denning's report.

21. The second request is for information of the following description: documentation which has been generated since 1 January 2012 and which relates to its future plans for this evidence including its possible retention and or destruction.
22. As noted above, the Cabinet Office has argued that, because it can aggregate the cost of compliance and because the cost of compliance with one of the requests would exceed the appropriate limit, it can refuse to respond to either of the requests. This means, in practice, that it is arguing that it can refuse to confirm or deny whether it holds any of the information described in the two requests.
23. The Commissioner has therefore first considered whether the requests can be aggregated for the purpose of calculating the cost of compliance. Where they can, the Commissioner would then look at whether it would exceed the appropriate limit to comply with them by providing confirmation or denial as to whether the information is held.

Can the requests be aggregated?

24. The Commissioner is satisfied that both requests follow an overarching theme, namely the Denning Report into the Profumo Affair. On that basis, the requests were legitimately aggregated by the Cabinet Office.
25. In the Commissioner's view, by aggregating the requests and then focussing on the last request, the Cabinet Office has not considered whether information could be communicated to the complainant in respect of the first request which was made in two parts. It is arguable that the approach taken at least implies that the Cabinet Office does hold the information requested in the first two requests. However, the Commissioner notes that by aggregating the requests, the Cabinet Office has avoided the need to address the question whether that information is exempt or disclosable.

Would compliance with the aggregated requests exceed the appropriate limit?

26. The Fees Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - *determining whether the information is held;*
 - *locating the information, or a document which may contain the information;*
 - *retrieving the information, or a document which may contain the information; and*

- *extracting the information from a document containing it.*
27. The Commissioner would stress here the effect of section 12(2) which states that section 12(1) "does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) [providing confirmation or denial that requested information is held] unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit".
 28. The Commissioner has therefore considered whether the Cabinet Office is obliged to comply, at least, with section 1(1)(a) of the Act or whether it would exceed the cost of compliance to do even that.
 29. Focussing on the last request, the Cabinet Office explained what it would need to do in order to comply with it (even after the complainant had refined the timeframe – it had already asked the complainant to do this prior to the request under consideration in this case). It explained that the information could be held in eight different areas and by more than 20 individuals at various levels. This included individuals who had sent or received relevant emails including attachments. It claimed that it would take, on average, an hour and a half for each individual to check whether they had relevant information. It accepted that it may be less in some cases but asserted that it would be more in others. It gave an example of one member of staff and the time it would take for that person to check the 150 emails likely to be in their possession for relevant information.
 30. It then set out other arguments as to the sensitivity of the Denning report which are not relevant to the consideration of section 12 except insofar as it would explain why a large amount of correspondence on the subject might be generated across several areas and between a large number of individuals.
 31. Using the Cabinet Office figures, this would mean the following calculation: 90 minutes x 20 persons = 1800 minutes. 1800 minutes ÷ 60 minutes = 30 hours or £750 work at £25/hour. As noted above, the appropriate limit for a central government public authority is 24 hours or £600 at £25/hour.
 32. The key question for the Commissioner, therefore, is whether the average figure of 90 minutes is reasonable.
 33. The Commissioner has concluded that, on the balance of probabilities, this is a not a reasonable figure.

34. The Commissioner asked for the Cabinet Office's full and final arguments in support of its position on 13 May 2014. When it did not provide these by that date, the Commissioner asked the Cabinet Office again on 10 June 2014 and 8 July 2014. During this correspondence, the Commissioner reminded the Cabinet Office that he may serve an Information Notice under section 51 of the Act which would require it formally to provide its full and final response. The Commissioner's requirement for the Cabinet Office's full and final arguments had therefore been clearly stated on more than one occasion and the consequences of failing to provide those arguments upon request were also made clear.
35. The Cabinet Office eventually provided its response on 14 July 2014. Given that the Commissioner had pressed the Cabinet Office on three occasions for this response and had specifically requested that it be the Cabinet Office's "full and final response", the Commissioner did not think it was either appropriate or expedient to press it for further arguments beyond that which was provided in its letter of 14 July 2014. He notes that the Cabinet Office invited him to do so in its letter of 14 July 2014. However, because of the protracted delays experienced in obtaining any response at all, the Commissioner was sceptical as to how forthcoming or how prompt the Cabinet Office would be were he to make additional enquiries or seek clarification.
36. In its letter of 14 July 2014, the Cabinet Office did not provide particularly detailed arguments as to how it reached the figure it was asserting. The Commissioner accepts, in general terms, that the Denning report is a topic likely to generate voluminous exchanges of correspondence on a range of themes which may include the subject of the complainant's second request. However, the Cabinet Office did not explain which areas of its business would be most likely to hold relevant information or the extent to which it has gathered relevant evidence from those business areas.
37. However, noting that the information described in the second request, if held, would be held electronically, he does not accept, on the balance of probabilities, that the Cabinet Office can rely on section 12 in the manner in which it has done. Of crucial importance here is the wording of section 12(2) which states that section 12(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".
38. The Cabinet Office has not satisfactorily explained how it would take 20 people on average 1.5 hours each to ascertain whether any information is held within the scope of either request. As such, the Commissioner

does not agree that the Cabinet Office is exempt from its obligation to comply with section 1(1)(a) by virtue of section 12.

Section 12 - conclusion

39. Having considered the Cabinet Office's submissions, the Commissioner does not agree that to ascertain whether any of the requested information is held would in itself exceed the appropriate limit in this case.
40. The Commissioner finds that the Cabinet Office is not entitled to rely on section 12 as a basis for refusing to provide confirmation or denial in respect of any of the requests. He therefore requires the Cabinet Office to provide a fresh response which does not rely on section 12 as a basis for refusing to provide such confirmation or denial.

Section 16 – Advice and Assistance

41. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to someone making an information request, including helping an applicant refine a request so that it can be answered within the appropriate costs limit.
42. In the exchange of correspondence with the complainant prior to the requests considered in this case, the Cabinet Office did suggest that the complainant narrow the time frame of the second request.
43. However, the Commissioner thinks that the Cabinet Office could have gone further to satisfy its obligations to the complainant under section 16 in relation these requests. For example, the Commissioner has seen no clear reason why the Cabinet Office did not confirm or deny whether it held information within the scope of either of the requests. Even if, strictly speaking, the Cabinet Office can aggregate the cost of compliance in respect of both requests, it could have provided confirmation or denial in relation to the first request in order to be helpful to the complainant. If, as it asserted, the revised timeframe was still too broad to allow it to respond to the second request, it could have explained more clearly to the complainant how it had reached that view so that he would be in a better position to reframe his request.
44. In light of the above, the Commissioner finds that the Cabinet Office has contravened its obligations under section 16 in respect of both requests.

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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