

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2018

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking information about its discussions with Southampton University about the Broadlands Archive. The Cabinet Office initially took the view that it did not hold any information falling within the scope of the request. However, following clarification from the Commissioner in relation to how the request should be interpreted it argued that compliance with the request would exceed the appropriate cost limit. The Commissioner agrees with this assessment and therefore the Cabinet Office does not have to comply with the request by virtue of section 12(1) of FOIA. However, the Commissioner has concluded that the Cabinet Office has a duty under section 16(1) of FOIA to provide the complainant with advice and assistance.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to allow him, if it is possible to do so, to formulate a request seeking information about the Cabinet Office's discharge of its functions under the Ministerial Direction discussed in this notice which can be answered within the appropriate cost limit.
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.

Background

4. In 2011 Southampton University (the University) purchased the Broadlands Archive from the Trustees of the Broadland Archive. The archive, a collection of papers from the sixteenth century to the present centre on the Temple (Palmerston), Ashley, Cassel and Mountbatten families. The archive had previously been on deposit at the University for more than 20 years.
5. In order to fund the purchase the University relied, in part, on a grant from the National Heritage Memorial Fund for the sum of £1.9m. The sale was also subject to the 'acceptance in lieu' scheme under which art works and archives are accepted by the nation in lieu of inheritance tax. As a result, a Ministerial Direction (the Direction) was issued under the National Heritage Act 1980 setting out the terms of the acquisition.

Request and response

6. The complainant submitted the following request to the Cabinet Office on 31 May 2017:

'I am making a FOI request for all details and correspondence concerning the 2011 purchase by Southampton University of the Mountbatten papers including the terms of the Ministerial Direction made on 5th August 2011. I would like to know the sums paid for the papers, where those sums came from, the conditions for access, reasons for any restrictions and under which provision of the 1980 Act the 'ministerial direction' was made'.

7. The Cabinet Office responded to the request on 27 June 2017. It confirmed that it held information falling within the scope of the request but that the cost of complying with the request exceeded the appropriate cost limit and therefore the request was being refused on the basis of section 12(1) of the FOIA. By way of advice and assistance the Cabinet Office suggested that he may wish to refine his request so that it could be potentially be answered within the cost limit, eg by defining the date range covered by the request or specifying the subject matter more exactly.
8. The complainant submitted the following refined request to the Cabinet Office on the same day:

'May I then limit my request to documents relating to the performance by the Cabinet Office of the matters specified in paragraph 2b of the Schedule to the Ministerial Direction dated 5 August 2011'.

9. The Cabinet Office responded on 8 August 2017 and explained that it did not hold any information falling within the scope of this request. The Cabinet Office explained that:

'The reason for the 'not held' response is that material relating to closed parts of the Archive relates to the Broadlands Trust prior to the Ministerial Direction and acquisition by Southampton University of the Archive. Of course, you have the right to request this information from us, but our assessment is that this would result in a section 12 refusal because of the age of the material and the way in which it is stored.'

10. The complainant contacted the Cabinet Office on 31 October 2017 and asked for an internal review of this decision.
11. The Cabinet Office informed him of the outcome of the internal review on 7 February 2018. The review concluded that no information was held falling within the scope of the complainant's revised request.

Scope of the case

12. The complainant contacted the Commissioner on 2 January 2018 to complain about the Cabinet Office's failure to complete its internal review in relation to the refined request of 27 June 2017.
13. Following the completion of the internal review, the complainant explained to the Commissioner that he did not accept the Cabinet Office's findings that it did not hold any information falling within the scope of his request and outlined why this was the case.
14. When she began her investigation, the Commissioner contacted the complainant in order to seek clarification on the period of time which he intended his request to cover. The complainant explained that he intended his request to cover information both pre-dating the signing of the Direction on 5 August 2011 and information post-dating signing of the Direction. The Commissioner explained to the complainant that she accepted that such an interpretation of his request was an objective one, albeit that she noted that the Cabinet Office appeared to have interpreted this request as only seeking information which post-dated the Direction. The Commissioner suggested to the complainant that in her view it was likely, given the Cabinet Office's response to his original request, that if his refined request was interpreted broadly then its position would probably be to argue that complying with it would also exceed the appropriate cost limit. During the course of the Commissioner's investigation of this case it did in fact become apparent that this was the Cabinet Office's position.
15. This decision notice therefore considers three matters:

- How the complainant's request of 27 June 2017 should be interpreted;
- Whether complying with this request, if it were interpreted broadly, would exceed the appropriate cost limit; and,
- Finally, given the Commissioner's findings that it would, whether the Cabinet Office needs to take any steps to comply with the duty at section 16(1) of FOIA to provide advice and assistance.

Reasons for decision

The interpretation of the request

16. As noted above, the complainant's refined request was as follows:

'May I then limit my request to documents relating to the performance by the Cabinet Office of the matters specified in paragraph 2b of the Schedule to the Ministerial Direction dated 5 August 2011'.

17. Paragraph 2b of the Ministerial Direction is as follows:

'2. The specified conditions are that the University of Southampton constituted under Royal Charter dated 29th day of April 1952 shall:...

...b. Keep the relevant property at the University of Southampton, University Road, Southampton, Hampshire and make it accessible to the public with the exception of those elements of the Archive which had been notified to the University of Southampton as closed by the Knowledge and Information Management Unit of the Cabinet Office which shall remain closed to public access until such times as the Cabinet Office confirms in writing to the University of Southampton that the closed material can be opened to general public scrutiny and not allow any part of the relevant property to be moved outside the premises except for short periods from time to time for the purpose of restoration, preservation or loan for temporary exhibition'

18. Based upon the wording of the request and the Direction, in the Commissioner's opinion the scope of this request could pre-date or post-date 5 August 2011, ie the date the Direction was signed. This is because the request seeks *'documents relating to the performance by the Cabinet Office of the matters specified in paragraph 2b of the Schedule to the Ministerial Direction'*. Paragraph 2b refers to elements of the archive **'which have been notified to the University of Southampton as closed by the Knowledge and Information Management**

Unit of the Cabinet Office [Emphasis added]. In the Commissioner's opinion this should be interpreted as referring to correspondence between the Cabinet Office and the University about any closed material which was exchanged prior to the issuing of the Direction. Paragraph 2b of the Direction also refers to elements of the archive remaining closed '**until such times as the Cabinet Office confirms in writing to the University of Southampton that the closed material can be opened to general public scrutiny**' [emphasis added]. In the Commissioner's opinion this should be interpreted as referring to correspondence between the Cabinet Office and the University about any closed material which post-dates the Direction.

19. As noted above, the complainant confirmed that his request was intended to cover the period both before and after 5 August 2011.
20. The Commissioner specifically asked the Cabinet Office how it believed this request should be interpreted. Without providing an explicit response, the Cabinet Office argued that if interpreted broadly complying with the request would exceed the appropriate cost limit.
21. In light of the above, the Commissioner believes that the correct and indeed objective interpretation of this request is one that means that the request covers the period before and the period after 5 August 2011, ie the date the Direction was signed.

Section 12 – cost limit

22. Section 12(1) of the FOIA states that:

'(1) 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.'

23. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for central government departments such as the Cabinet Office. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours.
24. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.

25. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.¹

The Cabinet Office's position

26. In its submissions to the Commissioner the Cabinet Office set out a timeline of the history of the Broadlands Archive and its involvement with it. It explained that as the timeline demonstrated it had a long, albeit a sporadic, history of involvement with the Archive hence why any searches for information falling within the scope of the complainant's request would have to cover a significant period of time. For the purposes of this notice, the key dates in the timeline are:
- 1969 – Her Majesty's Government agreed not to seek ownership of the Mountbatten papers in return for assurances on safe custody.
 - 1989 – The University secure the loan of the archive from the Broadlands Estate, excluding papers relating to Lord Mountbatten's official activities. The University agrees in perpetuity not to sell or loan any of the papers without clearance from the Cabinet Secretary.
 - 2007-2008 – The Cabinet Office reviews the papers held at Broadlands House and agrees what papers can be transferred and opened at the University.
 - 2011 – The University completes the acquisition of papers from Broadlands Trust following the Ministerial Direction. Oct 2012 – The University reveals it has obtained additional archival material (diaries and correspondence) and seeks advice of Cabinet Office about an FOI request.
 - Nov 2012 – Cabinet Office staff visit the University to look at additional material.
 - 2013 – Cabinet Office and University discuss the process for clearing access to this material.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> - see paragraph 12

27. The Cabinet Office explained that its involvement in the archive, and the transactions between the University and the Broadlands Archive about it, were to ensure that the remaining sensitivities that still persist in the papers were properly reflected in the handling and future publication of those papers.
28. It argued that if the request is interpreted more broadly then it would cover very many years and as a result a large number of media and locations would have to be examined to locate any potentially relevant information. The Cabinet Office suggested that this was not a subject that came up consistently or would have justified its own dedicated file. Furthermore, the Cabinet Office explained that from the searches it had conducted it had established that some of the correspondence about this subject had not reached its Knowledge and Information Management unit (KIM) (or predecessor units) and that individuals outside that unit were involved in matters concerning the archive, and thus any search for material could not be restricted to simply the Cabinet Office's KIM unit.
29. The Cabinet Office explained that more recently, ie over the last 10 years, there had been very sporadic correspondence about the archive that had been stored on a number of different IT systems. It explained that data from such correspondence had been retained but it knew from experience that data heaps from a former contract have proved very difficult to search effectively.
30. More specifically, the Cabinet Office argued that to search for information falling within the subject of this request both prior to and after 5 August 2011 would exceed the cost limits as the following searches would all have to be conducted:
 1. Manual searches across paper records inherited by the KIM unit (from its predecessor units) or created by the KIM unit would take an estimated 3-5 days. The Cabinet Office emphasised that a paper about this matter could be held in any of the many files it holds.
 2. Searching for documents held in the digital legacy from previous IT systems cannot be searched for fully even using a specialised piece of AI search tool recently procured without having to manually search through many returns to see if they are or are not in scope. The Cabinet Office estimated that it would take between 1 to 2 days to run a search and document the returns followed by between 1 to 2 hours manual search for each return to see if that was relevant to the request. The Cabinet Office noted it was not possible to estimate what the cumulative resource effort would be.
 3. Searching email accounts in all the current IT systems - again the search would have to be run across all the IT systems it

would have to be followed by manual searches of the results to identify the emails that are in scope. The Cabinet Office explained that estimates of resource time to such conduct searches of IT systems, based on previous work, were 2-4 days followed by manual searches of the results.

The complainant's position

31. The complainant argued that his request was not wide ranging. Moreover, he argued that the Cabinet Office must know what (if anything) it had notified to the University as closed, and subsequently confirmed as open, whether pre or post 5 August 2011. He suggested that unless the Cabinet Office could know this, and easily locate and provide the information, it could not otherwise monitor the University's compliance with the Direction, nor consider whether it had lawfully exercised its own powers.
32. Furthermore, the complainant argued that the idea that a government department is unable within the cost limit of section 12, to identify whether, when and how it has exercised its power to bar public access to documents of enormous heritage and historical significance acquired with several million pounds of public money was quite extraordinary. He emphasised that it was of fundamental democratic importance that the Cabinet Office's purported exercise of this power could be understood and scrutinised.
33. The complainant further argued that without wanting to refine or revise his request, in his view as a minimum the Cabinet Office must be required to provide information about precisely what files or documents they consider to be presently withheld from public access pursuant to the Direction, the notification(s) it is relying on for such closures and the reasons for such closures.
34. With regard to the Cabinet Office's response to his request, ie that it did not hold any information about its performance of its powers under the Direction post 5 August 2011, the complainant explained to the Commissioner that he had received a disclosure under FOIA from the University which cast doubt on this position. The complainant shared with the Commissioner copies of some of these disclosures which comprised exchanges of emails between the University and Cabinet Office dating from 6 September 2011 to March 2018 which appeared to concern the latter's performance of its functions under the Direction. The complainant suggested that it was troubling that the Cabinet Office did not locate these emails when it responded to his request in August 2017 or in its review of February 2018.

The Commissioner's position

35. With regard to the Cabinet Office's submissions, she considers it important to note that the complainant's request does not seek all information that the Cabinet Office holds about the archive. Rather, as the complainant suggests, his request is narrower in scope in the sense that it is only seeking information about the Cabinet Office's discharge of its powers under the Direction. However, despite the relatively narrow subject matter of the request, the timeframe which it covers is clearly a large one.
36. Therefore, the Commissioner accepts that in order for the Cabinet Office to locate all information it holds falling within the scope of the request it will have to examine its files dating back of over a considerable period of time. There does not appear to be an obvious earliest date which the Cabinet Office could begin its searches from, but given that the University's involvement with the archive began in 1989, to the Commissioner it appears plausible that information falling within the scope of this request could originate from that date forward.
37. Moreover, based upon the Cabinet Office's submissions to her, in the Commissioner's opinion its position that section 12(1) applies to a broad interpretation of the request clearly stems from the manner in which its records about the archive are stored. Of particular significance, in the Commissioner's view, is that there is no single file or location within the Cabinet Office where information about the archive, and thus information about the Cabinet Office's discharging of its duties under the Direction, would be stored. Furthermore, the Commissioner considers it is also important to note that although the KIM unit is the part of the Cabinet Office that leads on this issue, the Cabinet Office established as part of its searches that information about the archive was held outside of this unit (albeit not necessarily information in the scope of request), and information was held by the Cabinet Office about the archive (again albeit not necessarily information in the scope of this request) that the KIM unit was not previously aware of.
38. In the Commissioner's opinion given the Cabinet Office's long history of its involvement with the archive and given the way its records about the archive are stored, in order for it to locate all information it holds falling within the scope of the request the nature of the searches described at paragraph 30 above are ones that would need to be conducted. Furthermore, the Commissioner accepts that the estimates of the time it would take the Cabinet Office to conduct these searches are reasonable and realistic ones. In reaching this conclusion she notes that the Cabinet Office has based some of its estimated figures on previous searches that it has done of the systems in question which in her view give the estimates added credibility.
39. Consequently, the Commissioner is satisfied that the Cabinet Office is not under a duty to respond to the complainant's request of 27 June

2017 when it is interpreted broadly (as it should be) to encompass information which both pre- and post-dates 5 August 2011 because to do so would exceed the appropriate cost limit. Section 12(1) of FOIA therefore applies to this request.

40. In reaching this conclusion, the Commissioner does not seek to dismiss or negate the arguments raised by the complainant in paragraphs 31 to 33. Indeed, she has considerable sympathy with the points made by the complainant. However, her remit in terms of this request and her powers under section 50 of FOIA is to determine whether, under the terms of FOIA, the Cabinet Office is obliged to answer the request, and if it is, whether it has located and provided all of the information it holds to which the complainant is entitled. In the circumstances of this case, and for the reasons set out above, the Commissioner is satisfied that the Cabinet Office is not obliged to answer the request by virtue of section 12(1) of FOIA.
41. Finally, the Commissioner appreciates that the complainant has provided her with evidence to support his view that the Cabinet Office may hold some information post-dating 5 August 2011 which would fall within the scope of his request, despite the Cabinet Office's previous position being that no such information is held. In light of her findings that section 12(1) applies to this request the Commissioner is not required to determine whether the Cabinet Office actually holds any information falling within a particular period covered by the request. Nevertheless, she has written to the Cabinet Office separately about this particular point, albeit she would note that there may be a rational explanation as to why the University held such information but the Cabinet Office did not.

Section 16 – advice and assistance

42. Section 16 of FOIA places an obligation on public authorities to offer advice and assistance to requesters where it is reasonable to do so. When a request is refused under section 12(1) of FOIA, the Commissioner's view is that section 16 obliges public authorities to provide practical suggestions on how the scope of the request could be reduced so that information of interest to the requester might be provided.
43. As part of her investigation the Commissioner suggested to the Cabinet Office that if she concluded that section 12(1) of FOIA applied to the complainant's request what, if any, advice and assistance did it think it could provide to the complainant to assist him in submitting a refined request.
44. In response the Cabinet Office explained that it understood the complainant's objective was to access the Mountbatten files within the

archive. It is noted that when it initially refused the complainant's original request on 27 June 2017 it explained that he could submit a request to the University for the files and the Cabinet Office would then advise the University on whether they would be suitable for release. The Cabinet Office explained that it was its understanding that the complainant had not yet done so. In light of this the Cabinet Office suggested that it was not clear how much more assistance it could give. The Cabinet Office also suggested that even if it were able to find a past, historical record detailing material that should be withheld from publication, it would still have to consider the sensitivity of the material in the light of the present day as such the Cabinet Office suggested that such material would be of little value to the requester.

45. The Commissioner has considered the Cabinet Office's submissions, and the circumstances of this request carefully. Given her findings in relation to section 12(1) of FOIA, the Commissioner is conscious that it may be the case that given the manner in which the Cabinet Office holds information on this topic it is potentially not possible to comply with a request on this subject without the cost limit being met, or perhaps more realistically not comply with a request on this subject matter without restricting the timeframe to a very narrow one to the extent which could make any refined request of little use. Furthermore, she acknowledges that when it refused the complainant's original request it did provide the complainant with some guidance on how he could refine his request so that section 12(1) did not apply.
46. However, despite such advice and assistance, the complainant's refined request could not be answered within the cost limit. Taking this into account, and given the apparent divergence of views between the complainant and Cabinet Office as to how his refined request should be interpreted, the Commissioner considers that it would be reasonable for the Cabinet Office to re-visit its position and consider if it could provide further assistance to the complainant to allow him to submit a more specific, presumably time specific, request that would not trigger section 12(1).
47. In reaching this decision, the Commissioner acknowledges that the Cabinet Office has stated that it does not know what more it could do in terms of providing advice and assistance. However, she would suggest that in order to provide her with its detailed submissions on this complaint the Cabinet Office has clearly undertaken considerable work. She would have expected that as a result of this work the Cabinet Office may be able to help the complainant frame a narrower request for information regarding discussions between it and the University in respect of the Cabinet Office discharging its functions under the Direction. For example, by inviting a request for a specific period of correspondence described in the timeline above. The Commissioner's separate correspondence with the Cabinet Office about the material on

this subject matter which the University located and disclosed to the complainant may also potentially be of assistance to the Cabinet Office. Moreover, the Commissioner acknowledges that the Cabinet Office's assumption that the complainant's aim is to get access to the Mountbatten files is not misguided. However, in the Commissioner's view to focus on this misses the point of his request to the Cabinet Office. This is not get access to the files themselves but to understand how the Cabinet Office has been discharging its functions in relation to the Direction.

Other matters

48. The complainant expressed his concern to the Commissioner about the length of time it took the Cabinet Office to complete its internal review. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
49. In this case the complainant submitted his request for an internal review on 31 October 2017. The Cabinet Office informed him of the outcome of the internal review on 7 February 2017, 68 working days later. The Commissioner wishes to use this as an opportunity to remind the Cabinet Office, as she has done on a number of previous occasions, of the need to complete internal reviews within the timeframes set out in her guidance.

Right of appeal

50. 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

51. 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.
52. 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

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