Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **14 October 2019**

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 asking it to provide him with the records returned as a result of six electronic searches of its records which he had described. The Cabinet Office refused to comply with the request on the basis of section 12(1) (cost limit) of FOIA. The Commissioner has concluded that it was entitled to refuse to comply with the request on the basis of section 12(1) of FOIA. The Commissioner has also concluded that the Cabinet Office provided the complainant with a reasonable suggestion as to how he could refine his request in the particular circumstances of this case in order to fulfil its duty under section 16 (advice and assistance) of FOIA.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 30 April 2018:

> *'This request concerns papers relating to Lord Denning's Profumo Report which were being transferred to The National Archives.*
>
> *1. Please send me copies of all communications since 1 Jan 2014 with TNA that relate to whether such papers should be made publicly available or at what time they should be made publicly available*
>
> *2. Please send me copies of all communications since 1 Jan 2014 with the Advisory Council on National Records and Archives that relate to*

whether such papers should be made publicly available or at what time they should be made publicly available.'

3. The Cabinet Office responded on 21 May 2018 and explained that complying with the request would exceed the appropriate cost limit and therefore it was refusing to comply with the request on the basis of section 12 of FOIA. The Cabinet Office suggested to the complainant that he consider refining his request so that it could potentially be responded to within the cost limit by relating the information he was seeking to a definite context such as a particular policy or region or a notable event or initiative.

4. The complainant submitted the following refined request to the Cabinet Office on 15 June 2018:

'Thank you for your reply.

I now make the following FOI request.

Please carry out the following electronic searches of Cabinet Office records and send me copies of the full content of all records that are located in response to each search. I am happy for the searches to be limited to records created since 1 Jan 2014.

*1. Denning ****AND***** archives*

*2. Denning ****AND***** TNA*

*3. Denning ****AND***** ACNRA*

*4. Profumo ****AND***** archives*

*5. Profumo ****AND***** TNA*

*6. Profumo ****AND***** ACNRA'*

5. The Cabinet Office responded on 13 July 2018 and explained that complying with the request would exceed the appropriate cost limit and therefore the request was being refused on the basis of section 12 of FOIA. In support of this position the Cabinet Office explained that the requested information could be contained in very many files and searching all of these files to locate any information relevant to the request would exceed the appropriate limit laid down in the regulations. The Cabinet Office suggested that it may be able to comply with a refined request if it covered a shorter time period.

6. The complainant contacted the Cabinet Office on 13 July 2018 and asked it to conduct an internal review of this refusal.

7. The Cabinet Office informed him of the outcome of the internal review on 21 December 2018. The review concluded that section 12 had been correctly applied to the request. In support of this finding the Cabinet Office explained that:

> *'It may be useful if I explain why the electronic searches you requested using specific terms would exceed the cost limit. It would be necessary for us to search files held in several IT systems and repositories and in different formats for nearly a four year period. Documents and emails held in the digital legacy from previous IT systems cannot be searched fully without having to manually search through many returns to see if they are or are not in scope.*
>
> *Given the length of time and number of search terms you have requested, we anticipate a large volume of information would be generated. Furthermore, we are likely to hold records for several people named Denning and to other matters Lord Denning was involved in. We would have to read through each item to determine whether it is in scope. This procedure would be repeated for all six of your requests.'*

Scope of the case

8. The complainant contacted the Commissioner on 4 January 2019 in order to complain about the Cabinet Office's handling of his request. More specifically, he raised the following points of complaint:

- He disputed the Cabinet Office's reliance on section 12 of FOIA to refuse to comply with his request;
- Without prejudice to his view that section 12 did not apply, the complainant argued that in refusing this request the Cabinet Office had not provided him with sufficient advice and assistance to allow him to submit a refined request; and
- He was dissatisfied with the length of time it took the Cabinet Office to complete its internal review.

Reasons for decision

The interpretation of the request

9. Before considering the Cabinet Office's section 12 position, the Commissioner has considered the preliminary issue of how this request should be interpreted.

10. In his submissions to the Commissioner the complainant suggested that the Cabinet Office appeared to have misunderstood his request. He emphasised that he had simply asked for information which is located in response to a number of electronic searches. He noted that his request did not state that it was limited to any particular individual called Denning or to any particular matters involving Lord Denning. Therefore, he argued that there was clearly no need for the Cabinet Office to read through every item located by the electronic searches to determine if it was in the scope of the request; rather the complainant argued that every item located by the six searches is plainly within the scope of his request.

11. In submissions to the Commissioner the Cabinet Office explained that it had interpreted the request as seeking all information as defined by the six search terms. The Cabinet Office explained that it had interpreted the search term 'Denning' as a request for information relating to Lord Denning, Master of the Rolls 1962-1982. The Cabinet Office argued that this was an objective and reasonable interpretation of the request both in terms of the collateral search terms employed by the complainant (ie Archives, TNA, ACNRA and Profumo) and given that this was a refinement of the complainant's earlier request of 30 April 2018 which had asked explicitly for '*papers relating to Lord Denning's Profumo Report which were transferred to The National Archives'*.

12. Furthermore, the Cabinet Office explained that had it interpreted the request in the way the complainant had suggested then it would have been derelict in its obligation to properly read the request in context. The Cabinet Office suggested that it was disingenuous for the complainant to assert that he intended it to provide him with information relating to any occurrence of the word 'Denning' whether as a personal name or, presumably as a present participle. The Cabinet Office explained that had it interpreted the request in such an open-ended way, it would almost certainly have had to refuse it under 14 of FOIA, the provision for vexatious requests.

13. In any event, the Cabinet Office explained that the interpretation of the request was a secondary issue since it did not materially alter the costs of determining whether the information is held, locating the information, retrieving or extracting it.

14. The Commissioner has carefully considered the points made by both the complainant and the Cabinet Office. In her view, both interpretations of the request can be said to be objective ones. As the complainant suggests, his request simply asked for the records returned by six particular electronic searches, and there was no attempt or suggestion in the request itself that the Denning in question related to a particular individual. However, given that this was a refined request, in the Commissioner's opinion it is understandable that in considering this request the Cabinet Office took into account the context of the previous request, and the previous request clearly focused on Lord Denning, not simply any Denning. In light of this, the Cabinet's Office interpretation that the request was seeking information about Lord Denning also appears to be a reasonable and objective one.

15. However, for the reasons discussed below, the Cabinet Office's position and the basis for its reliance on section 12(1) of FOIA is not materially affected by the interpretation of the request. Nor, again for the reasons that are discussed below, are the Commissioner's findings in relation to section 12(1). Therefore, the Commissioner does not consider this disagreement over how the request should be interpreted to be an issue which prevents her from reaching a decision on the Cabinet Office's application of section 12.

Section 12 – cost limit

16. Section 12(1) of 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.'*

17. 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.

18. 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.

19. 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]

20. Section 12(1) is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether, despite this being the case, there is a public interest in the disclosure of the information.

The Cabinet Office's position

21. The Cabinet Office provided the Commissioner with the following background information to support its reliance on section 12(1) of FOIA:

22. The Cabinet Office explained that the time period covered by the request is 4½ years, from 1 January 2014 to present day which was taken as the date the request was received (15 June 2018). The Cabinet Office explained that during this period it made significant changes to its IT provision and this increased its difficulty in searching for the requested information. The Cabinet Office suggested that such difficulties would occur in any request covering such a long period and this explained the costs involved in searching for the information held.

23. With regard to the systems that would need to be searched to locate any relevant information, the Cabinet Office explained that in addition to searching for information on its 'live' IT system, it also held information on systems created by previous successive IT providers and these may contain information falling within the scope of the request. Therefore, the Cabinet Office explained that to comply with this request it would have to search its current IT system, its legacy IT systems and extensive orphaned data as well requiring specific individuals to search their emails accounts for relevant information. The Cabinet Office also explained that one reason why it believed such a wide search across all these repositories is necessary is because there would have been many emails about the subject which underlies the request. A search would need to be conducted across all these repositories to ensure that all information in scope would be identified.

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

24. The Cabinet Office also provided the Commissioner with the following calculations with regard to the four activities referenced above:

Determining whether it holds the information

25. The Cabinet Office explained that on a basic calculation, the complainant provided six search terms which will take a minimum of 144 hours to complete, ie 24 hours per search term. By way of an explanation, the Cabinet Office explained that the requester provided six pairs of search terms. However, it was unable to carry out the Boolean searches required on IT systems. Instead the Cabinet Office explained that it would have to carry out individual searches for the two principal search terms 'Denning' and 'Profumo' and then determine whether the records identified by these searches also contained one of more of the three ancillary terms. This latter process would require officials to read the documents identified in the search. It estimated that the combined searches, taking into account the degree of human supervision and intervention required and the analysis of the results, are likely to take a minimum of 144 hours to complete (24 hours per pair). The Cabinet Office estimated that around 60% of that time would require human intervention to set up the search and produce a report that is usable. This would equate to a minimum of 86.4 people hours (60 % of 144 hours). The results of this search would still have to be searched for relevance given that the search results will include many false positives that would have to be excluded (see *'locating the information, or document containing it below'*).

26. In support of this calculation and approach the Cabinet Office also explained that whilst searches do not require constant human interaction once started, it did know that from experience on occasion the search has failed and had to be restarted. It explained that monitoring can sometimes prevent the search from failing. Furthermore, the Cabinet Office explained that electronic searches have proven to be cumbersome, difficult and somewhat inaccurate and this has resulted in more human interaction and analysis of the search results than hoped for. In particular one of problems that has arisen is the inability to limit the data searches by date range effectively given how the transfer of data has resulted in the loss or errors in metadata.

27. Furthermore, the Cabinet Office explained that in addition to searches of its IT systems, it would have to interrogate the files of government policy areas of the various Parliamentary period which are managed by a different system. The Cabinet Office explained that the electronic catalogues for each Parliamentary period (Coalition, Cameron, May administration) would have to be searched using the six search terms and this would take 1 hour per search term for each administration. It explained that this would take a minimum of 18 hours to complete (6 hours x 3 administrations).

Locating the information, or a document containing it

28. With regard to the second stage of locating the information, or a document which may contain the information, the Cabinet Office estimated that it would take 5 minutes to use the search results to locate each digital object returned by the search and then check each and every one of those positive results from the keyword search to determine whether the item was in scope so it could exclude non-relevant instances of Denning and items outside the time period specified. Based on this estimate it would 1 hour to check 12 objects. The Cabinet Office explained that is was unable to provide an estimate of the number items within of scope the request. However it is likely to be over 100 items given the frequency and variety of correspondence with TNA and ACRNA and therefore it would take, as a minimum, 8.3 hours to complete this stage.

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

29. The Cabinet Office explained that as the request was for an electronic search of records using keywords this stage was not required to fulfil the request.

Extracting the information from a document containing it

30. Again, the Cabinet Office explained that as the request was for an electronic search of records using keywords this stage is not required to fulfil the request.

31. In summary, the Cabinet Office explained that the costs broke down as follows:

    - People hours to set up, monitor IT searches - 86.40 hours
    - Electronic catalogue search - 18.00 hours
    - Locate, retrieve, interrogate search returns for relevance (min) - 8.30 hours
    - Searching paper records from catalogue – Not necessary
    - Extraction and relevance check - Not necessary

    - This gave a total of 112.70 hours.

32. With regard to how these figures were arrived at, the Cabinet Office explained that its estimates were based on the recorded length of time to complete similar analysis for other FOI requests. Although no sampling exercise was carried out for this particular request it considered that it was reasonable to refer to data from other requests in this case.

The complainant's position

33. In its submissions to the Commissioner the complainant noted that in its responses to him the Cabinet Office had not provided any evidence or calculations to support its contention that the cost limit would be met and it was completely unclear why the searching of electronic files would exceed the relevant time limit.

34. Furthermore, the complainant emphasised that he had simply requested the records returned by the six electronic searches identified in his request. Therefore, he argued that there was no need for the Cabinet Office to read through the search results in order to determine if they were in the scope of the request and such a task should not be counted towards the cost limit.

The Commissioner's position

35. In the Commissioner's view based on the details contained in the refusal notice and internal review, the complainant's scepticism as to why section 12(1) would apply to his request is understandable. In particular, the Commissioner accepts that on the face of it the complainant's request appears to be a relatively straightforward one, i.e. simply for the records returned as a result of six electronic searches. Similarly, on the face of it, it is difficult to understand why a public authority would need to conduct a manual search of records when an FOI request had specifically asked it to provide the results of electronic searches of its records.

36. However, have reviewed and considered the Cabinet Office's submissions in relation to this complaint, the Commissioner accepts that the situation is more complex, and the work required by the Cabinet Office more involved, than it would initially appear. In particular, the Commissioner accepts that given the way the Cabinet Office's records are held, and more specifically the limitations in respect of how they can be searched, some manual searching of its records would be necessary in order to fulfil the request regardless as to the fact that the request defined the information requested by electronic search terms. Furthermore, in the Commissioner's view such complications arise regardless as to which interpretation of the request is used and under both interpretations of the request some aspect of manual searching and intervention would be required.

37. The Commissioner has reached these findings for a number reasons. The first – and a key one - being that the Cabinet Office has stated that it is unable to conduct Boolean searches of its IT systems. Therefore, it cannot actually undertake the specific electronic searches that the complainant requested in order to fulfil this request. The Commissioner therefore accepts that it is necessary for the Cabinet Office to first

undertake electronic searches of its records and then the manual searches of these results in order to locate information falling within the scope of the request. That is say, a search of each of the various IT systems for records for 'Profumo' would then have to be manually reviewed to establish if they also concerned 'archives', 'TNA' or 'ACNRA'. Secondly, as noted above, given the errors or loss in some of the metadata that has been transferred as IT systems have been migrated it is not possible to accurately limit searches by date range for some systems. Thirdly, the Commissioner accepts that for the reasons set out in paragraph 26 above the process of actually conducting these electronic systems is far from a straightforward one and still requires some manual intervention in order to ensure the completion of such searches.

38. With regard to the actual figures put forward by the Cabinet Office, the Commissioner notes that these are not based on a sample exercise. Rather, it has relied on searches it has conducted of these IT systems when dealing with other FOI requests. In the Commissioner's view the estimates would be more compelling evidence if the Cabinet Office had actually conducted a sample exercise in order to locate any relevant information, for example just for one of the six search terms specified by the complainant. Nevertheless, she does accept that the estimates are based on previous experience of searching and interrogating these systems and in the Commissioner's view this does do give them sufficient credibility for the purpose section 12(1). In light of this although the figures suggested by the Cabinet Office for completing the first stage appear high, given that they are based on previous experience, and taking into account the limitations of the Cabinet Office's ability to conduct the nature of the searches requested by the complainant, the Commissioner accepts that undertaking such work alone would exceed the appropriate cost limit.

39. With regard to the second stage, the Commissioner is not entirely clear why this would be necessary given that as part of this first stage the Cabinet Office would have, by its own admission, already undertaken a manual searches of its initial search results in order to determine whether information falls within the scope of the request. The Cabinet Office suggested that this would be necessary in order to exclude non-relevant instances of Denning and items outside the time period specified. However, under the complainant's interpretation of the request such a step would not be required and in the Commissioner's view in respect of the time period any irrelevant records could presumably have been excluded during the previous manual search conducted as part of determining whether it held the requested information. Therefore, the Commissioner is not persuaded that the 8.30 hours work is necessary to fulfil the request. However, the Commissioner accepts that given the significant time period estimated to complete the first step this is not fatal to the Cabinet Office's position

that section 12(1) of FOIA applies. Furthermore, the Commissioner accepts that it would still have to interrogate the files of government policy areas of the various Parliamentary period which are managed by a different system and this would add to the time taken to comply with the request.

40. For the above reasons the Commissioner has concluded that the Cabinet Office was entitled to rely on section 12(1) of FOIA.

Section 16 – Advice and assistance

41. 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.

42. When it issued its refusal of the request the Cabinet Office explained:

> *'The reason that your request exceeds the cost limit is that relevant information could be contained in very many files. Searching all those that might contain relevant information to determine whether the Cabinet Office holds any information relevant to your request will exceed the appropriate limit laid down in the regulations. If you wish, you may refine your request in order to bring the cost of determining whether the Cabinet Office holds relevant information, locating, retrieving and extracting it, below the appropriate limit.*
> *The period covered by your request is very long and one way to refine it would be to narrow the period it covers but even a shorter period would require us to search many files and would not be sufficient, on its own, to make it possible for us to comply with your request within the appropriate limit. Bearing in mind that our records are classified by broad subject areas, I consider that we will not be able to carry out a search for information unless you can relate the information you seek to a definite context such as a particular policy or region or a notable event or initiative. I must also inform you that if the Cabinet Office does hold any information, it may be subject to one or more of the exemptions contained in the Freedom of Information Act.'*

43. In his submissions to the Commissioner the complainant argued that *if* it was the case that the Cabinet Office's electronic record system is so disorganised that conducting these electronic searches would go over the limit then under section 16 it should have provided suitable advice and assistance by giving him a list of the relevant IT systems, depositories and formats, so that he could have selected which subset of them he would like to be searched for a narrower search which would

fall within the cost limit. He argued that since his request was based on making specific electronic searches, in his view this would be the most practical way to narrow it down in the highly unlikely event that such narrowing is actually required rather than by, for example, the date range or subject matter.

44. As part of her investigation the Commissioner asked the Cabinet Office to comment on the complainant's criticism of the nature of the advice and assistance provided to him. The Commissioner also asked the Cabinet Office whether in light of this it was in a position to be able to provide the complainant with any further advice and assistance at this stage.

45. In response the Cabinet Office explained that it considered the advice and assistance it had provided to the complainant met the requirement on it '*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*.' (emphasis added by the Cabinet Office).

46. The Cabinet Office also explained that it had advised relating the information being sought to a definite context such as a particular policy or region or a notable event or initiative. It noted that Cabinet Office records are filed according to subject and it therefore considered this to be reasonable advice. The Cabinet Office also noted that as Lord Denning was involved in several inquiries, providing a context or topic might have meant a search could have been carried out within the appropriate limit. The Cabinet Office also noted that the search period covered four and a half years and it advised shortening the time period.

47. The Cabinet Office also noted that it had explained in its response that documents and emails held in legacy digital IT systems cannot be searched fully without having to manually search through many returns to see if they are or are not in scope. The Cabinet Office argued that for this reason it did not provide the requester with a list of the relevant IT systems, depositories and formats because it is view this would not have helped the complainant to advise such a search strategy. The Cabinet Office remained of the view that the productive option is to shorten the timeframe to reduce the number of potential records in scope of the request.

48. Having considered the submissions of parties carefully, and of course also now having had the benefit of the Cabinet Office's explanation and detailed submissions to her to support the application of section 12(1) of FOIA, she accepts that the advice and assistance provided an appropriate response to allow the complainant to submit a refined version of his request that could be answered within the cost limit. Moreover, she does not think that providing the complainant with a list

of relevant IT systems would have been useful. She is therefore satisfied that the Cabinet Office has fulfilled its duty at section 16(1) of FOIA to provide advice and assistance as far as is reasonable.

49. However, as is clear from her proceeding comments in this notice, the Commissioner can understand why, based on the refusal notice and internal review, the complainant was unclear why the Cabinet Office needed to manually interrogate its records when the request simply asked it to conduct electronic searches. The Commissioner notes that the internal review touched upon the need to conduct manual searches in order to fulfil this request. However, in her view it would have been helpful if the Cabinet Office had explained in more detail why such manual searches were necessary. Whilst a failure to provide such an explanation does not undermine the Commissioner's findings in respect of section 16(1) of FOIA, nevertheless in the circumstances of this case in her view it would have been good practice for the Cabinet Office to have offered this additional explanation of its position.

Other matters

50. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.

51. In this case the Cabinet Office took 115 working days to complete its internal review response. The Cabinet Office explained that this was due to administrative difficulties arising from staffing changes.

52. Regardless as to the nature of such administrative difficulties the Commissioner considers such a delay to be unacceptable and she has recorded this delay for her own purposes of monitoring the Cabinet Office's performance in terms of completing internal reviews in a timely manner.

Right of appeal

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

54. 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.

55. 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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