

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 09 July 2019

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to the US space programme in a two year period. The public authority refused to comply with the request relying on section 12(2) FOIA (cost of compliance would exceed the appropriate limit).
2. The Commissioner's decision is that the public authority was entitled to rely on section 12(2) FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the following requests to the public authority on 15 and 16 October 2018 respectively:

"Please note that I am only interested in information which relates to the period 1 January 1968 to 1 January 1970.

Please note that the reference to the Prime Minister should include both Harold Wilson and his private office.

Please note that the reference to the US President - whether it be Lyndon B Johnson or Richard Nixon - should include the holders of that particular office.

Please note that the reference to communicate in the questions below should include any written correspondence and communication as well as the transcripts and recordings of any telephone conversations and the notes of any meetings.

1...During the aforementioned period did The Prime Minister communicate with the US President about any of the following issues.

a...America's space programme including its previous and ongoing missions and the strategic and defence implications of American space exploration.

b...Britain's own space programme and the possible role that Britain might play in the so called space race.

c...America's bid to make a manned landing on the moon and the subsequent successful moon landing in July 1969.

d...America's planned missions following the 1969 moon landing.

e...The space programme of the then USSR and the implications of Russian dominance in space.

2...If the answer to question one is yes can you please provide details of any communication including copies of all written correspondence and communication, the minutes of any meetings and the transcripts/recordings of any telephone conversations.

3...During the aforementioned period did The US President communicate with the Prime Minister about any of the issues outlined in question 1 a to e.

4...If the answer to question three is yes can you please provide copies of any written correspondence and communication, the minutes of any meetings and the transcripts/recordings of any telephone conversations.

If relevant documentation has subsequently been destroyed. Can you please provide the following details. In the case of each destroyed document can you state the date when it was destroyed and why. In the case of each destroyed document can you please provide a brief outline of its contents. In the case of each destroyed document can you please provide a copy of the document if it is currently held in another form.

And

"Please note that I am only interested in information which was generated between 1 January 1969 to 1 January 1970.

Please note that the reference to the Prime Minister should include Harold Wilson and or his private office.

Please note that the reference to The Queen and the Duke of Edinburgh should include those individuals and their private secretaries.

Please note that the reference to communicate in the questions below should include any written correspondence and communication as well as the transcripts and recordings of any telephone conversations and the notes of any meetings.

1...During the aforementioned period did The Queen and Prince Philip write to and or communicate with The Prime Minister about any of the following.

a...America's space programme including its previous and ongoing missions and the strategic and defence implications of American space exploration.

b...Britain's own space programme and the possible role that Britain might play in the so called space race.

c...America's bid to make a manned landing on the moon and the subsequent successful moon landing in July 1969.

d...America's planned missions following the 1969 moon landing.

e...The space programme of the then USSR and the implications of Russian dominance in space.

2...If the answer to question one is yes can you please provide details of any communication including copies of all written correspondence and

communication, the minutes of any meetings and the transcripts/recordings of any telephone conversations.

3...During the aforementioned period did The Prime Minister write to and or communicate with The Queen and or Prince Philip about any of the issues outlined in question 1 a to e.

4...If the answer to question three is yes can you please provide copies of any written correspondence and communication, the minutes of any meetings and the transcripts/recordings of any telephone conversations.

If relevant documentation has subsequently been destroyed. Can you please provide the following details. In the case of each destroyed document can you state the date when it was destroyed and why. In the case of each destroyed document can you please provide a brief outline of its contents. In the case of each destroyed document can you please provide a copy of the document if it is currently held in another form.”

5. The public authority issued a single response to both requests on 12 November 2018. Having aggregated both requests the Cabinet Office cited section 12 FOIA as the basis for refusing to comply with the requests.
6. The complainant requested an internal review of that decision on 14 November 2018.
7. The public authority provided him with details of the outcome of the review on 10 December 2018. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 12 December 2018 to complain about the way his request for information had been handled. He disputes the application of section 12 FOIA to his requests. He also considers that the requests should have been dealt with under the EIR rather than the FOIA. The complainant does not dispute that the public authority was entitled to aggregate his requests.
9. The scope of the Commissioner’s investigation therefore was to determine whether the public authority was entitled to handle the

requests under the FOIA and consequently whether the public authority was entitled to rely on section 12(2) FOIA.¹

Reasons for decision

Applicable access legislation

10. Regulation 2(1) EIR sets out the definition of 'environment information'.²
11. The complainant says: "...it is now accepted that space travel does have implications for Earth's environment..."
12. The public authority explained that records relevant to the requests are not tagged as containing 'environmental information.' Therefore, it would have to retrieve any information in scope and then determine if any of it fell under the EIR. However, because it is relying on section 12(2) FOIA, it is not possible to say if the public authority holds any information at all and therefore, by extension, whether the public authority holds any information caught by regulation 2(1) EIR.
13. The Commissioner is satisfied that the public authority was entitled to handle the requests under the FOIA since there was no relevant information for it to consider and consequently it could not consider any of the provisions in regulation 2(1) EIR.

Section 12(2) FOIA

14. Section 12 FOIA states:

"(1) Section 1(1)³ 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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the

¹ The public authority clarified during the course of the investigation that it was specifically relying on section 12(2) FOIA.

² <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

³ Two duties are set out in section 1(1) FOIA; subject to other provisions in the FOIA (such as in section 12), to confirm or deny whether requested information is held and, to disclose requested information.

estimated cost of complying with that paragraph alone would exceed the appropriate limit.⁴

15. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004⁵ (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that the public authority may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.
16. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that a public 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, or a document containing it.
17. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. However, the Commissioner considers that such an estimate must be one that is sensible, realistic and supported by cogent evidence.⁶

The public authority's position

18. The public authority's submission is summarised below.
19. Confirming or denying whether any information is held within the scope of the requests⁷ would exceed the appropriate limit.

⁴ The full text of section 12 FOIA - <http://www.legislation.gov.uk/ukpga/2000/36/section/12>

⁵ <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

⁶ Following the approach set out by the Information Tribunal in *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/004)

⁷ ie - Complying with the duty in section 1(1)(a) FOIA.

20. Multiple departmental files from the Cabinet Office retained archive which fall within the relevant period would need to be searched, namely; 26 files concerning intelligence matters because the US space programme at the time had an intelligence angle, 24 Royal files and nine US and USSR files in total. There are no lists for departmental files for retained MOD and FCO policy more generally for the relevant period. This means that the entirety of the retained paper archive would need to be searched for information. Space policy in the 1960s was a policy area led by the Ministry of Defence (MOD). The Royal files from the relevant period are held at by The National Archives (TNA) at Kew.
21. The volume of documentation held in these files vary. To give some idea of the variance in volume of the intelligence, US and USSR files; One USSR file from 1969 holds 101 pages of documents, one US file from 1968 holds 13 pages, one intelligence file from 1969 holds 515 pages and another intelligence file from 1969 holds 5 pages. It is difficult to give figures for the Royal files without retrieving them all. Some of the files can easily be two inches thick if the file is on a major topic such as Coronations, marriages and deaths. This compares with the briefing for each weekly Audience with the Sovereign which is one side of A4.
22. It is also difficult to give an estimate of the number of relevant retained MOD and FCO files. The retained archive is filed in numerical order using the PREM/CAB⁸ number as is given on the TNA catalogue. Therefore, someone would need to go through 14 magazine racks, which have 20 retained extracts per rack, compare the number on the front cover of each of these against the TNA catalogue to find out if these were MOD or FCO related extracts for the PREM series. Depending on the degree of sensitivity of the material some PREM extracts are a couple of single-sided pages, others are in excess of 60 pages. It is not possible to estimate the volume of documentation held in these files without first determining which are in scope. This would undermine the rationale for relying on section 12(2) FOIA. The relevant CAB series is largely Joint Intelligence Committee documents and these files are in large volumes as the Cold War period generated a lot of material.
23. Based upon on the reading speed of the staff member carrying out the original sift, it is estimated that it would take 147.5 hours just to search the identified 59 files alone excluding the MOD and FCO files.

⁸ PREM – records of the Prime Minister and CAB – records of the Cabinet Office.

The Commissioner's considerations

24. By virtue of section 12(2) FOIA a public authority is not required to comply with the duty in section 1(1)(a) FOIA (ie – confirm or deny whether requested information is held) if to do so would exceed the appropriate limit.
25. Therefore, as set out in the Fees Regulations the Commissioner has considered whether the estimated cost of locating the requested information or a document containing it would exceed the appropriate limit.
26. Judging by the fact that 4 out of a total of 35 relevant files alone collectively hold 634 documents, the Commissioner is persuaded that the time it would take to sift through these 35 files alone is likely to exceed the appropriate limit. In any event, the Commissioner considers that the amount of time it would take to sift through the retained MOD and FCO files plus the 35 intelligence, US and USSR files is highly likely to exceed the appropriate limit which is 24 hours for the public authority.
27. The Commissioner therefore finds that the public authority was entitled to rely on section 12(2) FOIA.

Section 16 FOIA

28. Section 16 FOIA states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”⁹

29. Further to the above provision, so far as it would be reasonable to expect it to do so, a public authority relying on section 12 FOIA is expected to provide advice and assistance to an applicant in order to enable the applicant narrow the scope of their request so that the work

⁹ <http://www.legislation.gov.uk/ukpga/2000/36/section/16>

involved in complying with the refined request does not exceed the appropriate limit.

30. The public authority explained to the complainant that its filing system uses broad subject areas, for example, security, resulting in a great number of files needing to be searched. The public authority therefore suggested that one method to reduce the scope of the requests to bring them within the appropriate limit would be to focus on just one country, or one notable event rather than the whole of the space programme in a two year period.
31. The public authority further explained that as records are broken down into two categories, PREM AND CAB, another method would be to focus on just one of these file series rather than both.
32. Finally, the time frame of the request could also be reduced from two years to three months.
33. In light of the above, the Commissioner is satisfied that the public authority has discharged its duty to the complainant under section 16(1) FOIA.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: grc@justice.gov.uk

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

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

Signed

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