

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2020

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office seeking information about any past and current plans to reclaim Hong Kong as British territory. The FCO explained to the complainant that complying with this request would exceed the cost limit and invited him to submit a refined request. The complainant did so, albeit that he still wished the FCO to provide him with a formal response to his initial request. With regard to the refined request the FCO concluded that it did not hold any information falling within its scope, a conclusion the complainant disputed.
2. In relation to the initial request, the Commissioner has concluded that the FCO was entitled to refuse to confirm or deny whether it held any information falling within the scope on the basis of section 12(2) of FOIA because to do so would exceed the appropriate cost limit. However, by failing to provide the complainant with a formal refusal notice stating this it breached section 17(1) of FOIA. In relation to the refined request, the Commissioner has concluded that on the balance of probabilities the FCO does not hold any information falling within the scope of this request.
3. The Commissioner does not require the FCO to take any steps.

Request and response

4. The complainant submitted the following request to the FCO on 15 September 2019:

'Request:

Any past made protocols and current plans to reclaim Hong Kong Island and Kowloon as British territory

If exists, any worst-case scenario plans made by The Right Honourable The Baroness Thatcher's government to take back Hong Kong Island and Kowloon as British land/territory.

Any in effect plans by the current government to reclaim Hong Kong Island and Kowloon as British land/territory.'

5. The FCO contacted him on 20 September 2019 and asked him to clarify the nature of the information requested.
6. The complainant clarified the nature of the information he was seeking on 21 September 2019.
7. Following receipt of this email, and following a telephone call with the complainant, the FCO contacted him again on 25 September 2019 and explained that in order for it to be able to understand and fulfil his request, it needed him to provide certain search criteria.
8. The complainant responded on the same date and suggested that his request was clear and he asked the FCO to process this and determine whether it could be fulfilled within the cost limit.
9. The FCO responded on 25 September 2019 and explained that as presently worded, the request would exceed the appropriate cost limit within FOIA. The FCO suggested adding a specific timeframe to the request to allow it to be answered within the time limit.
10. The complainant responded on 27 September 2019 and explained that he did not wish to refine his request to a narrower time frame at this stage.
11. The FCO responded on 1 October 2019 and explained it remained of the view that as formulated the request could not be answered within the cost limit and moreover, the FCO still needed additional clarification as to the information which was being requested.
12. The complainant contacted the FCO on 1 October 2019 and explained that he was dissatisfied with its handling of his request.

13. The FCO responded on 3 October 2019 and explained that it was satisfied that it had provided the complainant with the correct guidance to allow him to submit a valid request.
14. The complainant responded on 4 October 2019 and explained that the nature of the information he was requesting remained unchanged, but he gave two specific years to search for, namely 1984 and 2019.
15. The FCO responded on 28 October 2019 under its reference number 0970-19 and explained that its response only concerned the request for documents from 2019. The FCO explained that following a search of its paper and electronic records it had established that the requested information was not held.
16. On 1 November 2019 the FCO responded in relation to the request which sought information from 1984 under its reference number 0969-19. The FCO explained that following a search for information it could not locate any information falling within the scope of the request. However, the FCO explained that a number of FCO files previously transferred to The National Archives (TNA) may be relevant to the request.
17. The complainant contacted the FCO on 30 October 2019 and on 3 November 2019 and asked it to conduct an internal review of its refusal of requests 0969-19 and 0970-19.
18. The FCO informed him of the outcome of the internal review on 8 November 2019 in relation to request 0969-19 and on 22 November 2019 in relation to request 0970-19. Both of the internal reviews concluded that the FCO had conducted adequate searches and did not hold any information falling within the scope of either request.

Scope of the case

19. The complainant contacted the Commissioner on 12 October 2019 to complain about the way his requests for information had been handled. More specifically, he has raised the following grounds of complaint:
 - He was unhappy with the FCO's decision to refuse to accept his initial request of 15 September 2019 as a valid request and process it in line with its obligations under FOIA. Moreover, he disputed the FCO's suggestion that complying with this request would exceed the cost limit and thus could have been refused by the FCO on the basis of section 12 of FOIA.

- He disputed the FCO's position that it does not hold any information falling within the scope of the request given the reference number 0969-19, ie the request seeking information from 1984.
- Similarly, he disputed the FCO's position that it does not hold any information falling within the scope of the request given the reference number 0970-19, ie the request seeking information from 2019.

Reasons for decision

The request of 15 September 2019

20. The Commissioner understands that in scenarios where an individual submits a request, and it is very clear that the request will easily and obviously exceed the appropriate cost limit, the FCO will often advise the individual of this and invite them to make a refined request rather than process the request and issue a formal section 12 refusal notice.
21. The Commissioner understands the rationale behind this approach and acknowledges the benefits it brings both to the requester and to the FCO. Certainly, from the previous complaints involving the FCO where this approach has been adopted, the requesters in question have been content with the FCO taking such an approach to their initial requests. (That is to say, any dispute brought to the Commissioner has focused on the FCO's response to any subsequent request).
22. However, in the circumstances of this case, in the Commissioner's opinion it is clear from the complainant's initial exchanges with the FCO that he was of the view that processing his original request of 15 September 2019 would not exceed the appropriate cost limit. Furthermore, the Commissioner is satisfied that the request of 15 September 2019 was a valid request for the purposes of FOIA.
23. Therefore, in the Commissioner's view the FCO should, in line with the requirements of section 17(1) of FOIA, have issued the complainant with a formal refusal notice citing section 12 rather than refuse to process that request and instead effectively require him to submit a refined request.
24. Its failure to do so therefore represents a breach of section 17(1) of FOIA.
25. Given this position, rather than requiring the FCO to take such a step during the course of her investigation, the Commissioner decided that it would be more pragmatic for her to simply consider whether complying

with the original request of 15 September 2019 would exceed the appropriate cost limit as part of her consideration of her complaint.

Section 12 – cost of compliance

26. Section 12(1) of FOIA states that

'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.'

27. And section 12(2) states that:

'Subsection (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.'

28. 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 FCO. 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 effectively imposes a time limit of 24 hours.

29. 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.

30. 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

¹ Paragraph 12 of EA/2007/0004.

31. Section 12 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 FCO's position

32. The FCO explained that given that the original request had no specific timeframe, it focussed initially on files held in its historical archive, starting with those from the former Hong Kong Department (HKD). The FCO explained that it held files from that series for the years 1994, 1995 and 1996. According to its departmental list, there are a total of over 1600 hard copy files for those three years.
33. The FCO explained that it used the following search terms 'future of Hong Kong/Kowloon', 'reclaim Hong Kong/Kowloon' and 'protocol Hong Kong/Kowloon', in order to assess the potential relevance of file titles in the series. Having done so it estimated that approximately one third of them (ie 533) would require detailed inspection to determine whether they hold information in scope of the request.
34. In addition, the FCO explained that although the majority of HKD files up to 1993 have been transferred to The National Archives (TNA), there are 47 files for that period which it had retained which would require further inspection in order to determine whether they held any relevant information.
35. The FCO also explained that it held files from the former Far Eastern Department (FED) for the years 1993-1996. It explained that having assessed the potential relevance of the file titles in that series, it estimated that a further 19 files would require detailed inspection to determine whether or not they hold relevant information.
36. The FCO explained that as all of the files are hard copy, it would need to go through them, folio by folio, to a) ascertain whether they do hold material in scope and b) retrieve/extract that information. It noted that the latter process would involve photocopying any folios containing relevant information and making further copies of the specific extracts where necessary.
37. The FCO explained that the time taken to go through and extract relevant information from each file would depend on the number of folios each contains. It explained that using an average of 5 minutes per file, the time/cost involved would be:
 - $533 + 47 + 19 = 599$ files $\times 5 = 2995$ minutes or approximately 50 hours ($\times \pounds 25 = \pounds 1250$)

38. The FCO noted that using a more conservative estimate of 3 minutes per file, the total time/cost would be:

- Approximately 30 hours (x £25 = £750).

39. The FCO explained that using either estimate the cost of compliance would exceed the appropriate cost limit. However, it emphasised that such searches only considered hard copy files. In order to establish whether it held any information falling within the scope of the request the FCO explained that it would also have to inspect material held electronically in both archived and current files. The latter would also require searches to be made by relevant members of staff in their personal folders and mailbox accounts.

40. For the purposes of this complaint, the FCO explained that it conducted an initial search in 'iRecords' (since 2000, the FCO's electronic archive for key information that needs to be retained for the public record). The following search terms were used:

'Hong Kong + Reclaim',

'Hong Kong + Reclaim + Plan', and,

'Hong Kong + Reclaim + Protocol'.

41. The FCO explained that these searches produced a total of 903 documents which would need to be analysed to ascertain whether they held information in scope of the request, as the terms 'reclaim', 'plan' and 'protocol' could, of course, refer to something different.

42. Again, the time taken to go through and extract relevant information from each document would depend on its size. Using a conservative estimate of 30 seconds per document, the FCO estimated that additional time/cost involved would be:

- 903 files x 0.5 = 451 minutes = c 7.5 hours.

43. The FCO therefore argued that it could not confirm or deny whether it held information falling within the scope of the request within the appropriate cost limit and therefore it considered that section 12(2) applied to the request of 15 September 2019.

The complainant's position

44. The complainant argued that the FCO had not adopted the most effective way of locating information falling within the scope of his request. He argued that the FCO was likely to hold current plans concerning the taking back of Hong Kong and moreover senior officials

would clearly be the ones within the organisation who had access to this information. Therefore, the complainant argued that in order to locate information relevant to his request the FCO should simply speak to the senior officials in question rather than conducting the searches of its files.

The Commissioner's position

45. Given that the original request did not have a timeframe, the Commissioner accepts that in order to establish whether it held information falling within the scope of this request it is logical for the FCO to suggest that it would have to undertake a search of all of its files which could potentially hold information. That is to say, a search of its files not restricted to a certain date or timeframe.
46. With regard to the search of the hard copy files, the Commissioner accepts that the search terms that were used to identify potentially relevant files were sensible and reasonable ones. Furthermore, the Commissioner accepts that an average of 5 minutes per file to locate any relevant information within it is a reasonable one.
47. Similarly, the Commissioner accepts that the searches undertaken by the FCO of its electronic records on the 'iRecords' system were ones which were sufficiently focused and specific to locate any potentially relevant information. Again, she accepts that an average of 30 seconds to assess whether an electronic documents fall within the scope of the request is a reasonable one.
48. Consequently, based on the figures provided by the FCO, the Commissioner accepts that searching its hard copy records alone would exceed the appropriate cost limit of £600 and adding in the estimated cost of searching the iRecords would only add to this cost. Moreover, the Commissioner notes that these estimates do not include the costs in searching the personal folders and mailbox accounts of relevant staff.
49. Therefore, the Commissioner is satisfied that the FCO is entitled to refuse to confirm whether or not it holds information falling within the scope of the request of 15 September 2019 because the cost of doing so would exceed £600.
50. With regard to the complainant's grounds of complaint, she notes his view that current senior officials are likely to hold information falling within the scope of his request. However, given that the request did not specify a timeframe, the Commissioner considers it appropriate for the FCO to determine which period of its records it began to search in order to locate any potentially relevant information prior to it determining whether section 12(2) of FOIA applied to the request of 15 September 2019. Furthermore, for the reasons discussed below, in relation to the request of 4 October 2019, the Commissioner is satisfied that it was not

necessary for the FCO to search the records of ministerial offices or indeed speak to ministers in order to locate information dating from 2019. As a result in the context of the request of 15 September 2019 the Commissioner does not consider that taking such action would have allowed the FCO to determine whether it held any information falling within the scope of the case within the cost limit.

The request of 4 October 2019

51. As explained above this request sought information on the same topic as the original request but limited to two specific years, namely 1984 and 2019. The FCO's position is that it does not hold any information falling within the scope of the request; the complainant disputes this position.
52. In scenarios such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
53. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
54. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or other explanations offered as to why the information is not held.

The complainant's position

55. The complainant submitted detailed submissions to the Commissioner to support his view that the FCO would hold information falling within the scope of his request of 4 October 2019 both in relation to 1984 and 2019.
56. The Commissioner has summarised the points he raised below:
 - a) The complainant argued that the 1984 joint declaration between Great Britain and Northern Ireland and the People's Republic of China granted the restoration of Hong Kong to China on the condition of one country, two systems. He argued that at the point that this declaration was agreed it would be logical to assume that in a worse case scenario where China did not honour this condition, then the UK would have, in reserve, a plan in which to take back Hong Kong.

- b) The complainant identified this Parliamentary question, answered on 26 June 2019 by Dr Andrew Murrison.² He also identified this statement by Dominic Raab, the Foreign Secretary, on 26 September 2019.³ He has argued that in light of Dr Murrison's response and Mr Raab's speech it was impossible that a plan to reclaim Hong Kong does not exist.
- c) Furthermore, the complainant argued that in light of the above points, in order to locate relevant information the FCO should have liaised directly with Dr Murrison and/or the Foreign Secretary.
- d) More specifically, the complainant criticised the FCO's decision to restrict its searches for information simply to records. He emphasised that FOIA covered recorded information held in any form, and this could include information held in a person's private emails or text messages. In support of this position the complainant cited the Commissioner's guidance, 'Official information held in private email accounts'.⁴ He noted that this guidance explained that:

'The definition of information under FOIA is provided at section 84 and states that "information" ... means information recorded in any form". Therefore, official information recorded on mobile devices, including text messages on mobile phones, or in any other media, may also be considered to be held on behalf of the public authority in the circumstances outlined in this guidance. Again, this does not necessarily mean that such information will be disclosable, but, on receipt of a valid FOIA request, public authorities should consider all locations where the requested information may be found.'

In the circumstances of this case, the complainant argued that it was there necessary for the FCO to undertake searches of Dr Murrison's phone and private email given the points he had made in his response to the Parliamentary Question cited above as it was possible that relevant information, covered by FOIA, was held in these locations.

² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-06-18/266293/>

³ <https://www.gov.uk/government/speeches/hong-kong-protests-and-the-chinese-british-joint-declaration-foreign-secretarys-statement>

⁴ https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf

The FCO's position

57. The FCO explained that in order to identify any relevant information in the scope of this request it searched the following for the calendar year 1984:
- The FCO archive inventory, which provides details of all file series and miscellaneous information held by the FCO.
 - The FCO annual departmental file lists for the former Hong Kong Department and other potentially relevant departments (eg Far East Department, Legal, Defence and Security Policy).
 - TNA catalogue, in order to identify any files held by TNA which might be relevant to the request and for which the FCO might be holding retained material.
58. The FCO explained that the search terms used were the same ones as set out above in relation to the request of 15 September 2019. In terms of 1984, the FCO explained that any substantive information held would have been in manual records only, and would have been identified from the above searches. Neither the initial search, nor a further search carried out at internal review stage, yielded any results. Nor were there any records of information relevant to the request that had been destroyed in the intervening period.
59. The FCO explained that for the calendar year 2019 it searched the following areas:
- iRecords
 - Electronic shared folders held by Asia Pacific Directorate (APD)
 - Personal folders and mailbox accounts of relevant members of staff in APD, including those at post.
60. Again, the FCO explained that the search terms used were the same ones as set out above in relation to the request of 15 September 2019. The FCO confirmed that for 2019 any information would have been held electronically. However, neither the initial search, nor a further search carried out at internal review stage, yielded any results. Nor were there any records of information relevant to the request that had been destroyed in the intervening period.
61. The Commissioner also asked the FCO to comment on the complainant's grounds of complaint a) to c) as set out above.
62. In relation to a), the FCO noted that just because a requester thinks 'it would be logical to assume' that it held information on a particular

subject, does not mean that it actually did. Moreover, the FCO emphasised that the searches it had carried out for the two requests in question did not yield any relevant information.

63. As further background, the FCO explained that the Joint Declaration set out the way in which Hong Kong will be governed for at least 50 years following the handover, and states that any breach of that Declaration will be pursued on a bilateral basis between the UK and China. The FCO explained that it does not provide for the UK to reassert sovereignty over Hong Kong in the event of a breach of the Declaration by China.
64. With regard to b), the FCO explained that it did not consider that there is anything in either the Parliamentary Question response or the statement by the Foreign Secretary that suggests/implies such a plan exists.
65. With regard to c), the FCO confirmed that any material relevant to the requests would have been found within the records outlined above. It explained that as a matter of information management policy, it is the relevant internal department's responsibility to retain information that has been shared or discussed with ministers, and consequently there was no reason to ask the ministerial offices to carry out additional or duplicative searches.

The Commissioner's position

66. The Commissioner considers the searches undertaken by the FCO for material dating from 1984 and 2019 to be reasonable and focused ones. The search terms used were logical and the FCO has searched in areas of the organisation that would be most likely to hold any relevant information. The Commissioner also notes that two searches have been carried out, ie one when the request was initially responded to and then at the internal review stage. In her view this adds to the credibility of the FCO's position that it does not hold any information falling within the scope of the request for either year.
67. With regard to the complainant's grounds of complaint, the Commissioner considers the FCO's response to point c) to be a compelling one. She agrees that there is no need to conduct searches of ministerial offices, or indeed speak to senior officials and ministers, to identify recorded information relevant to the request if such information would also be held by the relevant internal department and their records had already been searched and no information located. As the FCO's response explains this is indeed the position here. With regard to the complainant's remaining grounds of complaint, the Commissioner acknowledges the complainant's interpretation of the speeches in question and the joint declaration. However, she does not consider that his interpretation of these documents is sufficient to persuade her that

there is a genuine likelihood that the FCO holds information falling within the scope of the request. Furthermore, the Commissioner notes the FCO's point that the Joint Declaration does not provide a basis for the UK to reassert sovereignty over Hong Kong in the event of a breach of the Declaration by China. In light of this the Commissioner questions why the FCO would be likely to hold any plans or protocols to reassert sovereignty over Hong Kong. In any event, even if the Commissioner was persuaded by the complainant's interpretation of the speeches and/or declaration, then she would have expected the FCO's detailed searches to have located relevant information; such searches have of course yielded no such results.

68. Finally, with regard to the complainant's suggestion that the FCO should not have restricted its searches to records, the Commissioner acknowledges that her guidance cited at footnote 4 explains that information held in private email accounts and in private text messages can potentially be caught FOIA. However, as this guidance explains, the scenarios where this will be the case are rare. Furthermore, the guidance points to a number of factors which indicate where information is likely to be held in private accounts, namely:

- the focus of the request, indicated by the words used by the requester;
- the subject matter of the information which falls within the scope of the request;
- how the issues to which the request relates have been handled within the public authority;
- by whom and to whom was the information sent and in what capacity (e.g. public servant or political party member); and,
- whether a private communication channel was used because no official channel was available at the time.

69. In the Commissioner's opinion none of these factors are relevant in this case. The plan or protocol for the action which the complainant believes exists would presumably, if one existed, be an official UK government policy. This leads the Commissioner to assume that if any recorded information was held about such a plan or protocol then such information would be located in relevant *official* records. However, as explained above, these relevant records have been searched twice by the FCO and no relevant information has been located. Moreover, the complainant's evidence to support his view that the FCO would hold information falling within the scope of his request appears to rest on the to a Parliamentary Question response and a speech in House of Commons by the Foreign Secretary. That is to say, very public and open statements about the UK's position in respect of Hong Kong. Given the

nature of such statements, the Commissioner finds it hard to accept that any information about the matters discussed in these statements – including the plan or protocol envisaged by the complainant – would then *not* be held in official records but *only* contained in private emails or text messages. Consequently, the Commissioner does not believe that there are any credible grounds to assume that information falling within the scope of the request would be held in the private email accounts or phone messages of FCO ministers or indeed FCO officials. As such, the Commissioner does not consider it necessary for the FCO to conduct searches of such areas in order to determine whether it holds any information falling within the scope of his request.

70. For the reasons set out above, the Commissioner has concluded that on the balance of probabilities the FCO does not hold any information falling within scope of the request of 4 October 2019 for the years 1984 or 2019.

Right of appeal

71. 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

72. 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.

73. 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

Jonathan Slee
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