

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2020

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant made a multi-part request for information relating to correspondence between the Home Office and the Duke and Duchess of York about Mr Jeffrey Epstein.
2. The Home Office refused to comply with the request on the grounds that it would exceed the cost of compliance to do so (section 12 of the FOIA).
3. The Commissioner's decision is that the Home Office is entitled to rely on section 12(2) as its basis for refusing to comply with the request. She also found that there is no breach of section 16(1) (duty to provide advice and assistance) of the FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 28 August 2019, the complainant wrote to the Home Office and requested information in the following terms:

"I would like to request the following information under The Freedom of Information and The Environmental Information Regulations.

...

Please note that I am only interested in information relating to the period 1 January 2000 to 1 January 2001.

...

Please note that I have confined the request to the period 1 January 2000 to 1 January 2001 because this is a period when the Prince is known to have had a great deal of contact with Mr Epstein.

...

I believe there are strong public interest reasons for disclosure given the continuing controversy surrounding The Prince's relationship with the late Mr Epstein.

1...During the aforementioned period did The Duke and Duchess of York write or correspond with The Home Secretary about any of the following.

a...The American businessman Jeffrey Epstein.

b...Any business or charitable organisation run by Jeffrey Epstein either in the UK or abroad.

c...Jeffrey Epstein's nationality and the possibility that he could apply for and or obtain a British passport.

d...Past and current police investigations which have centred on Mr Epstein's private life or his financial affairs.

e...The amount of time spent by Mr Epstein in the UK and his UK residential status.

f...The idea that Mr Epstein should be given a diplomatic or trade role which would involve him representing the UK Government overseas.

2...If the answer to question one is yes can you please provide copies of this written correspondence and communication?

3...Did The Home Secretary write or correspond with The Duke and Duchess of York about any of the above (a to f)?

4...If the answer to question three is yes can you please provide copies of this correspondence and communication.

5...If any relevant correspondence and communication has been destroyed can you state when it was destroyed and why. In the case of each piece of destroyed correspondence and communication can you identify the author (s), the recipient (s), the date generated and a brief outline of its contents. If any destroyed documentation continues to be held in another form can you please provide a copy of that documentation".

6. The Home Office responded on 23 September 2019. It refused to provide the requested information, citing section 12 (cost of compliance) of the FOIA as its basis for doing so.
7. The complainant requested an internal review on 27 September 2019.

Scope of the case

8. The complainant contacted the Commissioner on 19 November 2019 to complain about the way his request for information had been handled.
9. He disputed that section 12 applied in this case and was also "*unhappy that the department has refused to process my request for an internal review*".
10. The complainant provided the Commissioner with copies of correspondence that had been sent/received on the subject of the internal review.
11. In the circumstances, the Commissioner exercised her discretion to accept the complaint without an internal review.
12. Following the Commissioner's intervention, the Home Office provided its internal review on 12 February 2020. It upheld its application of section 12 of the FOIA, clarifying that it considered that section 12(2) applied in this case. While it also considered the request engaged regulation 12(4)(b) (manifestly unreasonable) of the EIR, the Home Office told the complainant that any information in scope of the request, if held, would be unlikely to be environmental information.
13. The complainant confirmed that he remained dissatisfied with the Home Office's handling of his request for information. He told the Commissioner:

"I do not accept that the department is unable to locate the information within the time and cost constraints laid down by the Act. Moreover I don't think the Home Office has offered evidence to that effect".
14. The Commissioner wrote to the complainant clearly setting out the scope of her investigation, namely whether the Home Office was entitled to rely on section 12(2) of the FOIA as a basis for refusing to provide the withheld information. She also advised that she would consider the timeliness with which it conducted an internal review.
15. Accordingly, the analysis below considers the Home Office's application of section 12(2) of the FOIA to the requested information. The

Commissioner has also considered whether the Home Office provided appropriate advice and assistance under section 16 of the FOIA.

16. The Commissioner addresses matters concerning the internal review in 'Other Matters' below.

Reasons for decision

Section 12 cost of compliance

17. Section 12 of the FOIA states:

"(1) Section 1(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.

(2) 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".

18. 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. 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.
19. 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.

¹ 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

20. 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, in accordance with her guidance², the Commissioner considers that such an estimate must be one that is sensible, realistic and supported by cogent evidence.

The complainant's view

21. The complainant told the Home Office that he was:

"... only seeking correspondence and communications between a small number of senior individuals about a very specific topic".

The Home Office's position

22. The Home Office told the complainant that the information, if held, would not be held centrally. It explained:

"A search would require contacting each unit who may have had some engagement with the Royal Household at some point. Considering there are well over 100 units within the Home Office, and it is not clear which units may have some engagement with the Royal Household, based on a conservative estimate of 30 minutes per unit to search and identify the information it may hold, we expect it to take over 50 hours to locate the information".

23. With reference to the timeframe specified in the request, the Home Office considered that to be an important factor. It told the complainant:

"At that time, the Home Office did not possess an electronic filing system and stored its records on paper files only. These files are classified by broad subject areas and as a result, we are not able to easily carry out searches for information within the specified cost limit. Correspondence to/from specific Royal Family members are not stored in a separate file, but (if any exists) it will be held within the relevant topic file. Most of these are likely to be archived and stored by a 3rd party. Any request that requires searches of large numbers of hard copy files are likely to breach the cost threshold, especially when even the act of retrieving potential files to search, will incur a cost".

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

24. During the course of the Commissioner's investigation, the Home Office was asked to provide more detail in respect of its application of section 12.

25. In its submission, the Home Office told the Commissioner:

"The information requested by [name redacted] dates from 2000-01, some 18-19 years ago, when the Home Office did not possess an electronic filing system and stored its records on paper files. This means that we are not able to carry out key word searches of a whole document but are limited to the broad subject/topic areas identified by each file title As the internal review states; correspondence to/from specific Royal Family members is not stored in a particular registered file but, if it exists, would likely be held within a file(s) on a broad subject/topic".

26. Describing the work involved as 'a very substantial piece of work', the Home Office provided more detail about the activities that would be required to identify any potentially in-scope material and confirmed that the same process would need to be carried out for all relevant policy areas.

27. With regard to the number of Units within the Home Office where it considered information 'might reasonably be held', it confirmed what it had told the complainant:

"We estimate that these teams/units number in excess of 100".

28. The Home Office told the Commissioner that it would not be possible to confirm exactly what information is held within a given file without recalling it from storage and considering each one in turn. The Home Office provided the Commissioner with examples of the high-level nature of the file titles in support of that view. It also estimated how long it would take to retrieve files held on-site and for a third party to retrieve those held off-site.

29. With respect to the amount of time required to check each potentially relevant file, it said:

"Each file will vary in size, but we estimate - conservatively - that on average it would take 5 - 10 minutes to check each file once it had been identified and retrieved".

The Commissioner's view

30. By virtue of section 12(2) of the FOIA a public authority is not required to comply with the duty in section 1(1)(a) of the FOIA (ie – confirm or deny whether requested information is held) if to do so would exceed the appropriate limit.
31. When dealing with a complaint to her under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way.
32. Therefore, as set out in the Fees Regulations, the Commissioner has considered whether the estimated cost of responding to the multi-part request would exceed the appropriate limit.
33. The Commissioner has taken into account that the timeframe specified in the request was January 2000 to January 2001.
34. The Commissioner is also mindful that the complainant disputes that:
"... this sort of correspondence and communication will have been filed away with general documentation".
35. However, from the evidence she has seen during the course of her investigation, the Commissioner is satisfied that the Home Office has provided a reasonable explanation as to the likely locations, both on-site and off-site, from where files would need to be recalled. She is also satisfied that it provided evidence of a sampling exercise it had carried out in order to justify its position regarding the time it would take to determine whether the retrieved files actually contain the information described in the request.
36. The Commissioner concludes that its calculations are reasonable and supported by cogent evidence.
37. Section 12(2) does therefore apply and the Home Office is not required to comply with the request.

Section 16 advice and guidance

38. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request *"so far as it would be reasonable to expect the authority to do so"*.

39. In her guidance on section 12³, the Commissioner considers the provision of advice and assistance. She states:

"In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:

- either indicate if it is not able to provide any information at all within the appropriate limit; or

- provide an indication of what information could be provided within the appropriate limit; and

- provide advice and assistance to enable the requestor to make a refined request".

40. In general, where section 12 is cited, in order to comply with this duty, a public authority should advise the requester as to how their request could be refined to bring it within the cost limit.
41. In that respect, the Commissioner acknowledges that the Home Office apologised to the complainant that its original advice, namely to limit the time period of the request, *"was not helpful"*.
42. The Commissioner is satisfied that the Home Office subsequently provided him with more detailed advice. For example, it advised him to identify particular key words to be searched in relation to a search of historical files.
43. She is therefore satisfied that the Home Office fulfilled its duty at section 16(1) of the FOIA to provide advice and assistance as far as is reasonable.

Other matters

44. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has
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³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

issued guidance in which she has stated that, in her view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.

45. As noted above, the internal review was provided following the Commissioner's intervention.
46. The Commissioner has sought to establish the circumstances that led to the delay in the internal review being provided to the complainant.
47. In its submission to the Commissioner, the Home Office advised that it had drafted an internal review within the recommended timeframe. However, it also confirmed that, not having received the required clarification from the complainant, it did not send it at the time.
48. It is not in dispute that, when requesting an internal review, the complainant inadvertently used a different email address to the one he had used to make the original request on 28 August 2019.
49. The Commissioner has been provided with evidence, from both parties, that they corresponded with regard to the complainant's request for an internal review.
50. However, it appears that while the requester responded to the Home Office's requests for clarification regarding him seeking the internal review, the Home Office was unaware that he had responded as he did not use the email address that the Home Office advised him to use.
51. When asked about the email address the complainant had used, the Home Office told the Commissioner that that mailbox is not monitored. It also advised that, because the mailbox is not monitored, anyone sending an email to that address is sent an automatic reply advising them of this, and of the email address to use instead.
52. The Commissioner would recommend that requesters, when corresponding with a public authority regarding FOIA, use the email address cited by the public authority for such purposes.

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

**Laura Tomkinson
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