

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2020

Public Authority: Attorney General's Office
Address: 5 - 8 The Sanctuary
London
SW1P 3JS

Decision (including any steps ordered)

1. The complainant has requested information regarding animal right activists. The Attorney General's Office did not comply with the request, citing section 12(1) (costs exceeding the cost limit) of the FOIA.
2. The Commissioner's decision is that although section 12 of the FOIA applies, the Attorney General's Office should have applied section 12(2) ('neither confirm nor deny' on cost grounds) of the FOIA.
3. The Commissioner does not require the Attorney General's Office to take any steps as a result of this decision.

Background

4. On 24 May 2016 the complainant submitted a request to the Attorney General's Office (AGO) – see annex 1 for the full request. The AGO provided the complainant with some information. The complainant requested an internal review.
5. In its internal review, the AGO provided further information, which included a document called "Annex A - information within scope of request 1 that [is] not subject to an exemption".
6. The present request is asking for information referred to in Annex A.

Request and response

7. On 6 September 2018, the complainant wrote to the AGO and requested information in the following terms:

'Please provide the following documents that AGO confirmed it held on 1 September 2016 in

- 1. Briefing document for the Law Officers drafted by an AGO official dated 23 March 2004 entitled "MISC 13 MEETING CONFERENCE ROOM C, CABINET OFFICE TUESDAY 23 MARCH 2004 11AM" (as described in Annex A of response to my request FOI/79/16 dated 1 September 2016)*
- 2. Agenda of "Stakeholder meeting on Animal activism" held at CENTREX on 27 April 2004 (as described in Annex A of response to my request FOI/79/16 dated 1 September 2016)*
- 3. Briefing for the Attorney General by an AGO official entitled "Animal Rights" dated 1 June 2004 (as described in Annex A of response to my request FOI/79/16 dated 1 September 2016)*
- 4. Briefing for the Attorney General sent on 15 June 2004 (as described in Annex A of response to my request FOI/79/16 dated 1 September 2016)*
- 5. June 2004 document "OVERVIEW OF POLICING AND DOMESTIC EXTREMISM ISSUES - A note by Association of Chief police Officers, Terrorism and Allied Matters" as described in Annex A of response to my request FOI/79/16 dated 1 September 2016)*
- 6. Minutes of "MEETING OF HOME OFFICE DELIVERY GROUP ON 15 JUNE 2004" as described in Annex A of response to my request FOI/79/16 dated 1 September 2016)*
- 7. Text apparently prepared for a letter form [sic] AGO to Caroline Flint MP entitled "ARE MINISTERIAL DELIVERY GROUP - 15 JUNE 2004" (as described in Annex A of response to my request FOI/79/16 dated 1 September 2016).'*

8. The AGO responded on 3 October 2018. It refused to comply with the request, citing section 12 (cost of compliance exceeds appropriate limit) of the FOIA.
9. Following an internal review, the AGO wrote to the complainant on 17 July 2019 upholding its original decision.

Scope of the case

10. The complainant contacted the Commissioner on 18 July 2019 to complain about the way his request for information had been handled.

He explained that as well as challenging the AGO's application of section 12, the requested documents were clearly available in 2016 and are relevant to the ongoing public inquiry into undercover policy. The complainant also argued that £500 to send someone to an archive location effectively places documents out of FOIA reach and gives the government a way to hide documents that may embarrass them, under a costs exemption. He also gave his view that this was clearly a problem for transparency and accountability of government.

11. The complaint also explained that he believes that the costs aggregation argument was unfair and open to challenge.
12. The Commissioner notes that the AGO has cited section 12(1) (cost of compliance exceeds appropriate cost limit). The Commissioner considers that section 12 applies, but that the AGO should have applied section 12(2) ('neither confirm nor deny' on cost grounds) of the FOIA rather than section 12(1). The Commissioner will also consider how the AGO dealt with the request generally under the FOIA, including the length of time taken to deal with it.

Reasons for decision

Section 1 – General rights of access to information held by public authorities

13. Section 1 of the FOIA states that –

"(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 12 – cost of compliance exceeds appropriate cost limit

14. Section 12(1) of the 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."

15. Section 12(2) of the FOIA 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."

16. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') set the appropriate limit at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that there is a time limit of 24 hours in this case.
17. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) 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.Section 12(2) requires a public authority to estimate the cost of confirmation or denial rather than provide an exact calculation.
18. The Commissioner must therefore consider whether the cost estimate provided by the AGO is reasonable. If it is, then section 12(2) is engaged and the AGO is not obliged to confirm or deny whether the requested information is held.

Aggregation of requests

19. The AGO explained that it could aggregate the costs of complying with the request of 21 August 2018¹ and the present request, under the Fees Regulations; this is because they relate to the same or similar information and were received within 60 working days of each other.
20. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or

¹ The complainant complained to the Commissioner about the way in which the AGO handled that request. The Commissioner issued the following decision notice: <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617588/fs50856265.pdf>

more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied. Those conditions require the requests to be:

- made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
- made for the same or similar information; and received by the public authority within any period of 60 consecutive working days.

21. In her guidance on section 12² the Commissioner explains that:

'Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.

A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested'.

22. The Fees Regulations wording of "relate, to any extent, to the same or similar information" makes clear that the requested information does not need to be closely linked to be aggregated, only that the requests can be linked.
23. If they relate to the same overarching theme, public authorities can aggregate two or more separate requests in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.

Two or more requests

24. Public authorities can aggregate two or more separate requests. However, a public authority should ensure that each request can be

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

aggregated in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.

Same or similar information

25. Regulation 5(2) of the Fees Regulations requires that the requests which are to be aggregated relate "*to any extent*" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.
26. A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.

Requests received within 60 consecutive working days

27. The Fees Regulations also state that requests received within 60 consecutive working days can be aggregated.
28. The Commissioner is satisfied that both requests were submitted by the same complainant. She is also satisfied that each of the requests can be aggregated in accordance with the conditions laid out in the Fees regulations. The requests are for information which have an overarching theme ie: relating to Annex A (see background); and they were received within 60 consecutive working days.
29. The Commissioner therefore considers that the AGO can aggregate both requests for the purpose of applying section 12.

Application of section 12(2)

30. The AGO explained to the Commissioner that the present request related to a previous internal review carried out in a separate, related request submitted by the complainant in 2016 (see annex at the end of the decision notice for that request in full). It also explained it had dealt with a more recent related request from the complainant made on 21 August 2018. That request had also requested information listed in Annex A.
31. The AGO explained to the Commissioner that AGO officials were already aware that it had not been possible to locate the 2016 FOIA file, as it

had tried to do this in relation to the August 2018 request. In that case, in order to respond, officials undertook a review of the digital records held in connection with the 2016 FOIA request. The digital file contained a copy of Annex A but did not contain copies of the underlying documents. A search of its digital files was conducted using key search terms to determine whether the documents were held. This was unsuccessful. As a result, attempts were made to recover a hard copy of the 2016 FOIA request, as officials believed that the hard copy file could contain the underlying documents.

32. In addition, the AGO explained that the official who had prepared the 2016 response had left. The ex-member of staff was contacted in order to confirm whether the documents were retained and suggested that the file in question may still be stored in the office. As a result, two officials conducted a search of the office. This involved conducting a fingertip search of 14 secure lockers held on site, as these are the lockers in which this type of material would be held. As explained in the initial response letter dated 3 October 2018, this took two members of staff six hours in total.
33. The AGO also confirmed that the material was not located; having been unable to locate the files in its office, it appeared that the files must have been moved out of its London archive centre. The AGO also explained that between the 2016 request and the present request, its office moved location. As part of that move, a large number of physical files were moved to its offsite archive centre. These files were placed into large boxes and a record was kept of the files held within each box so that they could be searched in the future. A search of the digital file records was conducted, but the 2016 FOIA file was not recorded as being stored in any of the off-site boxes. The AGO considered that the 2016 FOIA may have been placed into an off-site box without being recorded. It was at this stage that officials concluded that section 12 applied. The AGO also explained that the next stage of the search to determine if the information was held would have required an AGO official to travel to the offsite archive and conduct a physical fingertip search of the files held there.
34. Additionally, the AGO explained that its archive is located approximately 1 hour outside of Central London and requires a train and a taxi, costing an estimated total travel cost of £20 per day. Given the number of files stored at the off-site location (over 3,000), it would take a single employee over a day to undertake a fingertip search of the files. Officials estimated that it would likely exceed two days. The AGO explained that a conservative estimate of at least 2 full days spent searching (16

hours), combined with 2 hours travelling a day and the 6 hours already spent searching the files, would exceed 24 hours.

35. The Commissioner also notes that in the August 2018 request, the AGO carried out a second internal review on 1 July 2019. It had explained to the complainant that it had carried out a search for the document summarised in Annex A. It confirmed that it had taken a further seven hours to search its records again to identify potentially relevant files; retrieving from its archive files that had not been destroyed due to the passage of time; confirming that they did not contain any requested information; confirming the number of files destroyed due to the passage of time; identifying the file it considered held the requested information and conducting a further targeted search of its current accommodation for it.
36. The AGO explained to the Commissioner that in its second internal review of the August 2018 request, it had again attempted to locate the relevant documents summarised in Annex A. It confirmed that it had located a document that identified files that had been searched in order to respond to the 2016 FOIA request. It also explained that it was likely that the document summaries in Annex A were originally found in these files. Three files had been recovered and searched but did not contain any documents summarised in Annex A. The remaining files could not be located and officials searched AGO records to identify any files held that related to the "National Forum on Domestic Terrorism". As a result, all files created between 2005 and 2007 (which were deemed to be the most likely files to hold relevant information) were searched by officials, who confirmed that eight had been destroyed, one was held off-site and one could not be traced.
37. The file held off-site was searched but it did not contain any material that fall within scope of the request. The file that could not be located had been recorded as being held off-site, but the off-site company could not locate it. The AGO also confirmed that its own office had been searched but the file was not located.
38. The AGO also explained to the Commissioner that, as in the August 2018 request, the next step would have been to visit the off-site facility and conduct a fingertip search of the files held. However, by this point in the August 2018 request, officials had spent approximately 13 hours trying to locate information within the scope of the request. It also reiterated that a search of the files stored off-site would take at least two days (16 hours searching and four hours travelling), which would exceed the 24 hour cost limit.

Conclusion

39. The Commissioner has considered the AGO's arguments regarding the time it had taken to search for the requested information, in relation to the August 2018 request. She notes that it explained that it had already spent 13 hours trying to locate the requested information and that the next step would be to search its off-site facility. The AGO also explained that the estimated time it would take to carry out this search would be a further 16 hours, which would bring the total time to 29 hours.
40. The Commissioner also considered the AGO's explanation that it would take two hours to travel to the site and two hours to travel back from the off-site facility. Given that the off-site facility agent had not been able to find the file in question in relation to the August 2018 request, she considers it is reasonable for the AGO to search the facility and therefore considers that it is reasonable for it to include the time it would take to get to and from the facility in question. However, the Commissioner also notes that notwithstanding this travel time, the appropriate time limit of 24 hours would still be exceeded.
41. The Commissioner considers that the time needed to fully search to determine if the requested information is held (including the AGO's searching its off-site facility) would exceed the appropriate time limit of 24 hours
42. The Commissioner considers this estimate to be a reasonable one. She therefore considers that section 12(2) is engaged and that the AGO was not obliged to confirm or deny whether it holds the requested information.

Section 16 – Duty to provide advice and assistance

43. Section 16(1) of the FOIA provides that -

"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".

44. 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 appropriate cost limit.
45. The Commissioner notes that in the August 2018 request, the AGO tried to ascertain whether it held the requested information or not; she considers that is the case in the present case. She does not consider

that it could have provided the complainant with any advice or assistance as to how to refine his request. The Commissioner also notes that in its internal review, the AGO advised the complainant that in relation to the first, second and third requests, he may want to submit them to the Crown Prosecution Service and the eighth, ninth and tenth requests to the Cabinet Office, both of whom may hold the information in question.

46. The Commissioner therefore considers that the AGO has complied with section 16(1).

Other matters

47. The complainant requested an internal review on 2 May 2019. Initially the AGO responded on 3 June 2019 but that internal review was in relation to the complainant's related request of 21 August 2018. The AGO responded to the request for an internal review in the present case, on 17 July 2019.
48. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
49. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review should normally be within 20 working days of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
50. The Commissioner notes that the AGO had provided a response on 3 June 2019, which was within 40 working days; however, this was not the correct internal review response. The AGO provided the correct response on 17 July 2019. The Commissioner is concerned that it took the AGO approximately 2½ months to provide the complainant with the correct internal review.
51. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"³ strategy to improve standards of

³ https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_-_design_strategy_201906.pdf

accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

52. 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

53. 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.
54. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annexe 1 – copy of the request of 24 May 2016 submitted by the complainant to the AGO

" 1. All information related to the Attorney General led 'National Forum on Domestic Extremism' from its inception to the present day.

2. All communications between the AG and the Prime Minister, and/or the Home Secretary referring to the National Forum on Domestic Extremism from its inception to the present day.

3. All information relating to the NPOIU sponsored conference attended by representative for the Attorney General, [name redacted].

4. All drafts of the 'proposal for the Sentencing Guidelines Council to contextualise offences linked to domestic extremism to make political motivation an aggravating feature of an offence' referred to in the LinkedIn profile of [name redacted] below.

5. All information that refers to the use and potential use of the Protection From Harassment Act 1997 against protesters against Brighton arms company EDO MBM Technology Ltd, and in the proceedings of the cases EDO MBM Technology and Smash EDO (2005), EDO MBM and Axworthy (2005).

6. All ministerial documents drafted by [name redacted] concerning domestic extremism policy issues that refer to the NPOIU, NETCU, and ACPO TAM."