

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2021

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested Highways England (HE) to provide a breakdown of the number of emails or communications sent between certain email addresses and any Highways England/Agency email address over a four year period. HE refused to comply with the request, citing section 12 of the FOIA.
2. The Commissioner's decision is that HE is entitled to refuse to comply with the request in accordance with section 12 of the FOIA. She has however found HE in breach of section 16 of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - HE is required to provide advice and assistance to the complainant so far as this is reasonable and practicable.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 February 2020, the complainant wrote to HE and requested information in the following terms:

"1. Please could you provide a breakdown of the number of emails/communications sent between the email address [email address] and any Highways England/Agency email address. Please could you include incoming and outgoing emails in your totals plus any where the email address was cc'd in. Please could you provide your breakdown by tax year as follows:

2017/18: X emails/communications

2018/19: Y emails/communications

2019/20 (YTD): Z emails/communications

2. Please could you provide a similar breakdown of the number of emails/communications sent between the email address [email address] and any Highways England/Agency email address. Please could you include incoming and outgoing emails in your totals plus any where the email address is cc'd in. Please could you provide your breakdown by tax year, starting from 2010/11."

6. The complainant received no response, so he chased the matter on 19 March 2020 and requested an internal review.

7. HE responded on 3 April 2020. It refused to comply with the request citing section 12 of the FOIA. It however suggested to the complainant that if he narrowed his request to a four year date range it would be able to process the request within the cost limit.

8. The complainant submitted a refined request on 3 April 2020 and it is this request that is the subject of this notice. It reads:

"I'm not clear whether or not you're saying I have to request the same 4 year period for each email address and whether or not it has to be calendar or tax years? If possible, I'd like the data for tax years, but if not, calendar years will suffice. If I have to use the same four year period for both email addresses, then please can you provide the data for 2016 - 2020.

If on the other hand, you are saying I can use a different 4 year period for each email address, then please could you use the following periods:

[email address] : 2016 - 2020

[email address] : 2014 - 2018

9. HE responded on 13 May 2020. It again refused to comply with the request citing section 12 of the FOIA. In terms of section 16 of the FOIA and providing advice and assistance, it stated that now it understood more clearly how the information is held it was not possible on this occasion to suggest how the scope of the request could be reduced to a point where a useful dataset could be produced within the cost limit.
10. The complainant requested an internal review on 13 May 2020. He pointed out that he had made a narrowed request based on HE's directions.
11. HE carried out an internal review and notified the complainant of its findings on 15 May 2020. It upheld its application of section 12 of the FOIA. It explained how it initially felt the information could be provided within the cost limit but then how this was based on a misunderstanding as to how the information is held; a misunderstanding that was identified as HE was trying to process the complainant's narrowed request. It apologised for the frustration caused.

Scope of the case

12. The complainant contacted the Commissioner on 17 May 2020 to complain about the way his request for information had been handled. He disputes the application of section 12 of the FOIA, especially as HE originally informed him that his request could be accommodated and suggested how to frame a narrowed request.
13. The Commissioner has reviewed the complainant's narrowed request of 3 April 2020 only. She considers the scope of her investigation to be to determine whether or not HE is entitled to refuse to comply with this request in accordance with section 12 of the FOIA. She will also decide if HE has met its obligations under section 16 of the FOIA.

Reasons for decision

Section 12 – cost of compliance

14. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations').

15. 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, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for HE is £450.
16. 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 18 hours for HE.
17. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - 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.
18. 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 Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
19. 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.
20. HE confirmed that it uses a contractor to manage its IT systems and mailbox management. The complainant has also requested the number of emails sent between the specified email address and any HE/Highways Agency mail address including cc's. If it did not use the IT service provider it would be required to contact over 5000 employees to do a check themselves, which would in most cases mean that archived emails would be missed. It also felt actioning the request in this way relied on all HE staff carrying out a search. With the numbers involved it felt there was a high probability that some would not or could not search

thoroughly and there was also an issue with those staff on long term absence, who would not action searches either. HE argued that even if it took this approach and asked each employee to carry out a search and it just took one minute per employee to do this, it would equate to around 83 hours work or £2075, which exceeds the appropriate limit by a considerable amount.

21. HE stated that given this option would be so labour intensive and highly unlikely to be accurate, it considered its only other option was to contact its IT service provider and ask it to estimate how much it would cost to search all inboxes remotely. It confirmed that the work required to complete the search is highly specialised and technical, the programme to undertake this work would require scripting and checking and this can only be carried out by a certain level of qualified IT Engineer. Netcompany is HE's IT service provider and it was procured via the G-Cloud Service provided by the Crown Commercial Service portal. Within this are the rates that Netcompany charge to carry out the services. HE advised in this case the work would need to be done at a level of Client Interface and Grade 6, which has a day rate of between £800 and £950 (the rate card associated with Netcompany was provided to the Commissioner).
22. HE explained that Netcompany is able to charge this increased rate as it is a specialised piece of work to complete, that cannot be undertaken by any other means by HE itself. Therefore, it is akin to a specialised software charge that can be applied to a request. However, in this case it is the specialised services and hours of a qualified IT engineer that is being charged and that is higher than the normal staff cost usually permitted under section 12.
23. It argued that the estimate provided confirms even just half a day's work would nearly be at the cost limit and there would still be no guarantee that the searches would be successful. Given that HE's only other option is to ask all staff to carry out individual searches, it considers it is clear that section 12 of the FOIA applies and there is no meaningful further advice and assistance it is able to provide the complainant under section 16 of the FOIA.
24. The Commissioner is satisfied that HE has sufficiently demonstrated that it would not be feasible to contact all employees and ask them to carry out individual searches. Even at one minute per employee (which is very conservative), HE estimates that it would take around 83 hours to comply. It has also pointed out that this would not be an accurate means of complying with the request either. It would rely on each member of staff carrying out thorough searches, does not equate for those that are on long term absence and there is a danger archived information would be missed.

25. The Commissioner therefore accepts that the only way HE could comply is to instruct its IT service provider to carry out the necessary work. It has supplied its provider's estimate and rates of pay, which are clearly in excess of the rate of £25 per hour permitted under section 12.
26. It is the Commissioner's view that regardless of whether HE uses contract or external staff to carry out some or all of the permitted activities, it can only include their time at a rate of £25 per hour irrespective of the actual cost charged or incurred. This is explained in paragraph 13 of her guidance, which can be accessed via this link:

https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf
27. HE has drawn similarities between this request and what would be needed and the purchase of specialist software; the cost of which if reasonable to include in an estimate is permitted. The Commissioner understands no purchase of specialist software is required in this case but it would cost considerably more than the permitted £25 per hour for its IT service provider to carry out the necessary work. The cost to HE over and above the permitted £25 per hour for staff time is not permitted and cannot therefore be taken into account in this case.
28. The Commissioner has reviewed the estimate in terms of time and it states that it would take 7.5 days to carry out the necessary work. The IT service provider's rates confirm that a consultant's working day is 8 hours exclusive of travel and lunch. This therefore means that it has estimated that it would take 60 hours to comply with the complainant's request. Even at the permitted hourly rate of £25, it is clearly over the cost limit.
29. The IT service provider confirmed that for 2016 to 2020, emails from the named email addresses to/from the requestor, would take half a day for each year. Emails between the named email addresses to/from HE staff would take around 1 day for each of the years 2016 to 2020. It advised that this would be a difficult task as it would need to search 5000 mailboxes on-premise and 5000 mailboxes on O365 exchange online and there is no guarantee that these would be successful. For 2020 or the last 12 months it said that it could target specific mailboxes if a log was provided to show who received and sent emails to the addressed mentioned. But again this would take one day per 12 months and would involve someone putting together that log, which would only add to the cost estimate.
30. For the above reasons, the Commissioner is satisfied that section 12 of the FOIA applies.

Section 16 – advice and assistance

31. Section 12 of the FOIA triggers the duty to provide advice and assistance. In this case, HE has informed the complainant that it is unable to provide advice and assistance due to the costs that would be involved using its IT service provider to carry out the necessary searches. Its consideration of section 16 was based on the assumption that it is permitted to take into account the hourly charge of its IT service provider.
32. As the Commissioner has determined that HE can only take account of the £25 per hour staff rate (not the charge its IT service provider would charge), she considers it could still provide some information within the cost limit. For example, it has stated that it would take either half a day (four hours) or up to a day (eight hours), depending on whether it has to search all staff mailboxes, for each year specified in the request. HE could suggest that the request is limited to an even shorter timeframe. It could also suggest that specific mailboxes are targeted. If there were key staff or key departments for example.
33. For this reason, the Commissioner has decided to find a breach of section 16 and request that HE provide further advice and assistance to the complainant.

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: 0870 739 5836

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

Samantha Coward
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