

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

Date: 22 February 2022

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information on the Department for Transport's (DfT) communications with the General Directorate MOVE of the European Commission and for documents issued by the DfT containing rules of aviation security relating to cabin luggage in a specific time period. The DfT refused the first part of the request citing section 12(1) of the FOIA. The DfT withheld the information in the second part of the request under section 24 of the FOIA.
2. The Commissioner's decision is that the DfT has correctly relied on section 12(1) to refuse to comply with the first part of the request but failed to comply with its obligations under section 16 (advice and assistance) of the FOIA. The Commissioner also finds that section 24 was correctly engaged in relation to the second part of the request and the balance of the public interest favours maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance to the complainant to assist in submitting a request falling within the appropriate limit.
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 17 October 2020 the complainant made a request to the DfT for information in the following terms:

“I would like to receive a list of all the documents sent between the DfT and the General Directorate MOVE of the European Commission in both directions with the following information:

Date, unit at the DfT, name of the employee of the DfT, unit at the Commission, name of the employee of the Commission, title of the document, direction (to or from the DfT). (By unit, I mean the smallest unit in the organisation.)

I would like to receive the documents issued by the DfT containing rules of aviation security concerning cabin luggage from 2006 to 2007.”

6. The DfT responded on 11 November 2020. For the first part of the request it stated that the cost of complying would exceed the appropriate cost limit and the request was refused under section 12 of the FOIA. For the second part of the request relating to cabin baggage security the DfT referred to a previous request response and stated it had nothing further to add.
7. The complainant requested an internal review on 22 December 2020 and the DfT conducted an internal review and responded on 25 January 2021.
8. The DfT upheld its decision to refuse the first part of the request on the basis it would exceed the cost limit under section 12 of the FOIA. It provided some additional explanations for this. With regard to the second part of the request; the DfT amended its position, accepting that the request was for the documents themselves rather than just a list of the documents held (as in the first part of the request). The DfT stated the information in these documents was being withheld on the basis of section 24 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 29 March 2021 to complain about the way their request for information had been handled.

10. The Commissioner considers the scope of his investigation to be to determine if the DfT has correctly refused to provide the list of documents asked for in part 1 of the request under section 12 of the FOIA and whether the DfT has correctly withheld the information held in scope of the second part of the request under section 24 of the FOIA.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(1) of the 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 cost limit.
12. Section 12(1) of the 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 cost limit.
13. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can make a notional charge of a maximum of £25 per hour to undertake work to comply with a request; 24 hours work in accordance with the appropriate limit of £600 set out above, which is the limit applicable to the DfT.
14. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
15. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the applicant refine the request so that it can be dealt with under the appropriate limit, in line with section 16(1) of FOIA.

16. The DfT has provided some background information to the Commissioner that it considers is relevant to consideration of its arguments relating to section 12 and the approach it has taken. The DfT has explained that it has been corresponding with the complainant since 2018 on matters of aviation security and it provided the Commissioner with copies of some of this correspondence for reference. The relevance of this is in understanding the DfT's interpretation of the first part of the complainant's request.
17. The request asked for "a list of all the documents sent between the DfT and the General Directorate MOVE of the European Commission". There was no specific topic referred to that might narrow the scope of this, leaving this to be, in the Commissioner's view, a very broad request. The DfT, based on its previous correspondence with the complainant took a more narrow interpretation, particularly in light of the second part of the request referring to cabin baggage. Specifically the DfT interpreted the request to refer to aviation security policy in 2006/2007 on liquids, aerosols and gas following the 'liquid bomb plot' of 2006.
18. The DfT explained that as the request related (at the time) to EU regulation, the most relevant team were contacted and asked about where information was held. A subsequent search of the DfT's computer system with the Aviation Directorate concluded there were 447 documents which, the internal review stated, related to the 12 Regulation Committee meetings that occurred during the period stated in the request.
19. The DfT has stated that due to the way in which information is held the use of a keyword search would not have helped narrow down the search and the act of determining if relevant information was held in each document would require manual intervention/human judgement. If information in the documents was relevant to the request a list would then need to be compiled to meet the request.
20. The DfT estimated that going through over 447 documents to see if they contained relevant information and then to extract the information into a list at an average of five minutes per file would equal 2235 minutes or 37.25 hours, totalling over £900 based on a staff rate of £25 per hour.
21. The DfT confirmed their view that this was the most reasonable and proportionate method of identifying information in the scope of the first part of the request.

The Commissioner's decision

22. In determining if the cost estimate is reasonable the Commissioner has revisited the wording of the request and the interpretation of this

request by the DfT as well as taking account of the complainant's comments. The request asked for a "list" of all documents sent between the DfT and the General Directorate MOVE to include the date of the document, unit at the DfT, unit at the Commission and title of the document. The complainant has made it clear that if a name(s) cannot be provided as it constitutes personal data then unit is sufficient.

23. The DfT has narrowed its searches to documents from 2006/2007 and the Commissioner considers this is reasonable given there was no timeframe specified for this part of the request and the second part of the request refers to these years. The Commissioner notes this position has not been challenged by the complainant.
24. The Commissioner has no reason to dispute that the search methods employed by the DfT are the most efficient methods to use for its systems and he also acknowledges keyword searches would be problematic given the request does not ask for a list of documents between specific named individuals or on a particular topic that would allow keyword searches to be used. The Commissioner does therefore accept that some degree of manual checking of the 447 files would be required to determine if they are in scope of the request. Similarly as the request asks for a list of documents with unit and date there will be some time required for extracting the information into a format in which it can be provided to the complainant.
25. Turning to the estimate itself; the DfT has given a figure of five minutes per file giving a final total of over £900, in excess of the £600 limit. The Commissioner must consider if 5 minutes per file is a reasonable estimate in the circumstances. The DfT did not conduct a sampling exercise making it more difficult to rationalise the five minute estimate. However, even if the time was reduced to a more reasonable three minutes it would still exceed the cost estimate. The Commissioner considers this to be objectively reasonable to scan a file, confirm it contains relevant information and then to extract the information required to satisfy the complaint i.e. unit, document title, date, and add this into a spreadsheet or list.
26. In any event the estimate is based on the DfT already having narrowed the request from all documents sent between the DfT and MOVE to a just those referring to cabin baggage. Taking the request at face value it is not unreasonable to assume that any search for all documents, regardless of topic or theme, would result in a much higher number of files and documents returned and thus a higher cost estimate.
27. The Commissioner has concluded that the cost of complying with the first part of the request would exceed the appropriate limit. He, therefore, finds that the DfT correctly applied section 12(1).

Section 16 – advice and assistance

28. Section 16(1) of the FOIA requires authorities to provide advice and assistance to any individual making an information request.
29. Generally, where section 12(1) is cited, authorities seeking to comply with section 16(1) should advise the requester as to how their request could be refined to bring it within the cost limit. The Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice, however, a refusal under section 12(1) is generally a trigger for advice under section 16(1) to be given.
30. In this case the Commissioner considers that the DfT's initial response failed to provide any advice and assistance. In its internal review the DfT advised the complainant that any refined request, even if it came under the cost limit, would likely not result in the disclosure of information as a number of exemptions would most probably be engaged.
31. The DfT considers that given the sensitive nature of the information involved it provided the complainant with as much advice and assistance as it reasonably could.
32. The Commissioner acknowledges that it is not always easy to provide meaningful advice on how a request can be refined, particularly if it appears quite wide-ranging in scope. In this case, the DfT narrowed the scope of the request based on its previous interactions with the complainant and identified documents relating to 12 Regulation Committee meetings.
33. The Commissioner considers that the DfT could have suggested narrowing the request to focusing on documents from a handful of these meetings rather than all 12. The DfT may also have been able to ask the complainant to focus on a more specific topic that could have narrowed search results further. In failing to offer any advice on how to refine the request, the Commissioner finds a breach of section 16.

Section 24 – national security

34. Section 24(1) of the FOIA states:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”
35. The Commissioner's interpretation of “required” is taken by the approach in the European Court of Human Rights where interference to human rights can be justified where it is necessary in a democratic society for safeguarding national security. ‘Necessary’ in this context is

taken to mean something less than absolutely essential but more than simply being useful or desirable. 'Required' in this context is therefore 'reasonably necessary'. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis that disclosure would have an adverse effect on national security before the exemption is engaged.

36. It is not necessary to show that disclosing the information would lead to an immediate threat to the UK, the exemption can be engaged to prevent a disclosure that would have adverse consequences. Safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent.
37. The Commissioner has viewed the information withheld under this exemption – the documents issued by the DfT containing rules of aviation security in reference to cabin baggage during the period of 2006 to 2007. The DfT acknowledges that a significant period of time has passed since 2006 but it argues the sensitivity of the information contained in these documents is undiminished. This is because the period of time the request relates to covers specific information and rules resulting from the discovery of the 'liquid bomb plot', a terrorist plot to detonate liquid explosives carried onto aircraft. The DfT therefore considers this to still be highly sensitive information.
38. The Commissioner recognises that terrorists can be highly motivated and may go to great lengths to gather information. This may mean there are grounds for withholding what seems to be harmless information on the basis that it may assist terrorists when pieced together with other information they may obtain. In this case the information, in parts, is relatively straightforward and simply sets out what measures would be in place for checking cabin baggage, information which is now widely known by anyone who has travelled via a UK airport since 2006/2007.
39. However, there are some details in the documents that may not be as widely known. The Commissioner considers that disclosing the withheld information, however limited or apparently harmless, may allow those seeking to commit acts of terrorism to exploit systems put in place to protect passenger and staff and ensure safe air travel.
40. In the Commissioner's view withholding this information is reasonably necessary in order to safeguard national security. Section 24(1) is therefore engaged.
41. The exemption is however subject to the public interest test set out in section 2 of FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in

maintaining the exemption outweighs the public interest in disclosing the withheld information.

42. The DfT acknowledges the disclosure of the documents would assist transparency and may provide reassurance relating to prohibited articles and the security screening processes in place at UK airports. The DfT is also of the view disclosure would contribute to the wider transparency agenda.
43. However, the DfT is of the view that disclosure would likely be used by those with an intention to cause harm thereby weakening aspects of the UK's national security safeguards. The DfT argues that disclosing the information would likely jeopardise the steps that have been taken to protect aviation from terrorist attack and, as a threat of this nature remains viable, the DfT cannot allow the possibility of security measures being compromised by disclosing the requested information.
44. The complainant argues that the rules around cabin baggage and security checks should be made public as there are instances in which passengers are subject to additional security checks due to a false positive i.e. a security check flagging a prohibited object only for further checks to determine the item was not dangerous. The complainant states that if a passenger questions the process they are not furnished with all the information but simply told the rules are being followed, creating an asymmetric relationship.
45. The complainant has also indicated that he agrees that technical information, for example how the equipment that checks the baggage operates, should not be made public for obvious security reasons but that the rules about what is permitted in cabin baggage and under which conditions should be made public in accordance with the rule of law.
46. The Commissioner's understanding is that all airports make it clear to passengers what items can be permitted in cabin baggage and clearly outline the specific conditions in which they can be permitted if there are any. What is not made public is the reasons why the specific restrictions on each type of liquid are in place or any information on how UK airports screen for prohibited items, beyond what is visible to passengers when passing through security checks. This information, if known can clearly be of interest to those who may have more sinister motives and the Commissioner cannot see why, without a substantial argument for disclosure, there would be a reason to disclose this information and potentially undermine the security of UK airports and national security.
47. Although the information is from some time ago and there is a case for saying that some of the sensitivity will have diminished over time, the information could be used to understand the thinking at the time and

the measures in place at UK airports to combat any future threats. Some of this information will still be relevant to date.

48. The Commissioner refers to the First-tier Tribunal decision in his guidance (Philip Kalman v Information Commissioner and the Department for Transport, EA/2009/0111¹), which found that 'the consequences of a successful terrorist attack on a plane were so great that even if there was only a low risk that disclosing the information would aid such an attack, there was a very strong public interest in withholding the information.'
49. Having considered all of the circumstances of this case, and taking into account the complainant's views, the DfT's submissions and his own guidance, the Commissioner has concluded that the balance of the public interest favours maintaining the exemption.

¹ [MARTYRES \(tribunals.gov.uk\)](http://tribunals.gov.uk)

Right of appeal

50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. 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.
52. 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

Jill Hulley
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