

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **17 January 2023**

Public Authority: **Home Office**

Address: **2 Marsham Street
London
SW1P 4DF**

Decision (including any steps ordered)

1. The complainant has requested details of various meetings from the Home Office (the "HO"). Initially, the HO would neither confirm nor deny ("NCND") holding any information, citing sections 23(5)(Information supplied by, or relating to, bodies dealing with security matters) and 24(2) (National security) of FOIA. It later confirmed holding information but advised it was exempt by virtue of sections 23(5), 24(1), 31(1)(a)(b) (Law enforcement), 40(2) (Personal information) and 43(2) (Commercial interests) of FOIA. Further to the service of an Information Notice, the HO again revised its position, instead relying on section 12(1) (Cost of compliance exceeds appropriate limit) of FOIA.
2. The Commissioner's decision is that the HO is entitled to rely on section 12(1) to refuse the request. No steps are required.

Request and response

3. On 23 October 2020, the complainant wrote to the HO and requested information in the following terms:

"I hereby kindly request a list of meetings held between representatives of Apple, Google (including Alphabet), Facebook (including WhatsApp and Instagram), Microsoft, Signal messenger, Telegram, and Wickr with officials from the Home Office held

between the 1st of January 2017 and the 20 September 2020 on the subject of encryption. Where possible the list should include:

- 1) The date of all the meetings
 - 2) A list of all the participants in each meeting and their positions in the company and Home Office
 - 3) The general topic of discussion or a brief description of the issues discussed in each meeting".
4. The HO responded on 24 November 2020, and refused to confirm or deny that the requested information was held, citing sections 23(5) and 24(2) of FOIA.
 5. The Home Office provided an internal review on 30 June 2021 in which it maintained its position.
 6. On 27 September 2021, the complainant wrote to the Commissioner to complain about the response.
 7. On 19 July 2022, the Commissioner wrote to the Home Office raising various queries to assist with his investigation.
 8. On 9 September 2022, the Home Office responded and revised its position. It also wrote to the complainant, to confirm that information was held but that it was exempt by virtue of sections 23(5), 24(1), 31(1)(a)(b), 40(2) and 43(2) of FOIA.
 9. When making such a revision, as well as advising the complainant, a public authority should make a fresh submission to the Commissioner outlining its revised response and its rationale for claiming new exemptions; this was not provided. Therefore, on 17 October 2022, the HO was advised that this submission was still required within 10 working days.
 10. On 23 November 2022, having not received a formal response, the Commissioner necessarily issued an Information Notice formally requiring one (this will be published separately on his website¹).
 11. On 6 January 2023, outside the time for compliance, the HO responded to the information Notice. It again revised its position, advising that it would exceed the appropriate limit at section 12(2) of FOIA to deal with the request.

¹ <https://ico.org.uk/action-weve-taken/information-notices/>

Scope of the case

12. The complainant originally contacted the Commissioner on 27 September 2021 to complain about the way his request for information had been handled. Following the HO's revised response of 9 September 2022, the Commissioner sought further views from the complainant which were provided on 16 November 2022.
13. It is noted that the HO has again revised its position, relying on the cost limit at section 12 FOIA. In view of the considerable delays to date, this further revision has not been provided to the complainant. The Commissioner does not consider that the complainant will be disadvantaged as any public interest arguments relating to disclosure are not relevant when considering section 12.

Reasons for decision

Section 12 – cost of compliance

14. Section 12(1) 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.
15. When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
16. The Regulations state that the appropriate cost limit is £600 for central government, legislative bodies and the armed forces, and £450 for all other public authorities. The cost limit in this case is £600, which is equivalent to 24 hours' work.
17. 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 requests.

18. The HO explained to the Commissioner:

"The requested information is not held centrally. The request itself is wide: it asks about any meetings held with several large external organisations on the subject of encryption (which is itself a very wide subject), with any Home Office member of staff, and over a lengthy – three years and nine months – period. This information is not held in one place but will be dispersed across a number of locations, likely to include the personal mailboxes and drives of past and present members of Home Office staff who may have been engaged, either directly or indirectly, in any such meetings falling within scope of the request, as well as potentially in shared inboxes and drives.

In order to identify, retrieve, and locate the information, we would need to search multiple mailboxes and drives / internal databases. This would be a significant undertaking and would exceed the appropriate cost limit, and therefore we are unable to comply with this request.

The request asked for information between 2017 and 2020. The request was received on 23 October 2020. At the time of the request, over three and a half years had elapsed since the start of the requested time frame in January 2017. We would need to check staff (both past and present) personal mailboxes and drives to locate, identify, and retrieve, information held within scope. As a preliminary step we would need first to identify the relevant past and present staff in order to ascertain which personal mailboxes and drives to search; given the extensive period covered by the request and the passage of time since, this would be a considerable exercise in and of itself.

In order to demonstrate the work that would be needed, we have conducted a sampling exercise. Searching a current member of staff's personal drive only, using two relevant keywords we received a total of 332 'hits'. This was over a one-year period only. In turn, each of the 332 hits would need to be reviewed to see if it falls within scope of the request. We estimate that this would take on average about 30 seconds per hit. In total therefore, this would take about 166 minutes. We estimate that we would need to perform identical searches on at least 15 other staff accounts over the time period requested, which would take about 2,490 minutes (41.5hrs). Searches may also be required in shared mailboxes and

drives / internal databases. This is clearly in excess of the 24hr appropriate limit and hence why we believe section 12(1) is the correct response in this case.

Please note that this calculation is for a one-year period only (not a period of three-plus years as requested), plus, this sampling exercise is based on one member of staff's personal mailbox only – not all their possible mailboxes, folders, drives etc. The search was also limited to two relevant keywords – searches would need to take place for each of the organisations listed.

For the reasons as noted above, even at a conservative estimate, we believe the cost of complying with this request – locating, retrieving and then extracting any relevant information in scope, would substantially exceed the appropriate limit. As can be seen above, even searching for only a small element of this request is estimated to exceed the appropriate limit considerably.

I can also confirm that the above estimate has been based upon the quickest method of gathering the requested information".

Commissioner's conclusion

19. Having considered the estimates provided above, the Commissioner finds that they are realistic and reasonable. He therefore accepts that to provide the information would exceed the appropriate limit.

Section 16 – Advice and assistance

20. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general where section 12(1) 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, albeit that 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.
21. As advised above, the HO revised its position at a very late stage and it has not therefore written to the complainant; which the Commissioner has not required at this stage. However, recognising its duties, it advised the Commissioner:

"Even if [the complainant] had been provided with advice at the time, it is very likely that any request for information of the kind to which this request refers will be refused on the basis of the exemptions set out in our earlier reply.

Accordingly, it may be possible to comply with a revised request if the time frame was both more recent and significantly reduced, the

request was limited to certain officials only (e.g., senior civil servants) and to fewer organisations, and the subject matter – encryption – was drawn in more precise terms. However even if we would be able to comply within the appropriate limit, our position as set out in our letter of 9 September 2022 would still very likely apply".

22. This information may be of assistance to the complainant if he chooses to submit a revised request.
23. The Commissioner does not find a breach of section 16.

Other matters

24. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

25. As the HO failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.
26. The considerable delays and late compliance with the Information Notice are noted in this case and will be monitored.

Section 45 Code of Practice ("COP")²

27. The section 45 COP provides guidance for public authorities on how to achieve best practice in meeting their responsibilities under Part I of the Act. The COP sets the standard for all public authorities when considering how to respond to Freedom of Information requests.
28. The Commissioner considers that the HO's standards in dealing with this case do not comply with its responsibilities under the COP. In this case, the HO cannot have ascertained what information it held prior to issuing its initial refusal notice, undertaking its internal review or when initially revising its response during the Commissioner's investigation. Had it

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926.pdf

done so, it would have been aware that it was unable to comply with the request within the time limit at a much earlier stage.

29. This poor practice is noted and will be logged for monitoring purposes.
30. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by Design strategy³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

31. 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@hmcts.gsi.gov.uk

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

32. 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.
33. 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

**Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF**