

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 January 2023

**Public Authority:** Scotland Office (UK Government)

**Address:** Dover House  
Whitehall  
London  
SW1A 2AU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding legal advice sought and issued around a second independence referendum in Scotland, and information relating to the legality of a second referendum. The Scotland Office refused the requests as it considered that the cost to comply would exceed the appropriate limit under section 12(2) of FOIA.
2. The Commissioner's decision is that the Scotland Office was entitled to rely on section 12(1) of FOIA, to withhold the requested information. It has also complied with its duty to provide advice and assistance in line with the requirements of section 16 of FOIA.
3. The Commissioner does not require the Scotland Office to take any steps.

## Request and response

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4. On the 3 May 2022, the complainant made requests for information in the following terms:

"1) Whether the UK Government has sought legal advice around a potential second independence referendum in Scotland

2) If it has, any legal advice issued to ministers or provided by civil servants since and including 2020."

And

"1) Any internal correspondence between senior civil servants, special advisers or ministers in 2021 and 2022 within the Scotland Office relating to the legality of a second independence referendum in Scotland to date."

5. On 31 May 2022, the Scotland Office responded advising the complainant that the information was exempt from disclosure by virtue of section 12(2) of FOIA (the cost limit exemption).
6. The Scotland Office provided an internal review response on 27 July 2022 maintaining its reliance on the cost limit exemption under section 12(2) of FOIA, and as part of its section 16 responsibilities supplied links to published information within scope of the request as well as suggesting a narrowed timeframe may assist with the request.

## Scope of the case

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7. The complainant contacted the Commissioner on 27 July 2022 to complain about the way the request for information had been handled saying:

"I believe the application of the cost exemption is erroneous and, in any case, is not calculated for the benefit of the requester. The department claims the aggregation of the two requests did not in itself exceed the cost limit and that both on their own would have breached the cost limit. This is not credible. The requests are narrow in scope and time, restricted to senior civil servants, special advisers, and ministers. Fundamentally I believe the information request has been mishandled and the information should be disclosed because the cost exemption does not apply as claimed by the Scotland Office."

8. During the Commissioners investigation, it was established that the Scotland Office had made an error when citing their reliance on the exemption at section 12(2) of FOIA, and in fact, they were reliant on section 12(1) of FOIA to withhold the requested information. The Commissioner considers the scope of this case to be to determine if the public authority is entitled to rely on section 12(1) of FOIA in response to the request. He has also considered whether the Scotland Office complied with its duty to provide advice and assistance under section 16 FOIA.

## **Reasons for decision**

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### **Section 12 – cost of compliance exceeds the appropriate limit**

9. Section 12 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 cost limit.
10. 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 public authorities such as the Scotland Office.
11. 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 of FOIA effectively imposes a time limit of 24 hours for the Scotland Office to deal with this request.
12. 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.
13. 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 decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/0004*, 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.

14. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

**Would the cost of compliance exceed the appropriate limit?**

15. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources or how it chooses to hold its information.
16. Therefore, as set out in the Fees Regulations, the Commissioner has considered whether the estimated cost of responding to the request would exceed the appropriate limit of 24 hours.
17. As is the practice in a case where a public authority has cited the cost limit under section 12, the Commissioner asked the Scotland Office to provide a more detailed explanation of its cost estimate.
18. The Scotland Office explained to the Commissioner that to determine whether information in scope was held for each request, an initial electronic key word search was carried out which took an average of 2 minutes per email (around 300 emails) or 7.5 hours. In addition to this, further searches were carried out of related personal inbox and shared folders with the estimate being a further 4 hours to determine whether any further material could be in scope.
19. The Scotland Office also explained that the requests were further separated to ensure that any information specific to those requests could be captured and further examined to see if they were in scope of the specific request, these took a further 4 and 5 hours, respectively.
20. Section 1 FOIA provides a general right of access to information requested. However, a public authority has a duty to consider whether any information located and retrieved is relevant to the request. For these reasons it is not a case of merely providing the information without reviewing it to determine if the information held could be in scope.
21. In light of this, the Scotland Office explained that not all information within each email and attachment identified by the key word searches, would necessarily fall within scope of the request. Therefore, each email

and attachment would have to be examined individually to identify, and then extract, the in-scope material.

22. The Scotland Office confirmed that: "Furthermore, one G6 team leader, 4 SCS, and three Private Offices (including special advisors) conduct similar searches for information in relation to DB 2286 and DB 2885 in their personal inboxes. Estimate this would take at least 1-2 hour each so in total = 12-24 hours (12 is the number used in the calculation below)."
23. In total, therefore, to determine if any information is held for the email chains and attachments, the Scotland Office estimated it will take between 30 and 31 hours for each request.
24. Even if it were possible to reduce the amount of time taken to check the email chains and attachments to, this would still be over the cost threshold limit at 24 hours.
25. Having considered the estimates provided, the Commissioner's overall conclusion is that the Scotland Office has estimated reasonably and cogently that to comply with the complainant's request would exceed the cost limit of 24 hours. The Scotland Office was therefore entitled to apply section 12(1) of the FOIA to the complainant's request.

## **Section 16 – advice and assistance**

26. 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 where it would be reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice in providing advice and assistance, it will have complied with section 16(1).
27. In general, where section 12 is cited, in order to comply with this duty a public authority should advise the requester how their request could be refined or reduced to potentially bring it within the cost limit.
28. The Commissioner notes that the Scotland Office suggested a way the complainant may wish to consider refining the request, noting that the request related to two linked but essentially differing topics. It suggested that a reduced timeframe would be more likely answerable within the cost limit, although it did not guarantee that would be the case. They also provided links to publicly available information they felt would assist the requester in this case.

29. The Commissioner considers this was an appropriate response in the circumstances given the nature of the original request. He is therefore satisfied that the Scotland Office met its obligation under section 16 FOIA and does not require it to take any steps.

## Right of appeal

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30. 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](mailto:grc@justice.gov.uk) <mailto:GRC@hmcts.gsi.gov.uk>

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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 .....**

**Joanna Marshall**  
**Group Manager**  
**Information Commissioner's Office**  
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**SK9 5AF**