

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

### **Decision notice**

**Date:** 16 October 2023

**Public Authority:** Attorney General's Office  
**Address:** 102 Petty France  
London  
SW1H 9EA

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

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1. The complainant requested information about the use of privately held email accounts by Ms Suella Braverman, while serving as Attorney General.
2. The Attorney General's Office (AGO) refused to comply with the request, citing section 12(1) (cost of compliance) of FOIA.
3. The Commissioner's decision is that the AGO is entitled to rely on section 12(1) to refuse to comply with the request.
4. The Commissioner does, however, find that the AGO failed to provide reasonable advice and assistance in accordance with section 16 of FOIA to aid the complainant in refining their request.
5. The Commissioner requires the AGO to take the following step to ensure compliance with the legislation:
  - provide advice and assistance to the complainant regarding how they may potentially refine their request within the cost limit.
6. The AGO must take this step 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**

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7. On 4 November 2022, the complainant wrote to the AGO and requested information in the following terms:

“Please state the number of occasions that Suella Braverman forwarded emails from her ministerial email account to one of her privately held email accounts, over the term of her office as Attorney General between 10 September 2021 and 6 September 2022”.
8. Further to the Information Commissioner’s Decision Notice (DN) of 19 July 2023, in which the Commissioner ordered the AGO to issue a fresh response to the complainant, the AGO responded on 23 August 2023. It confirmed it holds some information that is relevant to the request, but refused to provide it, citing section 12(1) (cost of compliance) of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 23 August 2023 to complain about the way their request for information had been handled.
10. In the circumstances, the Commissioner accepted the case without an internal review.
11. The complainant disputes the cost estimate provided and considers that the AGO failed to provide supporting evidence as to how the estimate was calculated. They also consider that the AGO continues to rely on section 12, “rather than relying on a substantially new exemption as required by the DN”.
12. With respect to that point, the Commissioner notes that the earlier DN required the AGO to issue a fresh response to the complainant that does not rely on either section 14(1) or 12(2). He acknowledges that while the AGO’s fresh response relies on section 12, it relies on a different limb, namely section 12(1).
13. The Commissioner considers that the scope of his investigation is to determine if the AGO correctly cited section 12(1) in this case.

## **Reasons for decision**

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### **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 at £600 for central government.
16. 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 the AGO may refuse the request for information under consideration if it estimates that it will take longer than 24 hours to comply with it.
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".
19. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the AGO was reasonable; in other words whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, that section 12(1) therefore applied and that it was not obliged to comply with the request.
20. Section 12 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 there is a public interest in the disclosure of the information.

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

21. The AGO told the complainant that locating, retrieving and extracting information relevant to their request would require government officials to undertake a manual review of all material within the "sent items" of Ms Braverman's ministerial email account for a period of 12 months. It estimated that this would take more than 24 hours to complete.
22. It also stated that not all such information would be held by the AGO for the purposes of FOIA and that assessing whether or not such information is held by the AGO would take additional time.
23. However, although explaining in general terms why it considered that complying with the request would exceed the cost limit, the AGO failed to provide the complainant with evidence in support of the reasonableness of its estimate.
24. Acknowledging that the complainant had suggested ways in which they considered the AGO could conduct the necessary searches, the AGO told the complainant that it had considered the search methods they had suggested. However, it said:

"The AGO concludes that none of those search methods provides an adequate alternative to a full manual review of Ms Braverman's ministerial inbox".
25. In its submission to the Commissioner, the AGO provided information about its search strategy in support of its application of section 12(1). It also confirmed that its response was based on the results of a detailed sampling exercise. It told him that the sampling exercise followed some preliminary work that was done to establish whether the AGO held potentially relevant material, given that it would be within the 'sent items' of the ministerial email account that any forwarded emails would be found.
26. The AGO also confirmed what it had told the complainant, namely that the sent items folder contained significant volumes of information, not all of which would be relevant to the FOIA Request.
27. In its submission, the AGO provided the Commissioner with details of the sampling exercise it had carried out to estimate the work involved to respond in full to the request.
28. It said that the exercise was based on a single month within the scope of the request that was chosen at random. It told the Commissioner that following the one-month sampling exercise, an exercise of extrapolation was conducted to provide an estimate for completion of the full timeframe search required to satisfy the request.

29. It considered that it was reasonable to conclude, on the basis of the sampling exercise, that a twelve-month search would exceed the appropriate limit.
30. In that respect it considered that months where email "traffic" may have been lighter (e.g. during parliamentary recess) would be compensated for by busier months (e.g. when Parliament was sitting).
31. The AGO told the Commissioner that the sampling exercise demonstrated "that to obtain correct information responsive to the FOIA request would not be a simple 'search' and 'collate' exercise".
32. 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, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, the Commissioner's role is simply to decide whether the requested information can, or cannot, be provided to a requestor within the appropriate costs limit.
33. In essence, therefore, this case turns on whether the estimate provided by the AGO was reasonable.
34. The Commissioner recognises that the complainant disputes the cost estimate provided and considers that the AGO failed to provide supporting evidence as to how the estimate was calculated.
35. The Commissioner accepts that it is not a statutory requirement to explain how the estimate has been calculated. However he considers it is beneficial to a public authority to do so to enable the requestor to assess the reasonableness of the estimate.
36. He considers that it was not until its submission to the Commissioner that the AGO explained the nature of the permitted activities in complying with the request and the nature of the work required to be undertaken.
37. Having considered the estimate provided, the Commissioner finds that it is realistic and reasonable. He therefore accepts that to provide the requested information would exceed the appropriate limit and that section 12(1) has been correctly applied in this case.
38. As he finds that section 12(1) does apply, the AGO is not required to comply with the request.

**Section 16(1) – The duty to provide advice and assistance**

39. Section 16(1) of FOIA sets out a duty for a public authority to provide advice and assistance to anyone who has made, or is thinking of making, a request for information.
40. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requestor refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.
41. In this case, the Commissioner acknowledges that the AGO responded to the complainant about the searches he suggested. However it failed to provide any advice on how the complainant might narrow their request so that it could fall within the cost limit.
42. The Commissioner is mindful that, when first making the request, the complainant told the AGO:

“If you are encountering practical difficulties complying with this request, please contact me so that we can discuss the matter and if necessary I can modify the request”.
43. The Commissioner is not satisfied that the AGO met its obligations under section 16 of FOIA. He has therefore recorded a breach of section 16 of FOIA.

## Right of appeal

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44. 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)

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

45. 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.
46. 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 .....**

**Michael Lea**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**