

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2024

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth & Development Office (FCDO) for information relating to a trip the Prime Minister's trade envoy to Mongolia made in April 2023. The FCDO initially confirmed that it held the requested information and extended the time it needed to consider the balance of the public interest test, but subsequently refused the request on the basis of section 14(1) (vexatious) of FOIA given the burden in complying with it.
2. The Commissioner's decision is that the FCDO is entitled to refuse the request on the basis of section 14(1) of FOIA. However, it breached section 17(5) of FOIA by issuing its refusal notice citing this provision of the legislation late. The Commissioner has also concluded that it would have been reasonable for the FCDO to provide the complainant with additional advice and assistance, under section 16(1) of FOIA, to help him frame a request that is not potentially burdensome.
3. The Commissioner requires the FCDO to take the following steps to ensure compliance with the legislation:
 - provide the complainant with further, and more specific, advice and assistance to allow him to submit a request that is not potentially burdensome.
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. The complainant submitted the following request to the FCDO on 14 June 2023:

"Please could you provide all papers and correspondence held by British Embassy Ulaanbaatar as part of the FCDO that relate to a trip to Mongolia made by Daniel Kawczynski, the prime minister's trade envoy to Mongolia, in his official role earlier this year in April.

Please search from the time period 1 January 2023 to date.

I would expect records within the scope of my request to include but not be limited to:

- Minutes of meetings attended by Mr Kawczynski and Embassy officials including HM Ambassador
- Mr Kawczynski's itinerary and agenda during his trip
- Preparatory notes and briefings for Mr Kawczynski and HM Ambassador ahead of any meetings and journeys in Mongolia...

...I would also like to ask your department on answering this request to provide a schedule of documents which are relevant to this request. I believe that there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld, and would also represent best practice in open government."

6. The FCDO contacted the complainant on 12 July 2023 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. The FCDO explained that it needed additional time to consider the balance of the public interest test.
7. The FCDO sent the complainant further public interest test extension letters on 9 August and 11 September 2023.
8. The FCDO provided the complainant with a substantive response to his request on 3 October 2023. The FCDO explained that:

"As you are aware we initially extended the deadline while we started to consider the information identified as being in scope of your request. However, when working through the information we now realise that we would need to spend a substantial amount of time processing your FOI request, and we believe that the time it would take to review the information, carry out redactions and consult with relevant third parties would prove disproportionately burdensome to the department.

Under section 14(1) of the Freedom of Information Act 2000 the Foreign, Commonwealth & Development Office (FCDO) is not obliged to comply with your request and we will not be processing it further."

9. The FCDO added that:

"It may however be possible to comply with the terms of a less burdensome request, for instance, if you were to request a specific document of interest."

Scope of the case

10. The complainant contacted the Commissioner on 3 October 2023 in order to complain about the FCDO's handling of his request. More specifically he argued that:

11. It was unreasonable for the FCDO to spend three months considering the public interest test to then refuse this request on the basis of burden. In his view the FCDO should have been aware, having gathered the information and started to assess this as part of its public interest test considerations, the level of work that was needed to respond to the request.

12. In any event, he challenged the FCDO's reliance on section 14(1). His grounds for doing so are set out below. Given the FCDO's delays in processing the request, including its delay in citing section 14(1) of FOIA, the Commissioner exercised his discretion and accepted this complaint without the complainant having to seek an internal review.

Reasons for decision

Section 14(1) – vexatious

13. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
14. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
15. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the FCDO's rationale for relying on section 14(1) in this case.
16. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information **and**
 - the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.¹

¹ This approach is set out in the Commissioner's guidance on section 14(1) of FOIA <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/how-do-we-deal-with-a-single-burdensome-request/#section-12>

The complainant's position

17. The complainant questioned whether the request would be burdensome given that it was narrowly demarcated to concern a specific trip, made in a specific month, by a specific individual.
18. Furthermore, he argued that the FCDO's response does not make it clear whether it assessed the value and serious purpose of his request, a request made in order to further his investigation on a subject of public interest: the actions of the taxpayer-funded Prime Minister's trade envoy to Mongolia in that official role. The complainant noted that this is a subject on which previous press stories had been published.

The FCDO's position

19. In terms of the first criterion set out at paragraph 16 the FCDO, explained that there were over 500 documents falling within the scope of the request, some of which were emails with attachments, and some have attachments within the attachments.
20. With regard to the second criterion, the FCDO explained that a sample search identified that the following exemptions would apply to a significant amount of information falling within the scope of the request: section 27(1)(a), (c) and (d) (international relations), section 35 (formulation of government policy), section 40(2) (personal information) and section 43(2) (commercial interests) of FOIA.
21. With regard to the third criterion, the FCDO argued that the volume of information located as falling within the scope of the request would make separating out the exempt, from non-exempt, information a difficult and time consuming task to achieve in this case. The FCDO explained that such a process would involve going through an extremely large amount of information line by line, working with the relevant colleagues to identify information which can be released, determining the sensitivities and understanding the information to be able to ensure correct application of the FOI exemptions. In addition, the FCDO explained that to be able to fully consider exempt and non-exempt information, would require extensive consultation with a number of third parties.
22. The FCDO explained that it conducted a sampling exercise of the first 10 documents as part of its determination that processing the request would be burdensome. It provided the Commissioner with the details of this exercise. It found that it would take 6 working days to review and prepare just these 10 documents for disclosure, in addition to the 2 (at least) working days already spent on the request. The FCDO argued that using these 10 documents as a representative search of the information

held if it multiplied this up by the 500 plus documents held within scope of the request this would provide a total estimated time to process this request of 300 working days (500 divided by 10 x 6 working days = 300 working days). The FCDO also provided the Commissioner with copies of the 10 documents in question.

23. The FCDO explained that it recognised that there is a public interest in the information it holds which the complainant sought access to. The FCDO noted that it initially extended the deadline for considering the public interest while it started to consider the information identified as being in scope of the request in an effort to be able to release information not covered by an exemption. The FCDO explained that it had also tried to help and assist the complainant by suggesting he may wish to request a specific document of interest in relation to the visit.

The Commissioner's position

24. With regard to the criteria set out above, the Commissioner is satisfied that the first criterion is met; 500 documents clearly represents a significant amount of information.
25. With regard to the second criterion, having examined a sample of the withheld information, the Commissioner also accepts that parts of it may attract the exemptions cited by the FCDO and that such exempt information is dispersed throughout the information in scope.
26. With regard to the third criterion, whilst the Commissioner appreciates that the FCDO's estimate of 300 working days to respond to the request is based on a sampling exercise, this is obviously a very significant figure. Furthermore, although the Commissioner recognises that each request needs to be considered on its own merits, some of the time estimates in the sample provided to him appear to be significantly higher in comparison to other FCDO cases that he has considered recently. For example, in response to the request considered in case IC-183160-Z6L1² the FCDO reviewed and disclosed, in redacted form, a 100 page briefing document for a Ministerial visit. No reference was made in that case to the potential burden of processing the request. In view of this the Commissioner is not prepared to accept the validity of FCDO's estimate that it would take around 300 working days to process this request.

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025117/ic-183160-z6l1.pdf>

27. Nevertheless, the Commissioner accepts that the FCDO has located over 500 documents as falling within the scope of the request. As result, despite his reservations about the validity of the time estimate for processing the request, the Commissioner accepts that preparing 500 documents is still likely to be a burdensome process. For example if it took 10 minutes per document to review, consult relevant parties and prepare the document – a figure vastly smaller than the FCDO's estimate – then it would still take 83 hours to process the request (500 documents x 10 minutes = 5000 hours). If it took 5 minutes per document, it would still take over 40 hours to process the request, the equivalent of just over one working week. Such figures would also be more closely aligned to those provided by other public authorities in other section 14(1) cases.
28. The Commissioner therefore accepts that processing the request would still, even at these reduced figures, involve the FCDO expending a considerable volume of time on processing the request. The Commissioner accepts that processing the request would therefore be burdensome.
29. With regard to the value and purpose of the request, the Commissioner agrees that there is a legitimate public interest in the disclosure of information concerning the trip undertaken by the Prime Minister's trade envoy. However, in the Commissioner's view this value and purpose is not sufficient to outweigh the burden that complying with the request would place on the FCDO – even at the Commissioner's lower, and arguably more realistic, estimate of the time processing the request would take.
30. The FCDO is therefore entitled to refuse the request on the basis of section 14(1) of FOIA.

Procedural matters

Section 16 – advice and assistance

31. Section 16(1) of FOIA states that:

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

32. As the Commissioner's guidance on this provision explains:

“Under section 14(1), you [ie the public authority] are under no obligation to respond to a request when you find it meets the criteria for being vexatious on grounds of burden or cost alone.

When dealing with such requests, you should as best practice consider what reasonable advice and assistance you can provide to the requester to help them make a refined, less burdensome request.

Indeed, when dealing with a request deemed vexatious on grounds of burden or cost alone, you should as best practice consider what reasonable advice and assistance you can provide to the requester to help them make a refined, less burdensome request.

The consequences for the applicant of finding a request is vexatious because of burden or cost alone are similar to those where a request has been refused for exceeding the appropriate limit under s12.

It follows that, when handling a vexatious request on grounds of burden or cost alone, it would be reasonable for you to provide the applicant with advice and assistance in a similar way you would do for a request exceeding the appropriate limit.”³

33. The Commissioner also notes that his guidance on section 14 explains that:

“Where you decide it is appropriate to provide advice and assistance, you should do so as soon as possible. This means that the complainant has the opportunity to withdraw their original request within the time limit for complying with it. This may only be practicable if it is obvious from an early stage that the request is burdensome. In other cases, the extent of the burden may only become apparent once you have started to process the request. In these cases, it may only be possible to provide advice and assistance as part of the refusal notice.”⁴

34. The Commissioner notes that in its response of 3 October 2023 the FCDO advised the complainant that “It may however be possible to

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-16-advice-and-assistance/#vexatious>

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-14-dealing-with-vexatious-requests/how-do-we-deal-with-a-single-burdensome-request/#advice>

comply with the terms of a less burdensome request, for instance, if you were to request a specific document of interest.”

35. Having considered all of the circumstances of this request, the Commissioner is not persuaded that this advice adequately fulfils the duty contained at section 16(1) of FOIA. As set out above, the FCDO has located over 500 documents falling within the scope of this request. In view of this, and without any awareness of what these documents are, it seems difficult for the complainant to be able, based simply on the information already available to him, to identify a particular document that may be of interest to him about the visit.
36. As a result, the Commissioner considers it reasonable to expect the FCDO to provide the complainant with further, and more specific, advice and assistance to allow him to submit a request that is not potentially burdensome. The FCDO is obviously best placed to determine how to do this. Although the Commissioner would suggest possible (non-exhaustive) ways of doing so could be indicating to the complainant the key documents it holds pertaining to the trip and/or suggesting a shortened time frame for the request.

Section 17(5) – refusal notice

37. As noted above, the complainant has raised concerns about the FCDO taking three months to determine that this request would be burdensome and then to refuse this on the basis of section 14(1) of FOIA.
38. The delay in the FCDO issuing its refusal notice citing section 14(1) constitutes a breach of section 17(5) of FOIA which requires that such a refusal notice is issued within 20 working days of any request.
39. The Commissioner has commented further on this delay in the Other Matters section of this notice.

Other matters

Delays in citing section 14(1)

40. The Commissioner asked the FCDO to explain why it had not identified that processing this request would be burdensome more swiftly. The FCDO attributed this failure to a variety of factors including the very high volume of casework it was dealing with and pressures faced by staff as a result of the responding to international crises. The FCDO noted that staff were preparing a digest and considering the public interest of releasing / withholding information in what was an extremely

complex request with a large amount of information identified. The FCDO acknowledged that it should have identified that the request was burdensome much sooner in the process. The FCDO explained that it was improving its processes so to ensure that if a request is burdensome, and section 14(1) applies, then it is considered as early as possible and within the legislative timescales.

41. The Commissioner considers it regrettable the FCDO did not determine that section 14(1) was applicable earlier. He appreciates that such a delay has caused understandable frustration to the complainant. Nevertheless, the Commissioner notes that the FCDO is taking steps to ensure that such an issue does not occur again in future request handling.

Adequacy of sampling exercise

42. For the reasons set out above, the Commissioner does not consider that the FCDO's estimate to be a satisfactory one. In the Commissioner's view it overestimates the time taken to review and process the information falling within the scope of the request by a considerable margin in comparison to other requests he has previously had sight of. These include requests involving the FCDO and those involving other public authorities.
43. Whilst this issue did not ultimately undermine the FCDO's application of section 14(1) in this case given the volume of information in scope, in future requests such estimates could result in requests being incorrectly refused on the basis of being burdensome, and in turn the Commissioner rejecting the application of this provision of the legislation.

Right of appeal

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

Website: 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

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