

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to a chemical factory in Rabta, Libya. The Cabinet Office cited section 12(2) (cost of compliance exceeds appropriate limit) of FOIA to neither confirm nor deny that it holds information within the scope of the request.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 12(2) of FOIA. The Commissioner also finds that the Cabinet Office met its obligations under section 16 of FOIA by providing appropriate advice and assistance.
3. The Commissioner does not require the Cabinet Office to take any further steps on this matter.

Request and response

4. On 10 October 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

"From Sept 1988-Jan 1989, the US and UK were discussing how a chemical factory in Rabta, Libya may be involved in the manufacturing of illegal chemical weapons. I would like all documents relating to these allegations covering the period Sept 1988-Jan 1989 to be released to me."

5. The Cabinet Office responded on 7 November 2022. It stated that the request exceeded the cost limit, and therefore cited section 12 of FOIA.
6. Following an internal review the Cabinet Office wrote to the complainant on 24 January 2023. It stated that the searches required to determine if it holds information relevant to the request would exceed the appropriate limit, and therefore clarified that it was relying on section 12(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 29 December 2022 to complain about the way their request for information had been handled, at which point they had not received a response to their request for an internal review.
8. Following the Commissioner's intervention, the internal review outcome was provided by the Cabinet Office. The complainant remained dissatisfied with the Cabinet Office's reliance on section 12(2) of FOIA.
9. The Commissioner considers that the scope of his investigation is to determine if the Cabinet Office is entitled to rely on section 12(2) of FOIA to refuse to confirm or deny if it holds information within the scope of the request.

Reasons for decision

10. Section 12(2) of FOIA provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
11. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
12. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies and the armed forces, and at £450 for all other public authorities. Therefore, the appropriate limit for the Cabinet Office is £600.
13. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, effectively imposing a time limit of 24 hours for the Cabinet Office.

14. Where section 12(2) is relied upon, 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 activity:
 - determining whether the information is held.
15. Section 12(2) requires a public authority to estimate the cost of determining if the requested information is held, rather than to formulate an exact calculation. 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(2) matter is to conclude whether the public authority made a reasonable estimate of the cost of determining whether or not any relevant information is held.
16. Section 12 is not subject to a public interest test; if determining whether or not the information is held would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in confirming or denying whether the information is held.
17. It is important to note that whether or not section 12 of FOIA can be relied upon by a public authority is not affected by what information the complainant considers that the public authority should hold, or if a public authority should have a system from which it can easily search for and extract any information falling within the scope of the request. The Commissioner can only base his decision on the way that any information which may fall within the scope of the request is, as a matter of fact, held by the public authority at the time when it received the request for information.
18. In this case, the Cabinet Office explained that the records which it would be required to search in order to determine if it holds information within the scope of the request are titled with the broad subject area that the file covers, such as 'Libya' or 'United States'.
19. The Cabinet Office noted the complainants argument that they had conducted searches of the National Archives themselves and did not find any mention of the Rabta chemical factory in any of the records in it's catalogues. However, the Cabinet Office explained that this does not necessarily indicate whether or not the information is contained within the records held by the Cabinet Office. Instead it just means that the Rabta chemical factory may not have been logged as a specific point of reference within a file. Therefore, all relevant records (i.e. those titled 'Libya', 'United States', etc) would still need to be searched to determine

if they hold information relating to the Rabta chemical factory, and the searches conducted by the complainant at the National Archives do not subsequently help to narrow the scope of the files which the Cabinet Office would be required to search.

20. The Cabinet Office explained that all of the files which it would need to search are only available in paper form, which takes longer to examine as there is no electronic search function which could be utilised to filter the files and narrow down the amount of information which the Cabinet Office would need to consider. The Cabinet Office further explained that whilst the files vary in size, many are very broad and contain a lot of information, and those larger files would therefore take more than an hour each to examine and determine if they contain information within the scope of the request.
21. The Cabinet Office confirmed that there are upwards of 75 files which it would need to search to determine if they contain relevant information. Although some of those files are smaller and would not take as long to consider, many of them are very large and therefore it estimates that searching a single file would take an average of one hour. Therefore the total estimated time to search all of the files which could potentially contain information within the scope of the request far surpasses the appropriate limit.
22. The Commissioner is satisfied that the Cabinet Office has estimated reasonably that the cost of determining whether it holds information within the scope of the request would exceed the appropriate limit. Therefore, his decision is that the Cabinet Office was entitled to rely on section 12(2) of FOIA to neither confirm nor deny if it holds information of the description specified in the request.

Section 16 – duty to provide advice and assistance

23. When citing section 12 of FOIA, a public authority is required to offer advice and assistance to the complainant where it is reasonable to do so, in accordance with section 16(1) of FOIA. The aim of this advice and assistance is to help the complainant refine their request, if at all possible, to one which might be able to be dealt with within the appropriate limit.
24. Section 16(2) clarifies that, providing the public authority conforms to the recommendations as to good practice contained within the section

45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).

25. Whilst the advice provided by the Cabinet Office in its initial response to the request was very vague, in the internal review response on 24 January 2023 it stated:

"...if you wish to resubmit your request you may wish to consider providing more information about what you are looking for, by narrowing the time frame, or by describing the activities you believe to have taken place in Libya. You may also wish to reconsider the terminology you used in your request. The use of the word allegations requires officials to make a judgement about whether a statement constituted an allegation or not. We suggest that you identify or ask for information about specific events or activities that interest you, or identify relevant statements by the US or the British Government that would allow us to better target our searches."

26. The Commissioner is satisfied that due to the nature of how the information is held by the Cabinet Office it may be difficult to provide relevant advice which will locate information that satisfies the complainants interests. However, he is also satisfied that some of the suggested ways of refining the request may narrow the number of files which would need to be searched. They may also enable the Cabinet Office to locate relevant information which has been marked as points of reference within the files which it holds, where the scope and wording of the current request was unable to.
27. The Commissioner finds that the Cabinet Office provided sufficient advice and assistance as per the recommendations set out in the section 45 code of practice. Therefore, it has not breached section 16 of FOIA.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

28. 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

29. 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.
30. 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
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