

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a copy of all communications sent to, and received from, the then Second Permanent Secretary to the Cabinet Office, on a specific topic, during a specified month. The Cabinet Office refused the request under section 14(1) (vexatious request) of FOIA.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 14(1) to refuse the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. By way of background, the Cabinet Office told the Commissioner:

"Ms Sue Gray served as Second Permanent Secretary to the Cabinet Office between May 2021 and March 2023.

On 17 December 2021, the former Second Permanent Secretary was appointed to undertake the investigation into allegations of social gatherings on Government premises during periods of restriction under COVID-19 legislation. The former Second

Permanent Secretary published the findings of her investigation on 25 May 2022”.

Request and response

5. On 18 November 2022, the complainant wrote to the Prime Minister’s Office and requested information in the following terms:

“Thanks for your response. As requested, please find our refined request below:-

Subject to the parameters below, please kindly provide a copy of all communications sent to and received from the 'Second Permanent Secretary to the Cabinet Office' during the month of May 2022.

Parameters:

Concerning the investigation into alleged gatherings on government premises during covid restrictions.

EXCLUDING the meeting minutes requested in ref [reference redacted].

No further parameters”.

6. The Cabinet Office responded on 19 December 2022, citing section 14(1) (vexatious request) of FOIA.
7. The complainant requested an internal review on the same day, 19 December 2022.
8. Following the Commissioner’s intervention, the Cabinet Office wrote to the complainant on 15 March 2023 with the outcome of its internal review. It maintained its application of section 14(1).

Scope of the case

9. Following earlier correspondence, the complainant contacted the Commissioner on 15 March 2023 to complain about the way their request for information had been handled.
10. The Commissioner has received and considered a large amount of argument from the complainant. He finds that the following key factors, which they provided during the course of that correspondence, summarise and reflect the grounds of their complaint:
- They [the Cabinet Office] didn't deem the original request vexatious.

- Nothing was added to the refined request to increase the scope in any way from its original form.
 - The refined request is clearly asking for significantly less than the original version.
 - No changes were made that were not the result of their own advice.
11. The Commissioner has also considered the comprehensive submission from the Cabinet Office about its handling of this request.
 12. It is not in dispute that the request under consideration in this case was made following an earlier request. Nor is it disputed that the Cabinet Office refused that original request, citing section 12 (cost of compliance) of FOIA, providing advice and assistance as to how to refine the request.
 13. The Commissioner recognises that the complainant believes that following the advice from the Cabinet Office, they 'narrowed it [the request] down a lot'. He also recognises that they find it strange that the request in this case has 'become vexatious' while the previous request, on which it was based, was not deemed vexatious. They therefore dispute that section 14 applies.
 14. Regardless of the extent to which the complainant did, or did not, follow the advice provided by the Cabinet Office in relation to the earlier request, the Commissioner's role is to determine whether the Cabinet Office dealt with the request in this case – the request dated 18 November 2022 - appropriately.
 15. The analysis below considers the Cabinet Office's application of section 14(1) of FOIA to the requested information.

Reasons for decision

Section 14 vexatious or repeated requests

16. Section 14(1) of FOIA 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.
17. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.

18. Most people exercise their right of access responsibly. However, a few may misuse or abuse FOIA by submitting requests which are intended to be annoying, disruptive or have a disproportionate impact on a public authority.
19. In his published guidance on dealing with vexatious requests¹, the Commissioner considers the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
20. In that respect, his guidance advises public authorities:

"A useful starting point is to assess the value or purpose of the request before you look at the impact handling the request would have on you".
21. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the leading case on section 14(1), Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (ACC), (28 January 2013).
22. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive (of the requester), (3) the value or serious purpose (of the request) and (4) any harassment or distress of and to staff.
23. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. The Upper Tribunal emphasised that:

"all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA" (paragraph 82).

The Cabinet Office view

¹ <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/>

24. In correspondence with the complainant, the Cabinet Office confirmed that it had had regard to the Commissioner's guidance in reaching the conclusion that section 14(1) applies.
25. It set out its reasons for concluding that the request is vexatious. For example, while acknowledging that the request specifically excludes certain minutes, it nevertheless considered that the request was seeking to re-open issues that have already been, or are being, addressed.
26. It told the complainant that it considers that the request 'clearly lacks focus' and does not appear to have a clear purpose:

"There does not seem to be a clear purpose for this request beyond a "fishing expedition" regarding matters which have been the subject of an investigation which is now complete and the conclusions of which are readily available in the public domain".
27. It also noted that there is substantial documentation in the public domain about the investigation by the former Second Permanent Secretary.
28. It considered there to be "very little or next to no inherent public interest being pursued that would warrant the amount of public resources" that would be spent on responding to the request.
29. It subsequently explained:

"... that where there was a public interest in understanding the work of the former Second Permanent Secretary during May 2022 and the preceding months this has been made available in the public domain, including the conclusions of her investigation into the alleged gatherings".
30. With regard to the burden on the public authority and its staff, the Cabinet Office told the complainant:

"A search of the relevant files has identified a large amount of information held in the inbox of the Second Permanent Secretary. To read through every email that falls within the scope of your request would be lengthy and this would impose an unreasonable burden. The Cabinet Office has real concerns about potentially exempt information, which cannot easily be isolated for redaction because it is scattered throughout the requested material".
31. In light of the volume of information within the scope of the request, the Cabinet Office told the complainant that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the Cabinet Office.

32. It was this latter point – burden – that the Cabinet Office emphasised in its internal review correspondence. Recognising that the complainant had sought to refine their original request to a shorter timeframe, it nevertheless said:

“...we do not consider that this does appropriately reduce the burden and that there is a very limited public interest in considering the release of every single communication sent to or from the former Second Permanent Secretary when set against the very substantial burden this consideration would entail”.

33. Similarly, it told the Commissioner that it considered that the breadth of the request on its own would impose a grossly oppressive burden on the Cabinet Office.

34. In its submission to the Commissioner, the Cabinet Office expanded on the reasons it had given to the complainant for concluding that the request is vexatious.

35. With reference to the wording of the request, in particular the subject matter and timeframe specified, it noted that the investigation will have taken up a very considerable amount of the former Second Permanent Secretary's time during May 2022 on top of their usual duties as Second Permanent Secretary. In that respect it told the Commissioner that the amount of correspondence exchanged between the former Second Permanent Secretary and Cabinet Office officials “would have been considerable”.

36. While the Cabinet Office described the request of 18 November 2022 as “a slightly refined iteration of a previous request”, it considers that the request would still “indiscriminately bring within scope correspondence without regard to its importance”.

37. It explained that it would be necessary to read every email returned from the relevant searches in order to establish whether they concerned the investigation or not.

38. It recognised that while the use of various search terms would identify certain correspondence which could be relevant to the investigation, those search terms would not capture all of the information and may return emails which were not relevant. It also considered that the searches may return duplicates, further complicating the task.

39. The Cabinet Office argued that it considered the following exemptions of FOIA were likely to apply to information in the scope of the request: section 31 (law enforcement), section 36 (prejudice to effective conduct of public affairs), section 40 (personal information) and section 41 (information provided in confidence).

40. It told the Commissioner that, to establish whether exemptions might apply "would necessitate a review of all the correspondence produced by the searches". It also considered that the exempt information "could not be isolated with any ease" from the non-exempt information.
41. Although it did not provide an estimate of the time required to locate and consider disclosure of the information within the scope of the request, the Cabinet Office did provide the Commissioner with the number of emails sent and received by the former Second Permanent Secretary in May 2022.
42. In its submission, the Cabinet Office confirmed what it had previously advised, namely that where there was a public interest in understanding the work of the former Second Permanent Secretary during May 2022 and the preceding months, this has been made available in the public domain, including the conclusions of her investigation into the alleged gatherings.
43. It confirmed it had taken the context and history of the request into account when considering the purpose and value of the request. It also acknowledged what it considers to be the requester's concerns. However, it told the Commissioner that, while it recognises that the request seeks transparency, it considers the subject matter of the request has been conclusively resolved, stating:

"These matters have received widespread scrutiny and have been extensively covered in many different forums".

The Commissioner's view

44. As noted above, the Commissioner's guidance on section 14 of FOIA refers to the four broad themes considered by the Upper Tribunal in the case of Dransfield. The Commissioner considers these provide a useful structure when considering whether or not a request is vexatious.
45. He acknowledges that the complainant considers that a request worded as a result of advice from the Cabinet Office cannot become vexatious.
46. From the evidence he has seen, the Commissioner is satisfied that the complainant has requested a substantial volume of information. He also accepts that the Cabinet Office has real concerns about potentially exempt information being captured by the request.
47. Given the scope of the request, (namely all communications sent to and received from the former Second Permanent Secretary to the Cabinet Office during the month of May 2022 concerning the investigation into alleged gatherings on government premises during Covid restrictions), the Commissioner accepts that such information could potentially

contain information which could attract the exemptions cited by the Cabinet Office. Furthermore, given the nature of such information, the Commissioner accepts that any potentially exempt information would be scattered throughout the information and could not easily be isolated.

48. The Commissioner recognises that the complainant questioned whether the burden is truly disproportionate, "especially if the scope of the request is limited to a specific timeframe and subject matter".
49. In this case, from the evidence he has seen, the Commissioner is satisfied that the Cabinet Office has demonstrated that the amount of time to review and prepare the information for disclosure would impose a grossly oppressive burden.
50. However, even where it is established that compliance with a request would impose a grossly oppressive burden, the impact of the request must still be balanced against its purpose and value to determine if the request is vexatious or not.
51. The Commissioner is also mindful that the Upper Tribunal placed particular emphasis on the issue of whether a request had adequate or proper justification. He considers this clearly establishes that the concepts of "proportionality" and "justification" are central to any consideration of whether a request is vexatious.
52. The Commissioner accepts that the Cabinet Office acknowledged that the complainant excluded certain minutes from the scope of the request. The Commissioner understands, nevertheless, that the Cabinet Office considers that the request in this case is evidence that the complainant is continuing to pursue a particular line of enquiry.
53. With regard to the value and purpose of the request in this case, the Commissioner agrees with the complainant, and the Cabinet Office, that there is value and purpose, in principle, in seeking information about communications received by and from the former Second Permanent Secretary about the alleged gatherings. However, he also recognises that these matters have received widespread scrutiny and have been extensively covered in a number of different forums.
54. The Commissioner has considered the points made by the Cabinet Office about the availability of information in the public domain. The Commissioner considers that it is difficult to see how the information requested, and potentially disclosable under FOIA, could shed any particularly useful or revelatory light on the alleged gatherings beyond the information already in the public domain at the point this request was issued.

55. Taking the above into account, the Commissioner is satisfied that, given the burden and impact on the Cabinet Office of complying with the request, balanced against the limited value in disclosure, the effort required to respond to the request is disproportionate to the value of it.
56. It follows that the Cabinet Office is entitled to adopt the position that the request is vexatious under FOIA and it can therefore rely on section 14(1) to refuse it.

Right of appeal

57. 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

58. 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.
59. 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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