

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2024

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested correspondence related to a specified request previously made under FOIA.
2. The Department for Work and Pensions (DWP) originally relied on section 14(1) to refuse to comply with the request, however, during the Commissioner's investigation DWP changed its position and relied on section 12(1) as complying with the request would exceed the appropriate limit.
3. The Commissioner's decision is that DWP is entitled to rely on section 12(1) to refuse to comply with the request.
4. The Commissioner does, however, find that DWP failed to provide reasonable advice and assistance in accordance with section 16 to aid the complainant in refining their request. The Commissioner therefore requires DWP to:
 - Provide the complainant with advice and assistance regarding how to refine their request.
5. 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 8 August 2023, the complainant wrote to DWP and requested information in the following terms:
- “Under FOI, I am requesting all correspondence held by DWP which relates to a previous FOI Request (FOI2023/00058). In terms of the scope of this request:
- The request covers all internal DWP correspondence concerning the request, the internal review which followed and any correspondence following subsequent disclosure of information.
 - The request covers correspondence from or with other departments in relation to this request. (This may include, for example, the Cabinet Office).
 - The request does not cover correspondence which was previously sent directly by me or to me.
 - The request includes any attachments attached to the email correspondence covered”.
7. DWP provided its response on 1 September 2023. It refused to comply with the request as it considered that it was vexatious and section 14(1) was engaged. DWP explained that it considered the request was vexatious because it was speculative and burdensome. DWP further explained that locating information in scope would exceed the cost threshold of £600 set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and it would then need to review this information for potentially exempt information and redact this.
8. DWP upheld this position at internal review.

Scope of the case

9. The complainant contacted the Commissioner on 4 October 2023 to complain about the way their request for information had been handled.

10. During the course of his investigation, the Commissioner reminded DWP of his guidance on section 14(1)¹ which states:

"... we strongly recommend that if your main concern is the cost of finding and extracting the information, you should consider the request under section 12 of the Act, where possible".
11. This guidance also sets out that section 7 of the section 45 Code of Practice² makes clear that public authorities should always consider section 12 first in circumstances involving burden.
12. The Commissioner invited DWP to reconsider its position on whether section 12(1) or 14(1) was the appropriate procedural section to rely on to refuse to comply with the request in the first instance.
13. DWP confirmed to the Commissioner that it was revising its position and relying on section 12(1).
14. Public authorities may, at any stage, seek to rely on an exemption or exclusion not previously claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 047 AAC³
15. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 12 to refuse to comply with the request.

Reasons for decision

Section 12: Cost of compliance exceeds the appropriate limit

16. Section 1(1) of FOIA states:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-14-dealing-with-vexatious-requests/>

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

³ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

(b) if that is the case, to have that information communicated to him"

17. Section 12(1) states:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit".

18. The appropriate limit is set in the Fees Regulations at £600 for central government departments.

19. The Fees Regulations also specify that the cost of complying with a request must be calculated at a rate of £25 per hour. This means that DWP may rely on section 12 where it reasonably estimates that complying with the request would take longer than 24 hours or 1440 minutes.

20. 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.

21. DWP explained in its original refusal notice that to search for all correspondence relating to request FOI2023/0058 would involve numerous people searching their email accounts. It explained that this would not be straightforward as there may be instances where correspondence is not referenced by its unique identifier.

22. In its submissions to the Commissioner, DWP explained that it had conducted a sampling exercise. It had identified 51 staff who had been involved in correspondence regarding FOI2023/00058, its internal review and disclosure of the requested information. DWP explained that 27 of the 51 staff had been fully involved in the correspondence and 24 had been partially involved.

23. DWP confirmed that, in its sampling exercise, three members of staff had searched their records using the search terms:

- Reference numbers for the FOI request, internal review and ICO investigation

- "Infected Blood"
 - The requesters name
24. DWP confirmed that it took an average of 2 hours 49 minutes to review an average of 2174 pieces of correspondence that fit these search criteria. DWP also confirmed that one member of staff took 1 hour 15 minutes to locate 129 emails which fell in scope out of approximately 3000 results.
25. Having considered DWP's submissions, the Commissioner accepts that DWP's searches are reasonable and proportionate. He accepts that it may be the case that not all emails will be properly labelled with the correct reference number and it is therefore reasonable to include the subject matter of the request and the requesters name in the searches to ensure that information is captured.
26. The Commissioner notes the significant difference between the average of 2 hours 49 minutes to locate information and the individual example of 1 hour 15 minutes. He has therefore based his decision on the lower figure provided. On the basis of 27 people taking 1 hour 15 minutes each to search their records and locate information in scope, it would take at least 33 hours to locate all information falling within the scope of the request.
27. The Commissioner therefore finds that DWP is entitled to rely on section 12(1) to refuse to comply with the request as it would exceed the appropriate limit.

Section 16: Duty to provide advice and assistance

28. Section 16(1) of FOIA states:
- "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".
29. As DWP relied on section 14(1) in the first instance, it did not provide the complainant with advice and assistance on how to refine the request.
30. The Commissioner requires DWP to provide the complainant with advice and assistance on how to refine the request.

Other matters

31. The Commissioner notes that the request explicitly excludes correspondence between the complainant and DWP. It therefore appears that some of the requested information may include the complainant's own personal data.
32. The Commissioner cannot include a consideration under data protection legislation in a decision notice. However, to the extent that the requested information includes the complainant's personal data, DWP should ensure that it has handled the request as a subject access request.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Victoria Parkinson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF