

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 August 2024

Public Authority: Department for Energy Security and Net Zero
("DESNZ")

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant requested information relating to the department's response to a historic settlement involving the complainant and the British Coal Corporation. DESNZ relied on FOIA section 12– cost of compliance, to refuse the request.
2. The Commissioner's decision is that DESNZ is entitled to refuse the request in reliance on FOIA section 12(2).
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 14 July 2023, the complainant wrote to the public authority and requested information in the following terms:

"Under the FOIA please provide the information held in part of Legal Professional Privileges the Department sent to the ICO 2 & 3, however in a better way than in 4 & 5."
5. The complainant attached four emails to the request. Documents 2 & 3 comprise one letter from the ICO to the complainant dated 19 February 2009 regarding a complaint made to the ICO about the Department for Business, Enterprise and Regulatory Reform's (BERR) (a predecessor of DESNZ) handling of a Data Protection Act (DPA) 1998 Subject Access Request (SAR). Attachments 4 & 5 comprise a letter from Rachel

Sandby-Thomas, Director General, Legal at BERR dated 11 April 2008 regarding an Internal Review for a Freedom of Information Act 2000 (FOIA) request made by the complainant.

6. DESNZ interpreted the request to be for all the papers sent to the Commissioner in relation to a subject access complaint as referenced in the letter dated 19 February 2009 attached to the complainant's request. DESNZ responded on 26 September 2023. DESNZ refused the request relying on FOIA section 12 – cost of compliance. DESNZ advised the complainant that they may wish to narrow the scope of the request but that any information found was likely to be covered by Legal Professional Privilege (“LPP”) and may be exempted from disclosure.
7. The complainant requested an internal review on 2 October 2023. On 13 October 2023 the complainant wrote to DESNZ in separate correspondence. This letter revisited the history of his various related issues and also stated:

“For the purpose of any doubt the document I require and need advice and assistance on, is in (2) & (3) as per (1) paragraph 3 the advice of Nabarro Nathanson...”

8. On 30 October 2023 DESNZ provided its internal review of the response of 26 September 2023. It explained that the initial response was upheld as FOIA section 12.
9. With regard to the additional email of 13 October 2023 DESNZ confirmed that:

“...the Department does hold the letter from Nabarro to the Department dated 15 April 1996. However, you will be aware from the ICO's letter dated 19 February 2009 which you included as one of your attachments pursuant to your FOI request that the ICO is satisfied that the “Legal Professional Privilege” can be maintained by the Department in relation to this letter. On this basis the Department's position regarding this letter remains unchanged.”

Background

10. The Commissioner notes that he has previously issued a decision notice FS50463281¹ on 19 March 2013 concerning issues related to the request
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¹ <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=fs50463281>

in this case. At that time the decision notice was served on the Department for Business, Innovation and Skills ("BIS") (a predecessor of DESNZ). The background set out in that notice is relevant to this notice.

11. In summary, the complainant has been in contact with the department (under the various names listed below) since 1998 concerning his accident claim against the former British Coal Corporation ("BCC"). The BCC liabilities transferred to the Department of Trade and Industry on 1 January 1998 and then to the successive departments, BERR, the Department of Energy and Climate Change ("DECC"), BIS, the Department for Business, Energy and Industrial Strategy ("BEIS") and currently DESNZ.
12. DESNZ explained that the complainant's accident happened on 13 September 1991. The complainant's case went to Court and he was represented throughout. Liability was never conceded. The case settled in 1996 when the complainant accepted a Part 36 Offer². It appears that the complainant changed his position about the settlement after he had agreed the settlement and monies had been placed in Court which had brought the action to a close.
13. The complainant has been corresponding with the department since 1998 about issues concerning the accident claim, making numerous subject access requests and FOIA requests. DESNZ explained:

"In 2007, the Department dealt with two requests for information under the Freedom of Information Act 2000 (FOIA) and one SAR from [the complainant] concerning the accident claim and the records held in relation to another claim for respiratory disease. At the time Ian Mckenzie, then Head of the Coal Liabilities Unit, responded by saying that we considered the ongoing theme of his FOI requests demonstrated obsessive and manifestly unreasonable behaviour and that the Department declared his behaviour vexatious under section 14 of FOIA.

[The complainant] was told we would acknowledge his correspondence and place it on file. [The complainant] appealed this decision and on 11 April 2008 Rachel Sandby-Thomas, the then Director General of Legal, upheld the original decision."

² Part 36 offer in the Civil Procedure Rules is a provision which aims to encourage parties to try to settle their disputes by setting out the costs consequences of offers to settle if they are made in accordance with a Part 36 offer.

The letter of 11 April 2008 [from BERR] is the letter sent to DESNZ with this current request asking for a response in "a better way than in 4 & 5".

Scope of the case

14. The complainant contacted the Commissioner on 5 January 2024 to complain about the handling of his request. He explained:

"Here we go again, the DESNZ rely on hypothetical Legal Professional Privileged LPP advice under section 42 FOIA. The correct analysis;

 - (A) Hypothetical LPP advice that is not true about a person must be provided
 - (B) LPP advice about a person that is true cannot be provided."
15. In correspondence with the Commissioner the complainant has not specifically complained about DESNZ's reliance on FOIA section 12; his focus has concerned the history of the department's reliance on legal professional privilege to withhold information, namely the letter referenced in paragraph 9 ["the Nabarro letter"].
16. The letter of 19 February 2009 from the Commissioner concerns the response provided by BERR in response to a subject access request ("SAR") made by the complainant. The assessment in the letter concerns the complainant's personal data and was considered under the Data Protection Act 1998 ("the DPA"). The assessment concluded that it was likely BERR had complied with the DPA. The assessment explains that the document referenced by the complainant (the letter from Nabarro to the department) was withheld in response to the SAR as it comprised legal advice to which a claim for legal professional privilege ("LPP") could be maintained.
17. This reliance on LPP was not made under FOIA section 42 but rather under the DPA. As the decision in FS50463281 states, referenced above at paragraph 10, any personal data of the requester is exempt from disclosure under FOIA section 40(1) – personal information, where the information constitutes the requester's personal data.
18. The Commissioner understands that in offering advice and assistance regarding narrowing the request of 14 July 2023, DESNZ advised the complainant that, if found, any information was likely to be covered by LPP. The internal review, quoted in paragraph 9 also references LPP and this could have led the complainant to focus on FOIA section 42 rather than section 12.

19. The Commissioner accepts DESNZ's interpretation of the request as being for all papers sent to the Commissioner in relation to the complainant's previous SAR which had been classified as "Legally Privileged". DESNZ considered that there could have been several legally privileged documents and therefore it needed to identify and review the complete bundle of documents sent to the Commissioner.
20. The Commissioner notes that although DESNZ referenced the Commissioner's finding regarding LPP under DPA 98, it has not relied on FOIA section 42 in response to the current request. The Commissioner has therefore not considered section 42. He has made a determination on DESNZ's application of FOIA section 12.

Reasons for decision

Section 12 – cost of compliance

21. Section 1(1)(a) of FOIA states that a public authority must confirm whether or not it holds information unless relying on the provision for neither confirming or denying. Under section 1(1)(b) it must communicate the requested information to the applicant if it is held and is not exempt from disclosure.
22. Section 12(1) of the 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").
23. The appropriate limit is set at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for DESNZ is £600.
24. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit for DESNZ of 24 hours.
25. Section 12(2) requires a public authority to estimate the cost of establishing whether or not the requested information is held, rather than to formulate an exact calculation. The Commissioner must determine whether the cost estimate by DESNZ is reasonable. If it is, then section 12(2) is engaged.
26. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

The public authority's view

27. DESNZ explained that the information referenced in the request ["...the information held part of Legal Professional Privileges the Department sent to the ICO."] would have been sent to the ICO 15 years ago and it was therefore difficult to identify the information in scope of the request and whether the department still held this information, especially as the department had gone through significant structural changes and two different electronic filing systems over this period. As mentioned in the Background section, the complainant has been a regular correspondent with DESNZ regarding his accident and legal action. DESNZ advised that since August 2023 the policy team has filed 78 documents concerning the complainant and his dissatisfaction about the outcome of his legal case.

28. DESNZ explained:

"Initial discussions and searches were carried out by the policy team in the department's records management system, SharePoint, using the following terms [complainant/ICO, [complainant], McKenzie/complainant. Initially searching for documents in the time period 2007 to 2011. An ex-colleague and another team member known to be involved with earlier correspondence from [the complainant] were consulted. Personal email folders were also searched. A colleague identified and provided a list of communications with [the complainant] detailing various correspondence. The team member who carried out the search also attempted to gain access to department's earlier electronic filing system, MATRIX but without success. These actions took approximately 10 hours to complete over 5 to 7 days and did not produce any information in scope of the request."

29. DESNZ's FOI Team were asked whether it was possible they would hold any relevant information but they confirmed that records regarding FOI requests were only retained for a period of 3 years after the last action and in any case, this request related to a DPA SAR not an FOI request.

30. DESNZ further explained:

"The department's Knowledge and Information Management Team (KIM) were then asked to conduct a general search of the department's records using the search terms "[the complainant]" and "Coal" 01/10/08 – 28/02/09. 24 items were found and 3 identified for review. This failed to identify any documents in scope of the request. The KIM team also noted there are a few items in Archive 03 - Archive03/110/PARLIAMENTARY, MINISTERIAL AND PUB180709133357286/Folders/Coal Health Ministerial Correspondence in relation to Treat Officials. The KIM team tried to access the folders twice but without success. There are thousands of documents held

under the heading Coal. We estimate this search and review of records took approximately 4 hours to complete.”

31. DESNZ explained that a further search was undertaken by the policy team using additional key words and search terms such as “Time period 2008 and 2009 concerning an FOI request that was referred to the ICO”; “FOI/response from ICO dated 19 February 2009”. This search took a further two hours.
32. Following further discussion DESNZ’s Deputy Data Protection Officer was contacted to see if they could locate correspondence for the case in 2008/9. DESNZ explained:

“The ICO’s letter of 19 February 2009 specifically mentions the letter from Nabarro Nathanson Solicitors dated 15 April 1996 so it may be assumed that this letter was among the papers sent to the ICO, but it was not known whether this was the only information provided or whether further information was also sent. In fact, text within an internal email later discovered said “I note that some of the letters from BIS to the ICO refer to them being confidential”. This suggests there was more than one letter/communication where Legal Privilege was being applied.”

33. The DDPO explained that over 38 SARs have been processed for the complainant since 2008 across the various departments and the core information prior to 2008 had not changed. Further to the complainant’s correspondence of 13 October 2023 mentioning the Nabarro letter the DDPO was able to specifically locate this letter dated 15 April 1996 which had been the subject of much correspondence from the complainant.
34. Having conducted the searches described above and before the complainant’s correspondence of 13 October 2023, DESNZ concluded that expending any further time to determine if it held information within the scope of the request would exceed the cost limit which imposes the time limit of 24 hours. The Commissioner notes that DESNZ has decided that despite the searches undertaken it is unable to say, on the balance of probabilities, whether anything (other than the Nabarro letter) is held without expending further time.

The Commissioner’s decision

35. DESNZ has provided the Commissioner with the number of hours it had expended in the searches undertaken. The Commissioner accepts that DESNZ had already spent 16 hours undertaking searches. He considers DESNZ’s interpretation of the request as detailed in paragraph 19 to be a reasonable position to take as the request is not specific about any particular document. He also accepts that DESNZ conducted a reasonable search strategy in the circumstances of the request.

36. As the complainant has made many FOI and SAR requests over a number of years it is reasonable to believe that relevant information in the scope of the request could be held in different locations. Further searches of electronic records held on different systems across the various departments resulting from the machinery of government changes which have taken place since 2008 and including revisiting manual records held by Capita from 2008 would credibly take more than a further 8 hours. The Commissioner considers DESNZ's explanations on the further searches required to be reasonable in the circumstances.
37. The Commissioner therefore accepts that DESNZ cannot confirm, or deny, whether it still holds the information in scope of the request (as determined in paragraph 19) within the time for compliance. The Commissioner therefore concludes that section 12(2) is engaged and DESNZ is not obliged to confirm or deny holding the information.

Section 16 – advice and assistance

38. Section 16 of FOIA requires public authorities to provide reasonable advice and assistance to those making, or wishing to make, information requests.
39. When a public authority refuses a request because the cost of compliance exceeds the appropriate limit, it should explain, to the requester, how they could refine their request such that it would fall within that limit. In some cases, it will be appropriate for the public authority to explain to the requester why their request cannot be meaningfully refined.
40. In this case, the public authority informed the requester in its initial response that he could consider narrowing the scope of his request. The Commissioner notes that in order to fulfil the original request the Commissioner himself cannot determine how the complainant could narrow the request.
41. The Commissioner notes that the complainant's correspondence (after his request for internal review) specified his interest in the Nabarro letter. However, DESNZ did not consider that this clarification constituted a narrowed request for only one letter. DESNZ explained that this letter is not new information that the complainant is seeking to access and it has been addressed many times by the various departments referenced above.
42. The Commissioner accepts that DESNZ complied with section 16 of FOIA when dealing with this request.

Section 17 – refusal of request

43. Section 17(5) of FOIA states that if a public authority is relying on a claim that section 12 or 14 applies it must, within the time for complying with the request, give the applicant a notice stating that fact.
44. The request was made on 14 July 2023 and DESNZ refused the request under FOIA section 12 on 26 September 2023. The Commissioner therefore finds that DESNZ breached section 17(5) in failing to provide its refusal notice within 20 working days.

Other matters

The Nabarro letter

45. The complainant provided the Commissioner with a copy of a letter from DTI dated 28 February 2007 concerning a request for information under FOIA. The letter explains that DTI is withholding information under FOIA section 40(2) which is the personal information of third parties. It appears that the complainant's own information was provided under DPA 1998. Additionally, information is withheld under FOIA section 42. The letter does not explain the specific information withheld under this exemption; rather it speaks generically of correspondence between DTI and legal advisers.
46. The Commissioner has seen a copy of the Nabarro letter and notes the content as correspondence between a legal adviser and client. However, irrespective of the content in terms of LPP, the letter relates to the complainant and as such comprises personal information under FOIA section 40(1) which states:

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”
47. The decision notice FS50463281 (referenced in paragraph 10) found the exemption under section 40(1) to be engaged with respect to part (b) of the request in that case:

“(b) What was the full amount in Court on 11 April 1996 with all the parts?”
48. The request in that case asked three questions regarding the Nabarro letter which the complainant referred to at that time as a “notice of acceptance letter”. The other two parts of the request were found to be vexatious under FOIA section 14(1). The Commissioner notes that his decision was appealed by the complainant to the First-Tier Tribunal

("FTT") . The FTT at paragraph 11 reiterated that the decision notice concluded that part b of the requested information constituted the personal data of the Appellant himself with the result that it was exempt information under FOIA and capable of being obtained, if at all, under section 7 of the DPA 1998.

49. The Commissioner has referenced these previous investigations because they are relevant in this case. His previous determination regarding the Nabarro letter, that the information was exempt under FOIA section 40(1), remains the same. The Commissioner would point out that even if a narrowed request were possible it may not result in information being disclosed under FOI.
50. The Commissioner also notes that, as with the Nabarro letter, any information sent to the Commissioner in 2008/9 to determine the SAR complaint would be likely to engage FOIA section 40(1).

Right of appeal

51. 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

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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