

DRAFT - PROTECT

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2024

Public Authority: The Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about the United Kingdom's decision to leave the European Union. The Cabinet Office refused to comply with the request, citing section 12 (cost limit) of FOIA.
2. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 12(2) of the FOIA to refuse the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not rely on section 12(2).
4. The public authority must take these steps within 30 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. On 11 March 2024, the complainant wrote to the Cabinet Office and requested information in the following terms:

"The judgment of the Supreme Court was that the referendum on the EU was not a decision, however the European Union Notification of

DRAFT - PROTECT

Withdrawal Act was passed on the basis of "A decision already made". (See [European Union \(Notification of Withdrawal\) Bill - Hansard - UK Parliament](#)).

It follows that the decision must have been made by the government, or unilaterally by the prime minister.

If it was the government then it must have been made in a cabinet meeting, and the minutes of that meeting will be recorded, else if it was made by the prime minister alone, then they should have put their reasons on record.

Please provide a copy of these records, or if there are no records, then please confirm which prime minister made the decision."

6. On 12 March, the Cabinet Office asked the complainant to clarify if they meant who had made the decision to hold a referendum, or who made the decision to leave the European Union.
7. The complainant clarified they were asking for information about the decision to leave the European Union. Initially, the Cabinet Office stated the request did not constitute a valid request under FOIA, as it was not a request for recorded information. It did not provide an internal review.
8. After the requester complained to the Commissioner, the Cabinet Office issued a new response on 8 August 2024, in which it refused the request under section 12(2) of FOIA.

Reasons for decision

9. Section 12(1) of 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". However, it will still be required to confirm that it holds information in scope of the request.
10. Section 12(2) provides that a public authority doesn't have to inform a requester whether it holds information of the description specified in the request, if the estimated cost of doing so would exceed the appropriate limit.
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.

DRAFT - PROTECT

12. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'), and it's £600 for central government, legislative bodies and the armed forces. 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 estimated at the rate of £25 per person per hour, meaning that section 12 effectively imposes a time limit of 24 hours for the Cabinet Office.
14. Regulation 4(3) of the Fees Regulations states that a public authority can only consider 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
15. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. 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 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
16. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
17. 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.

Would the cost of compliance exceed the appropriate limit?

18. In its response, the Cabinet Office advised that the decision to leave the EU was not a single event. It was undertaken in several stages and at multiple different levels of government. It stated that: "there is no one document, nor series of documents that would comprise recorded information on 'the decision' to leave the EU."
19. The Cabinet Office highlighted several events that could be considered related. These include but are not limited to the passing of the EU

DRAFT - PROTECT

Referendum Act 2015, the outcome of the referendum on 23 June 2016, the Motion agreed by the House of Commons for the UK to exit the EU, the formal notification of these intentions to the EU, and the European Union (Notification of Withdrawal Act) 2017. It explained to the requester: "your request assumes a single decision, when in fact there were decisions at many stages and many levels of Government. This means we would have to consider all of those stages to be in scope, and this would require the Cabinet Office to conduct a search for all information that included a reference to the decision to leave the EU."

20. The Cabinet Office has identified 41 files and 104 Cabinet records on paper alone that relate to these events. It has estimated it would take one hour to review each file and approximately ten minutes to review each Cabinet record, for a total of fifty-eight hours.
21. The Cabinet Office has advised the files can be anywhere between 250 and 500 pages long and contain multiple different types of documents, such as minutes, advice, accounts of meetings, and correspondence. It has optimistically estimated it would take one minute to review one A4 page of information, but admits in practice it would likely take longer.
22. The complainant stated it was unreasonable the Cabinet Office would not hold information about the United Kingdom's decision to leave the European Union. The Commissioner asked the Cabinet Office to reconfirm their reliance on section 12(2), noting its response detailing all the files and records relating to leaving the EU, which would need searching, seemed to indicate it did hold information.
23. The Cabinet Office reconfirmed this, stating it had not provided any confirmation that information was held in scope of the request. It says it would need to search all the records first, before being able to determine whether any information is held.
24. The Commissioner's view is that any reasonable interpretation of the Cabinet Office's response would think that it does hold information in scope, whether it was one decision, or multiple decisions. This is because of the high-profile nature of the decision, the references to EU withdrawal related files and records in its response, and its existence as a piece of government policy since 2016. By explaining the various stages and processes involved in the decision to exit the EU and related records that would need searching, the Commissioner is not persuaded that the Cabinet Office does not know, without undertaking these searches, whether it holds information in scope of the request.
25. The Commissioner therefore finds section 12(2) is not engaged.

DRAFT - PROTECT

Section 16(1) – The duty to provide advice and assistance

26. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an 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).
27. The Commissioner notes that the Cabinet Office offered the complainant advice and assistance in terms of potentially narrowing or refining their request, although it did note breaking the request down into a series of smaller requests could still result in a refusal under section 12 if the aggregated cost were to exceed the limit.
28. The Commissioner is therefore satisfied that the Cabinet Office met its obligations under section 16 of FOIA.

¹ [Freedom of Information Code of Practice - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

DRAFT - PROTECT

Right of appeal

29. 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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF