

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2019

Public Authority: The Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information regarding ministerial misconduct complaints. The Cabinet Office refused to comply with the request under section 12(1) of the Act as it considered compliance with the request would exceed the appropriate limit.
2. The Commissioner's decision is that the Cabinet Office has not demonstrated that compliance with the request would exceed the appropriate limit and is therefore not entitled to rely on section 12(1).
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 which does not rely on section 12(1) of the Act.
4. 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 January 2018, the complainant wrote to the Cabinet Office and requested information in the following terms:

"1. HOW MANY MINISTERIAL MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT RECEIVE FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"

2. PLEASE PROVIDE A BREAKDOWN OF HOW MANY COMPLAINTS WERE MADE AGAINST EACH NAMED MINISTER FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"

3. HOW MANY MINISTERIAL MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT INVESTIGATE FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"

4. HOW MANY MINISTERIAL [sic] MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT UPHOLD FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"

6. On 19 February 2018, the Cabinet Office responded and stated that the information is not held centrally.
7. On 20 February 2018, the complainant wrote to the Cabinet Office and expressed his dissatisfaction at the response. The complainant stated that all ministerial misconduct complaints are sent to the Cabinet Office for investigation.
8. On 20 February 2018, the Cabinet Office requested confirmation of whether the complainant was seeking information about allegations of breaches of the Ministerial Code and provided a link to the code of conduct¹. The Cabinet Office also stated *"Please note that the Cabinet Office does not track all complaints made against Ministers. These will generally be held at departmental level"*.
9. On 21 February 2018, the complainant responded and asserted *"A Ministerial Misconduct complaint always relates to a Breach of the*

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_MINISTERIAL_CODE_JANUARY_2018_FINAL_3.pdf

Ministerial Code of Conduct which is always investigated by the Cabinet Office..."

10. Following the Commissioner's intervention, the Cabinet Office provided the outcome of its internal review on 2 May 2018. The Cabinet Office upheld its original decision and again stated that the information is not held centrally.
11. The complainant contacted the Commissioner on 9 May 2018 to complain about the way his request for information was handled. Following an investigation, the Commissioner issued a decision notice (FS50736559²) which concluded that, on the balance of probabilities, the information was held and required the Cabinet Office to issue a fresh response which did not deny that the requested information is held.
12. On 12 December 2018, the Cabinet Office issued a fresh response and refused to comply with the request on the basis of section 12 of the Act. The Cabinet Office explained that relevant information could be contained in very many files and searching all those that might contain information will exceed the appropriate limit. The Cabinet Office advised that the complainant may wish to refine his request by reducing the time period it covers.

Scope of the case

13. The complainant wrote to the Commissioner on 13 December 2018³ to complain about the way his request for information had been handled.
14. As set out in her previous decision notice, the Commissioner considers that it is clear that the focus of the request is complaints involving breaches of the Ministerial Code of Conduct (the Code). The Cabinet Office requested clarification of whether the complainant was referring to breaches of the Code following his request for internal review. When the complainant provided this confirmation, the Cabinet Office did not treat this as a fresh request and issued an internal review, following the Commissioner's intervention. The Commissioner therefore considers that

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2260371/fs50736559.pdf>

³ The Commissioner set out in decision notice FS50736559 that, due to the time elapsed since the original request was made, she would accept a complaint without requiring an internal review.

the Cabinet Office accepted this as the correct interpretation of the request.

15. The Cabinet Office also confirmed to the Commissioner that as the complainant had subsequently made a refined request for information, it considers that this complaint has been superseded.
16. Whilst it is not ideal to have a refined request made during an ongoing investigation, the subject of this complaint is the original request of 25 January 2018 and the Commissioner must base her decision on the specific circumstances of this request.
17. The Commissioner considers that the scope of the case is to determine whether the Cabinet Office is entitled to rely on section 12(1) of the Act to refuse to comply with the request dated 25 January 2018.

Reasons for decision

Section 12: Cost of compliance exceeds appropriate limit

18. Section 12(1) of the Act 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."

19. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004⁴ (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that the Cabinet Office may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.
20. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take in account the costs it reasonable expects to incur in;
 - determining whether it holds the information;
 - locating the information, or a document containing it;

⁴ <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

- retrieving the information, or a document containing it; and
 - extracting the information, or a document containing it.
21. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation, however, the Commissioner considers that the estimate must be reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/20060004, 30 October 2007)* which stated that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".
22. Section 12(4) of the Act states:
- "The Minister for the Cabinet Office may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –*
- (a) by one person, or*
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*
- the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."*
23. Regulation 5(2) of the Fees regulations states such circumstances are as follows:
- "(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*
- (b) those requests are received by the public authority within any period of sixty consecutive working days."*
24. The effect of the above provisions mean that in order for a public authority to be entitled to aggregate the cost of complying with two or more requests, the following three criteria have to be met:
- The requests are made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - the two or requests relate, to any extent, to the same or similar information; and

- the requests were received by the public authority within any period of 60 consecutive working days.

The Cabinet Office's position

25. The Cabinet Office confirmed to the Commissioner that it was relying on section 12(1) of the Act. It explained that in issuing its revised response, the Cabinet Office had taken account of the Commissioner's position and reached the conclusion that while it would be possible to retrieve and compile the information requested, to do so would require a significant undertaking to locate and review a considerable number of case files, which would require a level of work in excess of the appropriate limit.
26. The Commissioner had explained to the Cabinet Office that she considered it unusual that, due to their sensitivity and serious nature, allegations of a breach of the Code would not be held in a structured and easily accessible manner. The Cabinet Office responded by stating that this was an oversimplification of the nature of such allegations, the routes through which they may be made and the various established processes for addressing and resolving such cases.
27. The Cabinet Office explained that not all allegations of ministerial misconduct are received or processed by the Cabinet Office. The Cabinet Office set out that whilst it has responsibility for the Code, this is a guidance document and individual government departments are responsible for making an initial decision on any alleged breaches they receive before escalating to the Cabinet Office where necessary.
28. The Cabinet Office explained that each government department will have its own way of recording such allegations. The Cabinet Office set out that the complainant's first two requests contained in his correspondence of 25 January 2018 are seeking information on the total number of complaints, not simply those deemed worthy of investigation, broken down by Ministers, which were received across all of Government. The Cabinet Office therefore considers that compiling this information would not only require the Cabinet Office to search through its own records, but would also require it to liaise with all central government departments to have them do likewise.
29. The Cabinet Office confirmed that it receives allegations of ministerial misconduct via a number of means:
 - Public correspondence
 - Parliamentary questions
 - Issues raised in Parliament directly

- Direct queries to the Propriety and Ethics team by email, phone or face to face
30. The Cabinet Office set out that these are dealt with on a case by case basis. It explained that for some, it is immediately clear that no breach of the Code has occurred, whereas others require further attention. The Cabinet Office explained that information on potential breaches of the Code is held in a number of different ways across the department or in some cases may not be 'held' at all.
31. The Cabinet Office explained that compiling and reviewing this information would require a significant search of Cabinet Office records including those not directly held by the Propriety and Ethics Team.
32. The Cabinet Office set out that the complainant's third and fourth requests contained in his correspondence of 25 January 2018 seek information on the number of complaints that were investigated and upheld. It explained that in earlier correspondence, the Commissioner raised the issue of allegations that are referred to the Independent Advisor on Ministerial Interests, and used this to infer that the Cabinet Office should hold the information requested. The Cabinet Office explained that it should be stressed that that vast majority of complaints will not require referral to the Independent Advisor as only those that the Prime Minister decides warrant such further investigation are referred.
33. The Cabinet Office went on to state that:
- "It should also be reiterated at this point that all complaints are investigated by the government". [original emphasis]*
34. The Cabinet Office explained that if the request is not only those that are specifically referred to the Independent Advisor, it would have to compile information on all investigations conducted which would require it to consult widely across all government departments.
35. The Cabinet Office explained that the Independent Advisor published a report on a regular basis which includes information about the investigation of breaches of the Code. The Cabinet Office therefore considers that this information is already in the public domain. The Cabinet Office also confirmed that queries made via Parliamentary Questions or raised directly in parliament are publicly available with the Cabinet Office's responses.
36. The Cabinet Office again explained that the majority of information falling within the scope of the request is not directly or easily accessible to the Cabinet Office and would require consultation across Whitehall to compile an accurate response.

37. The Cabinet Office explained that it would be very difficult to estimate the amount of work collation of the requested information would require but it considered that it would almost certainly exceed the appropriate limit by a significant degree.
38. The Cabinet Office explained that just looking at information held by its Propriety and Ethics team, over 4000 emails and over 100 folders and documents would need to be searched and reviewed.
39. The Cabinet Office stated that assuming an average email of 200 words, taking an average of three minutes to establish if information falls within the scope of the request and evaluate the information for release for exemption, the email correspondence alone would take around 200 hours to review⁵.
40. The Cabinet Office confirmed that a sampling exercise had been undertaken across these emails to confirm its estimates, however, no details of this exercise were provided.

The Commissioner's position

41. The Information Tribunal in the case of *Ian Fitzsimmons v ICO & Department for Culture, Media and Sport* (EA/2007/0124) confirmed that multiple requests within a single item of correspondence are separate requests for the purpose of section 12.
42. Whilst the Cabinet Office has not explicitly sought to rely on section 12(4) to aggregate the four requests, the Commissioner is satisfied that they fulfil the criteria set out at paragraph 24 of this notice. Specifically, they were made by the same person, within a period of sixty consecutive working days and relate, to any extent, to the same or similar information (i.e. complaints regarding ministerial misconduct).
43. The Commissioner will, therefore, go on to consider whether complying with the aggregated requests will exceed the appropriate limit.
44. The Commissioner made clear to the Cabinet Office in her request for submission that she would provide only one opportunity to justify its position before proceeding to decision notice, stating:

*"As set out above, the Commissioner will provide the Cabinet Office with one opportunity to justify its position and she will proceed **directly to decision notice following receipt of the Cabinet Office's***

⁵ 3 minutes x 4000 emails = 12,000 minutes or 200 hours

submission, you should therefore ensure that you provide all detail and explanations required to adequately justify that section 12 is engaged.

If the Commissioner does not receive the Cabinet Office's submissions by this date, she will assume that the Cabinet Office does not wish to provide submissions and will proceed to decision notice in their absence." [original emphasis]

45. The Cabinet Office provided its response seven days after the deadline set by the Commissioner, however, she has accepted the submission for consideration.
46. The Commissioner is disappointed and concerned at the quality of the Cabinet Office's submission. The Commissioner considers that a large government department, with responsibility for governmental Freedom of Information policy and the section 45 Code of Practice, should be aware of the procedural basics of the Act. However, from the submission provided it appears that the Cabinet Office's apparent lack of understanding of the basic principles raised in decision notice FS50736559 has not improved.
47. The Cabinet Office repeatedly refers to consulting with other governmental departments in order to collate the requested information. The Cabinet Office provides no explanation regarding why it considers this information is held on its behalf under section 3(2)(b) of the Act⁶.
48. The Commissioner acknowledges that the request states "*THE UK GOVERNMENT*", however, the Commissioner considers that this is simply a reflection of the complainant's understanding that all misconduct complaints across government are handled by the Cabinet Office. She also considers that regardless of the specific wording of the request, the Cabinet Office should be aware that it is under no obligation to obtain information that was not held by virtue of section 3(2) of the Act.
49. The Cabinet Office provides contradictory explanations in its submissions. It states (paragraph 30) that for some complaints it is immediately clear that there is no breach of the Code, whereas others require further attention, and for this reason it would have to search the various correspondence routes into the Cabinet Office.

⁶ For the purposes of this Act, information is held by a public authority if [...] it is held by another person on behalf of the authority.

50. However, the Cabinet Office then goes on to state (paragraph 33):

"It should also be reiterated at this point that all complaints are investigated by the government."

51. It is therefore not apparent to the Commissioner why correspondence records would need to be searched when all complaints are subject to an investigative process.
52. The Commissioner considers that a public authority should not be required to search all records held on the remote possibility that information may be found. She considers that authorities should focus their searches on areas that have a reasonable prospect of identifying information relevant to the request.
53. The Commissioner has considered the estimate of 4000 emails requiring 3 minutes each to review and she is not persuaded that this represents a reasonable estimate.
54. As set out in paragraph 21 of this notice, the Tribunal has set out that estimates should be *"...sensible, realistic and supported by cogent evidence"*.
55. The Cabinet Office has not provided any information regarding the nature of the emails that would need to be reviewed or why it would be necessary to review such a large number of emails. For example, there is no indication of whether the 4000 emails are general correspondence which require review for potential complaints or whether they are identified complaints that require extraction of the requested information.
56. As set out above, the Commissioner does not consider it is always necessary to review all records held and without an explanation as to why the Cabinet Office would need to review 4000 emails, she cannot find that this is a reasonable estimate of the time required.
57. She also notes that the Cabinet Office's estimate of three minutes per email is flawed in that it includes time to evaluate the information for release or exemption. The permitted activities do not allow for redaction time to be included in an estimate for the purposes of section 12 and the Commissioner considers that the Cabinet Office should be aware of this well-established aspect of the legislation.
58. The Cabinet Office also failed to provide details of its sampling exercise despite being explicitly asked to do so. The Commissioner therefore considers that she has not been provided with cogent evidence to support the Cabinet Office's reliance on section 12.

59. For the reasons above, the Commissioner is not satisfied that the appropriate limit will be exceeded by complying with the requests.
60. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 12(1) to refuse to comply with the four requests.
61. The Commissioner requires the Cabinet Office to provide the complainant with a fresh response which does not rely on section 12 of the Act.

Right of appeal

62. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. 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.
64. 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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