

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 December 2020

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested specified contents of the Parliamentary Counsel Office's intranet. The Cabinet Office relies on 14(1) (vexatious request) of the FOIA to withhold the requested information.
2. The Commissioner's decision is that the Cabinet Office's reliance on section 14(1) was incorrect.
3. The Commissioner requires the Cabinet Office to take the following step to ensure compliance with the legislation:
 - issue a fresh response to the request which does not rely on section 14(1) of the FOIA.
4. The Cabinet Office must take this step 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.

Background

5. The Office of Parliamentary Counsel (OPC) is responsible for drafting all government Bills that are introduced to Parliament. It also provides related legal, handling, and procedural advice to its clients in government departments. OPC is part of the Cabinet Office but provides services to all government departments. The Cabinet Office is the public authority for the purposes of the Freedom of Information Act 2000.
6. There are approximately 50 Counsel and 15 support staff within OPC. All Parliamentary Counsel are qualified lawyers with specialist expertise in drafting legislation and advising on related matters such as Parliamentary procedure. Recruitment to OPC is highly competitive and counsel undergo a significant period of training to carry out their role. OPC is headed by the First Parliamentary Counsel (who is a Permanent Secretary in the Cabinet Office).
7. Counsel are organised into 4 teams and each team is allocated legislative projects from departments.
8. The process of preparing legislation involves subjecting policy proposals to rigorous analysis, ensuring that the full implications of the proposals are understood, and exploring all the options for giving effect to government policy. Both lawyers in OPC and the civil servants in the government departments who instruct them need to communicate freely and frankly in order to ensure that all aspects of the policy are fully explored and that the implementing legislation is well thought out and legally sound.
9. OPC also advise on the handling of government Bills through the Parliamentary process. In connection with that, drafters correspond with clerks in the Public Bill Offices in the House of Commons and the House of Lords.
10. All secondary legislation that amends Acts of Parliament is reviewed by OPC, and drafters at OPC very occasionally draft secondary legislation. OPC also advises on certain constitutional matters.
11. The complainant originally made a request (of the Cabinet Office) on 30 January 2020, for induction and training material for drafters. The requested material was provided on 24 February 2020.
12. The material disclosed comprised 180 pages of induction and training material relating to the drafting of legislation; staff names were redacted, and a small amount of information was redacted on the basis of the exemptions in sections 35(1)(a) (government policy) and/or 42(1) (legal privilege) of the FOIA. One of the documents provided referred to certain pamphlets that could be found on the know-how section of the OPC intranet.

13. On 26 February 2020, the complainant requested information as follows

- This is a FOIA request being made to the Parliamentary Counsel Office. It does not relate to the Cabinet Office more widely. Please provide an index of content available on your intranet in the section entitled "know-how".

14. On 11 March 2020, the Cabinet Office responded. It provided him with the information he had requested.

Request and response

15. The complainant made a new request in reply to the Cabinet Office on the 11 March 2020, by saying as follows.

"Thank you for your response. Please disclose the following content from that intranet:

Fast-track legislation

Drafting criminal offences -Index

Drafting criminal offences: drafting a penal provision

Drafting criminal offences: duplicity

Drafting criminal offences: burden and standard of proof, and presumptions

Drafting criminal offences: effect of other offences

To and Fro Pamphlet

Style Manual for Amendments to Bills

Know-how Note on s.13 of the Interpretation Act 1978

SI's drafted in OPC: who does what?

Criminal offences -Index

Drafting criminal offences: penalties

Meaning of "functions"

Words used to establish a statutory corporation etc

Choice of words

Overviews

Drafting Criminal Offences

Periods of Time

Gender-neutral drafting techniques

"Shall "

Numbers & dates

Paragraphing"

16. On 8 April 2020, the Cabinet Office replied to the complainant as follows.

"Your request would require us to review a significant amount of material (several hundred pages). As such, having regard to the likely value of the request and the burden imposed by the size of it, we are considering whether section 14 of the Freedom of Information Act 2000 would apply. But before doing that we wanted to explain this and give you the opportunity to reconsider what you have requested. If you were to limit the scope of your request, that could clearly affect the outcome. Please would you let us know within 14 days whether you are prepared to do this".

17. In reply, on the same day, the complainant said as follows.

"I am happy with my request as it is. Please proceed to issue a response."

18. On 12 May 2020 the Cabinet Office issued the following substantive response.

"I explained when I wrote to you on 8 April that we were considering whether section 14 of the Freedom of Information Act 2000 applied to your request and invited you to consider narrowing it. You responded, also on 8 April, confirming your original request."

19. The Cabinet Office went on to say, amongst other things, as follows.

"In this instance, having carefully considered your request and your response of 8 April in light of the Information Commissioner's guidance and considerations, I am of the view that section 14 applies and we will not be processing this request further."

20. On 12 May, the complainant asked the Cabinet Office to review its decision. On the 10 June 2020, it informed the complainant that it upheld its decision.

Scope of the case

21. The complainant contacted the Commissioner on 10 June 2020 to complain about the way his request for information had been handled.
22. The Commissioner considers she must determine whether the Cabinet Office correctly relied on section 14 to withhold requested information.
23. The Commissioner has been provided with, and viewed, a sample of the requested information.

Reasons for decision

24. Section 14(1) states

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

25. The Commissioner considers that section 14(1) 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.
26. The Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority¹. This is the position mainly adopted by the Cabinet Office in this case.

The submissions of the Cabinet Office
27. The Cabinet Office's submissions are given in paragraphs 28 to 40 below.
28. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the case of *Information Commissioner vs Devon County Council & Dransfield*

¹ The Commissioner has adopted this position cognisant of the fact that although a public authority can rely section 12 (cost limit) of FOIA if the cost of complying with the request exceeds the appropriate limit, which for central government departments is £600 or 24 hours work, this cannot include the cost and effort associated with considering exemptions or redacting information.

[2012] UKUT 440 (AAC), (28 January 2013) when it defined the purpose of section 14 as follows;

'Section 14...is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)...The purpose of Section 14...must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA...' (paragraph 10).

29. The request asks for 22 items of OPC know-how, that fall into several categories:
 - a. 3 OPC pamphlets, "To and fro", "Fast-track legislation" and "Style Manual for Amendments to Bills", which deal with handling government Bills in Parliament;
 - b. a note about protocol when OPC drafts statutory instruments;
 - c. a note about section 13 of the Interpretation Act 1978;
 - d. several notes about drafting criminal offences, including the proposed contents of a wider project;
 - e. several notes about drafting techniques, most of which are historic and some of which have been superseded or incorporated into Drafting Guidance.
30. The total amount of material involved is 313 pages.
31. The impact of meeting the request would be considerable, and would involve
 - a. time reviewing the requested material for potential exemptions, and
 - b. producing a suitable copy of the redacted documents.
32. One drafter (a Parliamentary Counsel (Director)) then carried out a sample review, spending 2 hours in total reading a sample of the material requested to identify potentially exempt material and any questions on which further advice would be needed.
33. From that sample review it was possible to estimate that a complete review of the material requested to identify potentially exempt material would take at least around 25 hours.
34. On top of that, time would be spent by the Cabinet Office in requesting and providing legal advice on the application of the exemptions where necessary.

35. Many requests under the FOI Act will be for what is, effectively, data – i.e. will be for information on a particular matter that is contained in correspondence or will involve reviewing large numbers of documents in a standard form to identify what is relevant. There, the significant task is to track down the information and then decide whether it is exempt; it is quite likely that all the requested information would take a similar form so that the same exemption would apply in a similar way to all the potentially exempt material.
36. OPC's know-how is altogether different, as explained above. The material requested consists of whole documents which contain condensed information in a tightly written form. Each sentence carries weight. There is no pattern in the way that there is to data, so each sentence needs to be considered separately. Given the purpose and nature of OPC's know-how, it is not surprising that reviewing the pamphlets and know-how notes to identify statements that are potentially exempt should be a slow and painstaking process. At the internal review stage, a second opinion was sought from a senior colleague in OPC (another Parliamentary Counsel (Director)), who confirmed that the approach taken had been appropriate and not unduly slow.
37. The know-how material requested is quite different in purpose and nature from the training material requested by the requester's 30 January 2020 request, which could readily be disclosed.
38. Much of the information covered by the 30 January 2020 request consisted of examples for discussion which were taken from previously published material.
39. There was also material giving an overview of the structure and interpretation of legislation and its Parliamentary process, material for drafting exercises, and other documents giving an outline of other aspects of the work of OPC. In short, that request covered material created or assembled for the purpose of training which is intended to be introductory and to provide an overview.
40. By contrast, the material requested by this request is intended for use by drafters in carrying out their roles and constructed to provide detailed guidance and information on which reliance can be placed.
41. There is no evidence that the requester has a serious purpose. He has not told the Cabinet Office his aims or motivation and they cannot be divined from breadth of the request.
42. Conversely, there is little evidence, if any, that the requester is abusing the right of access to information. His request for an internal review (12 May) asserts that his request was "a well-intentioned, valid request for

useful information" but does not say anything to back up that claim. We do not have enough information to assess whether that description is correct or not.

43. The OPC request is the third in a sequence of requests that, taken together, seem to have some of the hallmarks of fishing expeditions. Each has asked for a very wide swathe of information. The fact that the OPC request is for a large number of disparate know-how documents is more consistent with a fishing expedition than pursuit of a genuine line of enquiry. The latter can't be ruled out but it seems to be a less likely explanation for the course of events than that the requester has, at a glance, asked for a random sample of the material listed in the response to the previous request.

The Commissioner's reasonings and decision

44. In a Court of Appeal Case (*Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015)), Lady Judge Arden observed that.

"...the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public." (Para 68)

45. The Court went on to say.

'The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.' (Para 68)

46. The Commissioner cannot reasonably find that the information request has no reasonable foundation or that it is without value to the requestor the public or any section of the public. The requested information is information that plays an integral part in the application of the rule of law. It, of course, relates to and explains the drafting of legislation emanating from Parliament. Its function is central to the written laws and regulations that bind the public, which usually seeks to moderate a citizen's behaviour and facilitate the public good. However this does not conclude the Commissioner's decision, she has to consider all the relevant circumstances in order to reach a balanced view as to whether the request is vexatious.
47. The Cabinet Office submits that to meet the request would give it an unduly onerous task. It estimates that to scrutinise the requested information, to determine what exemptions may apply, would take (based on its sampling exercise) approximately 25 hours. It is however

only an estimation and the actual time needed may transpire to be more or less than originally estimated. The Commissioner takes cognisance that to be added to the estimated figure may be as of yet further time for others to actually confirm the applicability of actual exemption(s) and liaising to be taken on the same.

48. Such is the margin of error that must be inherent in the estimation, that the Commissioner cannot find with proper certainty that it amounts to a grossly disproportionate utilisation of the Cabinet Office's time and resources.
49. In certain circumstances, the complainant's behaviour can be a factor to determine whether section 14 is engaged. However, the Cabinet Office concedes that there is little or no evidence of what may be termed relevant malicious or mischievous conduct by the complainant in the context of this matter. It does suggest that the complainant is on what it terms a fishing expedition. In this regard it points to the complainant's successive requests, that is one request leading to another request. However, the Commissioner cannot find that this pattern of behaviour is currently such to leave the complainant without the ability to use the Act in these circumstances.
50. Due to the reasons above the Commissioner's decision is that section 14 is not engaged, and the public authority should now meet the complainant's request for information or rely on another exemption or exemptions not to meet the request .

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: 0300 1234504

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.

Signed

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