ico. Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **27 June 2022**

Public Authority: **Office of the Secretary of State for Scotland**
Address: **Dover House**
Whitehall
London
SW1A 2AU

Decision (including any steps ordered)

1. The complainant has requested from the Office of the Secretary of State for Scotland (OSSS), copies of the Secretary of State for Scotland Alister Jack's ministerial diaries from 1 December 2019 to 13 April 2021.

2. The Commissioner's decision is that the OSSS has correctly refused the request under section 12(1) of FOIA – costs exceed the appropriate limit. However, the OSSS failed to fulfil its duty under section 16 of FOIA to provide advice and assistance to the complainant.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

    - Provide advice and assistance to the complainant to assist in them submitting a refined request.

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 contempt of court.

Request and response

5. On 13 April 2021, the complainant wrote to the OSSS and requested information in the following terms:

   "From 1st December 2019 to the day this request is processed, please provide a copy of Secretary of State for Scotland Alister Jack's ministerial diaries. Please note, I am making this request out of the public interest. It is absolutely essential for the public to know - in full detail - the calls, events and meetings that took place across the year when the pandemic gripped the UK and beyond."

6. The OSSS responded on 11 May 2021, refusing to provide the requested information, citing the following procedural section of FOIA: section 14(1). It explained that the provision of a response to the request would impose a grossly oppressive burden on its resources, as to answer the request it would require the extraction and collation of a considerable volume of information.

7. Following an internal review the OSSS wrote to the complainant on 16 June 2021, advising that it was revising its position and was now relying on section 21 of FOIA – information accessible by other means and section 22 of FOIA – information intended for future publication.

8. During the Commissioner's investigation, the OSSS revised its position again and advised that it was now relying on section 12 of FOIA – costs exceed the appropriate limit.

Scope of the case

9. The complainant contacted the Commissioner on 16 September 2021, to complain about the way their request for information had been handled.

10. The Commissioner considers that the scope of the investigation is to determine if the OSSS has correctly cited section 12 of FOIA in response to the request, and whether it has complied with its advice and assistance obligations under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

11. Section 1(1) of FOIA states that

"(1) 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

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

12. Section 12(1) of FOIA provides that:

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

13. The appropriate limit in this case is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') for central government which applies to the OSSS.

14. 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 of £600/24 hours for the OSSS.

15. 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.

16. 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 decision in the case of Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/00041, 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.

17. Section 12 is not subject to the 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.

18. 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 Office of the Secretary of State for Scotland's view

19. In its revised response, the OSSS advised it estimated that the cost of locating, extracting and collating the relevant information to meet the request would exceed the appropriate limit of £600 specified in the Fees Regulations.

20. The £600 limit is based on work being carried out at a rate of £25 per hour, which equates to 24 hours of work per request. The cost of locating, retrieving and extracting information can be included in the costs for these purposes.

21. The OSSS advised that the complainant had requested disclosure of the diaries, covering a 16-month period, or 500 days, presented in an electronic format, and, as such, it undertook a sampling exercise.

22. The OSSS explained that it undertook a sampling exercise in order to establish if the request would exceed the appropriate cost limit under FOIA. It provided a copy of the sampling exercise to the Commissioner.

23. The OSSS advised that it took a member of staff three hours and 10 minutes to enter the diary data, which was from 1 Janaury 2021 to 31 January 2021. It further advised that this was 31 days, or 6.2% of the days requested by the complainant. Additionally, the sample that was carried out, containied 154 entries, which meant that it took on average 1 minute and 13 seconds to input each entry into a spreadsheet.

24. Following this, the OSSS explained that the time taken to enter the entire diary into a spreadsheet would equate to around 51 hours of staff time and that the cost of data entry alone would equate to approximately £1,275.

25. Whilst the Commissioner notes that not every month would take the same amount of time to process, even if the time was reduced by half, it would still exceed the appropriate limit and, as such, he is satisfied that the OSSS's estimate is reasonable.

26. The Commissioner's decision is that the OSSS estimated reasonably that the cost of extracting the data would exceed the appropriate limit and

therefore the OSSS was correct to apply section 12(1) of FOIA to the request.

Section 16 – the duty to provide advice and assistance

27. Section 16(1) of FOIA states:

> "(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons who propose to make, or have made requests for information to it.
>
> (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

28. The Commissioner's view is that where a public authority refuses a request under section 12(1) of FOIA, compliance with the section 45 Code of Practice will fulfil its duty under section 16(1) to provide advice and assistance on how the scope of the request could be refined.

29. Paragraph 2.10 of the section 45 Code of Practice states:

> "Where it is estimated the cost of answering a request would exceed the "cost limit" beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit".

30. In addition, paragraph 6.9 states that "public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit".

31. What constitutes reasonable advice and assistance will vary from case to case. However, this might include a public authority identifying elements of a multi-part request that could be answered within the cost limit.

32. A public authority is not required to "lavish ingenuity" on finding ways to reframe the request, but it should be able to explain simple ways of reducing the scope – such as reducing the time parameters, or identifying elements of a multi-part request that could be answered within the cost limit.

33. Equally, there will sometimes be requests that are so broad, voluminous or multi-faceted in their scope that it is simply not possible for it to be

refined in such a way as to bring it within the cost limit whilst still retaining the thrust of the original request. In such circumstances the public authority should simply explain that it cannot provide meaningful advice and assistance.

34. It is not in the interests of either the requestor or the public authority for the requestor to keep submitting requests that the public authority cannot comply with. A key purpose of providing advice and assistance is to prevent that from happening by explaining how the request needs to be refined.

35. As the OSSS did not provide any advice and assistance to the complainant, it has not complied with section 16 of FOIA.

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Right of appeal

36. 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

37. 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.

38. 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 ……

Michael Lea
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