

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2014

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested emails between the Prime Minister and Steve Hilton relating to education reforms that were sent or received via an unofficial email address. The Cabinet Office stated that it was unable to confirm or deny whether this information was held without exceeding the cost limit and cited section 12 of the FOIA.
2. The Commissioner's decision is that the Cabinet Office made a reasonable estimate of the cost of this request. Section 12 was, therefore, cited correctly and the Cabinet Office was not obliged to comply with it.

Request and response

3. On 23 September 2012, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Could I please have emails sent between the Prime Minister and Steve Hilton using an email address other than [the Prime Minister's] official account that related to the government's education reforms."

4. The Cabinet Office responded on 22 October 2012. It refused the request under section 12 of the FOIA, stating that the request was too broad and that compliance would involve a search of all records relating to education created since the coalition government was formed. It invited the complainant to submit a refined request.

5. The complainant responded on 23 October 2012 and requested an internal review. The Cabinet Office responded with the outcome of the internal review on 22 November 2012. It revised its position, withdrawing its reliance on section 12. It now stated that it did not consider this to be a valid request for recorded information under the FOIA. It refused the request on the grounds that it did not meet the requirement of section 8(1)(c) to describe the information requested.
6. On 22 November 2012 the complainant contacted the ICO and asked for this refusal to be investigated. The Commissioner issued a decision notice on 11 June 2013¹, which rejected the position of the Cabinet Office. The conclusion of the decision notice was that the request was valid for the purposes of section 8 of the FOIA and the Cabinet Office was ordered to issue a fresh response to the complainant. The decision notice did not include a determination on the earlier citing of section 12 as that provision was at that stage no longer relied on by the Cabinet Office.
7. On 29 July 2013 the Cabinet Office responded to the complainant. It reinstated its original position and refused the request under section 12 on the grounds of excessive cost. At this stage the Cabinet Office provided brief advice to the complainant as to how his request could be refined to bring it within the cost limit, in line with its obligation to provide advice and assistance under section 16(1) of the FOIA. It reconfirmed the refusal under section 12 in an internal review response dated 16 August 2013.

Scope of the case

8. The complainant contacted the Commissioner on 19 August 2013 following the outcome of the internal review to request a decision on the citing of section 12. The complainant indicated that he did not accept the Cabinet Office's response.

¹ http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50475014.ashx

Reasons for decision

Section 12

9. Section 12 provides that a public authority is not obliged to comply with an information request where the public authority estimates that the cost of doing so would exceed the appropriate limit. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) at £600 for central government departments. The fees regulations are also specific that the cost limit must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours.
10. The position of the Cabinet Office is that it is not possible for it to establish whether it holds information falling within the scope of the request within the cost / time limit. This indicates that it is relying on section 12(2) which provides that a public authority is not obliged to comply with the section 1(1)(a) duty to confirm or deny whether information is held if it estimates that the cost of doing that alone would be in excess of the limit.
11. The task for the Commissioner here is to consider and reach a conclusion as to whether the estimate made by the Cabinet Office is reasonable. The approach of the Commissioner is that a reasonable estimate will be sensible and realistic.
12. The complainant's case is that it would be a simple task to search the appropriate non-official email accounts for relevant messages. Whilst the Commissioner agrees that it would be unlikely that the cost limit would be exceeded if complying with the request required only automated searches of one or more email accounts, the Cabinet Office contends that it is not necessary, and therefore not appropriate, to request the Prime Minister to search his personal emails. Instead, its cost estimate is based on the time that it would be necessary to spend searching within the Cabinet Office for this information.
13. There are two issues to be addressed here. First, whether the Prime Minister, or someone else on behalf of the Cabinet Office, should have been asked to carry out searches of his personal emails and, secondly, whether the estimate made by the Cabinet Office of the time it would be necessary to spend searching its own systems was reasonable.

14. The Commissioner has published guidance² on the issue of information that records official business carried out via personal email accounts. According to this guidance it is for a public authority to determine whether it is necessary to ask someone to search their private email account for information which might fall within the scope of an information request.
15. In this case, the position of the Cabinet Office was that it was not necessary to request the Prime Minister to search his private emails as, had official business been conducted via private email, these emails would have been placed on the official record. In support of this position, the Cabinet Office supplied to the ICO a copy of guidance produced by it titled "*Guidance to Departments on the use of email*". This states that where a non-government email system is used for government business, the originator or recipient should ensure that any such emails are officially recorded by, for example, copying it to an official email address. It also supplied to the ICO a copy of the National Archives' "*Guidance on the Management of Private Office Papers*", which touches on the issue of ensuring that informal communiqués are added to the official record. In light of this guidance, the Cabinet Office stated that there was no requirement to request the Prime Minister to search his private emails.
16. The FOIA does not provide a requester with a right to require a public authority to search for information in a particular location. In this case the Cabinet Office was not obliged to ask the Prime Minister to search within his personal emails. Instead, in line with the ICO guidance mentioned above, the Cabinet Office had a duty to consider what searches it would be appropriate to carry out for the requested information. If there was reason to believe that they contained information relating to official business that had not been copied to the official record the Cabinet Office ought to have asked the Prime Minister, and other individuals if appropriate, to search their personal emails.
17. The Commissioner is aware of no evidence to suggest that any such emails were not copied to the official record in line with Cabinet Office procedures. This means that he accepts that, if emails relevant to the request do exist, they will be held within the official records of the

2

[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freed_om_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freed_om_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx)

Cabinet Office. His view is, therefore, that it was not necessary in this case for the Cabinet Office to ask the Prime Minister, or any other individual, to search their personal emails for information within the scope of the request.

18. Turning to the second issue, whether the cost estimate was reasonable, the Cabinet Office has relied on the time that would be spent in establishing if any information within the scope of the request was held by the Prime Minister's private office support team (PMPOST). The position of the Cabinet Office was that the time spent searching in that area alone would exceed the appropriate limit.
19. Based on an average of one minute per record, the estimate of the Cabinet Office based on establishing whether relevant information was held within the records of PMPOST was approximately 33 hours / £825. As this estimate alone exceeded the cost limit, the Cabinet Office did not go on to give a detailed estimate for searching the remainder of its records.
20. The Cabinet Office stated that a search using key words of the records management system used by the private office returned more than 2,000 records relating to the subject matter referred to in the request. It estimated an average of one minute per record to establish whether each record held information of relevance to the request.
21. Upon initially receiving this estimate, the Commissioner raised the following issues with the Cabinet Office:
 - What do the 2,000 records consist of and, if this includes information in a format other than emails, why would it be necessary to search these other formats when the request specified emails?
 - Why would it take an average of one minute per record? If the records were already known to be emails that related to education reform, then checking if each of these was between the Prime Minister and Steve Hilton using a non-official account should be possible within a matter of a few seconds per email.
22. On the first point, the response from the Cabinet Office was that the records management system used by PMPOST did not allow searches to be limited by file type. This means that a search could not be limited to only *emails* on education matters, instead a search would return all *records* on education matters.
23. The Cabinet Office had previously stated that the PMPOST system also meant that it would not be possible to search for the information by reference to anything other than its subject matter. This meant that the

search would need to be for information relating to "education". It was not possible to carry out an automated search by reference to emails between the Prime Minister and Steve Hilton, or sent or received from a private account, or some combination of these two.

24. Furthermore, the Cabinet Office advised that the content of emails would be likely to be stored in this system in an alternative format. It gave the example that the content of an email would be likely to be copied into a Word document and saved in that way. This meant that it was not possible to limit the search only to information stored as an email.
25. As to why it would take an average of one minute per record, the Cabinet Office stated that most of the 2,000 records are several pages long. These may contain, for example, covering sheets and minutes and to be sure whether a record contained an email it would be necessary to check through the entire record. Once it had been established that a record did contain an email, it would then be necessary to ascertain who had sent and received the email and through what type of email account.
26. As noted above, the approach of the Commissioner is that a reasonable estimate will be sensible and realistic. In this case, the complainant does not accept that the cost estimate was reasonable. As covered above, however, the Commissioner has accepted that it was not necessary to ask the Prime Minister or anyone else to search their personal emails. Therefore, the question here is whether searching within the Cabinet Office's records for this information would be as time consuming as the Cabinet Office estimates.
27. Whilst the Commissioner understands why it might be assumed that an automated search of an email account for messages to and from another individual would be a simple task, he accepts that a search of the Cabinet Office's systems would be considerably more time consuming. On the basis of the explanation provided by the Cabinet Office, he also accepts that it would not be possible to carry out an automated search by reference to emails of the type referred to in the request and that instead an automated search would have to be made by reference to "education".
28. As to whether the estimate of one minute per record is sensible and realistic, again based on the representations of the Cabinet Office he accepts that emails would not necessarily be held in isolation. Instead they may be held within records that also contain other documentation. Compliance with the request would therefore require searching each record to ascertain if it included any relevant emails, and then identifying the sender and recipient and whether they had been sent or

received using an unofficial account. The Commissioner finds that an estimate of an average of one minute per record to carry out this task is sensible and realistic.

29. For these reasons, the Commissioner finds that the cost estimate made by the Cabinet Office was reasonable and that it was not necessary for it to go on to consider the time and cost of searching for this information in the remainder of its records. Section 12(2) of the FOIA therefore applies and the Cabinet Office was not obliged to comply with the requirement of section 1(1)(a) to confirm or deny whether information was held in relation to this request.

Right of appeal

30. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

31. 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.
32. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF