

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 November 2016

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information from Her Majesty's Treasury (the Treasury) about proposed Mersey Tunnel toll changes. The Treasury refused the request relying on section 12 – the cost of compliance exceeds the appropriate limit. The Commissioner's decision is that the Treasury is entitled to rely on section 12 to refuse the request. The Treasury's response to the request was issued outside the statutory timeframe of 20 working days and accordingly the Treasury has breached section 10 of the FOIA. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 6 December 2015, the complainant wrote to the Treasury and requested information in the following terms:
 1. *"A list of all recorded contacts, by the Government or Government officials with the Authority responsible for the Mersey Tunnels, after January 2015, which have included any mention or discussion of Mersey Tunnel tolls or tolling powers.*
 2. *A copy of any documents (including letters and emails) received or sent to the Government or Government officials and any agendas or minutes of any meetings between the Government or Government officials and the Authority responsible for the Mersey Tunnels, after January 2015, which include any mention of tolls or tolling powers on the Mersey Tunnels or on the existing and new (Mersey Gateway) bridges between Runcorn and Widnes.*

There may have been meetings internal to the Government or with someone other than those representing the Authority responsible for the Mersey Tunnels, but I am not at this stage asking for those documents. Note that the responsible authority for the Mersey Tunnels since April 2014 is the Liverpool City Region Combined Authority but that the people acting for the Authority may have used the 'Merseytravel' name and email address.

If these documents contain information which is not related to tolls or tolling powers on the Mersey Tunnels or on the existing and new (Mersey Gateway) bridges between Runcorn and Widnes, then you may wish to exclude that part of the information which is outside this request."

3. On 18 February 2016 the Treasury responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so: section 35 – formulation of government policy.
4. The complainant requested an internal review on 22 February 2016. The Treasury sent the outcome of its internal review on 2 June 2016. It revised its position, setting out that it would now rely on section 12(1) – costs of compliance exceeds appropriate limit.
5. The complainant's request for an internal review also set out his position that the request should have been handled under the terms of the Environmental Information Regulations (EIR) but in its response, HMT upheld its position that FOIA was the correct access legislation.

Scope of the case

6. The complainant contacted the Commissioner on 4 May 2016 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the request had been handled under the correct information access legislation, the delays by the Treasury and the refusal to disclose the requested information. The Commissioner considers that these points constitute the scope of the investigation in this case.

Appropriate legislation

EIR regulation 2

7. Regulation 2(1) of the EIR provides definitions of what constitutes environmental information:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"

8. The request to the Treasury is solely about tolls and tolling powers for the Mersey Tunnels and for the existing and new (Mersey Gateway) bridges between Runcorn and Widnes and it specifically set out that the Treasury could exclude information relating to anything other than this specific subject matter.
9. Having considered the nature and wording of the request, the Commissioner does not consider that it constitutes or relates to measures which are likely to impact upon the matters identified in regulation 2(1)(a) or 2(1)(b). Although she acknowledges that the definition of environmental information is subject to a wide interpretation in respect of the EIR, she considers that the request is several steps removed from the definition of environmental information as tolling and tolling powers in isolation do not constitute a measure defined within regulation 2(1)(c); consequently she does not consider that the specific request falls within the scope of regulation 2(1)(e).

Reasons for decision

FOIA section 12 – cost of compliance exceeds appropriate limit

10. Section 12 (1) of FOIA states that:

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

11. In other words, section 12 FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.

12. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government departments and £450 for all other public authorities. 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 24 hours in this case.

13. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- 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.

14. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.

Would compliance exceed the appropriate limit?

15. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be 'reasonable': she expects it to be sensible, realistic and supported by cogent evidence.

16. The Treasury has set out to the Commissioner that information held relating to the issue is not filed either by correspondent or by topic. This therefore means that in order to locate all of the information held and falling within the scope of the request, the Treasury would have to carry out key word searches in areas where information may reasonably be

held, consider any information identified to determine if it related to correspondence, meetings or other contact with the relevant authority and where that was the case it would then have to consider the information to identify if it concerned the matter of Mersey Tunnel tolls or tolling powers.

17. In order to provide the Commissioner with an estimate, the Treasury undertook a sample exercise.
18. One official involved in the project undertook a key word search to determine what emails he held which would need to be considered. There were five key terms used in the searches which were as follows; Mersey Tunnel, Toll, Liverpool City Region, LCR and Mersey Travel.
19. The Commissioner accepts that all of the terms are relevant to the request. The dates searched were from 1 February 2015 until 31 December 2015.
20. The terms searched were searched separately in order to ensure that all relevant information falling within the scope of the request was identified. It is for each public authority to determine the most appropriate sampling exercise based on the request for information and how that information may be held.
21. The Commissioner considers it important to note that a search of 'Mersey Tunnel' plus 'toll' may have produced documentation falling within the scope of the request but may not have produced all relevant documentation within scope. For example, it may not have produced documentation where the word 'toll' was not mentioned but 'levy' or 'charge' was used instead.
22. It is the Commissioner's view in this case that searching the terms separately would have ensured that all relevant information within scope was identified and would account for any ambiguity over wording.
23. It is important that a public authority takes a broad approach where a request is itself broad, in order to identify all information within scope. This is an approach that the Commissioner actively encourages to ensure that all information within scope is captured by a search.
24. The sample exercise produced a total of 2493 emails.
25. It is the Treasury's position that there are six other officials who were involved in the project who would also need to conduct the same search.
26. In setting out its position to the Commissioner, the Treasury has explained that it accepts that the search terms and the number of

searches will of course produce some duplication of emails but that the searches are entirely necessary in order to ensure that it identified all information falling within the scope of the request. The Commissioner accepts that in cases where the scope of a request is wide, searches will inevitably include duplication.

27. In addition to the searches set out in relation to individual officials involved in the project, the Treasury has stated that the same search terms would need to be applied to a search of the Department's record management system. In a sample exercise undertaken, this produced a result of 2450 documents.
28. The sample exercise has therefore identified a total of 4943 emails and documents which would need to be considered; the actual number would of course be higher.
29. The Commissioner notes that the request was made on 6 December 2015 and therefore that the search should in fact have been from 1 February 2015 to 6 December 2015 inclusive. However, given the large number of documents involved, the Commissioner considers that the seventeen working days between 6 December and 31 December 2015 would not have had a significant impact on the cost estimate and that the cost of compliance would still have exceeded the appropriate limit.
30. The Treasury set out that the documents identified varied in length with some emails containing a number of attachments which would also require consideration. It has submitted that even based on a conservative estimate of one minute to locate and consider each document from the sample exercise the required time would amount to over 80 hours and would therefore far exceed the 24 hour cost limit.
31. The Commissioner considers that The Treasury's estimate of one minute to locate and consider whether each document falls within the scope of the request is indeed a conservative estimate and that even in these circumstances, the cost of complying with the request would significantly exceed the appropriate limit. It is her position therefore that the Treasury was entitled to rely on FOIA section 12 to refuse to comply with the request.

FOIA Section 16 – advice and assistance

32. The Commissioner notes that the Treasury has suggested to the complainant that he might like to consider refining his request by reducing the amount of information he is interested in and she considers that the Treasury has accordingly discharged its duty under FOIA section 16.

Other matters

33. The Commissioner notes that in addition to the delay in issuing the initial response, there was a delay also in issuing a response to the request for an internal review. Although there is no statutory time limit for completion of internal review responses, the Commissioner has published guidance on this issue and it is her position that reviews should be completed within 20 working days and in exceptional circumstances may take up to 40 working days. She notes that the internal review response was issued 70 working days after it was requested. She considers this to be unacceptable and asks the Treasury to bear in mind her guidance regarding internal review response times.

Right of appeal

34. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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

Terna Waya
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF