

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 14 May 2020

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a specific Parish Council and the Cabinet Office. Initially the Cabinet Office advised that it held information but that it required further time to consider the public interest in respect of section 42 (legal professional privilege exemption). It sent a second letter to the complainant saying the same thing. The Commissioner then served a decision notice on the Cabinet Office requiring it to provide a response to this request. It did so out of time and cited section 12 (cost of compliance with the request) as its basis for not responding to the request.
2. The Commissioner has concluded that the Cabinet Office is entitled to rely on section 12 as its basis for refusing to respond to the request. However in failing to tell the complainant that it was relying on section 12 within the time for compliance, the Cabinet Office failed to comply with its obligations under section 17(5).
3. No steps are required.

## Request and response

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4. The initial stages of this request were subject to a decision notice (our reference: FS50854756) because the Cabinet Office failed to provide a response in accordance with its obligations under the Act.

The complainant had requested information in the following terms on 24 January 2019:

*"Dear FOI*

*I submit the following FOI request to the Cabinet Office & IPA:*

- 1. Copies of all emails, meeting notes and any form of written correspondence between the IPA department and the Ethics & Proprietary & FOI department with regard to the use of the Cabinet Office server for the Hoveton Parish Council.*
- 2. Copies of all emails, meeting notes and any form of written correspondence between the Ethics & Proprietary and any other Cabinet Office department with regard to exploring the breaches of the GDPR & FOI legislation in respect to the parishioners of Hoveton.  
[That is all correspondence which relates to the misuse of the Cabinet Office server for the processing and storing of private information about the parishioners of Hoveton. Emails to and from Hoveton parishioners have been stored on the Cabinet Office server for many years].*
- 3. Copies of all emails, meeting notes and any other form of written correspondence between any Cabinet Office department that contain decisions and actions undertaken by the IPA department in respect to the misuse of the Cabinet Office office and email server by an IPA employee.*
- 4. Copies of all emails, meeting notes and any other form of written correspondence by the Cabinet Office that discuss information or seek legal advice with regard to the use of the Cabinet Office server for transacting the business of the Hoveton Parish Council.  
[It is understood that legal advice received may be confidential, however, FOI item 4 seeks to understand whether (internal or external) legal advice has been sought and the nature of that legal advice sought]*
- 5. Copies of all emails, meeting notes and any other form of written correspondence by the Cabinet Office that discuss extraneous issues linked to Hoveton Parish Council.*
- 6. Copies of all emails, meeting notes and another form of written correspondence by the Cabinet Office departments that discuss extraneous information on the misuse of position and power of the crown and the misuse of email server by a Cabinet Office employee.  
The date this FOI covers is from the period of 20th September 2018 to 1st January 2019."*

5. The Cabinet Office responded on 21 February 2019. It stated that it held information relevant to the request but that it would need to extend the time taken to complete its public interest test considerations in respect of section 42(1) of the FOIA.
6. The Cabinet Office wrote to the complainant again on 18 April 2019 stating that it would need to further extend the time taken to complete its public interest test considerations in respect of section 42(1) of the FOIA.
7. The Commissioner served a decision notice on the Cabinet Office on 20 August 2019 (our reference FS50854756). This notice required the Cabinet Office to either provide the information or issue a refusal notice.
8. It did so on 4 October 2019 considerably after the date for compliance with the aforementioned decision notice. It cited section 12 (cost of compliance) as its basis for refusing to provide a response. It suggested to the complainant that if she removed point 6 in her request it may be able to process it within the cost limit.
9. Due to a technical issue, a draft letter the complainant had prepared on 4 October 2019 asking the Cabinet Office to look at the request minus point 6 was sent in error to the Cabinet Office. The complainant wrote to the Cabinet Office to withdraw this on the same date.
10. The Commissioner would normally expect a complainant to seek an internal review of any refusal but given the protracted delays the complainant has already experienced in respect of this request, the Commissioner concluded that it is appropriate to take the matter forward at this stage.

### **Scope of the case**

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11. The complainant contacted the Commissioner 4 October 2019 to complain about the way her request for information had been handled.
12. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 12 in respect of this request. The Commissioner will also consider whether the Cabinet Office has provided adequate advice and assistance in accordance with its obligations under section 16 of the FOIA.

## Reasons for decision

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13. Section 12(1) of the FOIA states 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 complying with the request would exceed the appropriate limit".*

14. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') set the appropriate limit 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.

15. This means that there is a time limit of 24 hours in this case.

16. Regulation 5(2) of the Fees Regulations requires that the requests which are to be aggregated relate *"to any extent"* to the same or similar information.

17. A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.

18. In this case, the requester expressly linked the requests and was unwilling to separate them when asked. The Commissioner is satisfied that they can be aggregated. The practical consequence of this is that if the cost of complying with one of the requests is in excess of the appropriate limit, the limit is exceeded for all of them.

*Would complying with the requests exceed the appropriate limit?*

19. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations 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.

20. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
21. The Cabinet Office explained the following:

It would need to involve a number of teams in the response such as:

  - a) Security teams; b) Human Resources teams; c) Propriety and Ethics teams; d) Data Protection Officer's Office; or e) any management chain within teams where any related investigation or disciplinary issues might be discussed.
22. It also explained that "this would make targeted searches at local team levels difficult and would involve a large number of staff to conduct such searches".
23. It further explained that "it would be difficult to set out a short list of search terms that would be required to adequately conduct searches to answer question 6 either locally, or centrally. This is due to the breadth of issues asked about in question 6 (misuse of email, misuse of position and misuse of 'power of the crown'). These matters could be interpreted broadly and would not be covered by a single short set of search criteria. For instance, simply searching 'misuse of email' across central email systems would not automatically capture any emails that relate to such matters. In fact, such searches would likely miss significant information in scope of the request. The descriptions and phrases used for these sorts of scenarios would often differ. As such, wider more generic search terms would need to be used to search for information."
24. It gave as an example "any email or correspondence document that refers to disciplinary matters would need to be reviewed to ascertain if they were in scope of any misuse of position, email or 'power of the crown'."
25. In response to the Commissioner's request about whether it had carried out a sampling exercise, it said "[b]ecause of the breadth of the complainant's request, the wording of question 6, and the difficulty in formulating a complete list of the totality of searches that would need to be conducted to find and identify information in scope, it is difficult to formulate a precise calculation of the costs of complying with the request. There would be no easily definable set of search terms by which officials could quickly narrow down the number of documents likely to be in scope of the request. Therefore there is no single short list of sample search results the Cabinet office can provide to set out and estimate the length of time it would take to respond to the entirety of the complainant's request."

26. It went on to explain that “[s]ome of the more identifiable search terms that might be used to search for information would also be fairly generic. Terms like ‘disciplinary’, ‘data breach’, ‘data protection breach’ would certainly identify huge numbers of documents and emails that might or might not be in scope of the request. This is particularly the case for the Cabinet Office where such terms will be identified within communications with other government departments, policy work and guidance formulation (not just in the type of incidents referred to by the requester). The initial findings from generic searches would then need to be sifted to ascertain which were actually relevant to the specific request. It is estimated that this sift would be a considerable exercise as there are numerous possible search terms (as set out above).
27. It added “[a]s for the possibility of a sampling exercise to demonstrate a calculation of cost impacts on the department to search out and identify information in scope, the type and volume of documents that would need to be reviewed following initial searches would vary across the department. Several teams (highlighted above) would need to search for information locally. As such, a sampling exercise would not be ‘sensible and realistic’, and a small sample would not be representative of the whole.
28. It argued that the ICO had accepted this approach in FS50768806 and FS50768657.<sup>1</sup>
29. It explained that in line with these decision notices, the Cabinet Office could only provide a speculative estimate for the Commissioner to consider and judge in this case.
30. This estimate was as follows:

“At a minimum, an official would need to coordinate this search work, with input from the Cabinet Office Data and Technology Team for large searches and downloading of information from central systems. Information would need to be reviewed to ascertain if it is or is not in scope of the request This would be expected to take up to four weeks due to some of the generic search terms that would be used and due to the number of teams work that would be involved. As a small additional example of the sort of volumes of emails that searches of generic terms

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2614079/fs50768806.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614285/fs50768657.pdf>

would generate, a brief search of Cabinet Office emails for the date range specified by the complainant identified the following volumes:

'Disciplinary' 5,000 +

'Data breach' 5,000 +

'Data protection breach' 2,804

'Personal data breach' 5,000 +"

31. For clarification, it added that "these results would represent not just discussions of incidents of those described in the request, but also communications with other government departments, policy work, guidance formulation and training. Reviewing two of these (approx. 17,000) emails every minute to ascertain if they are in scope would account for over 141 hours of work." It further explained that "None of the above search results are considered exhaustive; they are provided as examples in order for the commissioner to review"
32. It accepted that the complainant was focussed in requests 1-5 on Hoveton Parish Council but that question 6 moved far beyond this. It said that it undoubtedly held information within the scope of request 6 but that without refinement of this request as it had suggested, it could not comply within the cost limits.
33. It accepted that it had not responded to the request in a reasonable time. It argued that this was in partly because of the wording of the request and the difficulty it had in interpreting it. It said that it had belatedly suggested to the complainant that she reduce the scope of the requests to exclude request 6 but that the complainant had not agreed to this suggestion.

#### *The Commissioner's decision*

34. The Commissioner is not persuaded that there is sufficient mitigating circumstances to explain why there was such a protracted delay even after she had served a decision notice requiring the Cabinet Office to provide a response to the request. The complainant is not expected to know how the Cabinet Office's files are structured. The Cabinet Office's original interim response told the complainant it was considering section 42 (legal professional privilege exemption) and made no mention of the cost of compliance. It is entirely understandable that the complainant would be sceptical about the Cabinet Office's new reliance on section 12. It had ample opportunity to explain its cost concerns to the complainant which it did not take.

35. However, the Commissioner is satisfied that the Cabinet Office's explanation of costs, albeit excessively late, is a cogent and reasonable one. She accepts that the Cabinet Office can only provide a speculative estimate in this case in the unique circumstances of the case. She has reached this view with particular regard to the broader nature of the sixth request. Had the complainant excluded the sixth request, the Commissioner may have reached a different conclusion.
36. The Commissioner is therefore satisfied that the Cabinet Office can rely on section 12(1) as its basis for not complying with this set of requests.

### **Section 16 – advice and assistance**

37. Section 16(1) of the FOIA provides that -

*"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".*

38. In order to comply with this duty, a public authority should advise the requester as to how their request could be refined to bring it within the appropriate cost limit.
39. The Commissioner notes that the Cabinet Office did offer the complainant some advice and assistance in its refusal notice of 4 October 2019 by suggesting that she remove request 6 from the set of requests. The Commissioner therefore accepts that Cabinet Office has complied with its duty at section 16(1) albeit considerably late in the progress of the request.
40. The Commissioner recognises that, had the complainant agreed to removing request 6 from the set of requests they had submitted, the Cabinet Office may not have been able to rely on section 12 as its basis for not complying with the requests. That said, the information described in requests 1 – 5 may have been exempt from disclosure for other reasons – the Commissioner has formed no view on this.

### **Section 17 – Responding to a request**

41. Section 17(5) of the FOIA provides that -

*"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact".*



42. The time for complying with section 1(1) referred to in section 17(5) above is 20 working days. The Cabinet Office failed to do this by a considerable margin.
43. In failing to provide a response to the request stating reliance on section 12 within the time for compliance, the Cabinet Office contravened its obligations under section 17(5).
44. The Commissioner has commented further on the Cabinet Office's failure to provide a timely response to this request in the Other Matters section of this notice.

### **Other Matters**

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45. As an exercise of her discretion, the Commissioner decided not to apply for contempt of court proceedings when the Cabinet Office failed to comply with the previous decision notice referred to above in accordance with the time requirements of that notice. As with any decision notice issued by the Commissioner, the public authority upon whom it is served has 28 calendar days to comply with the terms of that notice or to lodge an appeal against that notice. The Cabinet Office did neither within 28 calendar days.

## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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