

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2021

Public Authority: Department for Business, Energy and Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant requested information from the Department for Business, Energy and Industrial Strategy (BEIS) about specified correspondence. BEIS refused to comply with the request citing section 12 (cost limit) of the FOIA.
2. The Commissioner's decision is that BEIS was entitled to refuse to comply with the request in accordance with section 12(1) of the FOIA. She also finds that BEIS met its obligation under section 16(1) of the FOIA to offer advice and assistance. The Commissioner does not require BEIS to take any steps.

Request and response

3. On 15 April 2021, the complainant wrote to BEIS and requested information in the following terms:

"a) Correspondence between ministers of BEIS and Aquind Limited, Alexander Temerko or Viktor Fedotov or their representatives from 1st January 2017 to 30th July 2018 concerning or discussing the firm's request to be deemed a 'nationally significant infrastructure project'.

b) A list of all meetings between ministers of BEIS, and Aquind, Alexander Temerko, Viktor Fedotov or their representatives from

1st January 2017 to 30th July 2018 concerning or discussing the firm's request to be deemed a 'nationally significant infrastructure project'.

c) For each meeting, please provide a copy of the minutes of the meeting, any civil service briefing prepared for the minister ahead of the meeting, and the attendance list for the meeting."

4. On 29 April 2021 BEIS responded to the request for information to state that in relation to questions (b) and (c) it held no record information. BEIS cited section 12 in response to question (a) and advised the complainant:

"You may wish to refine your request by narrowing its scope. You could, for example identify a specific Minister, or you may wish to reduce the timespan."

5. On 10 May 2021 the complainant submitted a refined request to BEIS in the following terms:

"I am happy to limit my new request to the new formulation of the first question on the basis that the second and third questions gave a nil return. I am happy to limit the scope of question 1 further, to Alexander Temerko, and staff of Aquind Limited (using Aquind email addresses, which would be easily searchable within email software)."

6. BEIS summarised the refined request in the following terms:

"Correspondence between ministers of BEIS and Alexander Temerko and staff of Aquind Limited (using Aquind email addresses), from 1st January 2017 to 30th July 2018, concerning or discussing the firm's request to be deemed a 'nationally significant infrastructure project.'"

7. On 9 June 2021, BEIS issued a section 12 refusal notice in response to the refined request.

8. The complainant requested an internal review on 16 June 2021. BEIS provided the internal review outcome on 30 June 2021 and upheld its section 12 refusal. BEIS, in accordance with its obligations to offer advice and assistance under section 16 of the FOIA, recommended that the complainant reduce the scope of his request:

"As previously advised, your request is particularly broad, and covers a significant period of time and a vast number of Ministers. You may wish to refine your request further by narrowing its scope."

As set out in our previous response, you could for example identify a specific Minister, or you may wish to reduce the timespan.”

Scope of the case

9. The complainant contacted the Commissioner on 1 July 2021 to complain about the way his request for information had been handled. The complainant disagrees with BEIS' application of section 12 of the FOIA.
10. The scope of the following analysis is to determine whether BEIS was entitled to rely on section 12 of the FOIA in this case. The Commissioner has also considered whether BEIS met its obligation to offer advice and assistance, under section 16.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
12. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. BEIS relied on section 12(1) in this case.
13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for BEIS is £600.
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 24 hours for BEIS.
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 in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, 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 a 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 the 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 the FOIA.

Would the cost of compliance exceed the appropriate limit?

19. As is the practice in a case in which the public authority has cited the cost limit under section 12 of the FOIA, the Commissioner asked BEIS to provide a detailed explanation of its estimate of the time and cost of responding to the request.
20. In its submissions to the Commissioner, BEIS maintained its reliance on section 12 of the FOIA and offered an explanation for how it had calculated that the request exceeded the cost limit.
21. BEIS explained that “*the activity defined as 'Extracting the information from a document containing it' is that activity that is the particularly burdensome element of the request. This request would require a member of staff to go through all of the results returned by the searches. To determine which of the results might contain information within the scope of the request, the member of staff would need to locate, open, and read each result in full.*”

22. BEIS stated that it conducted a review of search results for correspondence using the name 'Alexander Temerko' and '@aquind.co.uk', limited to ministerial parliamentary support team inboxes. BEIS estimated that it would take, on average, around 3 minutes to read and review each piece of correspondence. This search returned 635 results across 29 mailboxes and therefore BEIS calculated that this would equate to 635 results x 3 minutes to review = 1,905 minutes to process (31 hours and 45 minutes). This therefore took the request over the cost limit under the FOIA.
23. BEIS outlined that the search described above returned every email where both of the two key phrases were present in the message header, message body or attachments, limited by the date range and to ministerial parliamentary support inboxes. BEIS argued that its staff would need to review the contents of the search results to determine with confidence what material was covered by the scope of the request. The BEIS IT team also noted that text that appears in images, for example those documents that have been scanned, will not be identified in searches and would thus require further time to locate and identify.
24. BEIS informed the Commissioner that it conducted further searches for information within the scope of the request:

"A search of correspondence received by BEIS from '@aquind.co.uk' email addresses, limited to ministerial parliamentary support inboxes produced 286 results across 28 mailboxes. A further search of correspondence sent to '@aquind.co.uk' email addresses returned 34 search results across 4 ministerial parliamentary support inboxes. The BEIS IT team have advised that ascertaining the cross-over between the search results produced by these searches with the original search for 'Alexander Temerko' and '@aquind.co.uk' would not be an easy task to undertake. BEIS IT further advised that there are generally a number of different search syntaxes to achieve the same aim but that they do not necessarily return the same number of results, and that historically, attempts to target partial email address in the 'From' field of an email have met with variable results. They have further advised that such variations are a reason as to why it is important to have a well-defined brief."

25. The Commissioner accepts that the estimate of three minutes to review each item of correspondence is appropriate in the circumstances and that such a review would be necessary in order to comply with the request. For instance, some correspondence may have related to other topics of interest between each party; it cannot be assumed that all correspondence related only to discussion or otherwise of Aquind's request to be deemed a nationally important infrastructure project.

26. The Commissioner's overall conclusion is that BEIS estimated reasonably that to comply with the complainant's request would exceed the cost limit. BEIS was therefore correct to apply section 12(1) of the FOIA to the complainant's request.

Section 16(1) – The duty to provide advice and assistance

27. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).
28. The Commissioner notes that BEIS outlined to the complainant that he may wish to resubmit a refined request which covered a shorter time frame or to specify particular Ministers' inboxes to search for relevant information. The Commissioner considers this was an appropriate response in the circumstances given the broad nature of the original time frame. She is therefore satisfied that BEIS met its obligation under section 16 of the FOIA.

Other matters

29. The Commissioner notes that whilst the request referred to in this decision notice does invoke the cost limit, it is not far in excess of it. Were the complainant to refine his request further, it may be possible to bring it within the cost limit..

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF