

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 June 2021

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested information from the Department for Transport (the DfT) regarding letters of complaint sent to Chris Grayling, the former Secretary of State for Transport. The DfT refused to comply with the request citing section 12 (cost limit) of the FOIA.
2. The Commissioner's decision is that the DfT was entitled to refuse to comply with the request in accordance with section 12(1) of the FOIA. She also finds that the DfT met its obligation under section 16(1) of the FOIA to offer advice and assistance. The Commissioner does not require the DfT to take any steps.

Request and response

3. On 15 March 2019 the complainant wrote to the DfT and requested information in the following terms:
"Please disclose all letters of complaint sent to Chris Grayling about his conduct from January 1st 2017 to 15.03.2019."
4. On 11 April 2019, the DfT responded. It confirmed that it had not received any *"maladministration complaints about the conduct of the Secretary of State Chris Grayling."*
5. The DfT stated, however, that it receives thousands of items of correspondence each year and that these may contain personal views on

the Department and Ministers, in addition to the main subject of the correspondence. It explained that it does not hold a central list of such cases and that a manual search of each piece of correspondence would exceed the cost limit under the FOIA. This response was not clear about whether the DfT held the requested information. Neither did it specify section 12; the relevant provision of the FOIA relating to the cost limit.

6. On 16 April 2019 the complainant requested an internal review and argued that a comprehensive search for information within the scope of the request had not been undertaken by the DfT.
7. On 19 May 2019 the DfT provided its internal review outcome to the complainant. The DfT maintained its original position and reiterated that *"no maladministration complaints were made about the Secretary of State during the period stipulated."* It explained (in response to the complainant's suggested search method) that *"However, what was perhaps not clear to you in the original response is that the Department's correspondence database cannot be searched by the keyword 'complaint' or 'complain' in a manner that will return all results within the scope of your request"*.
8. The DfT's internal review response again did not clearly specify whether or not it held the requested information and neither did it cite section 12 of the FOIA at this stage.
9. The complainant contacted the Commissioner on 20 May 2019 to complain about the way his request for information had been handled.
10. On 11 March 2020, following an investigation of the complaint, the Commissioner issued Decision Notice FS50844524¹.
11. The Commissioner's decision in FS50844524 was that the DfT did not read the request correctly and therefore it had not complied with section 1(1)(a) of the FOIA as it had not issued a response based on the correct reading of the request. Specifically, the Commissioner considered that the DfT had focused its response on only correspondence relating to formal maladministration complaints and not on potential complaints which were received in general correspondence.
12. The Commissioner required the DfT to issue a fresh response to the request in accordance with the FOIA.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617498/fs50844524.pdf>

13. On 12 June 2020, the DfT issued a fresh response to the request. The DfT explained to the complainant that the cost of complying with the request would exceed the cost limit. The DfT therefore issued a section 12 refusal notice in reply to the complainant's request for information. The DfT, 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, either by specifying a reduced timescale for the correspondence requested or by specifying a particular issue.
14. On 1 July 2020, the complainant requested an internal review and questioned the DfT's application of section 12 of the FOIA. He queried whether a search for the information using keywords may bring the request under the cost limit.
15. On 27 July 2020, the DfT provided its internal review outcome to the complainant. The internal review upheld the DfT's section 12 refusal notice. The DfT explained that the only way to determine if a complaint was made regarding the conduct of Chris Grayling (and not recorded as a maladministration complaint, of which none were received during the specified period) would be by opening and reading each piece of correspondence received within the time frame of the request.
16. The DfT explained that around 40,000 pieces of correspondence were identified as potentially holding information within the scope of the request and that these would need to be searched manually. The time to search this volume of correspondence would be far in excess of the cost limit under section 12 of the FOIA.
17. The DfT explained that it receives correspondence in a variety of formats and that its systems do not have a way of searching the content of each individual piece of correspondence for keywords. It explained that when it receives a piece of correspondence a record is set up within the Department's correspondence handling system and the correspondence is attached to the record as a document. A summary of the correspondence is recorded in a free text box and, whilst the DfT's systems can search for keywords within the summary, this does not search the attached document itself.

Scope of the case

18. The complainant contacted the Commissioner on 10 August 2020 to complain about the way his request for information had been handled. The complainant disagrees with the DfT's application of section 12 of the FOIA.
19. The scope of the following analysis is to determine whether the DfT was entitled to rely on section 12 of the FOIA in this case. The Commissioner

has also considered whether the DfT met its obligation to offer advice and assistance, under section 16.

Reasons for decision

Section 12 – cost of compliance

20. 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”).
21. 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. The DfT relied on section 12(1) in this case.
22. 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 the DfT is £600.
23. 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 the DfT.
24. 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.
25. 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.

26. 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.
27. 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?

28. 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 the DfT to provide a detailed explanation of the estimations it had reached to calculate the time and cost of responding to the request.
29. The DfT responded with an explanation of its processes for identifying formal complaints. When staff at the DfT identify that the main part of a piece of correspondence is a potential complaint it is logged using the keyword "DfT Complaint" and passed to the appropriate team to respond to in line with the department's complaints process. The DfT explained that, during the time period specified for the request, no formal maladministration complaints had been made against Chris Grayling.
30. The DfT then cited Section 12(1) of the FOIA in the context of any information within received correspondence where the main subject was not a complaint, but it is possible that it contained potentially negative or critical comments relating to Chris Grayling. For example, a piece of correspondence where the main subject was pot holes could have had a comment at the end of the letter calling for Chris Grayling to resign as Secretary of State. The DfT explained that such correspondence would not be labelled as a complaint as the primary content related to another topic. The DfT explained further that ministerial departments receive correspondence on a wide range of subjects, with some of these letters also containing critiques or expressions of unhappiness with a particular minister. The key point from this is that such correspondence is not labelled by the DfT using the word "complaint".
31. In its submission to the Commissioner the DfT stated that searches had produced around 40,000 items of correspondence potentially within the scope of this request. The DfT would be required to read through each

item manually, in order to determine whether or not correspondence on another subject also contained a complaint.

32. The DfT explained that the correspondence it receives is labelled with a short summary title which describes, briefly, the main subject.
33. The Commissioner asked the DfT whether the search for information could be narrowed by first using a keyword search on only the summaries of each item of correspondence. The DfT responded to state that this would not capture all of the information that would be within the scope of the request as the summary will only contain a brief description on the main subject of the correspondence; for example, "letter regarding HS2 costs" would not give any indication as to whether it also contained a complaint. Therefore a full search of all 40,000 records would still be required.
34. The DfT estimated that it would take, on average, around 3 minutes to read and review each piece of correspondence. Therefore this would equate to 40,000 pieces of correspondence x 3 minutes to review = 120,000 minutes/2,000 hours. The estimated cost of complying with the request is therefore well in excess of the set limit of 24 hours under the FOIA for a government department.
35. The Commissioner considers that, even taking into account a more conservative cost estimate of only 1 minute per piece of correspondence, the DfT would still take considerably more than the 24 hours / £600 limit to respond to the request. The Commissioner accepts the explanation that it would have been necessary for the DfT to review many thousands of items of correspondence in order to locate all the information it held within the scope of the request. She also accepts that the estimate of three minutes per item of correspondence is appropriate, as well as noting that a considerably shorter estimate per item would still produce a total estimate well in excess of the cost limit.
36. The Commissioner's overall conclusion is that the DfT estimated reasonably that to comply with the complainant's request would exceed the cost limit. The DfT 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

37. 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 practice² in providing advice and assistance, it will have complied with section 16(1).

38. The Commissioner notes that the DfT outlined to the complainant that, due to the high volume of correspondence within the scope of the request, he may wish to resubmit a refined request which covered a shorter time frame. 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 the DfT met its obligation under section 16 of the FOIA.

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

39. 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

40. 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.

41. 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
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