

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2023

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth & Development Office seeking information about the incarceration and/or extradition of Julian Assange. The FCDO refused the request on the basis of 12(2) of FOIA arguing that it would exceed the appropriate cost limit to determine whether it held any information falling within the scope of the request.
2. The Commissioner's decision is that the FCDO were entitled to rely on section 12(2) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. The complainant originally submitted the following request by post to the FCDO on 30 April 2022:

'I am writing to ask under the terms of the FoI Act if any representations have been made by the Foreign Secretary or anyone acting on behalf of The Foreign Secretary to the Prime-Minister, The Home Secretary or the Department of Justice as to the impact which the incarceration and/or extradition of Julian Assange is likely to have

on free journalism around the world or on the claim by the British government to support free journalism around the world?’

5. The FCDO did not receive this request. The complainant subsequently contacted the Commissioner about the FCDO’s lack of a response and the Commissioner provided the FCDO with a copy of the request on 18 January 2023 and asked it to process this.
6. The FCDO provided a response on 15 February 2023. The FCDO refused the request on the basis of section 12(2) of FOIA and argued that given the wide scope of the request, as presently worded, it would exceed the cost limit to determine if any information falling within the scope of the request was held. The FCDO suggested that the complainant consider submitting a refined request, for example seeking only correspondence from the Foreign Secretary and provide a particular time period, 1 January 2016 to 31 December 2016.
7. The complainant contacted the FCDO on 25 February 2023. With regard to the FCDO’s reliance on section 12(2) he explained that:

‘I find this astonishing. All that is required is for a member of the FoI team to contact the Foreign Secretary’s Private Office and ask who would know if any such communications had been sent. That should take no more than a few minutes let alone 3½ working days. There should also be files on Assange and the Advisory Communications with Other Departments which can be perused by FoI officers, but a quick phone call the Foreign Secretary’s Private Office would seem the easiest and quickest way.’
8. The FCDO informed him of the outcome of the internal review on 30 March 2023. It upheld the application of section 12(2) of FOIA. In support of this position the FCDO stated that:

‘You state in your request for review that this request could have been handled quickly with a phone call. However your request as originally worded asked for information from or [on] behalf of the FS [Foreign Secretary]. We are all in the FCDO acting on behalf of the Foreign Secretary. Therefore the scope had not been confined to only the Foreign Secretary’s private office. Further you did not suggest a timeframe. The Assange case has been going on for a considerable amount of time and so the information we would need to search would cover all of FCDO and many years. In our response we suggested that you refine your request to enable us to search for information without exceeding the cost limit and you have not done so.’

Scope of the case

9. The complainant contacted the Commissioner on 24 April 2023 in order to complain about the FCDO's decision to refuse to comply with his request on the basis of section 12(2) of FOIA.
10. The Commissioner considers that the scope of his investigation is to consider the FCDO's application of section 12(2) of FOIA.

Reasons for decision

Section 12(2)

11. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
12. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
13. The "appropriate limit" is set in the Fees Regulations at £600 for central government, legislative bodies, and the armed forces and at £450 for all other public authorities. Therefore, the "appropriate limit" for the FCDO 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, effectively imposing a time limit of 24 hours for the FCDO to deal with this request.
15. Where section 12(2) is relied upon, 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 activity:
 - determining whether the information is held.
16. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. 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 complainant's position

17. The complainant's case that section 12(2) does not apply to his request focuses on what he considers to be a misinterpretation of his request by the FCDO on two grounds. Firstly, in his view the FCDO has erred in interpreting the phrase 'on behalf of' in his request and secondly he considers that his request does include a timeframe for the information being sought.

18. In respect of the 'on behalf of' issue the complainant's submissions to the Commissioner were as follows:

'I had asked if any communications had been sent by the Secretary of State, a Minister of State or anyone acting on their behalf to The Home Secretary, the Prime-Minister or Dept. of Justice regarding the impact which the incarceration of Julian Assange is likely to have on free journalism around the world. Now very few people will communicate with the Prime-Minister, the Home Secretary or Dept. of Justice on behalf of the Secretary of State for Foreign and Commonwealth Affairs. Perhaps a Minister of State or Permanent Secretary. Almost certainly it will be The Secretary of State himself/herself who would communicate directly with his/her counterpart or the P.M. on such a matter, in the way that the then Foreign Secretary Liz Truss communicated with the then Secretary of State Nadine Dorries to suggest that a ban on RT might result in the Russians banning British broadcasting into Russia....

...The Foreign Office has responded by saying that everyone working in the FCDO is 'acting on behalf of The Foreign Secretary'. On this basis, my FoI request is being refused on grounds of cost because there would have to be a search of the entire Foreign Office, including all its embassies abroad to ascertain whether anyone who is a Foreign Office employee has written to the Prime-Minister, the Home Secretary or the Dept. of Justice 'on behalf of The Foreign Secretary'.

How many people working in our embassies abroad would be likely to be writing to the P.M., the HS or the Dept of Justice on behalf of the Foreign Secretary on such a matter? I would suggest no-one. Let me be generous and accept that there was a genuine misunderstanding in the FCDO response of 15 February. But when I requested an Internal Review I clearly suggested that the search should take place in the Foreign Secretary's Private Office. Instead of doing that, the Internal Review upholds the original decision on grounds of cost. I believe the Internal Review to constitute a wilful misinterpretation of my FoI request.'

19. And in respect of the time period of his request, the complainant's submissions were as follows:

'Julian Assange was removed from the Ecuadorian [sic] Embassy in 2019 if I remember correctly. He was then sentenced for absconding over a Swedish extradition request that did not relate to his work as a journalist and publisher which I specifically referred to. It is the U.S. which seeks his extradition on matters relating to publication to material that was deeply damaging to the United States. I would have thought it apparent that I was referring to his incarceration on remand in Belmarsh following the U.S. extradition request, even though that request was received before he had completed his sentence for absconding. It is his incarceration as a result of that extradition request to which I am clearly referring. I would have thought that to be entirely obvious. In any event whether the period refers to 2019 onwards or 2020 onwards makes very little difference if the search is confined to the private offices of the Foreign Secretary or Ministers of State in King Charles Street.'

The FCDO's position

20. The FCDO's case for refusing the request on the basis of section 12(2) is set out in part by its responses in the refusal notice and internal review which are quoted above.
21. In addition, during the course of the Commissioner's investigation the FCDO confirmed that it maintained that it would take more than 24 hours to carry out reasonable searches to determine whether it actually held any relevant information. More specifically, it would need to carry out searches in the Foreign Secretary's Office, all the Ministers' offices, the relevant geographic directorates covering North America, South America and Sweden (plus foreign posts) and the relevant policy departments involved in the Assange case. The FCDO estimated that 50 people would need to carry out searches to see if they held relevant information in scope of the request. This would take 25 hours (allowing 30 minutes for each person to search, however the amount of time it would take would vary depending on how much information an individual holds). The FCDO emphasised that it held a large amount of information covering a number of years regarding the Assange case and that the information was not held centrally.

The Commissioner's position

22. Public authorities should read and interpret a request objectively. With regard to the phrase 'acting on behalf of the Foreign Secretary' the Commissioner can understand the complainant's position that on a matter like this those communications with the third parties detailed in the request could be limited to other Ministers or Permanent under Secretary.
23. Nevertheless, in the Commissioner's view it is not unreasonable for the FCDO to have interpreted this phrase in that way that it has. A simple google search of the phrase "on behalf of foreign secretary" returns examples of where a minister has been said to have been acting on behalf of the foreign secretary, but also examples where senior diplomats undertook a range of actions on behalf of the Foreign Secretary.¹ In light of this the Commissioner does not consider it unreasonable for the FCDO to have interpreted that part of the complainant's request in that manner in which it did. The phrase acting on behalf of the Foreign Secretary clearly has an established and (broadly) understood meaning within the FCDO. Moreover, in the circumstances of this case, the Commissioner notes that the request did not simply seek communications sent to the Prime Minister or Home Secretary but also sought communications to sent to the Department for Justice, which the Commissioner understands to mean the US Department for Justice. The Commissioner presumes that any such communications, should they exist, could have been made **by** official/diplomats rather than by Ministers.
24. In terms of the timeframe of the request, the Commissioner notes the complainant's points that he was only seeking information regarding the extradition request by the US given the reference to Mr Assange's work as a journalist and publisher in the request, and that as result any relevant information would only date back to 2020 or potentially 2019. The Commissioner has considered the wording of the request carefully. He does not consider that the reference to 'free journalism around the world or on the claim by the British government to support free journalism around the world' makes it clear that the request was in

¹ https://www.google.co.uk/search?q=%22on+behalf+of+foreign+secretary%22&ei=MAm-ZPaYIfijhbIPtbyz6Ag&ved=0ahUKEWj280O9y6aAAxX4UUEAHTXeDI0Q4dUDCA8&uact=5&oq=%22on+behalf+of+foreign+secretary%22&gs_l=Eqxnd3Mtd2l6LXNlcnAiICJvbiBiZWhhbGYgb2YgZm9yZWlnbiBzZWNYZXRhcnkiMggQABiJBRIiBDIFEAAyogRI5UJQ-ARYkz9wAXgBkAEAmAFroAGuBqoBBDEwLjG4AQPIAQD4AQHCAgoQABhHGNYEGLADwgIFECEYoAHCAggQIRgWGB4YHcICBxAhGKABGARCAgQQIRgV4gMEGAAgQYgGAZAGCA&scient=gws-wiz-serp

some way time limited. The Commissioner also notes that the request refers to 'the incarceration and/or extradition of Julian Assange'. Given the history of this matter, the Commissioner accepts that it was reasonable for the FCDO to assume that this referred not simply to the US extradition request in 2019 but also to an earlier time period given that since 2012 Mr Assange had sought refuge in Ecuadorian embassy in London to avoid arrest after Sweden asked Britain to extradite Assange for questioning. Indeed the Commissioner notes that Mr Assange's own legal teams' comments about concerns about US extradition predating 2019:

'From the outset of Sweden's preliminary investigation, Julian Assange's expressed concern has been that waiting in the wings was a United States extradition request that would be unstoppable from Sweden – and result in his spending the rest of his life in a US prison.'²
(Commissioner's emphasis)

25. In view of this the Commissioner accepts that it was reasonable for the FCDO to interpret the request as seeking information covering many years.
26. For the reasons set out above the Commissioner considers the FCDO's interpretation of the request to be a reasonable one. With regard to the application of section 12(2) of FOIA, as acknowledged above the Commissioner appreciates the complainant's point that given the nature of the material being requested, communications with the third parties detailed in the request are perhaps more likely to have been sent/received by Ministers or the Permanent under Secretary. However, given the Commissioner's (and FCDO's) interpretation of the request this does not mean that the request is limited to communications sent by those individuals. In particular, as set above in the Commissioner's opinion it is possible that communications sent 'on behalf of the Foreign Secretary' could have been made by any staff in the FCDO. As result, the Commissioner accepts that wide searches of the FCDO would be needed in order to locate any relevant information. In addition, in view of the submissions provided to him during the course of his investigation the Commissioner is satisfied that undertaking such searches would take at least 24 hours to establish whether information falling within the request is held and the FCDO is therefore entitled to refuse the request on the basis of section 12(2) of FOIA.

² <https://www.theguardian.com/media/2019/nov/19/sweden-drops-julian-assange-investigation>

Right of appeal

27. 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

28. 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.
29. 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
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