

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2022

Public Authority: Foreign, Commonwealth & Development Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested information from the Foreign, Commonwealth & Development Office ("the FCDO") relating to details of Black firsts that have been recognised by the department. The FCDO refused to comply with the request citing section 12 (cost limit) of FOIA.
2. The Commissioner's decision is that the FCDO was entitled to refuse to comply with the request in accordance with section 12(1) of FOIA. The Commissioner also finds that FCDO complied with its obligations under section 16 to offer advice and assistance.
3. The Commissioner does not require the FCDO to take any steps.

Request and response

4. On 1 October 2021, the complainant made the following request for information to the FCDO:

"Dear FOI Team

Black History Month 2021 – Black Firsts in the FCDO

Given that today marks the first day of Black History Month 2021, I would like to ask the FCDO, based on the information currently available, what Black firsts have been officially recognised by the

department?

More specifically:

- Based on records currently available, who was the first Black career diplomatic member of staff to represent the UK government overseas as HMA, HC or Chargé, when he or she held the position and in which post.
 - Based on records currently held by the FCDO, how many Black Heads of Post have there been in the history of the FCDO?
 - Based on the records currently held by the FCDO, what discussions have been held within the FCDO with specific reference to recognising Black firsts within the Diplomatic Service overseas. Special attention should be given to correspondence on this issue between the Human Resources Department, the Permanent Under Secretary's Office and myself between 2014 to 2018."
5. FCDO responded on 8 April 2022. It stated that it held information within the scope of the request, but that the cost of complying with the request would exceed the cost threshold of £600 for central government. In accordance with this finding, the FCDO issued a section 12 refusal notice in reply to the complainant's request for information. The FCDO offered the following advice and assistance to the complainant, suggesting that they could focus on the third question with a narrowed timeframe. The FCDO also provided information about the UK's first BAME Ambassador and signposted to a History Note that had been published exploring the topic of race within the Foreign Office.
6. The FCDO upheld its initial application of section 12 of FOIA via internal review on 25 May 2022.

Scope of the case

7. The complainant initially contacted the Commissioner on 12 March 2022 to complain about the late response to their request for information. Upon receiving the response and subsequent internal review outcome, the complainant contacted the Commissioner again on 13 July 2022 to say that they disagreed with the FCDO's application of section 12 of FOIA.
8. The Commissioner considers the scope of this case to be to determine if the FCDO has correctly cited section 12(1) of FOIA in response to the request. The Commissioner has also considered whether the FCDO met its obligation to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

9. Section 12(1) of 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”).
10. Section 12(2) of 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 FCDO relied on section 12(1) in this case.
11. 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 FCDO is £600.
12. 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 FCDO.
13. 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.
14. 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.

15. 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.
16. Where a public authority claims that section 12 of 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 FOIA.

Would the cost of compliance exceed the appropriate limit?

17. As is the practice in a case in which the public authority has informed the complainant that it holds the information, the Commissioner asked the FCDO to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
18. In its submission to the Commissioner, the FCDO stated that in applying section 12(1), it would have to examine staff records held both digitally and manually. Information relating to the postings and the ethnicity of staff is not held centrally and is held on the files of each individual employee. Each individual record would therefore need to be reviewed to determine if it contained the requested information and due to the large number of records and requested timeframe, the FCDO determined that it would require significantly more than 24 hours to locate and compile the requested information. The FCDO highlighted that it employs thousands of staff each year and to trawl through historical records would take a substantial amount of time.
19. The FCDO carried out a sampling exercise and determined that each paper record would take approximately one hour to locate and review manually and would therefore cost around £19 per record. Using this estimate the FCDO suggested that it would only be able to review 31 staff records within the cost limit. It also estimated that it would take a further 5-6 hours to review the records that are held digitally.
20. The Commissioner considers that the FCDO estimated reasonably that it would take more than the 24 hours or £600 limit to respond to the request. The huge number of staff files which would need to be reviewed would clearly take the request over the cost limit. The FCDO was therefore correct to apply section 12(1) of FOIA to the complainant's request.

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

21. Section 16(1) of 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).
22. The Commissioner notes that the FCDO had suggested a way that the complainant could narrow the scope of the request by concentrating on one of the questions and narrowing the timeframe. It had also provided information about the UK's first BAME Ambassador and signposted to a History Note that had been published exploring the topic of race within the Foreign Office. The Commissioner is therefore satisfied that the FCDO met its obligations under section 16 of FOIA.

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

Right of appeal

23. 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

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

24. 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.
25. 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

Michael Lea
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