

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: **19 September 2023**

Public Authority: **Department for Energy Security & Net Zero¹**
Address: **1 Victoria Street**
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant made a series of requests for emails exchanged within the Department for Business, Energy and Industrial Strategy ('BEIS') during specified periods of the Covid-19 pandemic.
2. BEIS refused the requests as it considered that compliance would exceed the cost limit under section 12 FOIA.
3. The Commissioner's decision is that BEIS has correctly cited section 12(1) FOIA in response to the final refined request. It has also complied with its duty to provide advice and assistance in line with the requirements of section 16 FOIA.
4. The Commissioner does not require BEIS to take any steps.

¹ On 7 February 2023, under a Machinery of Government Change, the Department for Business Energy and Industrial Strategy ("BEIS") began the transition into three separate departments, including the Department for Energy Security & Net Zero ("DESNZ"). The request in this case was made to BEIS, however this decision notice will be served on DESNZ as the appropriate authority albeit that the decision notice refers to BEIS throughout as it was the body that handled the request and with whom the Commissioner largely corresponded about this complaint. In August 2023 DESNZ provided submissions to the Commissioner and confirmed to the Commissioner that it was the appropriate authority to serve this decision notice on.

Background

5. The complainant made a series of requests for information to BEIS. They were for emails exchanged within BEIS during specified periods of late 2020 during the Covid-19 pandemic. The complainant considered the emails might indicate a social gathering.
6. The final refined request that forms the subject of this decision notice is dated 29 April 2022 (see paragraph 16 below). However, by way of background, the Commissioner has set out below a short summary of the series of requests in order to explain how the complainant refined their original request over time to reach the wording of the final refined request.
7. On 13 December 2021, the complainant made the following request for information to BEIS:

“I'm writing to you under the Freedom of Information Act (2000) to ask that you disclose emails sent between 3 or more people copied in between the 15th - 24th December, and 15th-31st November 2020 containing the following words: "party/ies", "santa", "christmas", "wine", "drink/s", "gathering", or "quiz".”
8. On 6 January 2022, BEIS refused to provide the requested information citing the section 12 (cost limit) of FOIA as its basis for doing so. It explained to the complainant that to determine if BEIS held emails copied to three or more (unspecified) people, containing any of the key terms in the request, would require a search of emails of all BEIS employees, covering a 26-day period. Due to the large number of searches required, BEIS issued a refusal notice and cited the cost limit under section 12 FOIA. BEIS provided some advice and assistance under section 16 FOIA about how the complainant might narrow the request.
9. On 8 January 2022 the complainant submitted a refined request to BEIS as follows:

“In that case I'd like to refine this request please, to include only in the central London offices, and specifically the teams around Kwasi Kwarteng, George Freeman, Paul Scully or Lee Rowley. Presumably, as most staff would have been working at home during this time, the number of staff members in the offices and able to have held such correspondence would have been greatly limited, so I'd like a focus on staff who were in the office during this time please.”
10. On 18 February 2022 BEIS responded to the complainant. BEIS explained that two of the Ministers specified in this request (George

Freeman and Lee Rowley) were not Ministers at BEIS during the period specified in the request. The response therefore concentrated on the offices of Minister Kwasi Kwarteng (who had been Minister for Energy, Clean Growth and Climate Change) and Minister Paul Scully (then Parliamentary Under Secretary of State (Minister for Small Business, Consumers and Labour Markets)).

11. BEIS again refused to provide the requested information for the refined request dated 8 January 2022 citing section 12 (cost limit) of FOIA. BEIS said:

"To determine if the department holds emails copied to 3 or more people in those private offices for the timeframes and key terms specified, would require a trawl of emails in the archived mailbox of our then Energy Minister (Kwasi Kwarteng) and Minister Scully's mailboxes, along with their private office staff who were working in the office during the specified timeframes. This would cover a substantial number of records which would then need to be individually checked to see if they were relevant to your request. We consider that doing this would place an unreasonable burden on the Department. Therefore, we will not process your request as currently drafted."

12. The complainant was advised that they may wish to consider reducing the number of individuals involved, the timeframe or keywords.
13. On 19 February 2022 the complainant made a further refined request for the following information:

"Thank you for your response, in that case I'd like to further refine my request. I want to include the same dates, and the same search terms, and once again I'm only asking for group Emails, but I want you to only include those which include the Email addresses associated with the following people specifically:

Kwasi Kwarteng, Greg Hands, Lord Grimstone, Ann Cairns, Vikas Shah, Stephen Hill, Nigel Boardman, Sarah Munby, Joanna Whittington, Tom Taylor, Freya Guinness, and Lee McDonough.

As this request now only includes 11 individuals, and covers a very limited date period, with keywords include which can be quick search in any Email client, this should fall well within the scope of the request, and within cost limit."

14. BEIS responded on 13 April 2022 and again cited section 12 to refuse the request. BEIS noted that the complainant had specified 12 individuals and no longer included the private offices of Ministers. However, BEIS concluded that, from the searches carried out in relation

to the previous request of 8 January, compliance with this request would also exceed the cost limit. This was because the date ranges and the search terms had remained the same, and Minister Kwarteng was still included in this request (and BEIS knew that his mailbox contained a substantial number of relevant emails, 1650 in total). Advice was again provided to the complainant suggesting they could further reduce the number of officials involved, the timeframe or keywords and/or exclude Minister Kwarteng.

Request and response

15. As explained above, the final refined request that forms the substance of this complaint to the Commissioner is dated 29 April 2022.

16. On 29 April 2022, the complainant refined his request as follows:

“I'd therefore like you to remove Kwasi Kwarteng directly from the search, and the word Christmas”.

17. BEIS responded to the complainant on 20 May 2022. Again BEIS concluded that the cost of complying with the request exceeded the cost limit at section 12. This is discussed in more detail below. Advice was provided to the complainant suggesting they could further reduce the timeframe, keywords and number of officials or exclude the Permanent Secretary.

18. On 22 May 2022, the complainant requested an internal review. They said:

“I believe that I have refined the terms of search to fall well under the £600 cost limit, it is an Email address keyword search for an incredibly limited timeframe, consisting of an incredibly limited amount of possible information.

I also believe that it could be inferred that this is an effort of stalling on the part of BEIS, and given the very clear public interest in this matter, would like to have this request, and the handling of it, reviewed by your department before conducting any further reductions in terms.”

19. Following an internal review, BEIS wrote to the complainant on 4 July 2022, upholding its position. BEIS explained that:

“some of the search terms specified in your request can have multiple alternative meanings, for example “parties” and “gatherings” can be used in the context of “Christmas parties/gatherings” or “gathering parties together for a meeting” or “political parties” etc. Searching such

terms therefore results in a very extensive list of potential records – all of which would need to be individually checked to see if they were used in the “Christmas” context inferred in your request.”

Scope of the case

20. The complainant contacted the Commissioner on 4 July 2022 to complain about the way the final refined request dated 29 April 2022 for information had been handled. They said: “I've refined my request time and time again, and it has become apparent that the department has absolutely no intention of even attempting to answer it”.
21. As is the practice in a case where a public authority has cited the cost limit under section 12, on 7 March 2023 the Commissioner asked BEIS to provide a more detailed explanation of its cost estimate for the final refined request dated 29 April 2022.
22. On 6 June 2023, the Commissioner contacted the public authority and reminded it that its response was over-due and if a response was not received an information notice would be served. Despite this chaser to BEIS, the submissions remained outstanding.
23. The Commissioner notes that, due to the Machinery of Government Changes referred to above, he provided BEIS with significant leeway in responding to him. However, on 22 June 2023, the Commissioner served an information notice on the Department for Business and Trade ('DBT'), who at that time the Commissioner considered to be the appropriate authority dealing with the complaint following the Machinery of Government Changes (the information notice will be published separately on his website²). The information notice required DBT, within 30 calendar days, to furnish the Commissioner with a copy of a substantive response to his letter of 7 March 2023.
24. On 14 August 2023, outside the time for compliance, the Department for Energy Security & Net Zero ('DESNZ') provided submissions to the Commissioner. DESNZ confirmed that it was now the appropriate authority dealing with the complaint and the authority the Commissioner should serve this decision notice on (and should have served the

² <https://ico.org.uk/action-weve-taken/information-notices/>

information notice on). However, for ease, this decision notice refers to BEIS throughout as it was the body that handled the requests and with whom the Commissioner largely corresponded about this complaint.

25. The Commissioner considers the scope of this case to be to determine if the public authority has correctly cited section 12(1) FOIA in response to the final refined request dated 29 April 2022. He has also considered whether the authority complied with its duty to provide advice and assistance under section 16 FOIA.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

26. Section 12(1) 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 cost limit.
27. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for public authorities such as BEIS.
28. 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) FOIA effectively imposes a time limit of 24 hours for BEIS to deal with this request.
29. 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.
30. 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 decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency* (EA/20017/0004), the

Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".

31. Section 12 FOIA 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 the public interest in compliance.
32. Where a public authority claims that section 12 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 FOIA.

Would the cost of compliance exceed the appropriate limit?

33. During the course of the Commissioner's investigation BEIS confirmed that it remained of the view that compliance with the final refined request dated 29 April 2022 would exceed the cost limit.
34. The Commissioner notes, for the avoidance of doubt, that the refined request dated 29 April 2022 which is the subject of this decision notice, followed on from the complainant's request dated 19 February 2022:

"Thank you for your response, in that case I'd like to further refine my request. I want to include the same dates, and the same search terms, and once again I'm only asking for group Emails, but I want you to only include those which include the Email addresses associated with the following people specifically:

Kwasi Kwarteng, Greg Hands, Lord Grimstone, Ann Cairns, Vikas Shah, Stephen Hill, Nigel Boardman, Sarah Munby, Joanna Whittington, Tom Taylor, Freya Guinness, and Lee McDonough".

35. On 29 April 2022, the complaint refined his request as follows:

"I'd therefore like you to remove Kwasi Kwarteng directly from the search, and the word Christmas".

36. BEIS's submissions explained to the Commissioner that it first established that five of the individuals named in the complainant's refined request of 9 February 2022 were not at BEIS during the timeframe specified in the request, namely: Greg Hands, Freya Guinness, Lee McDonough, Vikas Shah and Stephen Hill. This now made the request relevant only to the following individuals: Lord Grimstone, Ann Cairns, Nigel Boardman, Sarah Munby, Joanna Whittington and Tom Taylor.
37. BEIS also reiterated that the same time periods applied to the final refined request (15th-31st November 2020 and 15th - 24th December

2020), as did most of the original key words, except Christmas: party, parties, Santa, Wine, Drink, Drinks, Gathering, Quiz.

38. BEIS explained to the Commissioner that the keywords specified in the refined request can have multiple alternative meanings and accordingly this meant that manual checking of each email identified as potentially in scope was required. BEIS explained:

"It seems from the keywords used and the periods specified that [the complainant] may be focusing his request on "festivities" seeking to establish whether certain BEIS Ministers or senior staff were attending parties or having drinks in London offices during these periods when Coronavirus restrictions were in place. As demonstrated by the emails examined in response to the last request some of the keywords used (party, parties, gatherings and wine) could be used in an alternative business-related context so even when a keyword is present, it does not mean the email relates to what appears to be the focus of [the complainant's] requests. Equally mention of drinks or a quiz does not necessarily mean these events were conducted in person and are likely to have been virtual. Only examining each email would determine whether it is relevant to the request..."

39. BEIS advised the Commissioner that it conducted a sampling exercise to establish the potential information falling in scope of the final refined request dated 29 April 2022.

40. To do so, BEIS explained that a search was carried out of emails which contained any of the keywords specified in the request for each of the six individuals listed (ie Lord Grimstone, Ann Cairns, Nigel Boardman, Sarah Munby, Joanna Whittington and Tom Taylor) during the specific periods specified.

41. The results of the searches were as follows:

- Lord Grimstone or Ann Cairns - no emails containing these keywords were found in the mailboxes;
- Tom Taylor, Nigel Boardman and Joanna Whittington - a small number of emails containing the keywords were located in the mailboxes. They were examined for relevance to the request and found to be out of scope for the following reasons:
 - i. Tom Taylor - one email string was identified including the word "Drinks" which referred to the possibility of "a virtual breakfast or evening drink". BEIS did not consider this was in scope of the request which specifically related to individuals physically attending London offices. The only

reference to “party or parties” related to advice that included terms such as being party to an agreement or parties to a contract. For “gathering” only information related to gathering information or gathering facts for the purpose of advice to ministers was identified.

- ii. Nigel Boardman – only information related to “wine” was identified. However, this was in connection with a trade association seeking to lobby HMG about the bottle size for sparkling wine. BEIS advised the Commissioner that this was out of scope.
 - iii. Joanna Whittington – information was found mentioning ‘quiz’ ‘wine’ and ‘drinks’ in a Director Generals readout mail and separate Communications team email. However, BEIS confirmed to the Commissioner that these related to an event carried out virtually in 2020. One other email contained the word “Santa”. This was an e-Christmas card from Paul Monks, Chief Scientific Adviser and hence, also out of scope.
- Sarah Munby - a search of the Permanent Secretary’s mailbox using the keywords specified was conducted with the following results.
 - i. For the period 15-31st November 2020
 - 1. Party – 393 items
 - 2. Parties – 343 items
 - 3. Santa – 11 items
 - 4. Wine – 20 items
 - 5. Drink – 89 items
 - 6. Drinks – 35 items
 - 7. Gathering – 112 items
 - 8. Quiz – 10 items

Total 1013 emails containing at least one of these keywords.
 - ii. For the period 15-24 December 2020:
 - 1. Party – 263 items

2. Parties – 254 items
3. Santa – 14 items
4. Wine – 35 items
5. Drink – 63 items
6. Drinks – 30 items
7. Gathering – 82 items
8. Quiz – 7 items

Total 748 emails containing at least one of these keywords.

42. BEIS therefore concluded that 1761 emails identified in the Permanent Secretary's mailbox were relevant to the refined request. Each would need to be opened, examined for relevance to the request, and then relevant information extracted. BEIS explained to the Commissioner that:

"the only way to establish whether any of the 1761 emails identified in the Permanent Secretary's mailbox were relevant to this latest request would be to examine each one and then extract any if found to be relevant. A conservative estimate of 3 minutes per email for 1761 emails would be 5283 minutes or 88 hours. This is in addition to the time already taken by each of the six individuals to search their mailboxes for the keywords and the time that would be required to establish which individuals were in attendance in London offices at the time any email was sent."

43. Therefore, BEIS explained to the Commissioner that to identify and extract the relevant information held by BEIS, it estimated it would take 88 hours - plus the additional time for each of the six individuals to search their mailboxes using keywords, and also the additional time required to establish for each email which individuals were in attendance in London offices at the time any email was sent.
44. The Commissioner is not convinced that BEIS's estimate of a blanket three minutes per email is one that can be considered particularly realistic or reasonable. In this case, BEIS has not provided the Commissioner with sufficient details of a timed sampling exercise nor of the specific actions and steps that would need to be undertaken for each email to solidify the estimation of three minutes per email. The Commissioner expects the estimates provided to him to be based on

evidence and this usually involves the public authority conducting an adequate sampling exercise before responding to the Commissioner.

45. The Commissioner recognises that even if the three minute per email cost estimate was halved, this would amount to 44 hours. If the time estimate was reduced to one minute per email, this would amount to just under 30 hours. The Commissioner accepts that, unless the email is a long thread, it is arguable that it may not take one minute per email but significantly less. Nevertheless, the Commissioner accepts that, even if the time estimate was reduced to less than one minute per email, additional time would still need to be added to account for each of the six individuals searching their mailboxes using keywords and to establish for each email which individuals were in attendance in London offices at the time any email was sent. Therefore, this additional work suggests that the request would still be difficult to answer within the cost limit.
46. In conclusion, having reviewed and considered the BEIS's estimate and response to the final refined request dated 29 April 2022, the Commissioner accepts that the situation is more complex, and the work required by BEIS to identify emails in scope of the refined request more involved, than it would initially appear.
47. Whilst the Commissioner considers that BEIS's estimate of three minutes per email may be excessive, given the breadth of the information involved, the manual checking of information that is required due to the keywords used and their multiple meanings, the fact that six people potentially held information, and because additional time was needed to establish for each email which individuals were in attendance in London offices at the time any email was sent, he is satisfied in the circumstances, that the request could not be answered within the cost limit and it would still be far in excess of 24 hours.
48. The Commissioner's view is that BEIS can, therefore, demonstrate reasonably and cogently that to comply with the complainant's request would exceed the appropriate limit. BEIS was therefore entitled to apply section 12(1) FOIA to the complainant's request.

Section 16 – advice and assistance

49. Section 16(1) FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to

good practice contained within the section 45 code of practice³ in providing advice and assistance, it will have complied with section 16(1).

50. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester how their request could be refined or reduced to potentially bring it within the cost limit.
51. The complainant made four requests for information using keywords. Each time BEIS provided them with advice, and they were invited to refine their request.
52. The Commissioner therefore notes that BEIS suggested ways the complainant may wish to consider refining the request several times. Most recently, in relation to the latest refined request, BEIS suggested that the complainant could further reduce the timeframe, keywords and number of officials or maybe exclude the Permanent Secretary. It is noted that the complainant did not refine their request further but rather complained to the Commissioner.
53. The Commissioner considers the advice provided to the complainant were appropriate responses in the circumstances given the keywords provided by the complaint. He agrees with BEIS that "it is difficult to see how [the complainant] could refine [their] request to achieve what [they] appear to be trying to find out while continuing to use such keywords." The Commissioner is therefore satisfied that BEIS met its obligation under section 16 FOIA.

Procedural requirements

Information notice

54. Following the Machinery of Government changes, the Commissioner issued the information notice to DBT but, as explained above, DESNZ provided a response. An annotation will be added to the website version of the information notice to explain that it subsequently transpired that DESNZ was the correct authority and that the information notice should have been served on DESNZ.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

55. 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

56. 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.
57. 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

Sarah O’Cathain
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