

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 July 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested background information relating to the "Civil Service Diversity and Inclusion Strategy: 2022 to 2025"¹ from the Cabinet Office. The Cabinet Office provided some information but withheld the remainder citing sections 35(1) (Formulation of Government policy) and 40(2) (Personal information) of FOIA. The complainant queried the small amount of information that had been considered and the Cabinet Office then applied section 12(1) (Cost of compliance) to the request.
2. The Commissioner's decision is that the Cabinet Office failed to complete its deliberations on the balance of the public interest within a reasonable time and therefore breached section 17(3) of FOIA. He also finds that the Cabinet Office was entitled to rely on section 12(1) and that there was no breach of section 16(1) (Advice and assistance). No steps are required.

¹ <https://www.gov.uk/government/publications/civil-service-diversity-and-inclusion-strategy-2022-to-2025>

Request and response

3. On 22 March 2022, the complainant wrote to the Cabinet Office and requested the following information:

"I would like to request the following under the FOIA please.

Any and all correspondence concerning the "Civil Service Diversity and Inclusion Strategy: 2022 to 2025" (the document eventually published here <https://www.gov.uk/government/publicatio...>) to, from, or including as an addressee, the following people:

- Rt Hon Nigel Adams MP, minister of state without portfolio
- Alex Chisholm, Chief Operating Officer for the Civil Service
- Sarah Healey, Permanent Secretary Department for Digital, Culture, Media and Sport and Senior Sponsor for the Civil Service Diversity and Inclusion Strategy

This should include - but is not limited to - any correspondence mentioning Stonewall, the "diversity champions" scheme, "wokery", the "the London metropolitan bubble", transgender issues, or external assurance and benchmarking organisations.

The time period I am interested in is start of 15 September 2021 till end of February 2022.

Please do not hesitate to contact me if I can clarify any part of this request".

4. On 21 April 2022, the Cabinet Office advised the complainant that it needed more time in which to consider the public interest in disclosure, citing section 35 (Formulation of government policy). It gave an expected date of 20 May 2022 for its response.
5. On 20 May 2022, the Cabinet Office wrote to the complainant again. It further extended the date for providing its response, advising it would be provided by 20 June 2022.
6. On 21 June 2022. The complainant wrote to the Cabinet Office and asked for an internal review into the handling of their request.
7. On 21 June 2022, the Cabinet Office wrote to the complainant again. It further extended the date for providing its response, advising it would be provided by 20 July 2022; it did not refer to their internal review request.
8. On 21 June 2022, the complainant advised that they still required an internal review into the handing of their request.

9. On 24 June 2022, and again on 30 June 2022, the complainant chased an acknowledgement regarding their request for an internal review.
10. On 14 July 2022, the Cabinet Office responded to the request. It disclosed some information, withholding the remainder under sections 35(1) and 40(2) of FOIA. No reference was made to the request for an internal review into the handling of the request.
11. On 21 July 2022, the complainant requested an internal review into the response. They said:
 - “1. In my original request, i asked for "any and all" correspondence concerning this matter across a six month period "to, from, or including as an addressee" four key individuals. I am surprised that such a small number of documents have been disclosed and would like to ask that further checks are carried out to ensure nothing has been missed.
 2. I am not disputing the redactions made under Section 40 to protect personal information. However, I do dispute the need for S35 redactions to the extent that they have been made. Item 1 has been entirely redacted as have attachments to Items 2 and 3, together with the majority of Item 2 itself. This amounts to a non-disclosure, in my view, and is overly generous in its interpretation of what should be redacted to protect policy-making in the public interest, vis a vis what should be disclosed to allow for transparent government in the public interest. This is especially the case because the policy has already been formulated and published, and is currently being implemented by the civil service, so it is no longer in development. The public has a right to know, I believe, the discussions that informed this policy”.
12. The complainant chased a response to their latter request for an internal review on 5 August 2022, 12 August 2022 and 22 August 2022, without receiving any acknowledgement.
13. On 22 September 2022, the Cabinet Office acknowledged that it was undertaking an internal review.
14. The Cabinet Office provided an internal review on 13 October 2022 in which it revised its position, advising that it would exceed the cost limit at section 12 of FOIA to comply with the request. It made no reference to the first request for a review into the handling of the request.

Scope of the case

15. The complainant initially contacted the Commissioner on 9 September 2022, prior to receiving their internal review. On 27 October 2022, having received an internal review, they provided the following grounds of complaint to the Commissioner:

"1. Given the amount of time it took for the Cabinet Office (CO) to complete the review in the first place, it is worrying that it chose to completely revise the justification it provides for failing to disclose the requested information. Abandoning S35, which it cited in its initial refusal, the CO now sites [sic] S12 as a justification. This suggests to me that the initial response was somewhat slapdash and perhaps merely clutched at as a rationale rather than being properly considered and legally justified.

2. I do not accept the arguments given that S12 applies. The CO argues that it "would need to conduct extensive searches to answer your request and many of the required searches would generate large volumes of information not in scope of your request. It would exceed the cost limits of the Act to do this". However, my request was quite precise. Although it did ask for "any and all correspondence" concerning the civil society diversity scheme, I ensured that this was manageable by a) specifying a time period of less than 6 months ("15 September 2021 till end of February 2022") and b) specifying the 3 individuals whose inboxes I am interested in ("Rt Hon Nigel Adams MP, minister of state without portfolio, Alex Chisholm, Chief Operating Officer for the Civil Service and Sarah Healey, Permanent Secretary Department for Digital, Culture, Media and Sport and Senior Sponsor for the Civil Service Diversity and Inclusion Strategy).

This makes one of the CO's arguments (namely that the search would be "complicated" because "Numerous officials potentially involved in work that would have generated information in scope of your request will have left the Cabinet Office") rather redundant.

I also do not accept the reference made by the CO to "the second part of your request" for "correspondence mentioning Stonewall, the "diversity champions" scheme, "wokery", the "the London metropolitan bubble", transgender issues, or external assurance and benchmarking organisations". There was no "second part" of my request. On the contrary, I clearly wrote after the headline request "**This should include - but is not limited to** - any correspondence mentioning Stonewall, the "diversity champions" scheme". This wording was simply in recognition of the fact that, as the CO notes the phrase "Civil Service Diversity and Inclusion

Strategy" will not necessarily be included in any relevant email and so these search terms could also be applied.

Given the three specific people I have named and the five and a half month period I have named, I do not accept that such a search would exceed the £600 cost/time limit and would like the ICO to consider my appeal for the CO to be instructed to conduct the search".

16. The Commissioner will consider timeliness and the application of section 12 below. He has also commented on the handling of the request in "Other matters" at the end of this notice.

Reasons for decision

Section 17 – Public interest test

17. Section 1(1) of FOIA states that: "Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."
18. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
19. Section 17(3) of FOIA states that where a public authority is relying on a qualified exemption, it can have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information.
20. FOIA does not define how long a reasonable time is. The section 45 Code of Practice on request handling² states that "it is best practice for an extension to be for no more than a further 20 working days". This means that the total time spent responding to a request should not exceed 40 working days unless there are exceptional circumstances.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

21. In this case, the total time taken by the Cabinet Office exceeded 40 working days. The Commissioner does not consider there to have been any exceptional circumstances, also noting that there only appeared to be a small amount of information that was initially considered to be in scope. He finds that, by failing to complete its deliberations on the public interest within a reasonable time frame, the Cabinet Office breached section 17(3).

Section 12 – Cost of compliance

22. Section 12(1) 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.

23. When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are:

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it."

24. The Regulations state that the appropriate cost limit is £600 for central government, legislative bodies and the armed forces, and £450 for all other public authorities. The cost limit in this case is £600, which is equivalent to 24 hours' work.

25. Section 12 of FOIA makes it clear that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the Cabinet Office was reasonable; whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, that section 12(1) therefore applied and that it was not obliged to comply with the request.

26. In its submission to the Commissioner the Cabinet Office explained:

"The request in its totality is very broad, but particularly so because of the generic search terms that arise from the request and the period of time it covers (almost six months). Despite an explanation having been provided to the requester within our Internal Review, no attempt has been made to reduce the scope of this broad request.

The request is a catchall, as “any and all” correspondence in the specified inboxes would be captured if containing the generic search terms mentioned in the request, such as “Diversity”, “Inclusion” and “Strategy”, during the six-month period (not to mention “Civil Service”). As explained ... to the complainant, the search terms were unhelpful, as it would not identify all information in scope of the “strategy”. Nor would it identify information in scope of the second part of her request. There are of course definable search terms that officials could use to conduct searches, but the volume and breadth of those searches based on the wording of the request inhibits the ability to conduct effective searches of those terms within cost limits under the Act. Searching “Civil Service” and “Strategy”, “Diversity”, “Inclusion” referred to in the request would be unhelpful due to the unmanageable returns that would be generated. For example, the terms could be highlighted and returned as part of search results due to various official’s email signatures. Furthermore, the phrase “Civil Service Diversity and Inclusion Strategy” used in the request creates the additional issue that not all information would be captured by the above definable search terms.

The burdens of dealing with the request are further exacerbated by the second part of the request which further widens the parameters of the searches. For example, the complainant specifies information regarding “transgender issues”, but not all information in scope may be referred to as such and there is no guarantee that all the information for this specific topic would be captured.

A sample exercise in this case would not be representative of the searches that need to be conducted in this case.

As such, a sampling exercise would not be “sensible and realistic”, and a small sample would not be representative of the whole....

... The Cabinet Office can only provide a speculative estimate for the commissioner to consider and judge in this case.

Speculative estimate:

As a small example of the sort of volumes of emails that would need to be reviewed, when the term “Diversity” we searched from 15 September 2021 to 28 February 2022 in the Cabinet Office’s Permanent Secretary’s (Alex Chisholm’s) office shared mailbox, it produced 2758 amount of emails. A staff member would be required to manually examine the information within each email and relevant attachments identified by the keyword search to determine what falls within scope of the request. We estimate this would take 1.5 minutes to two minutes (or longer for lengthy and

complex emails / attachments) an email meaning that it would take $2758 \times 1.5 = 68.95$ hours. This very small sample represents the amount of work that would be required to answer the question in totality.

As previously noted, these results do not represent a complete search of potentially relevant inboxes.

... a refined request from the complainant may have reduced the cost of the search, but as it stands, the appropriate limit is exceeded and no refined request has been submitted”.

27. The Commissioner understands that the complainant has only asked for searches for three named parties over what would appear to be a manageable time period, ie just under 6 months. However, the Cabinet Office has demonstrated that searching for just one of the suggested terms in one mailbox has revealed a significant number of emails.
28. The Commissioner considers that a search time of 1.5 minutes per email to determine whether or not the email itself, or any attachments, falls within the scope of the request may be slightly excessive. However, were this reduced to 1 minute this would entail 46 hours' work and, even reducing it to 30 seconds per email almost exceeds the time limit for this one small element of the request in isolation.
29. Having considered the detailed estimate provided, the Commissioner finds that it is realistic and reasonable. He therefore accepts that to provide the requested information would exceed the appropriate limit and that section 12(1) has been correctly applied in this case.

Section 16 – advice and assistance

30. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request, so far as it would be reasonable to expect it to do so. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
31. In this case the Cabinet Office has explained to the complainant about how the information is held and why compliance would exceed the limit. It suggested:

“... if you were to amend your request, for example, by significantly reducing the timeframe, search terms or being more specific about the type of information that you are particularly interested in, we

may be able to comply with a future request. We would also recommend not using terms such as 'all information related to / concerning' which can often make requests extremely broad alone".

32. In providing this advice, the Commissioner finds that the Cabinet Office complied with its duties under section 16 of FOIA.

Other matters

33. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review - handling of the request

34. The Commissioner cannot consider the amount of time it takes a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
35. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that internal reviews should be completed as promptly as possible, however, it is noted that the Cabinet Office has not acknowledged or responded to the complainant's request to review the handling of their request.
36. The Commissioner considers that, in failing to conduct an internal review into the handling of the request, the Cabinet Office has not acted in accordance with the section 45 code.

Internal review – revision to original exemptions

37. The complainant has also expressed dissatisfaction with the Cabinet Office's decision to revise its position following internal review.
38. In this regard, the Commissioner notes that this is one of the purposes of conducting a review, ie that a public authority should revisit the request.
39. Based on the additional comments made by the complainant (see paragraph 11), the Cabinet Office revisited its handling of the request. Having done so, in order to respond to the clarified wording, it found that compliance would exceed the cost limit. On this basis, the Commissioner finds that this revised position was entirely plausible.

Right of appeal

40. 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

41. 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.
42. 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

Carolyn Howes
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