

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2023

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

Decision (including any steps ordered)

1. The complainant requested all emails containing three specific words from a particular date and within a particular former employee's email account. The Department for Transport (DfT) refused to comply with the request under section 14 FOIA as it considers it to be vexatious.
2. The Commissioner's decision is that the DfT was not entitled to rely on section 14(1) of FOIA to refuse this request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response to this request not relying upon section 14 FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 25 June 2022 the complainant made the following request for information under FOIA (this is a refined request following two previous requests made on 25 April and 4 June 2022 for similar information but with wider time frames):

"Thank you for notifying me that my narrower search criteria about the Gatwick Drone incident produced 332 results. There clearly is a wealth of information that if released might be very illuminating about the unsolved, costly, and disruptive event in December 2018. I understand that represents a large volume of emails to perform redaction on, hence please find below a further narrowing of the search criteria, please can I have copies of all emails that include all three of the words shown below within the double quotation marks, anywhere in the email body or email subject title, on the specified date? Do not include emails that only contain one of the search words.

Please also notify me how many records the search criteria return.

Date range: 21st Dec 2018

Search word 1: "Gatwick"

Search word 2: "drone"

Search word 3: "police"

Search Scope: The email account of the following former Department for Transport member of staff.

Email Account: [name redacted]

To comply with the application of Section 31(a) of Freedom of Information Act 2000 "Law enforcement", and to favour disclosure, I request that you please ensure that any information that may prejudice the prevention or detection of crime are redacted. This may include for example redacting any details of counter drone technology, or other operational details for responding and preventing drone attacks.

To comply with the application of Section 40(2) of Freedom of Information Act 2000 "Personal Data", and to favour disclosure - I request that you please ensure that any personal information are redacted, so as to remain lawful under the terms of the 1st and 2nd Principles of the Data Protection Act 1998.

It was disappointing to read your letter stating that my Freedom of Information requests about an incident which remains unsatisfactorily unexplained by Authorities may be regarded as "vexatious" by the Department for Transport. Therefore I'd like to remind you that transparency and accountability of public authorities are amongst the most important foundation stones of a true and mature democracy - which disconcertingly the U.K increasingly appears to be falling short of, and which is not going unnoticed.

...

I will make no apologies for exercising my freedom to make a small number of freedom of information requests to Authorities that provide public services on matters where the quality and effectiveness of that service has fallen into doubt, as an engaged and patriotic citizen of the United Kingdom. The only agenda I have is to obtain the truth from our nation's Authorities which to date has not been forthcoming from them in regards to this incident, and it is not good enough.

I look forward to your response with the information I have requested in compliance with the Department for Transport's freedom of Information obligations."

6. On 22 July 2022 the DfT refused to comply with the request citing section 14 FOIA (vexatious requests).
7. The complainant requested an internal review on 6 August 2022. This was provided on 20 October 2022 by the DfT; it upheld the application of section 14 FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 2 December 2022 to complain about the way the request for information had been handled.
9. The Commissioner has considered whether the DfT was correct to refuse the request under section 14 FOIA.

Reasons for decision

10. 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.

11. Section 14(1) of FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

12. The term "vexatious" is not defined within FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
13. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
14. Dransfield also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).
15. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
16. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains:

"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies".
17. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

18. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

Serious purpose and value

19. When considering its response, the DfT acknowledged the value of the request. It recognised that complying with the request would help satisfy the complainant's continued interest in the DfT's response to the disruption at Gatwick airport in December 2018 but considered that there was limited wider public interest. It should also be noted that the Police produced a full report into the incident and that has been released via FOIA on the 'What do they know' website. The DfT has also released information about the Gatwick drones incident in response to some of the complainant's requests, as well as in response to some further requests from another FOI applicant who submitted 13 requests for information similar to the complainant's requests.
20. The DfT considered that there were no immediate public interest arguments apparent as, due the broad nature of the request, it was unclear whether any information about the DfT's response would be revealed. It is also not clear how any relevant information held would serve the intended purpose of the requestor given that the considerable number of previous requests on the same topic do not have appeared to.
21. However, DfT recognises that this may not be immediately obvious and that some of the information may still be of interest to the requester or to the public. However, this was weighed against the level of disruption, irritation and distress that this would cause to individuals in the small Aviation team who were responsible for processing the complainant's numerous requests, and their reduced ability to carry out essential, day to day work whilst dealing with the complainant's requests which the Commissioner will go on to consider.

Burden on the DfT

22. The complainant has submitted nine separate requests to the DfT since April 2021, which all related to the disruption at Gatwick airport in December 2018. The collective burden of dealing with the previous requests and this latest request meant that a tipping point had been reached. These wide-ranging requests were drip fed over a period of 18 months, mainly seeking copies of all emails that the DfT retains (either as a whole, or within the email accounts of named individuals) which

contained one of a selection of keywords. When considering these requests on the whole, DfT believes them to be fishing expeditions.

23. When considering requests seeking copies of all emails retained by the DfT as a whole, there are two approaches that it can take, in general:

1. The first approach entails manually identifying all individuals who could have possibly been involved in the related event and asking them to each manually search their inboxes; or accessing archive mailboxes to perform a manual search. Given that the make up of the Aviation Security team has changed over time, with people leaving and joining, identifying individuals who may hold information related to any of the keywords provided in such a wide search would have required discussions with several senior individuals, many who have moved on to different roles. This would not have provided a complete picture.

- Furthermore, each individual involved would have been required to manually search their inboxes and other electronic files in order to identify files which match the search criteria before being able to advise whether the Department holds the requested information. Any such results would then have to have been reviewed further, to confirm the match and consider any possible exemptions.

- The overall process would have resulted in a significant impact on the Aviation team's limited resource, detracting from the ability of individuals to carry out day to day work while considering how to locate the information and searching for the information.

2. The alternative approach would be to seek the assistance of a team within its Digital Services Directorate who are able to carry out electronic searches of all live and archived accounts for specific keywords. This, however, is not practical. It has been previously advised by the team that, in order to perform such a search, all email accounts need to be added to the search tool manually, which takes up to 20 minutes per account. In addition, the tool needs to be constantly monitored to ensure that the searches complete in full. Finally, while the team search is carried out, the tool is unavailable for other purposes, detracting from the DfT's ability to comply with other statutory requirements such as request for information from the Covid Public Inquiry.

24. Whilst previous requests made by the complainant have asked for all emails retained by the DfT, it acknowledges that this particular request sought emails from only one former member of staff's email accounts. DfT has been able to identify this individual and has carried out a number of searches on the email account as requested. However, it said

that these searches returned a large number of results which would have to be manually reviewed by a member of staff in the Aviation Directorate familiar with the issue. To provide some context, it said that the previous refined request dated 4 June 2022 which covered a four day timeframe had located 332 emails.

25. DfT went on that each result would have required Aviation Directorate staff to review and consider the applicability of any exemptions under the Freedom of Information Act, particularly of Section 40(2)&(3A)(a) (third party personal information) and Section 41(1) (information provided to the DfT in confidence). The emails were assumed to have contained correspondence between the DfT and other Government departments, the police and Gatwick Airport. In line with the ICO's guidance on information provided in confidence, consultations with external stakeholders would have been required for each such result to establish whether they had any views on the release of information provided to the DfT. This would have placed a substantial and grossly oppressive burden on the Domestic Aviation team's limited resources, severely impacting their ability to carry out essential, day to day work.

Breadth of requests

26. DfT said that the complainant regularly asks for a range of information that contain broad key words (for example, 'witness' or 'Gatwick'). The requests appear unfocussed, and in DfT's view were aimed at obtaining information with an aim to then possibly submitting further requests for information. The Department has, on a number of occasions, reached out to the complainant advising him of the difficulties in complying with requests with a wide scope. However, subsequent requests remained broad in nature and indicative of an ongoing fishing expedition.
27. Furthermore, the DfT is aware of similarly wide-ranging requests submitted to other Government departments by the complainant which further evidence a wider fishing expedition. Where the information within scope of these requests concerned the DfT, Aviation team officials have had to review this information before it was released by the other department.

Pattern of requests

28. DfT said that the pattern and type of requests were considered to be indicative of an unknown number of future requests being submitted. In particular, in his request the complainant said, 'There clearly is a wealth of information that if released might be very illuminating'.

Acting in concert

29. The DfT explained that the complainant's requests have often coalesced with those submitted by another requestor, who, within a similar timeframe has made 13 requests for information, similarly wide-ranging, related to the drones incident at Gatwick in 2018. Therefore, the ability of the DfT to handle requests made by the complainant has been put under further strain by this pattern.

Holistic approach

30. The DfT said that cumulatively, the number of requests drip fed by this individual in relation to this issue is no longer sustainable for a small team with limited resource.
31. To comply with previous requests, it has often had to draw on support from wider teams beyond those leading on any drones work and it has an implication for the critical national security policy work that the team is able to deliver.
32. The DfT did consider the complainant's willingness to cooperate and aid in focussing the requests as much as possible; however, despite this the revised request continues to indicate an ongoing fishing expedition.
33. Overall, considering the history, number, pattern and breadth of the complainant's requests, the DfT reached the conclusion that the repeated requests are unlikely to stop, and complying with the requests was taking a disproportionate toll on the Team's resources as well as causing distress and irritation.
34. In previous responses it provided advice and assistance and invited the complainant to change his behaviour by suggesting that he narrows the scope of the requests by asking for specific information. The complainant has chosen not to do so. The DfT subsequently advised the complainant that it may have to consider s14(1) for any future requests on the same or similar subject unless the pattern of requests submitted by him changes. The latest request was then subsequently submitted with a broad scope. Due to this it considered that a tipping point has been reached, rendering this latest request relating to the Gatwick incident vexatious

The Commissioner's view

35. In this case the Commissioner considers that there is serious purpose and value in information on the drone incident at Gatwick airport in December 2018. However he has also taken into account that the police report into this incident has been put into the public domain as well as

other information which has been released by DfT in response to specific FOIA requests made.

36. The Commissioner is aware that the complainant has made nine FOIA requests to DfT over the period of 18 months on this subject matter. The breadth of these requests, some being for all emails held by DfT containing specific key words and some focussing on a particular staff member's email accounts has led to large volumes of information being returned as a result of searches. However, the Commissioner has viewed two previous requests made on 25 April 2022 and 4 June 2022 and these are similar requests as in this case relating to a specific staff member's email account but for wider time frames. This latest request is the complainant making a continued attempt to refine this request. Therefore at least one third of the nine requests made are in actual fact similar requests reducing the time frame to try to reduce the burden imposed upon the DfT to enable it to comply.
37. The Commissioner accepts that wide ranging information on the incident may be held within any emails located which would need to be reviewed to determine whether any exemptions would apply. The complainant acknowledges within the request that certain exemptions may indeed apply. The Commissioner accepts that complying with the previous 4 June 2022 request would have imposed a burden upon DfT as 332 emails were located; these would have needed to be reviewed and third parties consulted regarding redaction. However this work was not undertaken and the complainant refined the request. It is not clear what burden would be imposed by complying with this particular request relating to one staff member's email account on one specific date as DfT has not specified the number of relevant emails held for this date.
38. DfT considers that the request is a fishing expedition. The request is however clearly for information relating to a specific incident, within a specified individual's email account on a specified date and so on the face of it does not appear to be an unfocussed fishing expedition.
39. The DfT has suggested that the complainant's requests amalgamate with other requests made by a separate requester. The Commissioner hasn't been provided with sufficient evidence that these individuals are acting in concert in this case.
40. Taking a holistic view of this request, the Commissioner is satisfied that whilst there is a serious purpose and value to the subject matter of the request, relevant information such as the police report has already been put into the public domain. However given three of the nine requests are extremely similar with developing refinements in an attempt to reduce the burden compliance would impose, on balance the Commissioner

considers that DfT incorrectly categorised this request as vexatious under section 14 FOIA.

41. Although the Commissioner has found section 14 FOIA not to be engaged in this case, he considers complaints on a case by case basis and he might find section 14 FOIA is engaged in any future such complaints.

Right of appeal

42. 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

43. 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.
44. 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.....

Gemma Garvey
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