

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2012

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information in relation to the amount spent on refurbishing Whitehall and No. 10 Downing Street.
2. The Commissioner's decision is that the public authority was not entitled to rely on section 12(2) FOIA to refuse to comply with item 1 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Confirm or deny if it holds information within the scope of item 1 of the request.
 - Issue an accurate response to the complainant in response to item 2 of the request as explained in paragraph 41 below.
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 June 2011, the complainant wrote to public authority and requested information in the following terms:

'Dear Prime Minister's Office,

At the time of huge spending cuts – not least in the NHS – I wonder if you could explain why you have spent £5 million of taxpayer's money on refurbishing 10 Downing Street and 70 Whitehall?

- 1. Could you please give a detailed itemised a breakdown of what the £5 million (of taxpayer's money) was spent on?*
- 2. Could you also advise whether the £5 million (of taxpayer's money) also includes the £28,000, you spent on a new kitchen for your wife at 10 Downing Street, again at taxpayer's expense?*
- 3. Could you further advise how this refurbishment is an example of:*
 - i) Your assertion that "we're all in this together"?*
 - ii) A good use of taxpayer's money?*
6. The public authority responded on 30 August 2011. It explained that to determine if it held any information within the scope of the request would exceed the appropriate limit laid down in the regulations.¹ It could not therefore comply with the request by virtue of section 12 FOIA. The public authority then appeared to suggest that the complainant could refine her request so that it fell within the appropriate limit. In the public authority's words: *'The sum requested is very large and one way to refine it would be to request information for a smaller sum, but even a smaller sum would require us to search many files and would not be sufficient, on its own, to make it possible to comply with your request within the appropriate limit..'*
7. The public authority then provided (by way of explanation in the letter) what it referred to as *'general information on the £5million requested.'* It also provided background information on refurbishment of government properties.
8. On 30 August 2011 the complainant requested a review of the public authority's response above.
9. The public authority wrote back on 20 February 2012. It upheld the original decision and offered the following additional explanation:
'The management and monitoring of this programme [i.e. refurbishments] was at a high level in line with large building

¹ Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (Fees Regulations 2004)

programmes where payments were made on the basis of completion of pre-arranged milestones. In order to provide the details of expenditure you asked for we would have to abstract this information at considerable cost (far in excess of £600) from the higher level information. And even then we might not actually have isolated a true cost in relation to the elements you have asked for..... If you prefer you could modify your request to identify wider areas of the refurbishment programme in which you are interested.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. In addition to disputing the application of section 12 FOIA, she complained about the length of time it took the public authority to respond to her request and to complete its internal review.
12. The public authority clarified (in its submissions to the Commissioner) that it did not consider the following parts of the request were valid requests for information:

'At the time of huge spending cuts – not least in the NHS – I wonder if you could explain why you have spent £5 million of taxpayer's money on refurbishing 10 Downing Street and 70 Whitehall?

3. Could you further advise how this refurbishment is an example of:

i) Your assertion that "we're all in this together"?

iii) A good use of taxpayer's money?

13. Therefore, in addition to the application of section 12 and the timelines of the public authority's responses to the complainant, the Commissioner considered whether the parts of the request quoted above were valid requests for information under FOIA.

Reasons for decision

Section 17(5) FOIA

14. Section 17(5) states:

'A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for

complying with section 1(1), give the applicant a notice stating that fact.'

15. By virtue of 17(1), a public authority has 20 working days to comply with section 1(1). Therefore, by virtue of section 17(5) above, a public authority also has 20 working days to issue a notice relying on section 12 to refuse to comply with a request for information.
16. The request was made on 19 June 2011 and the public authority responded on 30 August 2011. The Commissioner finds the public authority in breach of section 17(5) for issuing a late refusal notice on the basis of section 12. Further commentary on the length of time it took to complete the internal review can be found in the 'Other Matters' section below.

Section 1 and Section 8 FOIA – Valid Requests for Information

17. As mentioned, the public authority did not consider that the following requests were valid requests for information:

At the time of huge spending cuts – not least in the NHS – I wonder if you could explain why you have spent £5 million of taxpayer's money on refurbishing 10 Downing Street and 70 Whitehall?

3. Could you further advise how this refurbishment is an example of:

- i) Your assertion that "we're all in this together"?*
- ii) A good use of taxpayer's money?*

18. Section 1(1)(a) FOIA states:

*'Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds **information of the description specified in the request....'***
[emphasis]

19. By virtue of section 8(1)(c), a person making a request under FOIA is expected to describe the information requested.
20. Therefore, requests for information under FOIA have to fulfil the requirements of section 8 which includes a description of the information requested. The Commissioner believes that it does not require public authorities to answer questions generally, only if they already hold the answers in recorded form. It does not extend to the merits or demerits of any proposal or action unless the answer to any such question is already held in recorded form.

21. In this case, the public authority did appear to hold recorded information in relation to the part of the request for an explanation as to why £5 million was spent refurbishing 70 Whitehall and 10 Downing Street. The background information it provided to the complainant was in the Commissioner's view adequate to answer that part of the request.
22. The Commissioner therefore finds that the request for the reason for spending £5 million refurbishing 70 Whitehall and 10 Downing Street was a valid request for information. Although it was not phrased conventionally, he is satisfied that it fulfils the requirements of section 8. As mentioned, he is also satisfied that the public authority responded to the request.
23. The Commissioner however finds that item 3 of the request above was not a valid request for information as it does not fulfil the requirement in section 8(1)(c) which requires a person to describe the information requested. It does not specifically describe information sought by the complainant. It merely seeks the public authority's opinion or explanation in relation to how the refurbishments could be regarded as evidence or examples of good use of public funds and the assertion by the government that in this period of austerity, all citizens have a contribution to make. Notwithstanding this, the Commissioner is also satisfied that the public authority does not hold recorded information to answer the question posed.

Section 12 FOIA – Item 1

24. Section 12 states:

- (1) *'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'*
- (2) *'Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.'*

25. Section 12(2) therefore applies if the cost of determining whether information is held or not (in compliance with section 1(1)(a)) would exceed the appropriate limit. The public authority submitted it would exceed the appropriate limit to determine if it held information within the scope of item 1 of the request. The key issue for the Commissioner to determine in this case, therefore, is whether confirming or denying whether an 'itemised' breakdown is held would exceed the appropriate limit.

26. As mentioned, the appropriate limit is set by the Fees Regulations 2004. It is set at £600 for central government bodies and is calculated at £25 an hour for time spent carrying out activities to determine if information is held. This equates to 24 hours of work.

27. The public authority explained that in common with other departments, it uses an earned value methodology (EVM) to pay contractor's invoices. EVM consists of the following 5 main steps:

- Agree overall contract
- Agree the work packages each contractor will complete during each stage of work
- At conclusion of each stage, independent quantity surveyors verify that completed works reach the agreed standard
- The value of the completed work is agreed
- The Cabinet Office releases progress payments based on this agreement.

28. Each stage of the process above is verified and agreed by internal and external auditors. In terms of the nature of the searches it would have to conduct to determine if it held the information requested, the public authority offered the following explanation:

'[As can be seen from the process described above] the Cabinet Office receives invoices from contractors covering many different work packages and in respect of many different items that are at different stages. These are managed in the weekly progress meetings we hold with our contractors.....it makes it more difficult to back track to isolate specific items and to do so would require the time of Cabinet Office officials, contractors' staff and staff of the quantity surveyors and external auditors. To do so for every element of every contract on a rolling programme of refurbishment to renovate and modernise two major historic building complexes would be excessively time consuming.....it is likely to take several people working full time weeks, if not months, to carry out such a task.'

29. The public authority explained that as part of its total facilities management contract, 'ETDE/EcovertFM' would have entered into the contracts on its behalf and all invoices for both contracts would have been paid to ETDE/Ecovert. Both contracts were awarded separately to different companies.

30. The Commissioner posed a number of questions to the public authority to better understand the nature of the work that would have to be carried out to comply with the request.
31. The Commissioner queried why the public authority considered the invoices issued by the contractors for different work packages would not be adequate to satisfy the request. He expressed the view that the invoices would presumably itemise the work done at the relevant stage of the refurbishments. He also asked the public authority to provide him with sample invoices issued at different stages of the refurbishments.
32. The public authority provided the following response:

'For both 70W [70 Whitehall] and No 10 [No 10 Downing Street] the invoices provided by ETDE have very little relevant supporting information. The invoices for the contracts are based on valuations of the work carried out during set periods agreed by the two sets of Quantity Surveyors acting on behalf of ETDE/CO and the main contractor. At the beginning of the project it's agreed what work will be carried out and valuations are then agreed on a fortnightly basis. The main contractor will then raise an invoice to ETDE and ETDE will raise a subsequent invoice to CO. As the invoices are based on fortnightly valuations there would be no relevant information apart from identifying the individual project.

...as the invoices are based on valuations it would be very time consuming to identify actual 'items' that would match valuation invoices.'

33. It was also at this point the public authority informed the Commissioner that the refurbishment of the kitchen at No 10 Downing Street was not part of the contract awarded for the refurbishment of No 10.
34. The Commissioner notes that public authority's explanation that the contracts were awarded separately to different companies. In the Commissioner's view, this means that there is no question of the public authority having to go through files or documents to locate invoices specifically relating to the contracts awarded for No 10 and Whitehall.
35. In response to the request for sample invoices relevant to the request, the public authority provided sample invoices for recent works not related to the request. It offered the following explanation for not providing samples relating to the request:

'We are supplying these because invoices are paper records and the older records are stored off-site and it would take longer to obtain copies. These do, however, show the sort of information contained in the invoices we receive for these major works.'

36. The Commissioner understands this to mean that the public authority considers the samples provided sufficiently represent the type of invoices which, according to the public authority, would have to be reviewed to determine if the requested information in item 1 of the request is held.
37. The Commissioner notes that the sample invoices contain a short description of the work or project, an estimate of costs and a payment schedule in some cases. He finds that invoices issued at different stages of the contracts would satisfy the request for an itemised breakdown of the costs and for that reason the public authority should have been able to respond in accordance with section 1(1)(a) FOIA without exceeding the appropriate limit. As the public authority itself explained, at the completion of each stage of the contracts, the work is verified, the value agreed and payment is made for that stage of the contracts.
38. In terms of the nature of the searches the public authority stated it would have to conduct, the Commissioner believes the key question to consider is what constitutes an itemised breakdown. As mentioned above, and taking into account the EVM methodology, he finds that the invoices issued at different stages of the contracts would provide the 'itemised' breakdown sought by the complainant. The Commissioner does not consider the public authority has adequately explained what it considers would constitute an itemised breakdown in the circumstances. It has not clarified whether a breakdown (of works completed) on a more granular level than that contained in the invoices could be held elsewhere. If that is in fact the case, the Commissioner does not consider that the public authority has clearly described the nature of the searches it would have to conduct to determine if an itemised breakdown is actually held elsewhere.
39. The Commissioner believes that if payments were made in relation to the refurbishments for works described in invoices, then the amounts paid out combined with a description of the nature of the work for which the payments were made would be sufficient to satisfy item 1 of the request. If invoices were issued for more granular description of work carried out, then the invoices would have been collated to determine the total cost of the refurbishments. It is therefore highly unlikely in the Commissioner's view that it would exceed the appropriate limit to confirm or deny that such invoices are in fact held.
40. The Commissioner is not persuaded by the public authority's reasons for refusing to comply with item 1 of the request, not least because despite the Commissioner's attempts at obtaining its interpretation of what constitutes an 'itemised' breakdown', it did not satisfactorily clarify its position. He therefore finds that the public authority was not entitled to rely on section 12(2) to refuse to comply with item 1 of the request.

Item 2 of the request – Kitchen refurbishment

41. As mentioned, during the course of the investigation, the public authority revealed that the amount spent on the refurbishments did not include the cost of refurbishing the kitchen at No. 10. It is unclear why the complainant was not informed of this from the outset as it would have satisfied item 2 of the request.

Other matters

42. Although there is no statutory time limit for completing internal reviews, the Commissioner's position is that they should take no longer than 20 working days, and in exceptional circumstances which have been clearly explained to the complainant, the total time taken should not exceed 40 working days. The Commissioner is concerned that the internal review took far longer than 40 working days and he would like to make it clear that this does not represent good practice.

Right of appeal

43. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

44. 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.
45. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF