

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2015

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for a copy of all of the documents it provided to the 'Detainee Inquiry'. The FCO argued that the request was vexatious because complying with it would place a grossly oppressive burden on it. It therefore refused the request on the basis of section 14(1) of FOIA. The Commissioner has decided that the FCO is entitled to refuse the request on this basis.

Request and response

2. The complainant submitted the following request to the FCO on 10 June 2014:

'I would like to request a copy of all documents provided by the FCO to the Detainee Inquiry (Gibson Inquiry). In response to a previous request (your ref. 0202-14), you sent me a copy of a file with title "20060606 Rendition handling submission redacted version", which I understand was provided to the Inquiry. I am now asking for all other documents supplied by the FCO to the Inquiry.'

If any of the information requested is subject to exemption, please redact (via blacking out, rather than via excising) as appropriate, and annotate to show which section(s) of the Act have been applied with regards to each redaction.'

3. The FCO responded to the request on 26 June 2014 and refused to answer it citing sections 14(1) and 14(2) of FOIA because it considered it to be both vexatious and repeated.

4. The complainant contacted the FCO on 1 July 2014 and sought to dispute its reliance on both sections as a basis to refuse his request.
5. The FCO informed him of the outcome of the internal review on 1 August 2014. The FCO withdrew its reliance on section 14(2) but maintained its reliance on section 14(1) on the basis that complying with the request would place an excessive burden on it.

Scope of the case

6. The complainant contacted the Commissioner on 12 November 2014 in order to complain about the FCO's decision to refuse his request on the basis of section 14(1).

Reasons for decision

Section 14(1) – vexatious requests

7. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
8. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
9. In particular the Commissioner accepts that there may cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the FCO in this case.
10. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information
AND

- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **AND**
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

The FCO's position

11. The FCO argued that to identify, isolate and copy the documents sent by the department to the Detainee Inquiry for release would take an estimated 130 hours work. It explained that this was established by sampling two of the 24 lever arch files and 11 ring folders in which the requested documents were stored and on the basis of the following calculations:

- 3,000 (estimated total number of documents) x 1 minute (approximate average time taken to note a document's details and determine whether it would be exempt in its entirety on the basis of any of the exemptions contained at sections 21, 23, 24, 27 or 42 of FOIA or whether it could be disclosed in a redacted form) = 3,000 minutes = 50 hours.
- 1,950 (estimated 65% proportion of documents that could be disclosed in a redacted form) x 5 (estimated average number of pages per document) = 9,750 pages.¹
- 0.5 minutes (approximate time taken to photocopy each page) x 9,750 = 4,875 minutes = 81¼ hours.
- 50 hours + 81¼ hours = 131¼ hours in total.

12. The FCO explained that this calculation did not include the time it would take to identify and clear redactions in order to prepare the estimated 9,750 pages for release. It explained that the documents contained a large proportion of highly classified material distributed throughout, information which would certainly be exempt under section 23 or section 27 of FOIA. The FCO also emphasised that not all of this material originates from within the FCO and permission to release this information (with or without redactions) from the originators would need

¹ The FCO estimated the remaining 35% of documents would be exempt from disclosure in their entirety.

to be sought. Additional hours of work, on top the estimated 131¼ hours, would therefore need to be factored in to allow for this.

The complainant's position

13. The complainant argued that the matter he was pursuing is far from trivial given that it concerned the question of the UK government's involvement in detention and interrogation practices which are of huge political and public interest, which are undoubtedly controversial and in some cases even have been illegal. The complainant emphasised that seeking these documents held by the FCO which are relevant to these matters and passed to the Detainee Inquiry for consideration, is a matter of clear public interest.
14. Given the serious purpose and value of his request in terms of the objective public interest in disclosure of the information being sought, the complainant argued that his request was not vexatious.

The Commissioner's position

15. With regard to the figures provided by the FCO, in the Commissioner's opinion an estimate of one minute to review a document, which on average is going to contain 5 pages, and determine whether it is exempt in its entirety or could be disclosed in a redacted form, is a sensible one. In particular the Commissioner considers the accuracy of this estimate to be sound given that it is based on a sample exercise undertaken by the FCO. Therefore the Commissioner accepts that it would take the FCO 50 hours simply to read and make a preliminary assessment as to whether a document should be withheld in full or whether it could be disclosed in a partially redacted form.
16. The Commissioner is somewhat sceptical that it would take, on average, 30 seconds to photocopy each page. Rather he would envisage that it would be possible to organise a more efficient way to copy the disclosable (or partially disclosable) pages than separately copying each page which is the process the FCO's calculation would appear to be based on. For example, after any redactions had been applied the Commissioner would envisage that a photocopier could be used to automatically copy, in say batches of a hundred pages or so, the documents that were to be disclosed.
17. Nevertheless, the Commissioner recognises that before any copying could actually take place, the FCO would still have to reach a decision as to which exemptions applied to the 9,750 pages that it estimates could be disclosed in a redacted form. As noted above the FCO's estimate of 130 hours did not include this work. Given the sensitivity of the information, the discussions with third parties which would be

necessary, and moreover the sheer volume of documents, the Commissioner accepts that this would clearly be a lengthy process. (For the record, given the nature of the information falling within the request the Commissioner has no hesitation in accepting that, in principle, a significant number of the documents are likely to attract one or more of the exemptions contained in FOIA.) Furthermore, the actual process of redacting this material, either physically by blacking out exempt material, or by using redaction software, would add further time to this process.

18. However, the Commissioner also believes that the complainant's arguments have significant merit; there is clearly a weighty public interest in disclosure of information which would shed light on this controversial issue. Even taking into account the significant amount of information that would be withheld under one or more of the redactions, the Commissioner considers it reasonable to speculate that disclosure of the non-exempt material could increase the transparency around this topic to a notable degree. The Commissioner is also conscious that the FCO does not apparently have an index of the documents that it sent to the Detainee Inquiry and consequently there is no easy or obvious way for him to refine his request in order to be provided with at least some information on this topic.
19. Nevertheless, despite the merits of the case made by the complaint, the Commissioner is persuaded that the FCO can rely on section 14(1) of FOIA to refuse to comply with this request. He has reached this conclusion because the sheer volume of information falling within the scope of the request, and the amount of time it would take to assess and prepare the documents for disclosure after exemptions had been considered and applied, make it difficult conclude that this would place anything but a grossly excessive burden on the FCO.

Right of appeal

20. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

21. 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.
22. 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

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