

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2022

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested information from HM Treasury relating to correspondence sent from or received by a smart phone device provided to Amyas Morse by HM Treasury. HM Treasury refused to comply with the request citing section 12 (cost limit) of the FOIA.
2. The Commissioner's decision is that HM Treasury has failed to demonstrate that section 12(2) is engaged and therefore, is not entitled to rely on this exemption.
3. The Commissioner requires HM Treasury to take the following steps to ensure compliance with the legislation.
 - HM Treasury must issue a fresh response to the request which does not rely on section 12(2) of the FOIA.
4. HM Treasury 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 7 June 2021, the complainant wrote to HM Treasury and requested information in the following terms:

"On 10 September 2019 at 13:18, an unnamed official in HM Treasury sent an email to Amyas Morse. The email contained the following sentence:

"We have been able to set you up on HMT IT so that you will have an email address and a Treasury laptop and smart phone when you come in on Thursday which you will be able to take away with you."

Amyas Morse confirmed by email at 14:30 on the same day that he would be at HM Treasury at 10am on (Thursday) 12 September 2019.

Please provide all incoming (received) and outgoing (sent) messages of any type or format, from the Treasury smart phone which was supplied to Amyas Morse, from the date he collected the phone to the date it was returned to the Treasury."

6. HM Treasury responded on 5 July 2021. It stated that it does not hold information within the scope of the request.
7. On 1 September 2021, the complainant wrote to HM Treasury and requested an internal review.
8. Following an internal, HM Treasury wrote to the complainant on 12 October 2021 and revised its position. HM Treasury stated that it may hold information within the scope of the request. However, it considers that the cost of determining whether the requested information is held would exceed the cost limit. Therefore, it refused to comply with the request citing section 12 (cost limit) of the FOIA as its basis for doing so.

Scope of the case

9. The complainant contacted the Commissioner on 13 October 2021 to complain about the way their request for information had been handled.
10. HM Treasury was not specific in its correspondence with the complainant which subsection of FOIA section 12 it was relying upon. However, as it stated in its 12 October 2021 response that its cost estimate related to the time required to determine whether the requested information was

held the Commissioner has taken this as an indication that HM Treasury was relying upon section 12(2).

11. The Commissioner contacted HM Treasury and invited it to provide representations on its refusal of the complainant's request. Having received no substantive response from HM Treasury even after agreeing to multiple extensions to the time to respond, this decision has been made without input from HM Treasury.
12. The scope of this case and the following analysis is to determine if HM Treasury has correctly cited section 12(2) of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

13. Section 1(1) of FOIA states that:

“(1) 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.”

14. Section 12(1) of the FOIA states that:

“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 cost limit.”

15. Section 12(2) of FOIA states that:

“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.”

16. 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 central government public authorities such as HM Treasury.

17. 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 effectively imposes a time limit of 24 hours for HM Treasury.
18. 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.
19. Where section 12(2) is relied upon, only the first of these bullet points is relevant.
20. A public authority does not have to make a precise calculation of the cost of determining whether the information is held, 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/20017/00041*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".
21. The task for the Commissioner in a section 12(2) matter is to determine whether the public authority made a reasonable estimate of the cost of determining whether the requested information is held.
22. Section 12 is not subject to a public interest test; if the public authority estimates reasonably that complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.

HM Treasury's position

23. In its internal review, HM Treasury stated that it does not hold any information within the scope of the request on the smart phone device that was provided to Amyas Morse whilst he conducted a Loan Charge review. It explained that any information received by the Loan Charge review was destroyed following the completion of the review including information held on the smart phone device provided to Amyas Morse.
24. HM Treasury stated that it may hold information within the scope of the request if Amyas Morse used the smart phone device to contact HM

Treasury staff not seconded to the Loan Charge review. If Amyas Morse did contact staff not seconded to the review, information within the scope of the request may be held by those staff members.

25. HM Treasury explained that it is unable to readily identify individual HM staff members contacted by Amyas Morse that were not seconded to the Loan Charge review. Therefore, in order to determine if information within the scope of the request is held by any HM Treasury staff not seconded to the Loan Charge review, HM Treasury explained that it would have to conduct a large scale search of all information held by HM Treasury staff.
26. HM Treasury explained that once it had located information which had been sent from Amyas Morse, it would then have to determine whether that information was sent from the smart phone device provided to Amyas Morse while conducting the Loan Charge review.
27. HM Treasury considers that the cost of determining whether information within the scope of the request is held by HM Treasury staff not seconded to the Loan charge review would exceed the appropriate limit under the FOIA. Therefore, it has applied section 12 to the request.

The Commissioner's position

28. As is the practice in a case in which the public authority has cited the cost limit under section 12(2) of the FOIA, the Commissioner asked HM Treasury to provide a detailed explanation of its estimate of the time and cost of responding to the request.
29. HM Treasury did not provide the Commissioner with any information to support its position or to explain how it estimated that the cost of determining whether it holds information within the scope of the request would exceed the appropriate limit.
30. The Commissioner considers that HM Treasury has failed to demonstrate how the cost of determining whether it holds information within the scope of the request would exceed the appropriate limit. Therefore, the Commissioner's decision is that HM Treasury is not entitled to rely on section 12(2) of the FOIA to refuse to comply with the request.
31. The Commissioner requires HM Treasury to issue the complainant with a fresh response to their request which does not rely on section 12(2) of the FOIA.

Right of appeal

32. 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

33. 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.
34. 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

Ben Tomes
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