

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2023

Public Authority: Department for Business and Trade

Address: Old Admiralty Building

Admiralty Place

London

SW1A 2DY

Decision (including any steps ordered)

1. The complainant requested information from the Department for Business, Energy and Industrial Strategy¹ ("BEIS") relating to the strategy document 'Working safely during coronavirus (COVID-19)². BEIS refused to comply with the request citing section 12 (cost limit) of FOIA.
2. The Commissioner's decision is that BEIS was entitled to refuse to comply with the request in accordance with section 12(1) of FOIA. The Commissioner also finds that BEIS did not comply with its obligations under section 16 to offer advice and assistance. However, appropriate advice and assistance has been provided via BEIS's response to the Commissioner's investigation.

¹ On 7 February 2023, under a Machinery of Government Change, the Department for Business Energy and Industrial Strategy ("BEIS") began the transition into three separate departments, including the Department for Business and Trade ("DBT"). The request in this decision was made to BEIS, however this notice will be served on DBT as the appropriate authority.

² Per the gov.uk website, the guidance currently available and last updated 10 June 2022, titled 'Reducing the spread of respiratory infections, including COVID-19, in the workplace' replaces the guidance document 'Working safely during coronavirus (COVID-19)' <https://www.gov.uk/guidance/reducing-the-spread-of-respiratory-infections-including-covid-19-in-the-workplace>

3. The Commissioner does not require BEIS to take any steps.

Request and response

4. On 9 December 2022, the complainant made the following request for information to BEIS:

"Dear Sir / Madam,

Freedom of Information Act request regarding Department for Business, Energy & Industrial Strategy document 'Working safely during coronavirus (COVID-19)', 10 July 2020 update
[<https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/homes>]

Section 1.1 point 6 states: You should ensure that steps are taken to avoid people needing to unduly raise their voices to each other. This includes, but is not limited to, refraining from playing music or broadcasts that may encourage shouting, including if played at a volume that makes normal conversation difficult. This is because of the potential for increased risk of transmission, particularly from aerosol transmission.'

Please could you provide electronic copies of any documents, publications, presentations and/or emails which were used to inform the text within this paragraph.

I would be grateful if you would provide your response to this email address: [EMAIL ADDRESS REDACTED]

Many thanks

Yours faithfully"

5. BEIS responded on 23 December 2022. It stated that it held information within the scope of the request, but that the cost of complying with the request would exceed the cost threshold of £600 for central government public authorities. In accordance with this finding, BEIS issued a section 12 refusal notice in reply to the complainant's request for information. In line with its duties at section 16 (advice and assistance) BEIS advised the complainant that they could refine their request by providing the time period covered by the rest.

6. BEIS upheld its initial application of section 12 of FOIA via internal review on 30 January 2023. However, BEIS also stated that through conducting its review it had identified some information³ within scope of the request that was already available in the public domain, and provided this to the complainant.

Scope of the case

7. The complainant contacted the Commissioner on 1 February 2023 to complain about the way their request for information had been handled. The complainant disagrees with BEIS's application of section 12 of FOIA.
8. The complainant stated that their request was already "highly refined and limited in scope", and did not agree that compliance with the request would exceed the £600 limit in place for central government departments.
10. The Commissioner considers the scope of this case to be to determine if BEIS has correctly cited section 12(1) of FOIA in response to the request. The Commissioner has also considered whether BEIS met its obligation to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(1) of FOIA 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" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
12. Section 12(2) of FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds

³ <https://www.gov.uk/government/publications/sage-46-minutes-coronavirus-covid-19-response-9-july-2020/sage-46-minutes-coronavirus-covid-19-response-9-july-2020>

(Paragraph 13, which provides an explanation of the risk of aerosol transmission at the time the guidance was published)

information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. BEIS relied on section 12(1) in this case.

13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for BEIS is £600.
14. 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(1) effectively imposes a time limit of 24 hours for BEIS.
15. 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.
16. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
17. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
18. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

19. As is the practice in a case in which the public authority has informed the complainant that it holds the information, the Commissioner asked BEIS to provide a detailed estimate of the time taken to provide the information falling within the scope of this request.

20. In its submission to the Commissioner BEIS provided the following background context:

"On 11 May 2020, guidance on working safely during the coronavirus (COVID-19) pandemic was published jointly by the Department for Business, Energy and Industrial Strategy (BEIS) and the Health and Safety Executive (HSE), with eight workplace-specific guidance documents that sit under the general guidance being published by BEIS.

To inform this guidance, the Government consulted approximately 250 stakeholders, including businesses, trade unions, industry bodies, devolved administrations of Scotland, Wales and Northern Ireland, as well as Public Health England (PHE) and the Health and Safety Executive (HSE)."

21. BEIS explained that the former team responsible for workplace guidance saved information in two folder locations titled 'Safer Places' and 'BEIS COVID-19 Response'. The total number of items within both folders is 5601. BEIS conducted a search of both locations using terms specified in the request up to the 10 July 2020, when the document update was published.

22. The search of the folder locations returned the following results:

"Voices" 66 documents and 17 emails;
"Shouting" 65 documents and 16 emails;
"Music" 84 documents and 99 emails;
"Broadcast" 49 documents and 83 emails.
"Aerosol" 60 documents 21 emails; and,
"Transmission" 177 documents and 944 emails.

23. BEIS stated that the total number of documents potentially within scope of the request is 1681 and includes Microsoft Word, Excel and PowerPoint documents as well as emails. BEIS estimated that to review each document at 3 minutes per item would take 84.05 hours, which would exceed the 24 hour limit given for central government departments.

24. The Commissioner considers that BEIS estimated reasonably that it would take more than the 24 hours to respond to the request. Even

when reducing the time required to analyse each document to a 1 minute per item, the time required would be 28.01 hours thereby exceeding the prescribed time limit. BEIS was therefore correct to apply section 12(1) of FOIA to the complainant's request.

Section 16(1) – The duty to provide advice and assistance

25. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice⁴ in providing advice and assistance, it will have complied with section 16(1).

26. The Commissioner notes that BEIS advised the complainant to refine the scope of their request by requesting documents from a specific time period. In its submissions to the Commissioner, BEIS explained the following:

"[REDACTED]'s request for any documents, publications, presentations and/or emails which were used to inform this text makes this request very broad. We would need to examine all evidence in the scope of the request prior to publication of the first iteration of this guidance (11 May 2020), up to the date the guidance was updated (10 July 2020). This would have resulted in a considerable number of documents/evidence being examined covering a period of at least three months...

A narrower request, such as a specific timeline or specific documents, could have resulted in fewer numbers of documents potentially falling within the scope of the request and may have allowed the department to complete the search within the appropriate cost limit."

27. In light of the above explanation, the Commissioner considers that the advice and assistance provided to the complainant by BEIS in its original response, while it may be considered to meet the requirements as outlined in the section 45 code of practice⁵, was insufficiently detailed

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁵

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

for the purposes of assisting the complainant in making a suitably refined request. The Commissioner considers that it would be difficult for the complainant to narrow the scope of their request to a specific time period without being sighted of the explanation provided at paragraph 26, and therefore it is likely that any further request made would fall to be refused under section 12(1) as BEIS did not indicate from which time period information could be provided within the appropriate limit. The Commissioner therefore finds that BEIS has not met its obligations at section 16 of FOIA, however, as appropriate advice and assistance has now been provided via its response to the Commissioner's investigation, the Commissioner does not require any steps.

Right of appeal

28. 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

29. 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.
30. 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

Jonathan Slee
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