

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2023

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. In a multipart request, the complainant has requested information about individuals who are, or have been, under investigation by the Serious Fraud Office ('SFO'). The SFO refused the request on the grounds that compliance would exceed the appropriate cost limit, under section 12 of FOIA.
2. The Commissioner's decision is that the SFO was entitled to rely on section 12(1) to refuse the request.
3. The Commissioner requires no steps as a result of this decision.

Background

4. The SFO is a specialist prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption. It is part of the UK criminal justice system covering England, Wales and Northern Ireland.

Request and response

5. On 23 August 2022, the complainant wrote to the SFO and requested information in the following terms:

"The term 'individual' is defined, for the purpose of this request, as a person who has been identified by the SFO as a suspect, has been interviewed and is awaiting a charging decision (unless specified otherwise).

The information requested is:

1. The number of individuals currently under investigation as a suspect
2. Of those individuals currently under investigation as a suspect, how many have been under investigation for up to:
 - 6 months
 - 12 months
 - 18 months
 - 2 years
 - 2 years and 6 months
 - 3 years
 - 3 years and 6 months
 - 4 years
 - 4 years and 6 months
 - 5 years or longer
3. The number of individuals currently under investigation as a suspect for alleged offences which do not extend outside of the jurisdiction
4. Of those individuals currently under investigation as a suspect for offences that do not extend beyond this jurisdiction, how many have been identified as a suspect for up to:
 - 6 months
 - 12 months
 - 18 months

- 2 years
 - 2 years and 6 months
 - 3 years
 - 4 years
 - 4 years and 6 months
 - 5 years or longer
5. For each year between 1 January 2018 and 31 December 2021 (inclusive) please provide the total number of individuals that have:
- a) Active investigations (pending a charging decision); and
 - b) Concluded investigations (those reaching charging decisions or decisions not to charge).
6. For each year between 1 January 2014 and 31 December 2017 (inclusive) please provide the total number of individuals that have:
- a) Active investigations (pending a charging decision); and
 - b) Concluded investigations (those reaching charging decisions or decisions not to charge)."
6. The SFO responded on 20 September 2022. It refused to provide the requested information, citing sections 31(1)(a), (b) and (c) (Law enforcement) of FOIA.
7. The complainant requested an internal review. The SFO provided the outcome on 10 November 2022. It revised its position, saying that it did not hold the requested information in a readily retrievable format and therefore that it did not hold it for the purposes of FOIA. However, by way of assistance, it said that if the information was held, it would be exempt from disclosure under section 31, as previously described.

Scope of the case

8. The complainant contacted the Commissioner on 31 January 2023 to complain about the way their request for information had been handled. They disagreed with the application of section 31 to withhold information. They did not address the SFO's claim not to hold the information.
9. During the Commissioner's investigation, the SFO revised its position. It confirmed that it held the requested information, but said that

compliance with the request would exceed the appropriate cost limit, established under section 12 of FOIA. It also argued that the information was, in any case, exempt in its entirety under section 31, and that the information requested at parts (3) and (4) of the request was also exempt from disclosure under section 30 (Investigations and proceedings) of FOIA.

10. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption, either before the Commissioner or the First-tier Tribunal, and both must consider any such new claims.
11. The analysis below considers whether the SFO was entitled to rely on section 12(1) of FOIA to refuse to comply with the request. Having found that it was, the Commissioner has not gone on to consider its application of sections 30 and 31.

Reasons for decision

Aggregation of requests

12. The request asked to know:
 - (1) the number of individuals currently under investigation as a suspect by the SFO,
 - (2) how long they had been under investigation for,
 - (3) how many were suspects of alleged offences not extending outside the UK, and
 - (4) how long they had been under investigation for.
13. Two final questions, (5) and (6), requested the number of individuals considered by the SFO as suspects in each calendar year from 2014 to 2021.
14. Multiple questions within a single item of correspondence are considered to be separate requests for the purpose of section 12. However, where requests relate to the same overarching theme, a public authority may aggregate two or more separate requests in accordance with the conditions laid out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations"). Any unrelated requests must be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.

15. In the Commissioner's guidance¹ on exceeding the cost limits, he explains that:

"Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.

A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested".

16. Although the SFO did not specifically address aggregation, having considered the wording of the complainant's request, the Commissioner is satisfied that there is an overarching theme. This is because the various parts of the request all refer to individuals under investigation by the SFO. Therefore, the SFO was entitled to aggregate the costs of dealing with each part of the request.

Section 12 – cost of compliance exceeds appropriate limit

17. The SFO refused to comply with the request on the grounds that section 12(1) of FOIA applied.

18. Section 12(1) of FOIA states:

"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."

19. This limit is set in the Fees Regulations at £450 for public authorities such as the SFO. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that the SFO may refuse a request for information if it estimates that it will take longer than 18 hours to comply with it.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

20. In estimating whether complying with a request would exceed the appropriate limit, the Fees Regulations state that a public authority can only take into account the costs it reasonably expects to incur in:
- determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information, or a document containing it.
21. Section 12 states that public authorities are only required to estimate the cost of compliance with a request, and are not required to give a precise calculation. However, the Commissioner considers that the estimate must be reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2007/0004, 30 October 2007) which stated that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".
22. The SFO explained that the requested information was not held in a way which would allow it to be retrieved readily. The activities that would be involved in identifying whether it was held, and in locating, extracting and retrieving the requested information would exceed the cost limit under section 12 of FOIA. It estimated that the total time required to meet the request would not only breach the formal 18 hour limit allowed for under FOIA, but would substantially exceed it.
23. The SFO has explained to the Commissioner:
- "To identify how long an individual suspect has been considered as such, using the definition provided in the request, we would need to establish when each individual was interviewed under PACE [Police and Criminal Evidence Act 1984] conditions and either declassified as a suspect individually, or removed as a suspect because a case was otherwise resolved.
- The first hurdle we encounter is the inconsistent manner in which data relevant to the request is recorded on current active cases. New projects to help SFO cases progress more quickly have recently revised how such data is recorded. There is additional variation in how this is recorded in cases dating back to 2014.
- Of the currently active cases that would fall within the scope of questions one to four, just over one third have been onboarded to a new system for recording case progression. This system, which was introduced over one year ago, has case teams record when individual

suspects are interviewed, when they are declassified as suspects, or alternatively when the case is otherwise resolved. For these cases, collating responsive information would be quick as it is held centrally. For the remaining two thirds of currently active cases, this is not the case.

For these two third current live cases, and 90% of cases that are responsive to questions five and six, a central recording system identifies when individual suspects are interviewed and when a case, as a whole, is resolved. It does not record whether an individual is declassified as a suspect prior to the resolution of a full case. Therefore, information on this system is not responsive to the request.

For each of the cases that have not been onboarded to the new case progression system, we would need to speak to the operational staff associated, if they still work at the SFO, and identify in their records when individuals were declassified as suspects. As SFO cases can run for a number of years, some reaching ten or more, this will be resource intensive for active cases alone. For closed cases, this may require searching archived files manually if operational staff who worked on the case no longer work at the SFO.”

24. It explained that it had conducted a sampling exercise which had established the following:

“To address questions one-to-four, for each of the SFO’s active cases that are not part of the new case progression system...a member of operational staff working on the case would need to confirm whether individuals have been interviewed under PACE through the course of an investigation are still deemed a suspect. Owing to the complexity of SFO casework, we estimate that this would take ninety minutes per case as a minimum – costing £750 in total at a minimum². The span in complexity of SFO case varies considerably, therefore a more complex investigation would take significantly longer for the information to be ascertained and validated.

Further, to address questions about suspects dating back to 2014, the case teams and those of now closed SFO cases would have to search records to identify through which years individual suspects were anticipating charging decisions following a PACE interview. Where a representative of a case team is no longer an employee of the SFO, we would have to secure access to archived folders and search these records for the responsive information. Owing to a greater complexity

² A minimum of 30 hours work

and scope, as well as taking into consideration the approximately 100 cases that fall within the scope of this request, identifying the responsive information would take over two hours for each case—vastly exceeding the cost limit by reaching a minimum of 200 hours of work or £5,000 in total, but almost certainly far exceeding this”.

25. Addressing an observation made by the complainant in their internal review request, that the SFO had previously complied with a similar request for information, the SFO said that the previous request had requested data about active **cases**, which was more straightforward to collate:

“Critically, there is no reference to suspects or individuals within [the previous request], meaning that it is in no way comparable to this request.”

The Commissioner’s decision

26. When dealing with a complaint to him under FOIA, it is not the Commissioner’s role to make a ruling on what information a public authority should hold, or how it should hold it. He is not concerned with how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner’s role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.
27. The Commissioner’s job here is to determine whether the SFO has demonstrated that the work involved in providing the information specified in the request would be likely to exceed 18 hours, and thus the £450 cost limit established under section 12 of FOIA. Between them, the six questions request 25 different pieces of information. As set out above, the Commissioner is satisfied that the SFO was entitled to aggregate the costs of dealing with all parts of the request when calculating its estimate. It is not necessary for the SFO to have complied with as much of the request as it could until the cost limit was reached. It is sufficient for it to show that it has estimated that the work set out in the bullet points in paragraph 20 would exceed 18 hours, and that its estimate is a reasonable one.
28. The SFO has provided an estimate that compliance with the request would require at least 230 hours work, “...but almost certainly far exceeding this”. It has explained that its estimate is derived from a sampling exercise in which it carried out the relevant work.
29. The Commissioner considers this estimate to be credible and is based on a break down of just a portion of the work that would be necessary. The actual costs involved with locating, identifying and extracting relevant

information from all the business areas that would need to be consulted, would be higher, perhaps considerably so.

30. Having considered the search strategy adopted and the specific estimates provided by the SFO as set out above, the Commissioner's conclusion is that the SFO has estimated reasonably and cogently that the costs involved in complying with the request would exceed the £450 limit established by the Fees Regulations.
31. The SFO was therefore entitled to apply section 12(1) of FOIA to refuse to comply with the request.

Section 16 – advice and assistance

32. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so.
33. In general, where section 12(1) is cited, a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
34. In this case, although the SFO did not apply section 12(1) until the Commissioner's investigation, it did explain to the complainant that it was specifically the definition of "individual" employed by the request which caused it to be highly complex to comply with:

"The identification of individual suspects in SFO Cases takes place at various stages throughout the course of an investigation, and case hypotheses are subject to change and evolution – including the persons of interest. Within the life cycle of a case (all of which are subject to regular reviews) it would be impractical, and unreasonable, to collate a full and finite list of potential suspects across all SFO investigations.

If we consider more narrow terms, such as those you have applied, namely '[1] a person who has been identified by the SFO as a suspect, [2] has been interviewed and [3] is awaiting a charging decision', we encounter an initial hurdle in accurately compiling this information.

To address your first point, the decision to firmly 'identify' an individual as a suspect, sits with a number of different members of the SFO, and is not routinely reported to a central place, although it is frequently mooted within a case hypothesis and subject to review while an investigation is evolving.

...

In response to point two, we have taken this to mean PACE interviews...While records of PACE interviews are held centrally, the SFO does not hold a central record of whether those interviewed as suspects on active cases remain as persons of interest for the purposes of law enforcement, and therefore whether they are 'awaiting a charging decision'. It is entirely reasonable that someone who attended a PACE interview as a suspect is no longer deemed a suspect, so any individuals that we consider 'under investigation' for the purposes of our PACE interview records, may no longer be. The suspect status of an individual is contained within the evolving investigation plans of the operational case teams and subject to review as an investigation progresses.

...To reiterate, in order to validate the data requested, the SFO would need to engage every Case Controller in the organisation and attempt to confirm which of those individuals who received PACE interviews as a suspect remain as such and will continue to remain as such."

35. The Commissioner therefore accepts that the SFO tried to explain how the requested information is held on its systems. Although it would have been helpful had it advised the complainant how long it would take to respond to their request, based on the wide-ranging wording of this request, he concludes that there was no easy way for it to suggest how the complainant could refine it such that it would return numerical information on "individuals currently/previously under investigation as a suspect". Even if the timescale specified was reduced, the SFO would encounter the same issue with regard to drilling down into multiple individual cases to identify relevant information, which would likely exceed the appropriate limit by some degree. He therefore finds there was no failure to comply with section 16.

Right of appeal

36. 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

37. 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.
38. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF