

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 July 2023

**Public Authority:** Attorney General's Office  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### **Decision (including any steps ordered)**

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1. The complainant requested information about the use of privately held email accounts by the current Home Secretary, Ms Suella Braverman, while serving as Attorney General.
2. The Attorney General's Office (AGO) refused to comply with the request, citing sections 14(1) (vexatious request) and 12(2) (cost of compliance) of FOIA.
3. The Commissioner's decision is that the AGO has failed to demonstrate that section 14(1) is engaged and is therefore not entitled to rely on this exemption to refuse to comply with the request. Nor has it demonstrated that section 12(2) is engaged and so is not entitled to rely on this exemption to neither confirm nor deny whether it holds the requested information.
4. The Commissioner requires the AGO to take the following step to ensure compliance with the legislation:
  - issue a fresh response to the complainant that does not rely on either section 14(1) or 12(2).
5. The AGO must take this step 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**

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6. On 4 November 2022, the complainant wrote to the AGO and requested information in the following terms:

“Please state the number of occasions that Suella Braverman forwarded emails from her ministerial email account to one of her privately held email accounts, over the term of her office as Attorney General between 10 September 2021 and 6 September 2022”.
7. The AGO acknowledged receipt on 4 November 2022. However, it was not until 5 January 2023, following the Commissioner’s intervention, that the AGO provided its substantive response. It cited section 14(1) (vexatious request) of FOIA, on the basis of the burden of complying with the request.
8. The AGO maintained its position following an internal review.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 10 February 2023 to complain about the way their request for information had been handled. The complainant disputes that the request is vexatious on the grounds of burden.
10. In support of their complaint, they told the Commissioner that the AGO failed to make any meaningful attempt to engage with the points they raised at internal review.
11. During the course of the Commissioner’s investigation, the AGO confirmed its application of section 14(1). It additionally cited section 12(2) (cost of compliance) of FOIA on the basis that it would exceed the appropriate limit to confirm or deny whether the requested information is held.
12. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
13. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.
14. The issues for the Commissioner to determine in this case are:

- whether dealing with the request would impose an unreasonable burden on the AGO; and, if not,
  - whether it would exceed the appropriate limit to confirm or deny whether the requested information is held.
15. The following analysis explains why the Commissioner is not satisfied that the AGO has demonstrated that the request is vexatious (section 14(1)). Nor is he satisfied that the AGO had demonstrated that it is entitled to neither confirm nor deny holding the requested information by virtue of section 12(2).

## Reasons for decision

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### Section 14 vexatious request

16. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
17. The Commissioner accepts that a public authority does not have to comply with vexatious requests. There is also no requirement for the public authority to carry out a public interest test or to confirm or deny whether it holds the requested information.
18. The word “vexatious” is not defined in FOIA. However, as the Commissioner’s guidance on section 14(1)<sup>1</sup> states, it is established that 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.
19. His guidance also recognises that a single request may be vexatious solely on the grounds of burden.
20. In particular, the Commissioner accepts that there may be 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 AGO in this case.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

### **The complainant's view**

21. When requesting an internal review of its handling of the request, the complainant told the AGO he considers it unlikely that section 14(1) applies. In support of that view, the complainant suggested a number of approaches the AGO could have used to identify information within the scope of the request.
22. With respect to its application of section 14(1), the complainant considers that it is "far from clear" that using what the complainant describes as "these obvious search methods" would pose a gross burden on the department.
23. The complainant also provided the AGO with a link to a newspaper article<sup>2</sup> about the personal use of email by Ms Braverman, the then Home Secretary.

### **The AGO's view**

24. The AGO told the complainant that complying with the request would require officials to consider a very large number of communications from the periods when Ms Braverman was Attorney General.
25. In support of its application of section 14(1) in this case, it made reference to two recent decisions by the Information Commissioner's Office, where the use of section 14(1) was upheld. It told the complainant:

"Those [requests for information] are very similar to the nature of your request".
26. The AGO also told the complainant:

"It is not immediately apparent what particular public interest might be served by your request. When balanced against the burden of compliance explained above, we do not consider the public interest to weigh in favour of compliance".
27. Having conducted an internal review, the AGO confirmed that the burden of complying with the request "is such that it means it is vexatious". It provided no further explanation as to how it reached that conclusion.

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<sup>2</sup> [Suella Braverman admits using personal email for work six times | Suella Braverman | The Guardian](#)

28. As is his practice in a case such as this, the Commissioner asked the AGO to explain the basis on which it refused the request. He also asked the AGO to explain the relevance, to this case, of the recent ICO decisions it referred to in its correspondence with the complainant.
29. In its submission, the AGO noted:

"When reliance is had to section 14(1) FOIA, there is no requirement to confirm or deny whether the information sought was held and the AGO did not do so".
30. The AGO also set out, in some detail, the steps taken in reaching the conclusion that the request was vexatious within the meaning of section 14(1) of FOIA.
31. With regard to whether it held details of any personal email accounts held by Ms Braverman, it told the Commissioner:

"...no record of any personal email account(s) or the number of any personal email accounts held, was in the possession of AGO at the point of receipt of the FOIA request such that a search of Ms Braverman's ministerial email account could immediately have been undertaken by reference to any of those personal email address(es) as a search term across the "sent items" folder".
32. It therefore said that it had undertaken a sampling exercise, based on a monthly sample, which enabled a fully informed consideration of the burden of the request to be made. The AGO told the Commissioner:

"Each individual email within the "sent items" folder of Ms Braverman's ministerial account during the monthly sample was reviewed in full and each recipient in the "to"/"cc" fields of the emails identified and subsequently verified. Furthermore, each individual email chain was read in full .. All attachments were also read.... This process ensured the accuracy and integrity of the manual review process".
33. Describing the process undertaken in that sampling exercise as a 'first line review', the AGO told the Commissioner that it took approximately two hours. It considered it was reasonable, therefore, to estimate that it would take approximately 24 hours to complete a first line review of the twelve month period covered by the request.
34. It further explained that a second line review of any material identified would need to be undertaken by a more senior officer, followed by a review and preparation of any information identified for disclosure.
35. It argued that:

"Following the results of the monthly sample exercise, it was considered by AGO that a full manual review within the scope of the FOIA request ... would be "grossly oppressive in terms of the resources and time demanded by compliance so as to be vexatious" within the meaning of s14(1) FOIA".

36. The AGO told the Commissioner that it had also considered whether a less burdensome process could have been undertaken. However, it concluded that no alternative approach was available.
37. It argued that, even if it were to establish an alternative means of satisfying the request, a manual review of any such emails would still be required "to identify personal information and the context of any emails sent to ensure the accuracy of any information provided to the complainant".
38. The AGO also confirmed that it had considered whether the general public interest in this matter outweighed the burden of compliance. Mindful of the date of the request, it told the Commissioner it had concluded:

"...[in the circumstances], the public interest in a further consideration of this matter does not outweigh the burden of compliance particularly in circumstances where AGO Security Policy allowed the use of AGO provided email addresses for reasonable personal use and where Ms Braverman has already acknowledged and apologised for her recent conduct in this sphere".

39. Addressing the Commissioner's question about the relevance of the recent ICO decisions it referred to, the AGO told him it considers that those cases are relevant, as a detailed process of 'review and preparation' would be required before any potential disclosure to the complainant.
40. In that respect, it explained that, while the complainant seeks disclosure of the number of emails potentially sent from Ms Braverman's ministerial email account, the request further requires the AGO to **prepare** any information in the format requested by the complainant. In support of that view the AGO highlighted the following phrase, where the requester stated:

"please send me this information by email to [the complainant's email address] in a machine readable format such as .csv or.xlsx where appropriate".

41. It told the Commissioner that to prepare any emails within the scope of the request in the format requested by the complainant:

"...would require manual inputting of relevant information (addressee, subject matter, date, time etc) into, for example, a spreadsheet. That imposes a considerable burden on the AGO".

42. The AGO further argued that, should Ms Braverman have sent any emails, merely providing the number of emails sent is likely to be misleading or taken out of context without the preparation of an explanation of any figure and its context.
43. It also explained why it considers the two cases cited are relevant in relation to the need to **review** any information in scope of the request. It told the Commissioner, as above, that as the AGO does not hold details of any personal email account(s) that may be held by Ms Braverman, any emails sent from their ministerial email account would need to be reviewed to ensure they do, in fact, belong in a personal capacity, to Ms Braverman.

### **The Commissioner's decision**

44. In this case, the AGO has cited the burden of complying with the request. In order to refuse a single request under section 14(1), the AGO must demonstrate that compliance with the request would impose a grossly oppressive burden.
45. It is a high bar to engage and the Commissioner considers it is most likely to be the case where public authorities can demonstrate:
  - the requester has asked for a substantial volume of information; and
  - there are real concerns about potentially exempt information, which it is able to substantiate, if asked to do so by the Commissioner; and
  - the potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
46. The Commissioner acknowledges that the AGO provided a comprehensive submission, in which it explains its reasons for concluding that complying with the request would impose a grossly oppressive burden.
47. Dealing first with its reference to his two earlier decisions, the Commissioner notes that those cases involved requests for copies of ministerial diaries over a substantial period of time.
48. The Commissioner is mindful of the wording of the request in this case. He considers that the request is clear in its scope, namely "the number of occasions that...".

49. In his view, the cases relating to copies of ministerial diaries are very different in scope to the request under consideration in this case.
50. Nor does he accept the AGO's argument that disclosure of the number of emails potentially sent from Ms Braverman's ministerial email account "is not the end of the FOIA request".
51. Regarding the phrase highlighted by the AGO in relation to the format of the information to be provided, in the Commissioner's view, the wording is in accordance with his guidance to members of the public on how to write an effective request for information<sup>3</sup>.
52. In that guidance, which includes a template letter, the Commissioner says that it is optional for the requester to specify whether they have a preferred format to receive the information.
53. The Commissioner recognises that section 14(1) may apply if a significant burden is imposed on a public authority due to redacting information, consulting third parties, applying exemptions and preparing the information for publication for which it cannot claim in section 12.
54. However, having reviewed the AGO's submissions and estimates, the Commissioner does not consider that all of the activities set out in its estimate are relevant to the consideration of this case. For example, he considers that conducting a full manual review of the content of any emails within the scope of the request is more than is needed to satisfy the request, which is for only the number of emails sent. Nor does he consider that the AGO has explained why it would be onerous to prepare any explanation that may be required to accompany any potential disclosure.
55. Having taken all the above into account, the Commissioner is not satisfied that the AGO has demonstrated that dealing with the request would impose an unreasonable burden.
56. It follows that section 14(1) does not apply.
57. The Commissioner has next considered the AGO's application of section 12(2).

## **Section 12 cost of compliance**

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<sup>3</sup> <https://ico.org.uk/for-the-public/official-information/how-to-write-an-effective-request-for-information/>



58. Section 12(2) of FOIA provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
59. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
60. The "appropriate limit" is set in the Fees Regulations at £600 for central government, legislative bodies, and the armed forces and at £450 for all other public authorities. Therefore, the "appropriate limit" for the AGO is £600.
61. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, effectively imposing a time limit of 24 hours for the AGO.
62. 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 activities:
  - 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.
63. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. 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".
64. A realistic estimate is one based on the time it would take to obtain the requested information, if held, from the relevant records or files as they existed at the time of the request, or up to the date for statutory compliance with the request.

### **The AGO's position**

65. The AGO relied on similar arguments to those put forward in relation to section 14(1). With reference to its application of section 12(2), it told the Commissioner:

“...to confirm to the complainant whether the AGO in fact holds the information requested cannot be accurately provided to the complainant without first completing the full manual search process to the timeframes as explained above”.

### **The Commissioner's view**

66. The question for the Commissioner here is whether the cost estimate provided by the AGO is reasonable. If it is, then section 12(2) is engaged and the AGO is not obliged to confirm or deny whether the requested information was held.
67. The Commissioner has considered the explanations put forward by the AGO and the factors it has taken into account when estimating that it would exceed the cost limit to determine whether or not it holds the requested information.
68. Based on that information, and mindful that the request explicitly asks for the number of emails sent, the Commissioner is not satisfied that the AGO has demonstrated that it would exceed the appropriate limit of 24 hours to confirm or deny whether it holds information within the scope of the request.
69. The Commissioner therefore concludes that the AGO has failed to demonstrate that section 12(2) is engaged.

## Right of appeal

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70. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. 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.

72. 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 .....**

**Laura Tomkinson  
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