

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2023

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DFX

Decision (including any steps ordered)

1. The complainant has requested information relating to certificates issued under section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992.
2. The Home Office relied on section 12(2) (cost limit) of FOIA to refuse the request.
3. The Commissioner's decision is that the Home Office was entitled to refuse to comply with the request in accordance with section 12(2).
4. The Commissioner finds that the Home Office has complied with its obligations under section 16 of FOIA to offer advice and assistance.
5. The Commissioner does not require further steps.

Request and response

6. On 30 May 2023, the complainant made the following request:

"I am writing to request information under the Freedom of Information Act 2000.

Regarding certificates issued under section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992. I am requesting:

Any guidance or policy documents on the issuance or usage of such certificates, applying to the Home Office or other bodies who you might issue certificate for, e.g., the Investigatory Powers Tribunal. For example, I presume this to include how the power to issue such a certificate is or should be delegated.”

7. The Home Office responded on 27 June 2023, refusing the request on the basis of the cost exemption in section 12(2) of FOIA. This decision was upheld in an internal review dated 26 July 2023.

Scope of the case

8. The complainant contacted the Commissioner on 26 July 2023 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the Home Office has correctly cited section 12(2) of FOIA. The Commissioner has also considered whether the Home Office met its obligations to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

10. Section 12 of FOIA states that 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”).
11. 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 information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
12. 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.
13. 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. The appropriate limit for the Home Office 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 effectively imposes a time limit of 24 hours for the Home Office.
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”.
17. The task for the Commissioner here is to determine whether the cost estimate by the Home Office was reasonable. If it was, then section 12(2) was engaged, and the Home Office was not obliged to confirm or deny whether the requested information was held.
18. 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. It is worth noting that if one part of a request triggers the section 12 exemption, then that will apply to the entirety of the request and there is no requirement for the Commissioner to consider any other exemptions cited by the public authority.
19. 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?

20. As is the practice in a case in which the public authority has cited the cost limit under section 12(2) of FOIA, the Commissioner expects the public authority to provide a detailed estimate of the time or cost required to provide the information falling within the scope of this request.
21. In its submission to the Commissioner, the Home Office explained that because the request was extremely broad and very vague in its nature, it made the search for information extraordinarily complex. In particular, there were three elements which made the request burdensome.
22. The first element was the range of the search – some 31 years since section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the “1992 Act”) came into force. Due to the range of the request, searches would have to be made of both digital and paper records across existing and historic directorates, with the searches of paper records being manual, to find policy and guidance documents. In addition, the request refers to “any” guidance or policy documents which would include historic as well as existing guidance or policies.
23. The second element was the subject matter of the request. Section 275 of the 1992 Act is concerned with exemptions from industrial action on the basis of national security. National security is not limited to one directorate within the Home Office and so searches would have to be made across multiple directorates.
24. The third element was the definition of “national security” and “certificate.” Roles which are critical to national security are constantly evolving and are not defined in the 1992 Act. Neither is “certificate.” The 1992 Act states that “a document purporting to be such a certificate shall, unless the contrary is proved, be deemed to be such a certificate”. The Home Office explained that because of this, there might not be guidance or a policy in relation to section 275 “certificates” which was strictly marked as such. Therefore, to locate, assess and identify documents in scope across multiple directorates, where it might not be clear whether the roles are critical to national security or whether documents are “certificates” under the 1992 Act, is problematic.
25. The Home Office confirmed that a sampling exercise had been conducted by one team in one directorate using the search term “certificate.” This produced 4176 results from one inbox over a period of 10 years. The Home Office then explained that the results would then need to be scrutinised to determine whether any information was in scope and even if this took only one minute per email, this would take over 60 hours to complete.

26. The Commissioner finds that the Home Office's sampling exercise does not appear to have been properly framed, i.e., the use of search terms such as "section 275", "Trade Union and Labour Relations Act" and "national security" would seem an obvious starting point.
27. However, whilst the Home Office sampling exercise does not appear to have been adequately targeted, the Commissioner accepts that the breadth of the records that would need to be searched and the vagueness of the request mean that the Home Office has estimated reasonably that to confirm or deny whether it holds any information within the scope of the complainant's request would exceed the appropriate cost limit. The Home Office was therefore correct to apply section 12(2) of FOIA to the complainant's request.

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

28. 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 practice¹ in providing advice and assistance, it will have complied with section 16(1).
29. The Commissioner notes that in its initial response and in its internal review response, the Home Office has advised the complainant to revise the request by referring to a specific timescale but that this might not necessarily result in the Home Office being able to comply with the request within the cost limit and that other exemptions may apply.
30. The Commissioner is satisfied that the Home Office has met its obligations under section 16 of FOIA as regards the request.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

31. 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

32. 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.
33. 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

Roger Cawthorne
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