

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 February 2024

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

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 Cabinet Office initially relied on sections 23(5) (security bodies) and 24(2) (national security) of FOIA to neither confirm nor deny that it held the information. At internal review, it amended its position to rely on section 12(2) (cost limit) of FOIA to refuse the request.
3. The Commissioner's decision is that the Cabinet Office was entitled to refuse to comply with the request in accordance with section 12(2). The Commissioner also finds that the Cabinet Office has complied with its obligations under section 16 of FOIA to offer advice and assistance.
4. The Commissioner does not require further steps.

Request and response

5. 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:

1. Any guidance or policy documents on the issuance or usage of such certificates, applying to the Cabinet Office or to other Government departments. For example, I would presume this to include how the power to issue such a certificate is or should be delegated.”
6. The Cabinet Office responded on 27 June 2023, neither confirming nor denying that it held the information, on the basis of sections 23(5) and 24(2) of FOIA.
7. At internal review on 18 August 2023, the Cabinet Office revised its position to rely on the cost exemption in section 12(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 18 August 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 Cabinet Office has correctly cited section 12(2) of FOIA. The Commissioner has also considered whether the Cabinet Office met its obligations to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

10. Section 12 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”).
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 Cabinet 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 Cabinet 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 Cabinet Office was reasonable. If it was, then section 12(2) was engaged, and the Cabinet 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. The Commissioner has received arguments from the complainant in support of their complaint. A key point they made was that:

“their record system should allow searching for information across all folders in the system, and I would be extremely surprised if the cabinet office would have to manually search multiple folders for the information.

Overall, the request is a very simple request for very specific guidance and policy. This should be easily identified with relevant queries in their systems. It seems unlikely that the cabinet office would store guidance and policy in a way such that it would take over 3.5 working days to find the relevant guidance.”

22. The Commissioner has also considered the submission from the Cabinet Office about its handling of this request.

23. In its submission to the Commissioner, the Cabinet Office explained that while there were three business units that would need to search their records for potential information falling in scope of the request, it was most likely that the information, if held, would be held by one particular business unit – the Cabinet Office Public Records and Archives Team (COPRA).

24. In relation to COPRA, the Cabinet Office argued that there were two main elements which made the complainant’s request exceed the cost limit.

25. The first element was that the complainant did not specify a timeframe for the request. It noted that it is 31 years since section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the “1992 Act”) came into force. Therefore, the Cabinet Office considered that it would be reasonable that guidance may have been issued prior to the 1992 Act coming into effect and that any such guidance may also have been updated at any time since. It considered that a reasonable time frame for the search would, therefore, be from 1990 to the date the request was made, which would exceed 30 years. In addition, the Commissioner notes that the request refers to “any” guidance or policy

documents which would include historic as well as existing guidance or policies.

26. The second element was that there was a need to manually search through relevant paper records held within the COPRA business unit to find the requested policy and guidance documents (if any). The Cabinet Office advised the Commissioner that it had estimated that 700 paper files held by the COPRA business unit would need to be searched to identify if any information in scope of the request was held.

27. The Cabinet Office confirmed that a sampling exercise had been conducted by the relevant business unit. It said:

“Given that 700 paper files would need to be searched for information in scope of the request, it was reasonable to conclude that searching for the information requested would exceed the appropriate cost limit under the Act. These files tend to be large, and we would estimate that a search of each file would take a minimum of 30 minutes - though in most cases much longer. A low estimate for the time it would take to search these files is 350 hours or 15 times the appropriate limit.”

28. In its submission to the Commissioner that Cabinet Office did provide the Commissioner with an estimate of how many pages would be contained in each individual paper file. The Commissioner accepts from the information provided that each of the paper files concerned contain a substantial number of pages.

29. The Cabinet Office also explained that:

“NCND was considered appropriate for this request. However, as part of the Internal Review, it was considered more appropriate (for the reasons explained above) that the request be refused under section 12(2) as to confirm or deny if information is held would itself exceed the cost limit of the Act. The revised response should not be taken to mean information is or is not held.”

30. In conclusion, having reviewed and considered the Cabinet Office’s estimate and responses, the Commissioner accepts that the situation is more complex, and the work required by the Cabinet Office more involved, than it would initially appear. Given the breadth of the timeframe involved and the manual checking of very large paper files that is required, he is satisfied in the circumstances, that the request will be very difficult to answer within the cost limit. Even if the cost estimate was reduced by half to 175 hours it would still far exceed the cost limit.

31. The Commissioner accepts that the Cabinet Office has estimated reasonably and cogently that to confirm or deny whether it holds any information within the scope of the complainant's request would exceed the appropriate cost limit of 24 hours. The Cabinet Office was therefore correct to apply section 12(2) of FOIA to the complainant's request.
32. The Commissioner also notes that his decision in this case is consistent with his previous decision relating to the complainant's same request to the Home Office – see IC-247733-H2V2¹.

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

33. 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 practice² in providing advice and assistance, it will have complied with section 16(1).
34. The Commissioner notes that in its internal review response, the Cabinet Office advised the complainant to revise the request by narrowing it down to make it more specific. For example, it encouraged the complainant to provide a direct example of a certificate being used or to specify a business unit(s) or department that may have issued it. If this information was provided, the Cabinet Office may be able to comply with the request within the cost limit.
35. The Commissioner considers these were appropriate responses in the circumstances given the broad nature and lengthy timeframe of the original request.
36. The Commissioner is satisfied that the Cabinet Office has met its obligations under section 16 of FOIA as regards the request.

Other matters

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027381/ic-247733-h2v2.pdf>

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

37. As regards the internal review response, the complainant also complains that the Cabinet Office was late in responding. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the Cabinet Office took 38 working days to complete its internal review response, just within 40 working days. The Commissioner does note, however, that the Cabinet Office offered its apologies in its internal review response for the delay experienced by the complainant.

Right of appeal

38. 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

39. 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.
40. 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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