

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 May 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about the "Windrush generation" from the Home Office (the "HO"). The HO would neither confirm nor deny whether it held the requested information, citing the cost limit at section 12(2) of the FOIA as its reason for doing so.
2. The Commissioner's decision is that the HO was entitled to rely on section 12(2) to neither confirm nor deny whether it held the requested information. She also finds that the HO breached section 10(1) of the FOIA by failing to respond to the request within the statutory time limit and section 16(1) by failing to give adequate advice and assistance.
3. No steps are required.

Background

4. There is much information available online about the "Windrush generation", and many associated media articles.
5. According to Hansard¹:

"Between 1948 and 1973, nearly 600,000 Commonwealth citizens came to live and work in the UK – with the right to remain"

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2017/inquiry19/>

indefinitely. This included the Windrush generation, named after the hundreds of people who travelled from the Caribbean to England on HMT Empire Windrush in 1948. In 1973, UK immigration law changed: Commonwealth citizens were no longer allowed stay in the UK indefinitely and were instead granted temporary residence. However, many immigrants arriving before 1973 had not been given any documentation and the Home Office had kept no records to confirm these individuals' immigration status.

The last ten years have seen the introduction of the government's "compliant environment": only those migrants who are eligible have the right to live, work and access services like benefits and bank accounts in the UK. However, in early 2018, media reports began to grow about members of the Windrush generation being denied access to public services, detained in the UK or at the border, or removed from, and refused re-entry to, the UK. In April 2018, the government acknowledged that they had been treated unfairly.

... The Home Office has set up a taskforce to help resolve the Windrush generation's immigration status and is setting up a compensation scheme. At the end of September 2018, it had issued documents to 2,658 people to confirm their status. However, the NAO [National Audit Office] report also found that the Department still does not know how many members of the Windrush generation have been wrongly impacted by policies designed to target illegal migrants, and the extent of the problems they have faced".

6. The House of Commons Committee of Public Accounts has recently published a report² entitled "Windrush generation and the Home Office" about what has been termed the "Windrush scandal".

Request and response

7. On 22 April 2018 the complainant wrote to the HO and requested information in the following terms:

"Please note that I am only interested in information which was generated between the period 1 January 2009 to 1 December 2010.

² <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/1518/1518.pdf>

Please note my request refers to the issue of boarding cards and landing papers and ID papers held by members of the so called Windrush generation on their arrival in the UK.

You will be aware that this issued has dominated news media in the last few days.

1. During the aforementioned period did the Home Secretary exchange communications including emails with the Head of the UK border agency. Please note that I am only interested in that correspondence and communication which relates in any way to the issue of boarding cards and or landing papers for immigrants and arrivals who came to the UK from The Caribbean before 1980. These arrivals would now frequently be referred to as members of the Windrush Generation. This information will include but not be limited to plans by The Government(s) to destroy some or all of the documentation.

2. If the answer is yes can you please provide copies of this correspondence and communication including emails.

3. During the aforementioned period did the Home Secretary and the Head of the UK Border speak by telephone about the issuing of boarding cards and landing papers for immigrants and arrivals who came to the UK from the Caribbean before 1980. If the answer is yes can you please provide copies of any sound recordings held or the transcripts of any conversation.

Please redact the name and personal details of any individual arrivals / migrants mentioned in the documents”.

8. On the same day the complainant added:

"4. If relevant documentation has subsequently been destroyed can you please provide the following details. In the case of each destroyed document can you please provide a title and a brief outline of its contents. In the case of each destroyed document can you state when it was destroyed and why. If the destroyed document(s) continues to be held in another form can you please provide a copy of the document(s)".

9. On 26 April 2018 the complainant further added:

"Can you replace each and every reference to 1980 in the request with 1973.

I think the second date is more pertinent to the current debate about The Windrush Generation”.

10. On 8 November 2018 the HO responded. It refused to confirm or deny whether it held the requested information citing the cost limit at section 12(2) of the FOIA. In doing so it amalgamated parts (1) to (3) and assessed part (4) separately, applying 12(2) to each.
11. The complainant requested an internal review on 14 November 2018.
12. Following an internal review the HO wrote to the complainant on 20 February 2019; it maintained its position.

Scope of the case

13. The complainant contacted the Commissioner on 21 February 2019 to complain about the way his request for information had been handled. He asked her to consider timeliness and also whether the HO was entitled to rely on section 12(2) as a basis for refusing to comply with the request, saying:

"I do not accept that processing the request will breach the time and cost limits laid down by the Act. I am only seeking the correspondence and communication between a handful of individuals on a very specific issue... I believe that political considerations have been allowed to influence the department's handling of the request".

14. The Commissioner will consider timeliness and the application of section 12(2) to the request below.

Reasons for decision

Section 10 – time for compliance

15. Section 10(1) of the FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1)(a) initially requires a public authority in receipt of a request to confirm whether it holds the requested information.
16. The request was submitted between 22 and 26 April 2018 and the complainant did not receive a response until 8 November 2018.
17. By way of explanation, the HO advised the Commissioner:

"The delay was primarily down to those teams involved urgently having to work on a very large number of critical Windrush related work streams. The Department's initial attention was, of course, primarily focussed on providing urgent advice, assistance and

support for those citizens effected by it. That said, the Department regrets the unacceptable amount of time it took to respond to [the complainant]”.

18. The Commissioner finds that the HO has breached section 10(1) by failing to comply with section 1(1)(a) within the statutory time period.

Section 12 – cost of compliance

19. Section 12(2) 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. 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.
20. The appropriate limit is set at £600 for the HO by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations).
21. The fees regulations also provide that a cost estimate must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours, and specify the tasks that can be taken into account when forming a cost estimate as follows:
- 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.
22. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate by the HO was reasonable. If it was, then section 12(2) was engaged and the HO was not obliged to confirm or deny whether the requested information was held.

Aggregation of requests

23. Multiple requests within a single item of correspondence are considered to be separate requests for the purpose of section 12. In this case that means that there are four parts to be considered.
24. If they relate to the same overarching theme, public authorities can aggregate two or more separate requests in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests

should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.

25. According to the Commissioner's guidance³:

"Regulation 5(2) of the Fees Regulations requires that the requests which are to be 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".

26. Regarding its consideration of the request as two parts, the HO explained to the Commissioner:

"The request in its entirety would fall on 12(2) however, as parts 1-3 deal with existing information and part 4 with documentation that may have been destroyed, there was a distinction made between the type of information requested. The response was intended ... to help the requestor understand that locating existing documents and disposed of documents would be two different exercises, both of which even if undertaken independently of each other would exceed the cost threshold. The Department accepts that this could have been made clearer".

27. Based on its explanation, the Commissioner is satisfied that the HO was entitled to consider the four parts requests as two separate requests for the purposes of section 12(2).

Parts 1 – 3 of the request

28. In its refusal notice to the complainant the HO explained:

"To comply with part 1, 2 and 3 of your request would require a review of all correspondence and records of telephone conversations during 1 January 2009 to 1 December 2010, to identify any correspondence and communications between the Home Secretary and the Head of the UK border agency that may

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

relate 'in any way' to immigrants and arrivals who came to the UK from the Caribbean in 1973. We are unable to comply with it as the cost limit would be exceeded simply by the cost of assessing whether the information is held ...".

29. At internal review it further explained:

"... during the period in question there have been three Home Secretaries. We have interpreted the reference to the head of UKBA to mean Lin Homer, who was chief executive of the UKBA from 2008 to 2011. Our view is that to comply with the request would mean identifying what correspondence was sent by each former Home Secretary, or by members of their Private Office on behalf of the Home Secretary, that is held in electronic or hard-copy format for the requested period. We would then need to review all such correspondence that mentions 'in any way' the issue of landing cards and/or immigrants and arrivals who came to the UK from the Caribbean before 1980. We estimate that this exercise would clearly exceed the cost limit set out under section 12(2)".

Part 4 of the request

30. In its refusal notice to the complainant the HO explained:

"We are also unable to comply with part 4 of your request, for details of any documents that may have been destroyed, that may fall within the scope of your request, as again the cost limit would be exceeded simply by the cost of assessing whether the information is held ..."

Would confirmation or denial exceed the appropriate limit?

31. In response to the Commissioner's enquiries the HO provided more detailed reasons which covered both elements of the request. The arguments provided below therefore apply to both parts.

32. The HO did not agree with the complainant's view that this is simply a request for correspondence and communication between a handful of people on a very specific issue. Rather it considered it to be a 'catch-all' request as it is for:

"... any correspondence and communications (of any kind) that relates 'in any way' to the issue of landing cards or boarding papers, of people who came to the UK from the Caribbean before 1980; where the communications were exchanged between multiple former Home Secretaries and a former Head of UKBA, during a 23 month period, approx. 9-10 years ago".

It added that it did not consider the request to be a reasonable one:

"... because of the multiple 'any' elements within the request".

33. The HO further explained that, in terms of the number of individuals involved, as well as the former Home Secretaries themselves, it would need to identify the individuals that worked in their respective Private Offices as they may have corresponded or communicated with other parties on behalf of the respective Home Secretary. In this respect the HO advised:

"The number of staff (estimated based on current Private Office staffing levels) would be in the region of 7-8 staff at any one time, with staff possibly changing during the individual Home Secretaries' tenure. An estimate would be somewhere in the region of 21-24 Private Office staff (in post circa. 9 years ago)".

34. In respect of Lin Homer at UKBA the HO explained that it:

"... doesn't easily know who might have handled correspondence on behalf of Ms Homer and would need to investigate this before we could provide an estimate of the number of staff..."

35. The HO advised that any search would involve checking electronic and hard copy records, adding that some of its hard copy files are held securely off site by a third party contractor. As part of this contract, it advised that there is a charge of £1.26 per file to have each file returned and therefore that retrieval of any relevant documents would incur further costs. It advised that: *"Exact numbers of files held off site would not be known with any certainty until work to gather the information commenced"*.

36. The HO also provided these further details regarding how relevant information may be retained and the searches that would be necessary:

"In terms of storage, from May 2010 Private Office will have kept records of submissions and comments from officials and Ministers. Up to that point the Department was reliant on policy areas retaining full and accurate records. Private Office would need to undertake a search of Private Office folders using relevant terms for May to Dec 2010. Before May 2010 (and to a lesser extent afterwards) business areas kept their own records. UKBA would have been using a local drive (f:\drive); however, individuals may also have kept business information on personal drives and in email inboxes. UKBA information management was not managed by the core Home Office Information Management Service and business areas would need to carry out individual searches across their shared folders (although information might also have been in personal inboxes).

*In terms of the time/cost providing an estimate of the above activities, the issue is that the requestor is asking for "correspondence and communication which relates **in any way** to the issue of boarding cards and or landing papers for immigrants and arrivals who came to the UK from The Caribbean before 1980... This information will include but not be limited to plans by the Government(s) to destroy some or all of the documentation."*

During the period covered by the request, correspondence and communications would not necessarily have been referenced in such a way as to be easily identifiable as being related specifically to the issue of boarding cards and/or landing papers for immigrants and arrivals who came to the UK from the Caribbean before 1980. Whilst, as above, Private Office would need to undertake a search of Private Office folders using relevant terms for May to Dec 2010, prior to this we would need to perform a search on shared drives, personal drives and email accounts. Correspondence and communications between those above may have been shared with officials and saved in alternative locations or email accounts; and to identify that which relates in any way to the topic of the request could involve searches for a range of keywords (e.g. Caribbean, Commonwealth, Windrush, Landing Card, Boarding Cards) or other descriptor (e.g. document disposal, retention, storage cost).

In an attempt to estimate the time/cost involved in searching for specific terms or keywords, a policy area undertook a search of the current S:Drive shared folders using the search term 'Caribbean'. After 60 minutes the search was still processing. As we do not know where the information might be stored locally, we would potentially need to search multiple drives for communications that reference Home Secretaries and Lin Homer; and (depending on how the information was stored) multiple search terms.

e.g. S:Drive x 1 search term = 60 minutes. If we estimate that the time to perform the search is equivalent to 60 mins per search term and multiply that by the search terms we expect to use (e.g. 1. Commonwealth, 2. Windrush, 3. Landing Card, 4. Boarding Card, 5. 1980, 6. Immigration Act 1981, 7. document disposal, 8. Retention, 9. Storage, 10. Homer, etc.) performing a search on a single shared drive would be equiv. to 10+ hours. A conservative estimate of 30 mins for each of the former PO [Private Office] staff (20+) to perform a personal folder search per keyword would give an aggregated total of circa. 10 hours per search term.

As above, we have explored the possibility of retrieving emails sent directly from/to the email accounts of former Home Secretaries and Lin Homer, but this in itself presents another hurdle (both cost and time) in firstly attempting to recover historical mailboxes; and then

gaining access to the content of them. I'm sure you know that any exercise that requires the Department to physically search large numbers of files will involve significant costs.

No sampling exercise was undertaken before the original response was issued. Following the internal review request in January 2019 a search for paper files was made using the search terms Caribbean, Commonwealth, Windrush, Homer (Lin) and Landing Card; however, nothing obviously relevant was found. Also, as above, The Department performed a search of a shared folder using a search term relevant to the request and this took in excess of 60 minutes".

Commissioner's view

37. The Commissioner understands the complainant's view that there is a substantial public interest in the subject matter of his request. However, that is not something which is of assistance when considering a request which has been refused on cost grounds. It is only for the Commissioner to decide whether or not the cost estimate given by the HO was reasonable.
38. Whilst no actual sampling exercise has been undertaken in this case, the Commissioner notes that some initial searches have been undertaken by the HO as a way estimating how long actual searches would take. In view of the wording of the request, she is satisfied that the work undertaken by the HO to ascertain its estimate is adequate.
39. Having considered the estimate above, and with a lack of any argument to the contrary from the complainant other than the public interest in disclosure, the Commissioner considers this estimate to be a reasonable one. The Commissioner therefore concludes that section 12(2) is engaged and the HO was not obliged to confirm or deny holding any of the requested information.

Section 16 – advice and assistance

40. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general, where section 12 is cited, in order to comply with this duty 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.
41. In its refusal notice the HO advised the complainant that:

"Catch all' requests for all information or all correspondence, increase the likelihood that a request will place an unreasonable

cost burden on the Department. If you refine your request, so that it is more likely to fall under the costs limit, we will consider it again..."

42. Whilst this is of some limited help, it does not actually explain to the complainant what types of information it may hold, how it is held and how he might be able to refine his request. Whilst the Commissioner understands that this is not always possible to do, the HO has not made any alternative suggestions nor has it told him why it is not possible for it to do so; no further advice or assistance was offered at internal review.
43. The Commissioner therefore finds that the HO has breached section 16 on this occasion in failing to provide adequate advice and assistance. However, in light of the fuller explanation which has been articulated above, she does not now require any steps.

Other matters

44. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

45. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
46. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases, which this request was not.
47. The Commissioner is therefore concerned that it took the HO over three months to conduct an internal review in this case, which is compounded by the lengthy time period taken to respond to the request in the first place, ie over 6 months.

48. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by design"⁴ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁵.

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

49. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

Carolyn Howes
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