

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2015

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to illegal migrants who have been granted Discretionary Leave and in particular those who benefited from paragraph 353B of the Immigration Rules (Exceptional Circumstances). The Home Office refused this request on cost grounds under section 12(1) of the FOIA.
2. The Commissioner's decision is that the Home Office applied section 12(1) of the FOIA correctly and so it was not obliged to comply with the complainant's information request. However, the Commissioner also finds that the Home Office failed to provide adequate advice and assistance to the complainant under section 16(1) of the FOIA.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - take reasonable steps to advise and assist the complainant with a view to refining the request to bring it within the cost limit.

The Home Office must take these steps 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 FOIA and may be dealt with as a contempt of court.

Background

4. Paragraph 353B of the Immigration Rules (Exceptional Circumstances) is explained as where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim, or in cases with no outstanding further submissions where appeal rights have been exhausted and which are subject to a review. In such case, in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate, the decision maker will also have regard to the migrant's:
- character, conduct and associations including any criminal record and the nature of any offence of which migrant concerned has been convicted;
 - compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;
 - length of time spend in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused.

Paragraph 353B of the Immigration Rules does not apply to submissions made overseas, or where the person is liable to deportation.

Request and response

5. On 17 October 2014, the complainant wrote to the Home Office and requested information in the following terms:
- "Following the publication of your updated Discretionary Leave policy on 24 June 2013, kindly provide the number of illegal migrants who benefited from Paragraph 353B (Exceptional Circumstance), within the first four months."*
6. The Home Office refused the request on 13 November 2014 under section 12(1) of the FOIA, as it was estimated that the cost of meeting the request would exceed the cost limit.
7. The complainant submitted a request for internal review on 13 November 2014 as he was dissatisfied with the application of section 12(1).

8. The Home Office provided an internal review decision on 10 December 2014 upholding its original decision to refuse the request under section 12(1) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2014 to complain about the refusal of his request.
10. The complainant believed that the Home Office had incorrectly applied section 12(1) of the FOIA.

Reasons for decision

Section 12 - the appropriate limit

11. Section 12(1) of the FOIA provides that a public authority is not obliged to comply with a request if it estimates that to do so would exceed the appropriate cost limit. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 sets out the tasks that can be taken into account when forming a cost estimate as follows:
 - (a) determining whether the requested information is held,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
12. Regulation 4(4) states that the authority must calculate the cost of complying with a request at the rate of £25 per hour. If the authority estimates that complying with the request would cost more than the appropriate limit, it is not obliged to comply with the request. In the case of central government public authorities, a limit of £600 applies, which equates to 24 hours.
13. Section 12(1) requires a public authority to estimate the cost of a request; it is not required to calculate the exact cost of the request. The question for the Commissioner here is whether the estimate made by the Home Office of the cost of this request was *reasonable*.

14. Turning to the reasoning provided by the Home Office as to why compliance with this request would result in exceeding the cost limit, the Home Office explained that the number of illegal migrants who benefited from paragraph 353b is not recorded centrally. The Home Office explained that it does hold and record all the cases that were granted Discretionary Leave (DL); however the relevant Performance Unit within the department is unable to differentiate between paragraph 353b grants and other types of DL grants from the data they get from the Case Information Database. The Home Office explained that the figure for paragraph 353b grants is not held separately from the figure for discretionary leave granted on any ground, and so it would be necessary for a case worker to go through all of the cases manually to ascertain this information.
15. The Home Office explained that the total number of applicants granted DL within the timescale requested by the complainant was 13,663.
16. The Home Office explained that it would take a case worker 15 minutes to access each record. It stated that this 15 minutes would be made up of the following tasks.
 - Access the front page of the Central Information Database, which has the applicant's personal details, outcome decision and date. The case worker would need to then check these details to make sure they had the correct record.
 - The case worker would then have to access the notes pages to find out under what criteria DL was granted – depending on how many notes there are, the Home Office explained that this would be the most time-consuming element of the exercise.
 - The case worker would then have to update the notes page detailing why they had accessed the record.
17. The Commissioner believes that the estimate of 15 minutes per record may be too high. In any event, it is unlikely that he would have accepted this estimate without evidence from the Home Office in support of its representations. The Commissioner also does not accept that the database update described at the third bullet point above is within the tasks that the fees regulations specify can be taken into account when forming a cost estimate.
18. However, the Commissioner does accept that it would be necessary to search 13,663 records to comply with the request. Therefore, even if the time taken for each record was a fraction of the time estimated by the Home Office, it would still exceed the cost limit under section 12 of the FOIA.

19. Having accepted that figure of 13,663 records, the Commissioner therefore also accepts that the Home Office was entitled to refuse the request under section 12 of the FOIA.

Section 16(1) – advice and assistance

20. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to a person making an information request, including helping an applicant refine a request so that it can be answered within the appropriate cost limit.
21. In this instance, the Home Office did not provide any advice to the complainant on how their request could have been refined or narrowed to bring it under the cost limit. The Commissioner therefore finds that the Home Office failed to properly address its obligations to provide advice and assistance under section 16 of the FOIA. At paragraph 3 above the Home Office is now required to respond to the complainant with advice and assistance on refining his request.

Right of appeal

22. 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@hmcts.gsi.gov.uk

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

23. 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.
24. 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

Jon Manners
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