

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2024

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

Decision (including any steps ordered)

1. The complainant made a request for information relating to certificates issued under section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992.
2. The Commissioner's decision is that the Home Office was entitled to refuse to comply with the request in accordance with section 12(2) of FOIA.
3. The Commissioner finds that the Home 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 wrote to the Home Office and requested information in the following terms:

"In this request for advice and assistance I will refer to the Trade Union and Labour Relations (Consolidation) Act 1992¹ as "the Act", and certificates issued under Section 275 of the Act as "exemption certificates".

In my previous request I was told that my request exceeded the cost limit. Therefore, to reframe my request to be under the cost limit, I am asking:

1. Who in the Home Office may issue exemption certificates (the Act allows other people to issue certificates on behalf of Ministers of State)
2. For those who may issue exemption certificates, do they or their offices keep records of the exemption certificates they issue or the requests for those certificates
3. Does the Home Office keep records or statistics of issued exemption certificates centrally
4. How does the Home Office store exemption certificates, for example, within individual personnel files or all in a single repository
5. If the Home Office stores exemption certificates within individual personnel files, is it possible to perform a search of all of these for any exemption certificates, or would each personnel file have to be individually checked..."
6. The Home Office responded on 9 August 2023 refusing the request under section 12(2) of FOIA.
7. The Home Office conducted an internal review on 14 September 2023 maintaining its original position and also stating that the complainant's correspondence of 30 May 2023 was considered formally as a new request made under FOIA rather than a request for advice and assistance under section 16 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 15 September 2023 to complain about the way his request for information had been handled.
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¹ [Trade Union and Labour Relations \(Consolidation\) Act 1992 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

9. The Commissioner notes that as point 5 of the complainant's correspondence is a question about the Home Office's searching abilities and not about information it holds, he considers that points 1 to 4 of the complainant's correspondence are requests for information under FOIA.
10. The Commissioner therefore considers the scope of this case to be to determine if the Home Office has correctly cited section 12(2) of FOIA to points 1 to 4 of the complainant's correspondence of 30 May 2023. 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

Section 12 – cost of compliance

11. 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"). (g) the exercise of any public authority of its functions for any of the purposes specified in subsection (2).
12. 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.
13. 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.
14. 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.
15. 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.
16. 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 under section 12(2):

- determining whether the information is held.
17. 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”.
 18. 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.
 19. 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.
 20. 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?

21. 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 confirm or deny whether it holds information within scope of the request.
22. In its submission to the Commissioner, the Home Office stated that in support of its decision to apply section 12(2) to the request it was relying on a recent decision notice issued by the Commissioner on the 8 November 2023 (IC-247733-H2V2)². This decision notice also addressed

² [ic-247733-h2v2.pdf \(ico.org.uk\)](https://ico.org.uk/decision-notice/247733-h2v2)

a request for information relating to certificates issued under section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992.

23. At paragraph 23 of this decision notice the Home Office explained that Section 275 of the 1992 Act is concerned with exemptions from industrial action on the basis of national security. The Home Office also explained that national security is not limited to one directorate within the Home Office and so searches would have to be made across multiple directorates.
24. At paragraph 24 of this notice the Home Office stated that 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. In its submission to the Commissioner, the Home Office explained that the following three elements were identified, and it were these that made the request burdensome:
 - The subject matter (which requires searches across multiple directorates).
 - The definition of 'national security' and 'certificates'.
 - The range of the search required (spanning 31 years since section 275 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act") came into force).
26. The Home Office explained that in order to confirm if any information is held, officials would need to conduct a search across every department to identify any information that could be captured within the remit of the request.
27. The Home Office confirmed that if it was to ask every unit in the Home Office to search through their records it would not only be for the 48000 current members of staff it has, but also any record regarding members of staff that had joined and since left the in the last 31 years. It also explained that in addition to above, given the timeframe, any historical records would have to be searched.

28. The Home Office explained that in this case it is very difficult to clearly define a term or phrase which will balance the requirements of capturing all of the information and the amount returned of which it will have manually searched through to filter out any relevant results. It explained that terms such as 'national security' and 'certificate' are fairly generic and can relate to a number of areas.
29. As in IC-247733-H2V2, 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 it would exceed the appropriate cost limit by a significant margin.
30. The Commissioner therefore accepts that the Home Office was correct to apply section 12(2) of FOIA to the complainant's request.

Section 16 – the duty to provide advice and assistance

31. 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).
32. 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 practice³ in providing advice and assistance, it will have complied with section 16(1).
33. In its initial response, the Home Office explained that it was unable to suggest any reasonable ways to refine the request to fall within the cost limit. It advised the complainant that he may wish to approach the Cabinet Office to determine if any interpretation or guidance on this issue is held for this part of the legislation and how it applied to government departments.
34. In its submission to the Commissioner, the Home Office explained that it is difficult to suggest how the request might be refined due to the extent of the searches required, that every unit in the Home Office will have to

³ [Freedom of Information Code of Practice - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

participate and the lack of reliable search terms to use. It also explained that due to the large timeframe of the request, this significantly increases the search remit.

35. The Commissioner considers this is an appropriate responses in the circumstances given the broad nature and lengthy timeframe of the original request.
36. The Commissioner is therefore satisfied that the Home Office has met its obligations under section 16 of FOIA as regards the request

Right of appeal

37. 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

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Robyn Seery
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