

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 February 2016

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

#### Decision (including any steps ordered)

---

1. The complainants requested internal communications relating to a judgment by the Court of Justice of the EU. The Home Office refused the request on cost grounds under section 12(1) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 12(1) correctly, so it was not obliged to comply with this request, although it did breach section 16(1) of the FOIA by failing to provide advice to the complainants and section 17(5) by failing to respond to the request within 20 working days.

#### Background

---

3. The request was for information relating to the *O and B v Netherlands* judgment by the Court of Justice of the EU (CJEU). This was an immigration law case and the Home Office described it as follows:

*"...the ruling of the [CJEU] in the case of Surinder Singh confers EU law rights on the third country national spouse or civil partner of a British citizen, where certain criteria have been met.*

*The CJEU judgment in O and B v Netherlands affects the earlier Surinder Singh ruling".*

---

## Request and response

---

4. On 18 June 2015 the complainants wrote to the Home Office and requested information in the following terms:  
  
*"...release internal communications relating to [the O & B] judgment in period 12 March 2014 to 31 December 2014."*
5. After a delay, the Home Office responded on 3 August 2015 and refused the request on cost grounds under section 12(1) of the FOIA.
6. The complainants responded on 3 August 2015 and requested an internal review. The Home Office appears to have confused this request with an earlier request which was also refused under section 12(1) and it appears that this confusion resulted in the Home Office failing to carry out an internal review relating to the complainants' 18 June 2015 request.

## Scope of the case

---

7. Following earlier correspondence in which the scope of the case was clarified, the complainants confirmed on 4 December 2015 that they had still not received the internal review outcome. The investigation into the refusal of the request under section 12(1) commenced at that time.

## Reasons for decision

---

### Section 17

8. Section 17(5) requires that a response refusing a request under section 12(1) must be sent within 20 working days of receipt of the request. In this case the Home Office did not respond within 20 working days and, in so doing, it breached the requirement of section 17(5) of the FOIA.

### Section 12

9. Section 12(1) of the FOIA provides that a public authority is not obliged to comply with a request where it estimates that the cost of doing so would exceed the appropriate limit, which for the Home Office is £600. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "fees regulations") provide that the cost of a request must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours. The fees regulations also specify the

tasks that can be taken into account when forming a cost estimate as follows:

- Determining whether the requested information is held.
  - Locating the information, or a document which may contain the information.
  - Retrieving the information, or a document which may contain the information.
  - Extracting the information from a document containing it.
10. A public authority is required to estimate the cost of a request, rather than form an exact calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the Home Office was reasonable; if it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, section 12(1) applied and it was not obliged to comply with the complainants' request.
11. Turning to the explanation given by the Home Office for its cost estimate, in its representations to the Commissioner it stated that the judgment referred to in the request was significant and has required work relating to it to be carried out by several areas of the Home Office. The cost estimate made by the Home Office was based on time spent by officials who have been involved in that work on searching their emails for information of relevance to the request. The Home Office stated that as the judgment referred to in the request is a *"live policy issue"*, emails relating to it may be in individual officials' own storage; it would not necessarily be the case that such emails would be held in *"corporate filing"*.
12. It estimated that approximately 100 officials would be required to search their emails for information of relevance to the request. It explained how an electronic search based on search terms relevant to the judgment referred to in the request would be carried out. The complainants believed that complying with the request would not be time consuming as an electronic search for relevant communications would be all that was required. The Home Office indicated, however, that it would be necessary to review each item to verify whether it was within the scope of the request, which could not be done through automated means. It gave an estimate of 30 minutes per official for this task, giving a total estimate of 50 hours.
13. The Commissioner accepts the representations from the Home Office that the judgment referred to in the request was significant and that it has required work by a number of different areas within the Home

Office. He also has no basis on which to question the estimate of 100 officials, nor that it would be necessary for individual officials' emails to be searched to locate information of relevance to the request.

14. The remaining question is whether he accepts the estimate of 30 minutes per official. Whilst his view is that this estimate may be somewhat high for some officials, as there may be some whose search reveals either none or very few potentially relevant emails within personal storage, this figure is given as an average. He also notes that were the average time to be significantly shorter, even halved, the estimate would still be in excess of the cost limit. Taking these points into account, the Commissioner's view is that a reasonable estimate of the average time per official would, even if somewhat shorter than 30 minutes, take the total time over the 24 hour limit provided by the fees regulations. He also accepts that this task would be within those specified in the fees regulations as eligible to be taken into account.
15. This estimate is based only on the time spent searching emails. Whilst the Commissioner recognises that other information within the scope of the request may be held elsewhere and in different formats, such as memoranda or materials held on a backup server for example, as the estimate of the time spent searching emails is in excess of the limit, it has not been necessary to go on to also consider information held in other formats or locations.
16. For these reasons the conclusion of the Commissioner is that it was reasonable for the Home Office to estimate that the cost of this request would be in excess of the appropriate limit. Section 12(1) of the FOIA therefore applied and the Home Office was not obliged to comply with this request.

## Section 16

17. Section 16(1) of the FOIA provides that all public authorities are under a duty to provide advice and assistance to any person who has made or who intends to make an information request to it. The Commissioner's published guidance on section 12<sup>1</sup> sets out the following minimum advice and assistance that a public authority should provide to a requester when refusing a request on cost grounds:

- either indicate if it is not able to provide any information at all within the appropriate limit; or

---

<sup>1</sup> [https://ico.org.uk/media/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)

- provide an indication of what information could be provided within the appropriate limit; and
  - provide advice and assistance to enable the requester to make a refined request.
18. In this case the Home Office gave no advice and assistance to the complainant. In correspondence with the Commissioner about this case, the Home Office indicated that, had the request been possible to comply with within the cost limit, it would have likely been refused under exemptions, including those provided by sections 35(1)(a) (formulation or development of government policy) and 42(1) (legal professional privilege) of the FOIA.
19. Compliance with the duty to provide advice and assistance in this case should have involved advising the complainant of this and, in not doing so, the Home Office breached the requirement of section 16(1). As the preceding paragraph has superseded the necessity of the Home Office now providing this advice, no remedial step relating to this breach is included in this notice.

## Right of appeal

---

20. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

21. 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.
22. 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** .....

**Ben Tomes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**