

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2016

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

Decision (including any steps ordered)

1. The complainant requested the number of payments made by the Home Office of more than £25,000 that were not included in the information published by the Home Office about such payments, and the amount of each of those payments. 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 cited section 12(1) incorrectly and it is now required to issue a fresh response to the request.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not rely on section 12(1).
4. 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.

Request and response

5. On 1 October 2015 the complainant wrote to the Home Office and requested information in the following terms:

"I would like to ask the Home Office how many other payments above £25,000, other than for the office for security and counter-terrorism, have not been included on the spending list provided in the publication scheme [from January 2013].

I would also like the amount of each of the withheld payments. If monthly amounts aren't available, individual totals can be provided for each supplier."

6. The Home Office responded on 26 October 2015. The request was refused, with section 12(2) of the FOIA cited, which indicated that the position of the Home Office was that it was unable to confirm or deny whether it held the requested information.
7. The complainant responded on the same date and requested an internal review. The Home Office failed to respond with the review outcome within a reasonable period.

Scope of the case

8. The complainant contacted the Commissioner on 25 November 2015 initially to complain at that stage about the failure by the Home Office to complete the internal review promptly. The complainant was advised at that point to wait until 40 working days had elapsed since his request for an internal review.
9. The complainant contacted the ICO again on 22 December 2015 and stated that he still had not received the internal review outcome from the Home Office. Owing to the delay in the completion of the review, the case was accepted at that stage and the Home Office was advised that this case was being progressed without waiting any longer for it to complete the review.
10. During correspondence with the ICO, the Home Office changed its position and cited section 12(1), indicating that it confirmed that the requested information was held, but that it estimated that it would exceed the cost limit to disclose that information. The analysis below covers whether the Home Office cited section 12(1) correctly.

Reasons for decision

Section 12

11. Section 12(1) 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.
12. 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 request.
13. The first point to cover here is that the Home Office publishes a significant amount of information about its £25,000+ spending¹. This information is presented as *"Details of all Home Office spend over £25,000"*, although it is noted on this page that details of some spending by the Office for Security and Counter-terrorism had been redacted. Whilst no other mention is made of information having been redacted, the Home Office confirmed to the ICO during the investigation of this case that there are various other reasons for withholding some spending information. At the time of writing, and at the time of the request, information covering the period specified in the request up until December 2014 had been published.
14. Turning to the reasoning given by the Home Office for the citing of section 12(1), it stated that the only means to provide the requested information would be to review the record of every £25,000+ payment during the period specified in the request to ascertain whether it had been withheld from the published information. It stated that there were

¹ <https://www.gov.uk/government/publications/home-office-spending-over-25000-2014>

more than 1,000 payments of more than £25,000 for each of the 33 months covered by the request, so it would be necessary to check the record of more than 33,000 payments in order to comply with the request. The Home Office gave an estimate of 1.5 minutes per payment record, giving a total estimate far in excess of the limit.

15. As to the view of the Commissioner on this reasoning, whilst there are no grounds on which to dispute the figure of 33,000 payment records and so the Commissioner does not, the Home Office did not provide a thorough explanation for its estimate of 1.5 minutes per record. After the Home Office had failed to provide any breakdown of that estimate initially, the Commissioner asked the Home Office to give more detail with preferably some evidence, such as a sample record. The Home Office response to this was to simply assert that this time would be necessary to *"access each record to determine whether or not it falls within the scope of the request"*.
16. This absence of detailed explanation and evidence means that it is difficult for the Commissioner to accept 1.5 minutes per record as a reasonable estimate. He recognises, however, that this need not be fatal to the citing of section 12(1). As noted above, at the time of the request, as well as at the time of writing, the Home Office had published information up until December 2014, but had not published any more recent information. This means that the information within the scope of the request does not cover 33 months; it covers 24 months. Even taking that into account, were the estimate per record to be reduced from 1.5 minutes to just a few seconds, the total time would still be well in excess of the cost limit. The Commissioner also notes that the number of payments included on each of the published spreadsheets is around 1,000.
17. However, the Commissioner's view is that there is a more fundamental flaw in the approach that the Home Office has taken to this information request. The Commissioner's guidance on citing section 12 of the FOIA² refers to public authorities considering a search strategy at the outset of work on responding to a request. This strategy should identify the simplest, least time-consuming means by which to comply with the request.
18. In this case, it appeared possible that there may be a simpler means to comply with the request than reviewing the record of every payment. As

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

noted above the Home Office publishes spreadsheets that purport to be *"Details of all Home Office spend over £25,000"*. Although there is a caveat about spending by the Office for Security and Counter-terrorism, spending on that area was excluded from the scope of the request. Also, as mentioned above, the Commissioner learned during the course of his investigation that there are various other grounds for withholding spending information.

19. The Commissioner's view in light of this was that the proportion of £25,000+ spending that was not published needed to be established. The process for deciding which spending should not be published also needed to be addressed. If it was the case that, for example, information about only a small proportion of £25,000+ spending was not published and a separate record was kept of the non-published items, this would indicate that it was not necessary to review every payment in order to comply with the request.
20. In order to cover these points, the Home Office was asked to respond to the following:
 - Approximately what proportion of non-Office for Security and Counter-terrorism £25,000+ spending is not published?
 - What is the process for deciding which non-Office for Security and Counter-terrorism £25,000+ spending should not be published?
 - Is a record maintained of that process?
 - Is a separate record kept of which £25,000+ spending is not published, for example as part of the decision making process about what should be published, or when the spreadsheets for publication are prepared?
21. The response from the Home Office to each of these questions was, in full, as follows:
 - *"This percentage remains unknown."*
 - *"Each business area reviews their data and decides against the Treasury Transparency Guidance as to whether to publish the lines."*
 - *"Each business area is asked to maintain a record; the record is not held or maintained centrally."*
 - *"Each business area is asked to keep a record of what spend is redacted. However due to the high turnover of staff we understand the information is not available via these routes."*

22. These answers confirmed the possibility that the requested information could be collated through quicker means than suggested by the Home Office. It confirmed that each area is asked to maintain a record of the process of deciding which spending details are not published; it appeared likely that record would include details of the non-published spending. Whilst the Home Office asserted that this record *"is not held or maintained centrally"*, it is not clear how that is relevant; if it is maintained by any area of the Home Office, it would be held for the purposes of the FOIA.
23. The response from the Home Office on the issue of whether a separate record of redacted payments is made is suggestive of that possible alternative means of complying with the request not having been explored thoroughly. Without it being explained, the relevance of a high turnover of staff to the availability of this information is not clear. The result of this response was that the Home Office confirmed that there is an intention that each business area should keep a record of redacted spending information, but provided no real explanation as to why that information would not be available to comply with the complainant's information request.
24. It was subsequently made clear to the Home Office that the Commissioner was minded to issue a decision notice that found that section 12(1) did not apply. The Home Office was given a final opportunity to address the point about whether a separate record of the non-published spending information was maintained. The question asked by the ICO and the response from the Home Office was as follows:
 - State definitively whether the Home Office has a separate record of which £25,000+ spending is not published, for example as part of the decision making process about what should be published, or when the spreadsheets for publication are prepared.
 - *"Home Office does not maintain a central record of the 25K transactions that are not published. When the spreadsheets are prepared by the Business Units for publication, they are sent back to the central team with any and all redacted lines removed (as to avoid accidental publication)."*
25. Having been given a further opportunity to definitively address the point of whether it held a separate record of information relevant to the request, the Home Office again referred to its central records. It failed to address whether the business areas held this information.
26. Given that there appears to be an at least reasonable possibility that there is a quicker alternative means of complying with the request and that the Home Office has provided no convincing explanation as to why

that is not the case, the Commissioner does not consider himself to be in a position where he can accept the cost estimate of the Home Office was reasonable. Whilst the Home Office may argue that this issue could have been resolved by the ICO reverting to it for further explanation, by the point of this notice the Home Office had had five opportunities to explain its position; the refusal notice, in response to the complainant's request for an internal review, and in its first, second and third responses to the ICO. Furthermore, the Home Office is advised in every case that it has a single opportunity to make its case to the ICO; that approach had already been departed from in this case by the ICO reverting to the Home Office twice following its initial reply. In the interests of resolving cases promptly, the Commissioner will not enter into protracted correspondence with public authorities.

27. In reaching a conclusion on the citing of section 12(1) in this case, the Commissioner has taken into account that the Home Office confirmed that it is intended that a record of redacted payments is made, and provided no real explanation as to why that information would not be available to comply with the complainant's information request. In light of this, the Commissioner's view is that he has no choice other than to find that compliance with the complainant's request would not exceed the cost limit. His conclusion is, therefore, that the Home Office relied on section 12(1) incorrectly and at paragraph 3 above it is now required to provide a fresh response to the request that does not rely on section 12(1).

Section 16

28. 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 12³ 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
 - provide an indication of what information could be provided within the appropriate limit; and

³ https://ico.org.uk/media/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

- provide advice and assistance to enable the requester to make a refined request.

29. In the refusal notice the Home Office did refer to the possibility of it being possible to comply with a refined request and suggested refining it to *"a much shorter time scale"*. On the basis of the position of the Home Office at that stage as to why the request would exceed the cost limit, radically reducing its time scale was likely to be the only means by which the request would not have exceeded the cost limit and so the Commissioner finds no breach of section 16(1) in this case. He is also of the view, however, that this advice was barely constructive and that, in view of his finding above, the Home Office could have done much more to assist the complainant in this case.

Other matters

30. The approach of the Commissioner is that internal reviews should be completed within a maximum of 40 working days. In this case, the Home Office failed to keep to this timescale. A separate record has been made of this delay and this issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

31. 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>

32. 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.
33. 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
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