

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2017

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

Decision (including any steps ordered)

1. The complainant submitted a two part request for information about a proposal to amend the Royal Warrant for the Special Constabulary Medal. The Home Office disclosed information in response to the first part of the request, but refused the second part of the request, citing the exemption at section 35(1)(a) (Formulation of government policy) of the FOIA.
2. The Commissioner's decision is that the Home Office failed to properly establish whether it held the information at the second part of the request, and therefore that it has not complied with the duty at section 1(1)(a) of the FOIA.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - issue a fresh response to the second part of the request. If the information is held, it should either be disclosed or a refusal notice provided which is compliant with section 17 of the FOIA. If the information is not held, the Home Office is reminded of its duty under section 16 to provide reasonable advice and assistance to the complainant, with regard to establishing with him whether it holds any information which might assist him.
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 Act and may be dealt with as a contempt of court.

Request and response

5. On 11 July 2016, the complainant wrote to the Home Office and requested information in the following terms:

"I previously submitted a request to the Home Office in regard to the proposal to amend the Royal Warrant for the Special Constabulary Medal.

Despite the Home Office providing misleading information to the Information Commissioners Office, it has now been established that the Home Office sent a draft proposal to the Cabinet Office. They have now in turn stated in writing that this proposal was returned to the Home Office.

I therefore request the following information in accordance with the Freedom of Information Act:

1) When did the Home Office receive the reply from the Cabinet Office in regards to the proposed amendment to the Warrant?

2) When is it proposed to make a submission to the Cabinet Office.

I am aware from experience of the Home Offices willingness to provide misleading information and the use of the exemption provided under Sec 35(1)(a) of the FOI Act. Please note that I am NOT in any way asking for details of any internal or department discussions or its content."

6. On 26 July 2016 the Home Office asked the complainant to clarify his request and he did so on 1 August 2016.

"This request relates to the Special Constabulary Good Conduct Medal. It has been confirmed in writing that the Home Office made a draft submission to the Cabinet Office in regards to amending the Warrant.

In regards to question 2, now that the Cabinet Office replied to the draft submission when are the Home Office intending to make a new submission to the Cabinet Office?"

7. The Home Office responded on 1 September 2016. It answered the first part of the request. With regard to the second part of the request, it said that it held the information but that it was exempt from disclosure

under section 35(1)(a) of the FOIA, with the public interest favouring maintaining the exemption.

8. Following an internal review the Home Office wrote to the complainant on 29 November 2016 and upheld its decision.

Scope of the case

9. The complainant contacted the Commissioner on 29 November 2016 to complain about the way his request for information had been handled. He wished to challenge the Home Office's application of section 35(1)(a) to withhold the information at the second part of the request.
10. The Commissioner initially asked the Home Office to explain its application of section 35(1)(a). However, it became clear from its response that the Home Office had failed to properly establish whether or not it actually held the requested information; it had merely assumed that it did.
11. The scope of this decision notice is therefore whether the Home Office complied with section 1(1)(a) of the FOIA.
12. The Commissioner has, however, commented on the strength of the public interest arguments offered by the Home Office in support of the application of section 35(1)(a) in the "Other matters" section of this decision notice.

Reasons for decision

13. Section 1(1) of the FOIA states:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

14. It is clear from this that the first requirement of section 1 of the FOIA is that a public authority must determine whether or not it holds the information that has been requested.
15. The Home Office informed the complaint that it did hold the information. However, in its response to the Commissioner, it stated:

"The information requested at part 2 was 'when is it proposed to make a submission to the Cabinet Office'. The response stated that this information was held, but I am not sure that that was correct. I understand that at the time there was an intention to make a submission to Cabinet Office at some point, as soon as could be arranged, but it would appear that nothing was written down as 'the date we propose to make a submission to Cabinet Office'."

16. The Commissioner asked the Home Office to provide more information on this point. She asked it a series of detailed questions aimed at establishing the details of the searches it conducted and any other reasons it had for believing that it did not hold the information.

17. The Home Office replied as follows:

"So far as we have been able to establish, the requested information was not held at the time of the request. The policy area would presumably have had a rough idea of the timetable, but this does not seem to have been written down anywhere."

18. It indicated that it might not be in a position to provide further clarification on the matter for some time, and stated:

"In the meantime, you may wish to proceed with a decision notice."

19. Despite being asked to, the Home Office has not demonstrated that it conducted sufficiently thorough searches or made enquiries capable of establishing whether the information was or was not held at the time the request was received. The Commissioner is therefore not in a position to form a judgement as to whether, on the balance of probabilities, the Home Office holds the information requested at part 2 of the request.

20. It follows that she is not satisfied that it complied with the duty at section 1(1)(a), in respect of part 2 of the request. She now requires the Home Office to take the action set out at paragraph 3 to rectify this.

Other matters

21. Because the Commissioner concluded that the Home Office had not properly determined whether or not it held the information described in the second part of the request, the arguments it provided in support of section 35(1)(a) have no bearing on the decision set out above.

22. However, in the event that the Home Office goes on to determine that it *does* hold the requested information, the Commissioner would comment that the weight of the safe space and chilling effect arguments it has so far offered would be unlikely to tip the public interest in favour of

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maintaining that exemption, given the non-contentious nature of the information requested and the fact that it reveals nothing about the content of the policy in question.

Right of appeal

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

24. 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.
25. 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

Samantha Bracegirdle
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Wycliffe House
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