

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2020

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

Decision (including any steps ordered)

1. The complainant requested information from the Home Office about drugs found on ships in a specified area and over a significant time period. After initially refusing the request under section 31 of FOIA, the exemption for law enforcement, the Home Office revised its position at internal review and instead said it could 'neither confirm nor deny' on cost grounds whether it held the requested information, citing section 12(2) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to neither confirm nor deny the request in accordance with section 12(2) of FOIA. She also finds that it complied with its section 16 obligations to provide advice and assistance. The complainant also asked the Commissioner to consider the delays in this case. Having done so, the Commissioner finds the Home Office responded to the request within the statutory 20 working days' time limit, therefore, there was no breach of sections 1 or 10 of FOIA. She has commented on the internal review delay in the 'Other matters' section of this notice.

Background

3. The complainant told the Commissioner that he had originally submitted the request set out below to the Home Office on 2 December 2018 but failed to receive any response. He then resubmitted his request on 2 May 2019.

Request and response

4. On 2 May 2019, the complainant wrote to the Home Office and requested information in the following terms:

“Can you supply all dates, ship details and drugs found on ships at Hunterston in North Ayrshire, Scotland?”

I am aware of the MV Bulk Australia in 2011 where 10kg of Cocaine was found and also £16million of Cocaine found in 2014 on the MV Cape Maria.

But has [sic] any other events happened since 1980 until 2012?”

5. The Home Office responded on 4 June 2019. It refused to provide the requested information, initially citing section 31 of FOIA, the exemption for law enforcement. It said that the public interest test favoured withholding the information.
6. The complainant requested an internal review on 4 June 2019. He received an acknowledgement, but the Home Office failed to provide the review result within the recommended 20 working days' time limit, so the complainant submitted a complaint to the Commissioner.

Scope of the case

7. The complainant contacted the Commissioner on 30 July 2019 to complain about the way his request for information had been handled. He asked the Commissioner to consider both the non-response to his original request of 2 December 2018 and the delay in the Home Office's response to his request of 2 May 2019. He also complained about the outstanding internal review.
8. The Commissioner cannot consider the non-response to the complainant's original request of 2 December 2018 as she expects all complaints to be brought within three months of the last correspondence. This complaint is therefore out of time so the Commissioner has excluded it from her investigation.
9. In relation to the request of 2 May 2019, the Commissioner wrote to the Home Office on 15 August 2019 asking it to provide its internal review.
10. The Home Office did so on 10 September 2019 and now cited section 12(2) of FOIA; it said that it could neither confirm nor deny on cost grounds whether it holds the requested information. It advised the complainant as follows:

"Up until 2011, responsibility for drugs seizure data fell to Her Majesty's Revenue & Customs (HMRC) so we do not hold comprehensive information prior to this time. The Home Office does however hold some data as some data sets were subsequently transferred from HMRC to the Home Office, but it is not clear what specific information is held in these data sets and the only way to be certain is to assess these records individually.

Also, due to the age of some of the data you have requested, up to 39 years, it is possible that the Department may also hold some historical information in disparate locations and on hard copy files, however these would need to be identified (and then retrieved) from third party storage and manually searched to identify any information in scope of your request.

Taking the above into account, under section 12(2) of the Act, the Home Office is not obliged to comply with an information request where to do so would exceed the cost limit."

11. The Commissioner has considered whether the Home Office was entitled to cite section 12(2) of FOIA to refuse the request. She has also considered whether the Home Office complied with the associated duty to provide advice and assistance in accordance with section 16 of FOIA, and whether there was a delay in the Home Office's response to the request of 2 May 2019.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

12. Section 12 of FOIA states that:

"(1) 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."

13. Section 12(1) of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

14. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the appropriate limit. 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.
15. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') set the appropriate limit at £600 for the Home Office; they also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that the appropriate limit for the Home Office equates to 24 hours.
16. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - a. determining whether it holds the information;
 - b. locating the information, or a document containing it;
 - c. retrieving the information, or a document containing it; and
 - d. extracting the information from a document containing it.
17. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is 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.
18. The scope of the request was the period 1980 to 2012. The Home Office explained the following:

"It may be helpful if I explain that the Home Office, through the Performance Reporting and Analysis Unit (PRAU), took over reporting on Commodities around late 2011. This was a process it took on from HM Revenue and Customs (HMRC), following the new partnership of the Home Office and HMRC which took effect from August 2009. Through this partnership, the Borders, Citizenship & Immigration (BCI) Act 2009 provided the framework for Border Force staff, designated as customs officials, to exercise customs powers. For a period, HMRC continued the reporting until the process was handed over to PRAU. Given this, the internal review explained that the Home Office did not hold comprehensive information prior to this time."

19. Although the Home Office's responsibility began in 2011, it advised that it did hold some data sets prior to this time, which HMRC had provided. These were data sets for 2008/09 and 2009/10. The Home Office said that this information was most likely provided so that it had some historical data to allow them to carry out analysis/comparison work. The Home Office also held its own records for the period 2011-12. It told the Commissioner that:

"A search of all three data sets was conducted but no information was found which related to the timeframe given by [the complainant]."

Application of section 12(2)

20. The Home Office stated that, although it was looking considerably likely that no information was held, section 12(2) was cited at the internal review stage on the basis that further information may be held, but that it would exceed the cost limit to be able to confirm this definitively. It further explained:

"Electronic records

As part of the transfer process, HMRC provided a data extract from their database, called 'DCIS'; which is incidentally, where the data sets for 2008/09 and 2009/10 came from (they were extracts). However, the Home Office does not have access to this database, so it is unable to establish whether any further information is held on it, which might fall within scope of the request. This database belonged to HMRC and was a forerunner to the database that Border Force use today. As such, it is no longer in use and Border Force staff are not able to access it.

Paper records

Given the date of the information being sought, it is a possibility that paper records (ie files) might exist, holding information that may be relevant to [the complainant's] request.

The Home Office holds many thousands of historic paper files and, dependent on their age, are only searchable by file title. The individual documents within the files are not indexed on any electronic system. In order to locate and identify any Home Office files containing relevant information, which falls within the scope of the request, a search would have to be via keywords and then a manual search of each file would need to be carried out.

- *A search carried out using the keyword '**Hunterston**' identified no records*

- *A wider search using the keyword 'seizures' identified 618 records*
- *This was narrowed down to 274 possible records – once records which referenced other ports, and records which were outside the timeframe, were eliminated from the search*

With regards to the 274 records, based on a conservative estimate of 10 minutes per file to ascertain if it holds any information within scope, we would only be able to review 144 historic files before the FOIA cost limit is breached. For 24 hours to be spent reviewing these files, would clearly be disproportionate, as it would not provide a full picture of what information might be held.

Furthermore, there are costs for each archived historic file to be retrieved from 3rd party storage. To retrieve only half of the files, at a cost of £1.58 per file, would cost £216.46.”

21. In conclusion, and on balance, based on the searches that were carried out in this specific case (ie the search of the electronic data sets and the search for any paper records containing the word 'Hunterston'), the Home Office said it would appear to be the case that it holds no information within the scope of the request. It said:

“However, it would exceed the cost limit for us to categorically confirm if that is the case.”

Conclusion

22. The Commissioner must decide whether or not the cost estimate given by the Home Office was reasonable.
23. Whilst no sampling exercise is required in the circumstances of this case, the Commissioner notes that some initial searches have been undertaken by the Home Office as a way of estimating how long actual searches would take. In view of the wording of the request, she is satisfied that the work undertaken by the Home Office to ascertain its estimate is adequate as it is so broad.
24. The Commissioner therefore considers this estimate to be a reasonable one. The Commissioner concludes that section 12(2) is engaged and that the Home Office was not obliged to confirm or deny holding any of the requested information.

Section 16 – duty to provide advice and assistance

25. Section 16 of FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

26. Paragraph 14 of the section 45 Code of Practice¹ states:

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the 'appropriate limit' (i.e. the cost threshold) the authority should consider provide an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

27. The Commissioner's view is that, where a public authority refuses a requests under section 12(1) of FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.

28. In this case, the Home Office advised the complainant as follows:

"If you refine your request, so that it is more likely to fall under the cost limit, we will consider it again. If you were to revise your request to information from 2012 onwards we should be able to answer your request within the cost limit, however if a revised request were to fall within the cost limit, it is possible that other exemptions in the Act may apply.

You may wish to contact HMRC for information before 2011. HMRC's contact information has been supplied in Annex D.

Please note that if you simply break your request down into a series of similar smaller requests, we might still decline to answer it if the total cost exceeds £600."

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Conclusion

29. The Commissioner is satisfied that the Home Office met its section 16 obligations in this case.

Section 10 – time for compliance with a request

30. Section 1(1) of FOIA states:

"(1) 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."

31. Section 10(1) of FOIA states:

"(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

32. The complainant submitted his request under consideration in this notice on 2 May 2019. The Home Office responded on 4 June 2019. The 20 day 'clock' starts from the day after the request is received by the public authority; in this case 3 May 2019. There are 20 working days between 3 May 2019 and 4 June 2019.

33. As the Home Office responded within 20 working days the Commissioner finds that it did not breach sections 1(1)(a) and 10(1) of FOIA.

Other matters

Internal Review

34. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
35. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews

should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

36. The Commissioner is concerned that on this occasion it took over three months for an internal review to be completed.
37. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

38. 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@justice.gov.uk

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

39. 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.

40. 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

Carolyn Howes
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