

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2022

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

Decision (including any steps ordered)

1. The complainant has requested from the Home Office information on communications between Border Force, Dover Harbour Board and the police, and bilateral agreements with the French authorities, regarding migrant crossings. The Home Office refused the request on the grounds that compliance would exceed the appropriate cost limit, under section 12 of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 12 to refuse the request. It also complied with its duty to provide advice and assistance in line with the requirements of section 16 of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 7 March 2021, the complainant wrote to the Home Office and requested information in the following terms:

"Port of Dover Photography

Dear Home Office,

Originally established in 1606, Dover Harbour Board is responsible for the administration, maintenance and improvement of the harbour at the Port of Dover.

REQUEST

Disclose all information, created in the last 12 months, which is a communication between you and Dover Harbour Board or the police (any force), which relates to persons taking pictures (inc. video) at the Port of Dover of Home Office/Border Force staff bring in migrants from the sea.

Disclose all agreements, or similar information, between you and the French for handover at sea of migrants (aka asylum seekers, illegal immigrants etc.) crossing from Calais and surrounding area. I am particularly interested in agreed handover points at sea for escorting boats in to the UK, pls provide GPS coordinates."

5. On 8 April 2021, in accordance with section 17(2) of FOIA, the Home Office wrote to the complainant, informing him that it was considering applying sections 27 (International relations) and 31 (Law enforcement) of FOIA to the requested information. It said it needed further time to consider whether the public interest favoured maintaining those exemptions or disclosing the information.
6. The Home Office responded to the request on 27 April 2021. It refused to disclose the information described in the first paragraph of the request, on the grounds that it was exempt from disclosure under section 31(1)(a) and (e) of FOIA. It said that the information described in the second part of the request was exempt from disclosure under sections 27, 31 and 35 (Formulation of government policy) of FOIA. It said that the public interest favoured maintaining the exemptions.
7. The complainant requested an internal review on 27 April 2021, saying:

"I am writing to request an internal review of Home Office's handling of my FOI request 'Port of Dover photography'.

 1. List the information held, please, in date order.
 2. None of the exemptions can be applied. Give a properly detailed explanation of why releasing information about photography in Dover would cause harm."
8. The Home Office provided the outcome of the internal review on 2 September 2021. It revised its position, saying that the request should have been refused under section 12 of FOIA, as the cost of compliance would exceed the appropriate limit.
9. It said that while it would consider a refined request covering "...a recent time period of no more than one month", it cautioned the complainant that the requested information might still be exempt from disclosure under the exemptions it had previously cited.

Scope of the case

10. The complainant contacted the Commissioner on 7 September 2021 to complain about the way his request for information had been handled.
11. The analysis below considers whether the Home Office was entitled to rely on section 12 of FOIA to refuse to comply with the request.
12. The Commissioner has also commented on the Home Office's delay in providing the internal review in the 'Other matters' section, at the end of this notice.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate limit

13. The Home Office refused to comply with the request on the grounds that section 12 of FOIA applied.
14. Section 12(1) of FOIA states:

"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."
15. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ (the Fees Regulations) at £600 for central government public authorities such as the Home Office. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that the Home Office may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.
16. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that a public authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;

¹ <https://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

- retrieving the information, or a document containing it; and
 - extracting the information, or a document containing it.
17. Section 12 states that public authorities are only required to estimate the cost of compliance with a request, and are not required to give a precise calculation. However, the Commissioner considers that the estimate must be reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2007/0004, 30 October 2007) which stated that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".
18. The complainant's correspondence contained two requests for information. Multiple requests within a single item of correspondence are treated as separate requests for the purpose of section 12. However, when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied. Those conditions require the requests to be:
- made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - made for the same or similar information; and
 - received by the public authority within any period of 60 consecutive working days.
19. In this case, the first and third bullet points are clearly met. As regards the second bullet point, the requirement is that the requests which are to be aggregated relate "to any extent" to the same or similar information². In this case, the two requests are on the subject of arrangements regarding illegal migrants arriving in the UK via the English Channel. The Commissioner is satisfied that both requests relate to similar information and therefore that the three conditions are met. It follows that the Home Office was entitled to aggregate the two requests

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

when estimating the costs of compliance for the purposes of applying section 12.

Complainant's position

20. The complainant did not offer any reason as to why he disagreed with the Home Office's application of section 12, saying only that, "the exemption was wrongly applied."

The Home Office's position

21. As is his standard practice in cases where section 12 has been cited, the Commissioner asked the Home Office a series of questions to evaluate its reasons for concluding that the cost limit would be exceeded by responding to the request. He also asked the Home Office to provide a detailed estimate of the time/cost involved in complying with the request.
22. In a detailed response, the Home Office explained that much of the requested information was not held in a way which would allow it to be retrieved readily. The activities that would be involved in identifying whether it was held, and in locating, extracting and retrieving the requested information would exceed the cost limit under section 12 of FOIA. It estimated that the total time required to meet the requests would not only breach the formal 24 hour limit allowed for under FOIA but would substantially exceed it.
23. As regards compliance with the first part of the request, the Home Office said:

"It is not certain at this stage that such communications do actually exist or exist in the form that the requestor assumes that they do. Issues around security and access control to the premises at Dover and the surrounding areas would be discussed with Dover Harbour Board, including any potential security issue related to persons photographing or filming operations, as this would be part of the Home Office's duty of care both to its staff and contractors, and to those within its custody. Likewise, there is plenty of routine communication between the Home Office and the Police, and this would include that about potential security issues, including public order issues, identified at the premises at Dover where the Home Office processes arrivals and the surrounding area."
24. The Home Office went on to explain the significant work involved in determining whether the information was held. At the time of the request, there were multiple avenues for communication between Dover Harbour Board and Home Office staff, and between Home Office staff and the police. It would be necessary to search the personal inboxes of

a large number of staff members³ (which would involve checking for emails from obvious addressees/contacts and using the Microsoft Outlook 'advance find' function on such keywords as 'Dover', 'Pictures', and 'Video') and a review of records of meetings held with Dover Harbour Board (including manual notes as well as information held on electronic files, and correspondence). The central management of these tasks and collating the responses would add further time to the process of complying with the request:

"We would also have to have a process of assurance (insistence on nil returns) to ensure that no one in scope missed the request. This would require approximately one hour to identify the staff, draft the commissioning email and send out. The assurance piece is likely to take between 1-2 hours ie collating responses and chasing non responders. Total time for commissioning the search and confirming that all in scope have responded = 3 hours"

25. The Home Office explained that locating the information would be the most time-consuming phase of the process, as "There are plenty of routine quotidian interactions between the Home Office, the police and Dover Harbour Board, and any of these could conceivably include the references to which the requestor alludes."
26. It explained that a sample exercise was undertaken of a particular team inbox, using terms "Dover" or "Police" and either "Photo" or "Film". These searches identified 1,344 emails which then needed to be checked for content relevant to that described in the request.
27. The Home Office provided the Commissioner with details of the sampling exercise undertaken and its findings that searching just that one team inbox would take in excess of 16 hours. When it extrapolated this data across the other inboxes it believed would need to be searched, it estimated that compliance with the request could exceed 1,500 hours work.
28. Similarly, it explained how it had calculated the number of meeting records that would need to be consulted and it estimated that reviewing them for relevant information would take in excess of six hours.
29. It was unable to provide an estimate as regards retrieving and extracting the information, or a document which may contain the information:

³ The Home Office provided the exact number to the Commissioner. As it is operationally sensitive information, it is not disclosed here.

“The unit time for this activity will depend upon the degree to which information has been identified. If information is identified then any time taken will add to the overall cost of complying with the request. This will include extracting information from its location (which may require emails/documents to be scanned or extracts of information to be extracted from its location).”

30. The Home Office did remark to the Commissioner that it might be possible to respond to just the second part of the request within the cost limit if the complainant wished to submit a further request limited to just that information. However, it also said that this information might still be exempt from disclosure under the previously cited exemptions.

The Commissioner's decision

31. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on what information a public authority should hold, or how it should hold it. He is not concerned with how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.
32. The Commissioner's job here is to determine whether the Home Office has demonstrated that the work involved in providing the information specified in the request would be likely to exceed 24 hours, and thus the £600 cost limit established under section 12 of FOIA. As set out above, the Commissioner is satisfied that the Home Office was entitled to aggregate the costs of dealing with both parts of the request when calculating its estimate. It is not necessary for the Home Office to have complied with as much of the request as it could until the cost limit was reached. It is sufficient for it to show that it has estimated that the work set out in the bullet points in paragraph 16 would exceed 24 hours, and that its estimate is a reasonable one.
33. The Home Office has provided an estimate that compliance with the request would require at least 25 hours work and that it might exceed 1,500 hours work. It has explained that its estimate is derived from a combination of known data, and estimated data, based on its experience of carrying out relevant work. The Commissioner accepts that it has no way of precisely gauging the amount of work that would be required without actually doing the work, which the Commissioner's guidance on section 12 states public authorities are not obliged to do.

34. The Commissioner notes that the Home Office has provided a credible estimate that compliance would involve at least 25 hours of work, and that this estimate is based on a break down of just a portion of the work that would be necessary. The actual costs involved with locating, identifying and extracting relevant information from all the business areas that would need to be consulted, would be higher, perhaps considerably so.
35. Having carefully considered the search strategy adopted and the specific estimates provided by the Home Office as set out above, the Commissioner's conclusion is that the Home Office has estimated reasonably and cogently that the costs involved in complying with the request would exceed the £600 limit established by the Fees Regulations.
36. The Home Office was therefore entitled to apply section 12(1) of FOIA to refuse to comply with the request.

Section 16 – advice and assistance

37. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
38. On the question of whether adequate advice and assistance had been given to the complainant regarding how he could refine the request so that it might be complied with within the cost limit, the Commissioner notes that he was told that the request might be complied with if the timescale specified was reduced, from two years, to around a month, although it was noted that the exemptions cited in the original response might then be engaged.
39. The Commissioner is therefore satisfied that the Home Office did provide appropriate advice and assistance to the complainant regarding his request.

Other matters

40. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Section 45 - Internal review

41. 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 FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
42. The code states that, where offered, internal reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
43. The complainant asked for an internal review on 27 April 2021. The Home Office acknowledged receipt of this request the same day, and it undertook to respond by 26 May 2021. However, it did not provide the outcome of the review until 89 days after the complainant requested it, and only following the Commissioner's intervention. The Home Office has not offered any explanation for the delay.
44. The Commissioner considers that the Home Office's handling of the internal review was not in accordance with good practice under the Section 45 code.
45. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"⁴ strategy 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 systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁵.

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

46. 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

47. 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.
48. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF