

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2022

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

Decision (including any steps ordered)

1. The complainant requested from the Home Office information about Afghan evacuees. The Home Office refused to confirm or deny whether it held information within the scope of the request, citing section 12(2) (cost of compliance exceeds appropriate limit) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to apply section 12(2) of FOIA and is satisfied that the Home Office met its obligations under section 16 to offer advice and assistance. He finds that the Home Office breached section 10(1) FOIA by failing to respond to the request within the statutory time for compliance.
3. The Commissioner does not require the Home Office to take any steps.

Request and response

4. On 27 August 2021 the complainant requested the following information:

“1. The number of evacuees from Afghanistan found to have forged documents and/or documents that do not belong to them.

2a. The number of evacuees from Afghanistan found to have previously been on 'no-fly' or 'no-entry' lists.

2b. The number of evacuees from Afghanistan found to have previously been deported from the United Kingdom.

For background context, if you can disclose the number of previously deported Afghan evacuees who were Foreign National Offenders, please do so, along with any information on the category of offences committed (if any) you can make available.

If you can answer some of these questions but not all, please provide what answers you can instead of rejecting this request in its entirety.

Partial answers to questions will be acceptable if only partial information is held.

This request covers the period from the beginning of the recent Afghan relocation and resettlement schemes to the time when the Home Office answers this request, which I expect will be after the Afghan withdrawal date of August 31st."

5. The Home Office responded on 21 October 2021, stating that it did not hold the information requested in question 1. It further stated that the information requested in questions 2a and 2b of the request was exempt from disclosure under section 31(1)(a) and (e) of FOIA.
6. The complainant requested an internal review on 22 October 2021. He rejected the application of section 31 and suggested that information was held in relation to question 1. On 10 February 2022, the Home Office issued a revised response, stating that the request should have been refused under section 12(2) of FOIA as the cost of compliance would exceed the appropriate limit. In particular, the Home Office stated that the information, if held in respect of question 1, is "not recorded centrally and to identify if information is held would require a search of all relevant local records" which, it estimated, would exceed the appropriate limit.
7. The Home Office further stated that, in line with guidance produced by the Commissioner, if "part of a request cannot be answered within the cost limit, then the request in its entirety falls to be refused". The Home Office stated that it would consider a revised request from the complainant but that it was possible that other exemptions of FOIA would apply.

Scope of the case

8. The complainant contacted the Commissioner on 28 January 2022 to complain about the way their request for information had been handled. The complainant disagrees with the Home Office's decision not to separately address questions 2a and 2b of the request. They state that in applying section 12(2), the Home Office did not consider their detailed arguments against the application of section 31 in relation to question 2a and b. They say that it is unfair to make them resubmit the request and go through the procedure again given the length of time that it took to respond to the initial request and internal review.
9. The Commissioner considers the scope of this case is to determine if the public authority has correctly applied section 12(2) of FOIA in response to this request. The Commissioner has also considered whether the public authority met its obligation to offer advice and assistance, under section 16 of FOIA.
10. The Commissioner has, in addition, commented on the Home Office's delay in providing the internal review and initial response to the request in the 'Other matters' section, at the end of this notice.

Reasons for decision

Section 12(2)

11. 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" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
12. 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.
13. The "appropriate limit" is set in the Fees Regulations at £600 for central government, legislative bodies, and the armed forces and at £450 for all other public authorities. Therefore, the "appropriate limit" for the Home Office is £600.
14. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, effectively

imposing a time limit of 24 hours for the Home Office to deal with this request.

15. Where section 12(2) is relied upon, Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following activity:
 - determining whether the information is held.
16. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of "Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004", the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".
17. The task for the Commissioner here is to determine 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. In the Commissioner's view, section 12(2) will only be relevant where the public authority is entirely unaware of whether it holds any recorded information within the scope of the request.
18. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

Would confirmation or denial exceed the appropriate limit?

19. As is the practice in a case in which the public authority has cited the cost limit under section 12(2) of FOIA, the Commissioner asked the Home Office to provide a more detailed estimate of the time and cost of determining whether the requested information was held.
20. In its submissions to the Commissioner, the Home Office maintained its reliance on section 12(2) of the FOIA and offered an explanation for how it had calculated that the request exceeded the appropriate limit.
21. The Home Office explained that establishing if it held the information within the scope of the request "would only be possible by a comprehensive manual search through a very large amount of records." It was noted that whilst information such as names/nationalities can be quickly extracted through electronic reporting, other more detailed

information held on an individual (such as the holding of forged documents) "is not easily or quickly searchable, nor has been required in previous internal reports."

22. To find the information, the Home Office stated that "each record for Afghan arrivals into the UK would need to be identified and then manually searched for" within 'free text' fields. The Home Office has claimed that they are unable to run reports on such text fields, hence the requirement to conduct manual searches.
23. In calculating an estimated cost of establishing if the information is held, the Home Office cited media reporting which advised that "approximately 15000 Afghan evacuees arrived in August 2021. All of which would have to be manually searched for and reviewed." It was estimated that if the Home Office "took just 2 minutes to search for and check each record, then checking approximately 15000 records would equate to 500 hours. At an hourly staff cost of £25, this means it would cost over £12K to identify if the Home Office does or doesn't hold the information requested." To take half this time to locate and review each record for the information within the scope of the request, the time taken to review would still be significantly in excess of the appropriate limit.
24. The Commissioner notes the complainant's concerns around the Home Office's decision to reject the entirety of the request based on its application of section 12 of FOIA for question 1. As the Home Office noted in the internal review and its submissions to the Commissioner, however, this is in line with the Commissioner's published guidance which states:

"As a matter of good practice, public authorities should avoid providing the information found as a result of its searching and claiming section 12 for the remainder of the information. It is accepted that this is often done with the intention of being helpful but it ultimately denies the requestor the right to express a preference as to which part or parts of the request they may wish to receive which can be provided under the appropriate limit."¹

¹ [costs_of_compliance_exceeds_appropriate_limit.pdf \(ico.org.uk\)](https://ico.org.uk/costs_of_compliance_exceeds_appropriate_limit.pdf)

25. The Commissioner is therefore satisfied with the Home Office's decision to refuse both parts of the request based on its application of section 12 of FOIA for question 1.
26. The Commissioner's overall conclusion is that the Home Office has estimated reasonably that to confirm or deny whether it holds any information within the scope of the complainant's request would exceed the appropriate cost limit. This is because the Home Office's submissions would indicate that compliance would take more than the £600 limit to respond to the requests. The Commissioner considers that its calculations are "sensible, realistic and supported by cogent evidence", therefore falling in line with our guidance, particularly given the need for a manual search of information. The Home Office was therefore correct to apply section 12(2) of FOIA to the complainant's request.

Section 16(1) – duty to provide advice and assistance

27. Section 16(1) of FOIA provides that a public authority should give reasonable advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice² in providing advice and assistance, it will have complied with section 16(1). The FOIA code of practice states that, where public authorities have relied on section 12 to refuse a request, they should:

"provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the cost limit".
28. In terms of providing advice and assistance on refining the request so that it might be complied with within the cost limit, the Commissioner notes that the complainant was initially told that a revised request would be considered. The Home Office also informed the complainant that other exemptions of FOIA might be engaged, but did not provide any further advice at that stage, which was regrettable.
29. In its submissions to the Commissioner, the Home Office stated that it would be "very difficult to give helpful advice and assistance as to how

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

to bring a fresh request under the cost limit". The Commissioner accepts that, whilst the Home Office could have done more to explain their position to the complainant, it would ultimately be difficult for them to give any meaningful advice on how to reframe the request given the way in which the information was held and the need for a manual search of large amounts of data. As such, the Commissioner is satisfied that there was no breach of section 16(1) of the FOIA.

Section 10 – Time for response

30. Section 10(1) FOIA states that a public authority must respond to a request promptly and in any event not later than the twentieth working day following the date of receipt).
31. The request for information was made on 27 August 2021. The Home Office responded with a refusal notice on 21 October 2021. As this was more than 20 working days after the request was made, the Commissioner finds that the FCA breached section 10(1) of FOIA.

Other matters

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

Section 45 - Internal review

33. 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.
34. 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.
35. The complainant asked for an internal review on 22 October 2021. The Home Office acknowledged receipt of this request the same day. However, it did not provide the outcome of the review until 10 February 2022 after the complainant requested it, and only following the Commissioner's intervention. The Home Office has not offered any explanation for the delay.

36. 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.
37. 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"³ 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"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <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: 0203 936 8963

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

Claire Churchill
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