

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 20 December 2010**

**Public Authority:** Department for Business Innovation & Skills  
**Address:** Kingsgate House  
66-74 Victoria Street  
London  
SW1E 6SW

### Summary

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The complainant requested explanatory memoranda provided to legislators for debates on The Education (Student Loans) Regulations between 1990 and 1998. The public authority maintained that section 12(1) was applicable and provided the Commissioner with a detailed explanation of its reliance on this section. After a lengthy investigation the Commissioner's decision is that section 12 was engaged and therefore the public authority were relieved of their obligation to comply with section 1(1) of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant made a request to Department for Business Innovation & Skills ("the public authority") on 8 January 2008 for explanatory memoranda provided to legislators during parliamentary debates for The Education (Student Loans) Regulations (and amendments thereto) between 1990 and 1998. The complainant also directed the public authority to a speech of a minister recorded in

Hansard for a debate on the 1990 regulations which referenced such memoranda.

3. The public authority provided a response to the complainant on 6 February 2008 in which they provided him with a copy of two memoranda on two statutory instruments which had been published in the reports of the "House of Lords, House of Commons Joint Committee on Statutory Instruments". The public authority next wrote to the complainant on 26 February 2008 stating that they had made further searches for the requested information but they were fruitless.
4. The complainant wrote to the public authority on 19 April 2008 in which he maintained that the information provided by the public authority were not the explanatory memoranda he was seeking. What had erroneously been provided by the public authority were, according to the complainant, memoranda in reports "provided by government departments in response to requests from the Committee for clarification on specific points". The complainant went on to ask the public authority to "revisit his request".
5. The public authority wrote to the complainant on 15 January 2009 explaining that, amongst other things, their research indicated that the information he was seeking was not routinely generated by the legislative process. That is, the regulations that would give rise to the requested information would only be debated if they were subject to an objection and this apparently had only happened in 1994. Where there was not a debate the requested information would not have been generated. The letter went on to say that they did not hold the information, that section 12 of the Act meant the department were not obliged to comply any further with his request and that he had a right to request a review of its decision.
6. The complainant requested an internal review of the public authority's decision by way of a letter dated 18 March 2009. On 22 June 2009 the public authority wrote to the complainant with the details of the result of the internal review it had carried out. The outcome was to uphold the original decision.

## The Investigation

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### Scope of the case

7. On 14 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner notes that the public authority (paragraph 5 above) stated that they do not hold the information and that section 12 meant that the department were not obliged to comply further with the information request. However the public authority later clarified its position in correspondence to the Commissioner dated 19 August 2010 when it said they “were not required to carry out exhaustive searches for the information to establish whether it is held if to do so would exceed the costs limit”. The Commissioner therefore has to decide whether the public authority was correct to rely on section 12 not to comply with the complainant’s request for information.

### Chronology

8. The Commissioner wrote to the public authority on 14 April 2010 and on 15 July 2010 asking a series of questions relating to the requested information and the public authority’s reliance on section 12. The public authority provided a substantive response to the Commissioner in a letter dated 19 August 2010.
9. The public authority addressed the queries (as underlined below) raised by the Commissioner on its reliance on section 12 as follows;

In your letter of 15 July you ask some specific questions concerning the Department’s application of S12 in this case and the time taken. No detailed timings were taken at the time of the request so the following estimates are based on the recollections of those involved including the external agencies.

#### Determining whether information falling within the scope of the request is held

This primarily consisted of consultation with and work undertaken by the policy team’s legal advisers to establish the possible nature of the “explanatory memoranda” sought by the complainant, as described above, which took 4 approximately hours’ effort. This does not include the time initially taken on consulting policy officials on the possible nature of the memoranda requested; time to secure the assistance of legal advice, and background briefing for the lawyers in the context of

complainant's other requests and his wider interest in how the student loans legislation had developed over the years.

As explained this did not conclusively establish whether the information requested was held by the Department or not – the only way to establish with complete certainty whether the information was held was to conduct a complete search of all the relevant files relating to the Education (Student Loans) Regulations between 1990 and 1998. We are not required to carry out exhaustive searches for the information to establish whether it is held if to do so would exceed the costs limit. It was therefore decided to undertake a search of the files relating to the 1994 Regulations as it was considered to be the most likely Regulations for which an “explanatory memorandum” might have been produced, which would give a good indication of whether such information was held.

#### Locating the information, or a document which may contain the information

Information concerning the passage of the Education (Student Loans) Regulations between 1990 and 1998 through Parliament pre-dates the introduction of electronic records management in the Department. Such information would therefore be held in paper form only on physical files, and given its age would be located in an off-site archive store managed under contract by external contractors.

The process of identifying potentially relevant files relating to the 1994 Regulations for retrieval from storage is described above and took approximately 1 hour's effort. In addition, it is estimated that for the external contractors to locate the requested files and return them to the Department would have taken approximately 1 hour's effort. Special arrangements had to be made to receive and securely store the files at their offices as storage was limited and a 'clear desk' policy operated.

(The lawyers were also asked to look on their own files and some effort and time (which has not been recorded) was spent by lawyers on trying to locate their own files and see whether they held such memoranda on them. However their search revealed that their regulations records files went back only as far as 1995 and so did not cover the first half of the period covered by the request, and in particular the years 1990 and 1994 which were the ones when it was most likely that the “explanatory memoranda” sought might have been produced.)

#### Retrieving the information, or a document which may contain the information

The search for files related to the 1994 Regulations returned two boxes of files from the off-site store. To examine the content of each of the files and complete a careful review of the papers held on the one file identified as potentially relevant to the request took approximately 2 hours' effort.

#### Extracting the information from a document containing it

In the case of the 1994 Regulations no information appearing to fit the complainant's description of "explanatory memoranda" was located and retrieved. However, on the basis that it is unlikely that more than one "explanatory memorandum" would have been produced for any set of Regulations, if one had been found it would only have taken a few minutes to extract it from the file and take a copy (although various drafts may have existed and multiple copies stored on different files). Once each file had been examined it had to be "closed", and when all files had been examined they had to be packaged up and returned to the external contractors.

#### Estimate

On the basis of the above, we estimate that it would take a minimum of 4 hours' effort to locate and retrieve any relevant information held relating to one particular set of Education (Student Loans) Regulations. The 1990 Regulations were the original ones (the other Regulations built on these) and we would therefore expect there to be a larger quantity of records to locate and retrieve – for the purposes of these estimates we consider that it would be reasonable to double the estimate for this year.

In his original request the complainant identified 14 separate sets of Education (Student Loans) Regulations, including the original 1990 Regulations, covering 8 years. Based on the lower figure of 8 years' (i.e. not including any amendments thereto), worth of regulations assuming twice as much effort required for the 1990 Regulations (7x4 hours + 1x8 hours), and including the estimate for the work undertaken to determine whether the information is held (4 hours), we arrive at an estimate of a minimum 40 hours' effort. To this must be added the 5 hours' effort originally spent by the Library on the request, making a total estimate of a minimum of 45 hours' effort. In addition significant time would also have been needed for preparatory considerations and physical file handling, such as arrangements for secure storage and preparation for despatch. If, however, the Department concentrated on the 4 years regulations identified by the complainant in his spreadsheet when debates actually took place (although in the case of the 1990 and 1993 Regulations the complainant has identified that debates took place in both the Houses

of Parliament), and again assuming twice as much effort required for the 1990 Regulations (3x4 hours + 1x8 hours), and including the estimate for the work undertaken to determine whether the information is held (4 hours), we arrive at an estimate of a minimum 24 hours' effort. To this must be added the 5 hours effort originally spent by the library on the request, making a total estimate of a minimum of 29 hours' effort. Again, in addition, time for preparatory consideration and physical file handling, such as secure storage and preparation for despatch, would also have been needed.

It should, however, be noted that a good deal of additional time on this request was devoted to attempting to understand what this request comprised and how it differed from a parallel request for all draft student loan regulations over the same period. Given the passage of time, there was no-one who could remember the system 20 years earlier and so trying to address this request was very difficult. The above are therefore minimum timeframes and do not include time for exploratory and explanatory conversations with specialist FOI Advisers, clarification, instructions to colleagues, assignment of staff, re-assignment of the work they would otherwise be doing, false starts, etc.

Please clarify whether a sampling exercise has been undertaken in order to determine this estimate.

As explained above, the estimate is based on the 'sample' search for information relating to the 1994 Education (Student Loans) Regulations carried out at the time of the request.

Please also confirm that the estimate has been based upon the quickest method of gathering the requested information for example where possible databases would be used rather than searching manual files.

As explained above, information concerning the passage of the Education (Student Loans) Regulations between 1990 and 1998 through Parliament pre-dates the introduction of electronic records management in the Department. Such information would therefore be held in paper form only on physical files, and given its age would be located in an off-site archive store managed by its external contractors. The method described is therefore the only way available to search for information of this age. However, the records available of files created at that time are not necessarily reliable. For example, when asking for all 1994 files titles containing the key words Student Loans, the crucial loans regulations files did not appear. Accordingly, the process had to be repeated and time taken to re-specify the request specifically to include the regulations.

An added difficulty is that any paper filing system relies on staff creating files with appropriate titles and then storing individual documents on the most appropriate file. There is no guarantee that this will have happened and so conclusive proof of not holding documents could potentially be found only by searching all files, whether or not they had the word 'regulations' in the title, because the possibility of misfiling could not be ruled out.

## Analysis

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### Section 12

10. Section 12(1) of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit. The Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 ('the Fees Regulations') set a limit of £600 to the cost of complying with a request for government departments. The cost is calculated at a rate of £25 per person per hour, which is equivalent to 24 hours of staff time. The figure of £600 relates only to the appropriate limit; it does not relate to the fees that a public authority may charge for providing information. Section 12(2) provides that section 12 (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
11. Regulation 4(3) provides that only certain activities may be taken into account when calculating the cost. Those activities are: -
  - “(a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.”
12. The public authority states (see paragraph 9 above) that in his original request the complainant identified 14 separate sets of Education (Student Loans) Regulations, including the original 1990 Regulations, covering 8 years. Based on the lower figure of 8 years' worth of regulations, assuming twice as much effort required for the

1990 Regulations (7x4 hours + 1x8 hours), and including the estimate for the work undertaken to determine whether the information is held (4 hours), it arrives at an estimate of a minimum 40 hours' effort. To this, it went on to say, must be added the 5 hours effort originally spent by the Library on the request, making a total estimate of a minimum of 45 hours' effort. In addition significant time would also have been needed for preparatory considerations and physical file handling, such as arrangements for secure storage and preparation for despatch

13. The Information Tribunal in the case of Robin Williams & Cardiff and Vale NHS Trust held that it was permissible for it and the Commissioner to take into account "the manner in which the information was held; the fact that it is held in various location by the Trust and its appointed agents and also the fact that very little information is available by electronic means ..... It was not open to the Tribunal to disallow reliance upon section 12 on the basis that the Trust could have organised its records more efficiently. The question was whether the information was held by the Trust or its agents and if so the time taken in compliance with the letter of the request..." (paragraph 28).
14. Having regard to the previous paragraph the Commissioner will take into account that the information if held is held at a storage facility offsite of the public authority, it would be in manual form and indexed in a way that does not necessarily aid the search required to locate the information. The Commissioner accepts and notes the time the public authority has already expended searching for the information as evidence that supports their calculations and estimations. However it is not clear to the Commissioner that the claimed 5 hours originally spent by the Library "searching for the withheld information" is time spent on tasks permitted to be counted when calculating the costs for the purposes of regulation 4(3). Time spent, for example, searching for information not requested is not calculable time for the purposes of regulation 4(3). Similarly, it is not clear to the Commissioner whether adding in this additional 5 hours amounts to "double counting" of hours that are also included in the 40 hour estimate. However, and in any event, "deducting" the claimed 5 hours from the public authority's calculations still mean that the revised estimated search time of 40 hours is still well in excesses of what is required by the regulations. The Commissioner therefore finds that the public authority's estimate (minus the 5 hours), as detailed in paragraph 9 above for the purposes of section 12(1) is reasonable, and therefore the public authority are relieved of their obligation to comply with section 1(1) of the Act.



## Procedural Requirements

### Section 16(1)

15. Section 16(1) (full text in the legal annex) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
16. Whenever the cost limit has been applied correctly, the Commissioner must consider whether it would be possible for the public authority to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner view is that the public authority should have discussed with the complainant as to whether and how his information request should have been limited or modified to enable a search within the requisite statutory limits.
17. Paragraph 14 of the section 45 code of practice sets out what advice and assistance should be offered to applicants whose requests are refused on the basis of section 12(1) of the Act. This paragraph suggests that public authorities should consider providing an indication of what information is available within the cost limit and also consider advising the applicant that by reforming or re-focussing their request, information may be available within the cost limit.
18. On the basis of the information provided to him the Commissioner considers that, it would have been possible to provide the complainant with advice and assistance to help him narrow or refine his request in order to bring the time for compliance within the appropriate limit. In particular the Commissioner is of the view that the public authority could have provided to the complainant (as it latterly provided to the Commissioner) a detailed cost estimate of conducting a search for the requested information. This would have assisted the complainant to limit his request to only certain sets of Regulations. In particular, the Commissioner notes that both the complainant and the public authority came to agree that the memorandum for the 1990 Regulations had been generated. In view of the above, the Commissioner finds that the public authority breached section 16(1) of the Act.

## Section 17

19. The Commissioner finds that the information request was received by the public authority on 8 January 2008 and that it did not inform the complainant of its reliance on section 12(1) within 20 working days and thereby breached section 17(5) of the Act.

## **The Decision**

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20. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - (i) The application of section 12(1) to the information requested
21. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - (i) The public authority breached section 17(5) of the Act by failing to issue a refusal notice citing section 12(1) of the Act within 20 working days of the request.
  - (ii) The public authority also breached section 16(1) of the Act by failing to provide reasonable advice and assistance to the complainant as to how he may narrow his request.

## **Steps Required**

22. Although the Commissioner has found the public authority in breach of section 16(1) he requires the public authority to take no steps to ensure compliance with the Act. This is because the detail within this notice renders this unnecessary.

## **Other matters**

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23. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Commissioner finds that the information request was received by the public authority on 8 January 2008 and that the refusal notice was issued to the complainant on 26 February 2008. The complainant

requested a review, albeit by asking the public authority to re-visit its decision, in correspondence dated 18 March 2009 and the review findings were communicated to the complainant on 22 June 2009.

Part VI of the section 45 Code of Practice makes it 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. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided 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 be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner expresses his concerns that it took in excess of 65 working days for an internal review to be completed.

## Right of Appeal

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24. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 20<sup>th</sup> day of December 2010**

**Signed .....**

**Lisa Adshead  
Group Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### **Section 1 General right of access to information held by public authorities.**

(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.

### **Section 10 - Time for compliance with request**

(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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

### **Section 12 - Exemption where cost of compliance exceeds appropriate limit.**

(1) 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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

## **Duty to provide Advice and Assistance**

### **Section 16(1) provides that -**

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

### **Section 16(2) provides that –**

"Any public authority which, in relation to the provision of advice and 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."

## **Refusal of Request**

### **Section 17(1) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

### **Section 17(5) provides that –**

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."