

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2020

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant requested information from the Department for Education (DfE) relating to guidance and materials concerning the School Complaints Unit (SCU). The DfE refused to comply with the request citing section 12 (cost limit) of the FOIA.
2. The Commissioner's decision is that the DfE was entitled to refuse to comply with the request in accordance with section 12(1) of the FOIA and is satisfied that the DfE met its obligation under section 16 to offer advice and assistance. The Commissioner does not require the DfE to take any steps.

Request and response

3. On 14 December 2019, the complainant wrote to the DfE and requested information in the following terms:

"Please send me internal guidance, lines to take, training material, advice for caseworkers or equivalent, for use by the school complaints unit in respect of deciding if a school and governing body have acted unreasonably. Further please provide any such material dealing with breaches of child and parent ECHR convention rights and the Wednesbury principles in respect of school and governing body decisions.

Where the department is reliant on an exemption under section 21 please advise of the location of such material.

Where section 36 is considered please advise how the department has considered any lack of information available to the public and schools which would otherwise be considered as going towards meeting the public interest in having an understanding of how such considerations are made.

If the department relies on section 12, I request that it offers advice and assistance for the request to be narrowed as per section 45 code of practice."

4. The DfE responded on 14 January 2020. It stated that it held information within the scope of the request, but that the cost of complying with the request would exceed the cost threshold of £600 for central government public authorities. In accordance with this finding, the DfE issued a section 12 refusal notice in reply to the complainant's request for information. The DfE explained that, due to the nature of the request, it was not possible to offer advice and assistance which would enable the information to be provided without exceeding the cost limit. The DfE did, however, provide to the complainant some information which it believed was relevant to the request in question. This was provided outside the provisions of the FOIA in the interests of transparency.
5. The complainant requested an internal review on 14 January 2020.
6. The DfE completed an internal review and notified the complainant of its findings on 31 January 2020. It upheld its initial application of section 12 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 13 February 2020 to complain about the way their request for information had been handled. The complainant disagrees with the DfE's application of section 12 of the FOIA.
8. The scope of the following analysis is to determine whether the DfE was entitled to rely on section 12 of the FOIA in this case. The Commissioner has also considered whether the DfE met its obligation to offer advice and assistance, under section 16.

Reasons for decision

Section 12 – cost of compliance

9. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
10. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. The DfE relied on section 12(1) in this case.
11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the DfE is £600.
12. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the DfE.
13. 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 permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
14. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. 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”. The task for the Commissioner in a section 12 matter is to determine whether the public

authority made a reasonable estimate of the cost of complying with the request.

15. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
16. Where a public authority claims that section 12 of the 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 the cost of compliance exceed the appropriate limit?

17. As is the practice in a case in which the public authority has informed the complainant that it holds the information, the Commissioner asked the DfE to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
18. In its submission to the Commissioner the DfE stated that searches had produced thousands of pieces of information potentially within the scope of this request.
19. The DfE provided a sample of information recovered from the searches that fell within the scope of the request. The Commissioner noted that the content of the sample information fell under the classification of "lines to take" which did relate to the complainant's request. The DfE also provided a sample of information recovered that is not within the scope of the request. It was clear to the Commissioner that the information did not concern "lines to take" pertinent to the complainant's request. The DfE receives a high volume of enquiries and queries on a widespread range of topics within its remit and, as such, a significant number of "lines to take" exist which may be used to create bespoke responses from caseworkers.
20. In response to the Commissioner's questions the DfE stated that numerous searches had been undertaken of DfE email accounts and the DfE electronic filing system (SharePoint) to locate information within the scope of the request.
21. The DfE explained that they did not hold a formal set of "lines to take" for caseworkers, but that every case file or briefing pack relating to a case will contain "lines to take" specific to the case in hand. The DfE explained that caseworkers share numerous "lines to take" with colleagues when assessing the multitude of cases received. Therefore, the DfE consider that they hold "lines to take" but that the searches

required to locate these take the cost of complying with the request above the cost threshold.

22. DfE explained that the searches relating to the “lines to take” for caseworkers returned thousands of emails. Each of these items would need to be read through manually to ascertain whether it was information in the scope of the request. The searches also did not take into account the numerous attachments contained within the emails, which would also need to be read manually, thereby adding a substantial additional time and cost burden to the request.
23. The DfE outlined that the number of items returned for just the initial search terms “lines” and “reasonable” placed the request well in excess of the cost limit (4517 emails and 4740 documents). Due to the wide ranging nature of the “lines to take” described in paragraph 21 above, the DfE explained that more targeted searches were not possible.
24. The DfE estimated that it would take between 1 and 5 minutes to review and extract relevant information from the 4517 emails, notwithstanding the potential requirement for colleagues to be contacted to ascertain if additional communications were held following the receipt of each email. It would therefore cost between £1875 and £9400 to review the information ($4517 / 60 = 75$ hours \times £25 = £1875; $4517 \times 5\text{mins} / 60 = 376$ hours \times £25 = £9400).
25. As part of the DfE’s reconsideration of the request, prompted by the Commissioner’s correspondence, a further search was conducted for the term “unreasonably”. This further search identified 2242 emails, all of which would also require a manual review, with estimates provided which are in excess of the cost limit ($2242 / 60 = 37$ hours \times £25 = £934; $2242 \times 5\text{mins} / 60 = 186$ hours \times £25 = £4670).
26. The DfE estimated that it would take between 5 and 10 minutes to review each of the 4740 documents returned from a search of their SharePoint system using the term “reasonable”. This takes the request beyond the cost limit ($4740 \times 5 / 60 = 395$ hours \times £25 = £9875; $4740 \times 10 / 60 = 790$ hours \times £25 = £19,750).
27. The DfE therefore argued that, based on the combined estimates described above, the request would cost between £10,809 and £29,150 to fulfil.
28. The Commissioner considers that, even taking into account the more conservative cost estimates outlined above, the DfE would take more than the 24 hours / £600 limit to respond to the request. The DfE was therefore correct to apply section 12(1) of the FOIA to the complainant’s request.

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

29. Section 16(1) of the FOIA provides that a public authority should give 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 practice¹ in providing advice and assistance, it will have complied with section 16(1).
30. The Commissioner notes that the DfE outlined to the complainant that it was not possible to offer advice about how to reduce the scope of the request, due to the broad nature of the material requested. The Commissioner considers this was an appropriate response in the circumstances given the amount of files that would have to be searched. She also notes that the DfE provided some information to the complainant outside of the scope of the FOIA to assist with their request. She is therefore satisfied that the DfE met its obligation under section 16 of the FOIA.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

31. 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

32. 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.
33. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF