

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 September 2016

Public Authority: Department for Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about the Local Government reorganisation of Oxfordshire and Gloucestershire. The Department for Communities and Local Government (DCLG) relied on section 12 to refuse the request for information. The Commissioner considers that DCLG has not satisfactorily established that the costs of compliance exceed the appropriate limit. Having failed to provide the complainant with any advice and assistance following his request, and having failed to comply with the statutory 20 day time limit for response, DCLG has breached section 16 and section 10 of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response under FOIA which does not rely on section 12, providing appropriate advice and assistance as necessary.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 25 February 2016, the complainant wrote to DCLG and requested information in the following terms:

"I wish to request all documents, correspondence or other information in your department's possession with regards proposed local government reorganisation in Oxfordshire or Gloucestershire. In the interests of expediency, I am happy to restrict this to the last 12 months."

5. DCLG responded on 29 March 2016. It refused the request relying on section 12 – costs of compliance exceed the appropriate limit. Following a request for an internal review, DCLG responded on 19 April 2016. It upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 22 April 2016 to complain about the way his request for information had been handled. He set out his position that the estimate was not reasonable as required by statute and provided detail as to why he felt this to be the case. He detailed that the work rates relied on were so low as to be unrealistic and the assumptions as to levels of information held in other departments to be pessimistic.
7. The Commissioner considers the scope of the investigation is to determine whether DCLG has correctly relied on section 12 and whether it has provided a realistic estimate based on sensible and cogent evidence. She will also consider whether DCLG has fulfilled its obligations under section 16.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

8. 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".

9. In other words, section 12 FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.
10. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government departments and £450 for all other public authorities. 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 in this case.
11. 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:
 - determining whether it holds the information;
 - 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.
12. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
13. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be 'reasonable': she expects it to be sensible, realistic and supported by cogent evidence.
14. The initial submission provided to the Commissioner raised further questions and she had to write to DCLG again before reaching a conclusion. Her decision is therefore based on the response to the request, the response to the internal review and the two submissions provided to her office.
15. In its initial submission to the Commissioner, DCLG maintained its position regarding the estimate detailed in the response and review.
16. In responding to the complainant, DCLG set out that it had established that complying with the request would cost £1200. It set out only that it had identified more than 50 emails from one team and that other teams could be expected to have at least as many. It stated that locating and assessing these emails was estimated to take one member of staff around two days.

17. DCLG set out that if the complainant were able to narrow his request it could be handled as a fresh request under the appropriate legislation.
18. In setting out his request for an internal review, the complainant addressed DCLG's reference to 'assessing the information' stating that including this activity was contrary to the Commissioner's guidance. He also set out that as DCLG had made reference to two days' work this would amount to £400 at a rate of £25 per hour for 8 hours per day. He further stated that there was no explanation as to how the figure of £1200 had been reached.
19. In its review response, DCLG explained that the original response made it clear that it is locating, retrieving and extracting the information which is too costly and that this is in line with ICO guidance.
20. With regard to assessing the information, DCLG set out that before extracting the information it is necessary to determine whether information fell within the scope of the request and hence the use of the word 'assess'.
21. In respect of the costs, the review set out that it was the policy team leading on this area of the Department's work which had identified at least 50 emails and that there would be other correspondence and information across various areas of the Department including the correspondence team, private offices and other policy teams.
22. Turning then to the original estimate, DCLG stated:

"...if it took three members of staff 2 days each (at 16 hours) to locate and extract information from their various Departmental areas, then that equates to £1200. This is of course a reasonable estimate of the likely costs."
23. The review response explains that the original response could have been clearer about the extent of the information held across the Department.
24. In responding to the Commissioner's first request for a submission regarding the application of section 12, DCLG explained that the request had effectively been handled in two stages: the first based on the request for information and the request for a review, and the second based on the ICO request for a submission.
25. The submission sets out that at the first stage DCLG trawled for information, including from private offices, and that, based on the information received as a result, DCLG had taken the view that analysing that and preparing a response would take more than the

required time. The second stage followed the Commissioner's request for a submission.

26. The Commissioner notes that the work undertaken in response to the request and review does not appear to have been sufficient to allow DCLG to actually provide a reasonable estimate of costs and she is concerned that DCLG has included the activity of 'preparing a response' in its submission to her office.
27. This initial submission set out that DCLG had yet to fully ascertain the scope of further information held in other parts of the Department and as an example of this it cited private offices. The Commissioner notes with concern that the same submission sets out that private offices had been included in the first stage, i.e. the response and review to the complainant. This appears to be inconsistent.
28. In response to the Commissioner's request for a submission, DCLG explained that the lead official undertook a search for information on Oxfordshire and Gloucestershire material and identified just over 200 email chains and other pieces of data. DCLG set out that this had taken some 17 hours at around 5 minutes per item. DCLG estimated that a further 4 to 5 hours work may be needed to remove duplication but considerably more time might be needed depending on content. Again, the Commissioner notes with some concern that removing duplication is not a cost detailed in her guidance on section 12.
29. The Commissioner notes that DCLG refers to the policy lead and the lead official. Irrespective of whether this is one and the same individual, it is a cause for concern that the initial search did not produce the 200 emails later identified. It is not clear from the response whether the figure of 200 includes the initial 50 emails identified.
30. The initial submission to the Commissioner set out that the request had a very wide remit, seeking "all" information in "at least" the past 12 months. Although the Commissioner accepts the request is broad, she does not accept that the complainant set the time frame as suggested by DCLG. The request clearly states that the complainant is happy to restrict his request to the previous 12 months from the date of his request. The scope of the request is not therefore as broad as DCLG has set out in its submission.
31. DCLG has not stated whether any of the electronic searches undertaken at any time were restricted by time frame.
32. This submission set out that on receipt of the information request, the policy lead searched his records and sought information from other team members. DCLG explained in this submission that this identified around

50 different email chains and other information. DCLG explained in this submission that depending on the content of those 50 emails it may take less time than the estimate of one person 16 hours to consider whether those emails contain information falling within the scope of the request. It explained however that time would be taken up owing to the additional work in assessing the information and whether that suggests that there may be further relevant information not initially uncovered, and then managing that outcome. In terms of providing an estimate of cost, the Commissioner finds this particularly vague and appears to be based on a hypothetical situation rather than any cogent evidence other than the existence of 200 email chains.

33. The Commissioner specifically asked DCLG to provide full detail as to how it reached the original estimate of £1,200 and it responded by advising that the review officer's view was that more work than was originally estimated was likely to be required. The Commissioner considers that such a response is wholly inadequate and serves only to further question the application of section 12 in this case.
34. DCLG was asked to provide examples of any documents falling within the scope of the request which would be held in hard copy only. Despite stating that it is not unlikely that some documentation may only be held in hard copy, DCLG did not provide any examples to support this position.
35. Specifically asked if the team with the policy lead would expect to see all correspondence relating to this issue, DCLG advised that it would but that it is possible that information within the scope of the request could be held elsewhere.
36. Following consideration of DCLG's initial submission, the Commissioner considered that further questions had been raised and approached DCLG for a second submission. She is pleased to note that in this submission DCLG set out that the original response, and therefore the internal review and first submission to the Commissioner, may have set out too high an estimate of the work involved in meeting the request. However, it remained DCLG's position that section 12(1) did still apply.
37. In its second submission, DCLG has provided a narrative of the costs analysis and a table detailing the activities and time taken to complete them in order to support its application of section 12.
38. The table shows that in February 2016 an initial search of the lead official's inbox and policy area took three hours. DCLG had previously set out its position that it cannot conduct a search of its entire system, but the Commissioner finds it unusual that a search of one individual's inbox and shared drive, solely to identify information in a specific

category, would take three hours. The Commissioner would expect that initially information would be identified via an electronic search using relevant search terms and accordingly she considers three hours for this activity to be excessive. She notes too that in a decision notice from 2014, DCLG's position was that a search for information would be undertaken by an electronic search using key words.¹

39. Similarly, the Commissioner considers it excessive that a search of the Deputy Director's inbox would take two hours. Again it would seem appropriate to conduct an electronic search using relevant search terms. An initial search, for example, may have sought information relating to either county.
40. The table also sets out that in February 2016 a liaison exercise was undertaken. This activity was detailed as follows:

"Liaise with policy teams and other policy officials (principally the Cities and local Growth team, in order to cover LEPs and Enterprise Zones) to identify information they may hold"

41. It is the Commissioner's position that the liaison function conducted in February is extremely vague but she notes DCLG's position that it took five hours to 'liaise' with other policy teams and officials. She is concerned by the lack of evidence to support the fact that this function took five hours. There is neither an indication of what the liaison involved nor any detail of the outcome and she does not consider that it provides any supporting evidence in terms of estimating the costs of complying with this request.
42. It is DCLG's position, as set out in the table, that to assess the initial search results in February 2016 took two hours but that the function of locating the information via inbox search, shared drive search and liaison took five times as long. She notes too that these searches were conducted in February 2016 which was at the point when DCLG set out that it had identified more than 50 emails from one team but provided no estimate of what information other teams had located. Indeed, the later response in March 2016 set out that other policy teams 'could expect' to have at least as many emails.
43. The Commissioner considers this to be at odds with the fact that DCLG has stated that prior to issuing its initial response it conducted 10 hours

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/953398/fs_50508720.pdf

of searches for information and two hours of assessing the collated information. The table clearly sets out that the liaison function included 'policy teams' and other 'policy officials' whilst the initial response to the complainant suggests that the estimate is based on the identification of 50 emails from one team. It is unclear why the term 'could expect' was used when it appears that DCLG had in fact liaised with policy teams and officials and would have had evidence of information held in other teams.

44. As detailed earlier in this notice, the Commissioner notes too that DCLG's initial response to her office sets out that there were two stages to handling this request. The first was in which DCLG trawled for information, *"including from Private Offices"*, and had received information from other parts of the department. DCLG's position is that the second stage followed the ICO's intervention when a further electronic search was undertaken of *"all things relating to Oxfordshire and Gloucestershire."*
45. In the initial response to the Commissioner, DCLG has also set out that it had yet to *"fully ascertain the scope of the further information held in other parts of the department, such as private offices....."* It goes without saying that the two paragraphs, one after the other, are at odds. The Commissioner notes that in its most recent response to her office, DCLG now states in its narrative that private offices have advised that a search of the private office records would take one and a half hours each which would equate to an additional seven and a half hours. The table provided in this final response states that this activity would in fact take nine hours.
46. The Commissioner is concerned that the submissions do not sufficiently establish a reasonable estimate of a) whether private offices have in fact been consulted or remain to be consulted and b) how long that may take. Irrespective of whether it is seven and a half hours or nine hours, DCLG has not provided any supporting evidence upon which to base that assessment.
47. DCLG has set out three different estimates. One relates to 50 emails only, which was set out in the initial response to the complainant. Another was set out in its final response which details the original trawl but explains that it relates to 50 different email chains and other information such as progress reports as well as a ministerial submission. A further estimate provided as a result of the Commissioner's initial intervention relates to 200+ email chains. The Commissioner is concerned by these differences relating to the estimate of costs and is of the view that it is difficult to have confidence in the various estimates

provided, and therefore difficult to rely upon them to support the application of section 12(1) in this case.

48. In the table provided to the Commissioner in DCLG's final response it sets out that in May 2016, following receipt of the ICO's letter, a further search of policy area involving two people was conducted and that the search of their inboxes and personal folders took three hours. Again, according to the table, this relates solely to the activity of identifying information (not determining whether it is in scope). Given that the quickest way to do this would be to use relevant search terms to conduct an electronic search of two inboxes and personal folders, the Commissioner considers that three hours is excessive. Once again the Commissioner notes that it took more time to retrieve the information than to determine what was in scope, which the table records as two hours.
49. The table sets out DCLG's position that in February 2016 it spent five hours liaising with policy teams and other policy officials, and it therefore seems unusual that a further search of the policy area conducted in May 2016 included two colleagues. It is not explained why these two policy area colleagues were not included in the liaison exercise of February and were only identified in May. DCLG has not set out the amount of documents involved in this element of the search or how it reached the estimate of two hours to identify what information was in scope. Again, the Commissioner's position is that this does not provide adequate evidence to support any estimate.
50. In its second submission to the Commissioner, DCLG identified that a search of the correspondence system to determine what information is within the scope of the request had not yet been estimated, but it has allowed between two and six hours for this activity. Given its position that this is not yet estimated, the Commissioner finds it difficult to understand or accept the figure of between two and six hours which is not supported by any sensible or realistic evidence.
51. In its original response to the Commissioner, DCLG has set out that the initial response to the complainant identified the cost of responding to the request regarding unidentified information but takes a different position later on in the same response. The Commissioner wrote to DCLG and set out the question that 'if' the estimate in the original response related to the 50 emails already identified, was DCLG's position that this would take one person 16 hours to consider whether information fell within the scope of the request.
52. The Commissioner notes that rather than reiterate its earlier position that this estimate related to uncovered information, DCLG set out that

depending on the content it may take less time. DCLG has gone on to state that it is the additional work to assess the information and establish whether or not that suggests it may hold further relevant information which was not initially discovered which would take time. It also referred to a need to manage the outcome of the searches. It is the Commissioner's position that unknown factors and 'managing the outcome' of those unknown factors cannot be considered as contributing factors to support any realistic and sensible estimate. The four activities detailed in section 12(1) are clear, are sequential and do not include the task of 'managing the outcome'. The Commissioner considers this to be particularly vague on the part of DCLG.

53. The Commissioner notes too that the internal review set out that the estimate was based on what was initially discovered yet the first submission to the Commissioner sets out that the review considered the amount of information DCLG expected to hold.
54. The responses are confusing and inconsistent; DCLG has not been able to provide the Commissioner or the complainant with a clear and cohesive response detailing a realistic and sensible estimate to support its reliance on section 12(1).
55. DCLG has been afforded four opportunities to provide evidence to support the application of section 12(1); the response to the request, the internal review, the initial submission to the Commissioner and its latest response to her. However, it is the Commissioner's position that DCLG has not been able to provide a realistic estimate of the costs associated with complying with this request and consequently it has been unable to provide cogent evidence to support the estimates it has set out.
56. The Commissioner's decision is therefore that DCLG has not demonstrated why section 12(1) applies to the request.

Section 16 – advice and assistance

57. In its submission to the Commissioner, DCLG has set out a quote from its initial response to the complainant which states that if the complainant can narrow the scope of the request "*by perhaps asking for a shorter time period*" then DCLG may be able to provide some information within the appropriate limit.
58. The complainant has provided the Commissioner with a copy of the original email response to his request which makes no reference to the complainant refining his request by asking for a shorter time period.

59. It is the Commissioner's position that DCLG could and should have provided advice and assistance to the complainant by suggesting he refine his request in a number of ways. For example it could have suggested refining the request by asking for information over a shorter time frame; information between Ministers and staff; the two named councils and DCLG; one named council and DCLG; or perhaps minutes of meetings about the subject matter.
60. Although the complainant could not be expected to know how DCLG is set up or its records are structured, it may have been helpful to outline that there is a main policy area for the subject matter and to help him refine his request accordingly. The Commissioner notes the Decision Notice referred to at paragraph 38 of this notice explains that DCLG discharged its burden under section 16 in that case by setting out areas which are unlikely to hold information within scope – this too may have been a helpful approach in this case.
61. The Commissioner considers that DCLG has not complied with its duty under section 16 of the FOIA.

Other matters

62. The Commissioner would ask that in future, DCLG give careful consideration to the application of section 12, ensuring that it is able to provide a sensible and realistic estimate supported by cogent evidence. Any estimate should be set out at the earliest possible opportunity, usually at the point of responding to a request, which allows the requester to determine whether they should pursue their request further.

Right of appeal

63. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

64. 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.

65. 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

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