

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2019

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

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education ("DfE") relating to the meetings of the counter-extremism unit between certain specified dates where the topic of Birmingham schools and an Islamist takeover were discussed. The complainant also requested a copy of the evidence upon which Michael Gove made such claims. The DfE refused the request because it estimated that the cost of compliance would exceed the appropriate limit, citing section 12 of the FOIA.
2. The Commissioner has concluded that the public authority was entitled to rely on section 12(1) FOIA but has found the public authority in breach of its duty to provide advice and assistance in line with section 16 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To provide appropriate advice and assistance to the complainant as far as it is reasonable to do so in accordance with its obligations under section 16 of the FOIA.
4. 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

5. On 3 April 2018 the complainant made the following request for information under the FOIA:

On September 29, 2013, The Sunday Times reported how Michael Gove, the then Education Secretary, had recruited former MI5 agents as part of a "Counterextremism Unit" the Department for Education was putting together to investigate Islamist takeover of some British Schools:

<https://www.thetimes.co.uk/article/ex-mi5-agents-target-school-islamists-bl92jgwgl0s>

I would like a copy of transcripts or minutes of any meetings held by this counterextremism unit between September 29th 2013 and November 27th 2013, during which the topic of Birmingham schools and Islamists takeover was discussed.

In the same article in The Sunday Times, in the opening paragraph, it is suggested this counter extremism unit was put together following evidence that Islamic fundamentalists were trying to take over some British state primaries. Michael Gove goes on to cite some primary schools in Birmingham whose governing body were being "taken over" by parents with radical views, possibly with the hopes of radicalizing pupils and staff.

I would like to request a copy of the evidence on which Michael Gove made such claims about Birmingham primary schools."

6. The DfE subsequently divided the request into two parts:

'1. I would like a copy of transcripts or minutes of any meetings held by this counter-extremism unit between September 29th 2013 and November 27th 2013, during which the topic of Birmingham schools and Islamists takeover was discussed.

2. I would like to request a copy of the evidence on which Michael Gove made such claims [regarding primary schools in Birmingham whose governing body were being "taken over" by parents with radical views].'

7. The DfE responded on 1 May 2018 and stated that it did not hold information in relation to "*transcripts of minutes of any meetings...*" or "*evidence on which Michael Gove made such claims about Birmingham primary schools*" but it was suggested that if the complainant could rephrase part one of the request the DfE might be able to comply.

8. On 6 November 2018 the complainant then asked the DfE for some advice about how he should rephrase his request. It is unclear why so many months had passed. On 4 December 2018 the DfE responded to

him by saying that it had undertaken more searches but that if it continued it would exceed the fees limit and applied section 12 to his request. The DfE suggested he narrow the breadth of his request by specifying a school, meeting or document. The DfE also suggested that he ring up and discuss the matter further with the Press Office.

Subsequently, the complainant made many attempts to speak to the DfE officer concerned, without success, and the Press Office which ultimately suggested a review.

9. The DfE provided an internal review on 28 January 2019 in which it maintained its position that section 12 applied. The complainant subsequently had a meeting with the Press Office, though this did not resolve matters.

Scope of the case

10. The complainant contacted the Commissioner on 11 March 2019 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of this case to be whether the DfE was entitled to apply section 12(1) of the FOIA and whether it complied with section 16 and the duty to provide advice and assistance.

Reasons for decision

Section 12

12. Section 12(1) of the FOIA states that:

'(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.'

13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £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. This means that in practical terms there is a time limit of 24 hours in respect of the DfE. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority

can only take into account the costs it reasonably expects to incur during the following processes:

- 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.

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 IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.¹

The complainant's view

15. The complainant believes that his request is specific enough to locate information without the public authority needing to apply section 12. He states that he has no idea how the record systems are organised and what logistical obstacles needed to be confronted from the DfE's responses. The suggestion that section 12 applied, was not accompanied by any breakdown. Having not been provided with any detail, the complainant did not feel that he could remake his request. He rejects the idea that it would take the DfE over the cost limit to search for information from a two month period and that section 12 should not be applied to poor records management.

The DfE's view

16. Firstly, the DfE explained that its Due Diligence and Counter Extremism Division led on the DfE's response to what is known as the 'Trojan Horse' affair. Representatives of this team were involved in the investigation of Birmingham schools and the supposition therefore was made that this division would hold the relevant information.

17. Michael Gove had been Secretary of State with regard to the scope of the request and the Secretary of State's Private Office searched their emails using the search terms 'Birmingham', 'Islamist' and 'takeover'

1

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> (para 12)

within the date parameters of the request. There were approximately 421 emails returned. A sample of these was then taken – 15 emails took 15 minutes to review. To review all 421 would therefore take approximately seven hours.

18. Information is also held by a legal company on the DfE's behalf which has a contract to store files, emails and documents on the DfE's behalf. The legal company's electronic system holds an evidence base of over 300,000 documents relating to the 'Trojan Horse' investigations.
19. This system holds the relevant emails and information related to this case, as well as the information held on DfE IT drives from all the officials within the department who were involved in the 'Trojan Horse' investigations.
20. This system also holds four electronic shared folders relating to key departmental agencies involved in the case and relevant to the 'Trojan Horse' investigations – the Due Diligence and Counter Extremism Division; the Education and Skills Funding Agency; and the Teaching Regulation Agency, formerly known as the National College for Teaching and Leadership.
21. The same search terms reproduced in paragraph 17 were used within the specified date range. This search returned 1054 documents. The DfE estimated that the review time for the 1054 search returns would be 7.5 hours or £187.50. The estimate for the review was based on a 15 minute read-through exercise in which 35 documents were reviewed on the electronic system. The hourly review rate was approximately 140 documents per hour.
22. Hard copy evidence from the Due Diligence and Counter Extremism Division which has been scanned onto the electronic system would need to be reviewed because of the poor quality of the originals which can result in inaccurate searches. There are 34 folders identified as likely to contain relevant information from a schedule that was put together ahead of uploading to the electronic system. Reviewing this would take in the region of 8.5 hours.
23. From the above estimates, the DfE provided the following breakdown -
 - a. Estimated total number of 'items' found from the search within the timeframe provided = estimated 1,509
 - b. Estimated total time taken (hours) = 23
 - c. Estimated total cost = £1,000

These figures relate to the items returned as set out in paragraphs 17, 21 and 22. The DfE has stated that these are conservative estimates.

24. The DfE explained that 35 of the 1054 returned documents from the legal company's electronic system had not been published for review on the system and would incur publishing costs. These costs would be £425 (the cost of technical time and per gigabyte of data).
25. On the DfE's reckoning this would take the request over the threshold. The Commissioner queried the DfE's response. The DfE has calculated that it would take 23 hours (leaving aside the additional costs for the 'publishing') to carry out the permitted activities under the Fees Regulations. The Commissioner's advice says that a public authority, even if additional external staff time is required, can only charge £25 per hour to carry out some or all of the permitted activities, irrespective of the actual cost incurred.² The Commissioner asked the DfE to explain why 'publishing' would be necessary and what it meant in this context. She suggested that account had already been taken of these 35 unpublished documents within the total of files (1054) that would have to be reviewed. She therefore asked the DfE how much time or how necessary it would be to 'publish' them.
26. The DfE explained that 'publishing' in this context meant the legal company holding the information being commissioned to undertake the work necessary to make the information available for officials at the DfE to review. The company charges for the publishing per gigabyte of data as well as for technical time to make the documents available.
27. The DfE accepted that the Commissioner's guidance relating to section 12 did not allow for these costs but stressed that it did cost the DfE and, by extension, the taxpayer to review the information. The DfE therefore provided an alternative breakdown – one of its officials would need to commission the firm to undertake the work, create a purchase order to pay for the work, clear this with finance and senior officials, and then liaise with the legal company. The estimate was four hours for these activities. Additionally, the DfE estimated that it would take another three hours to allocate technician time to undertake the request.
28. The DfE's estimate now reached 30 hours in total, six hours above the appropriate limit.
29. The Commissioner wrote again to the DfE on 5 September 2019 in an effort to further understand the 'publishing' process and what would physically be required to retrieve the unpublished documents.

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

30. The DfE explained that publishing involves the legal company making the necessary search as it holds and has access to the information which has not been made available in the DfE's e-disclosure platform. The three hours is a total estimate which includes both work that has been done and work yet to be completed. The work already done included the initial search in which 1,054 documents were found of which 35 were corrupted and required fixing. This latter step has not been taken but includes work being carried out on the corrupted files to uncorrupt them. Subsequently the records would be pulled, put into a queue and made available on a folder within their system ready for review. They can then be downloaded individually, emailed securely to the DfE or put on a USB stick.

The Commissioner's view

31. The guidance says that a public authority should note that even if it uses contract or external staff to carry out some or all of the permitted activities, it can only include their time at the rate of £25 per hour, irrespective of the actual cost charged or incurred.
32. The Commissioner does not accept that commissioning, creating a purchase order, clearing with finance/senior officials and liaising with the legal company are permitted activities. However, the DfE has now explained that there are 35 'unpublished' returns, allocating technician time to 'publish' these is estimated to take three hours in order that they can be reviewed. The DfE has made clear that the estimate of three hours included the initial search where the 1,054 documents were found. The specific amount of time required for a technician to uncorrupt the files and make them available for review is therefore only part of the three hour estimate. However, the Commissioner accepts that it would not seem unreasonable that this activity would take the estimate from 23 hours to beyond the 24 hours allowed by the Fees Regulations.
33. Although the Commissioner accepts that the time estimate per item is conservative, it remains unclear why so many hours would need to be devoted to double-handling (electronic and manual) due to the double-checking of poor quality material. Nonetheless, the Commissioner is unable to disallow an estimate due to problematic record-keeping.
34. The Commissioner therefore finds that the DfE is entitled to rely on section 12(1) to refuse this request.

Section 16 – duty to provide advice and assistance

35. Section 16 of the FOIA states:

"(1) 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.

(2) Any public authority which, in relation to the provision of advice or 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."

36. Although the DfE suggested that the complainant rephrase the wording of his request, it did not suggest in what way he could do this and when he subsequently asked for advice, admittedly many months later, it was suggested that he specify a particular meeting, document or school and suggested he contact the Press Office. The Commissioner notes that the complainant was unable to make contact with the DfE official and was ultimately advised by the Press Office that it could not help with an FOIA request or suggest anything other than an internal review.
37. As the DfE failed to provide advice and assistance in its original response to the complainant, it breached section 16 of the FOIA.

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: 0300 1234504
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

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