

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2022

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 'Black Lives Matter'. The DfE refused to comply with the request citing section 12 (cost limit) of 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 FOIA. The Commissioner also finds that the DfE complied with its obligations under section 16 to offer advice and assistance.
3. The Commissioner does not require the DfE to take any steps.

Request and response

4. On 17 February 2022, the complainant made the following request for information to the DfE:

“..to request the [sic] all the information the department used as a basis for the recommendation that Black Lives Matter “go beyond the basic shared principle that racism is unacceptable.” To request a clear definition from the Department for Education of what it believes Black Lives Matter stands for, what DoE [sic] believes is the ideological underpinning of Black Lives Matter. To request details of all contacts between DoE [sic] Ministers, staff and associates with the Heritage Foundation.”

5. The DfE responded on 14 March 2022. 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 offered the following advice and assistance to the complainant; that refining the request to cover one topic and/or specifying a timeframe may bring the cost under the threshold.
6. The DfE upheld its initial application of section 12 of FOIA via internal review on 4 April 2022.

Scope of the case

7. The complainant contacted the Commissioner on 30 May 2022 to complain about the way their request for information had been handled. The complainant disagrees with the DfE’s application of section 12 of FOIA.
10. The Commissioner considers the scope of this case to determine whether the DfE has correctly cited section 12(1) of FOIA in response to the request. The Commissioner has also considered whether the DfE met its obligation to offer advice and assistance under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

11. 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”).
12. 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. In this case, the DfE relied on section 12(1).
13. 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.
14. 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 on the DfE.
15. The Commissioner notes that the request in this instance contains several parts which may be considered as separate requests. However, as the information all relates to the DfE and Black Lives Matter, they may be aggregated under section 5 subsections (1) and (2) of the Fees Regulations. This means that the cost limit the Commissioner will use is £600 for the whole request.
16. 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.

17. 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.
18. 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.
19. 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 FOIA.

Would the cost of compliance exceed the appropriate limit?

20. 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.
21. In its submission to the Commissioner the DfE stated that it ran a sample search of the emails of 12 members of staff known to have undertaken work in this area. In its search it identified over 2060 emails that may fall within the scope of the request. It worked out that at a conservative estimate of two minutes to consider each email, the time would total 4210 minutes which is 68.67 hours of time. At a cost of £25 per hour, it would come to a total of £1717 which is more than double the appropriate limit.
22. The Commissioner reviewed the sampling exercise submitted by the DfE and notes that it only included two core search terms of 'BLM' and 'Black Lives Matter' in its cost estimate. Were it to include the emails identified using the other four search terms, another 1385 emails would be in scope, bringing the total to 3445. Therefore, the Commissioner is satisfied that the DfE used the minimum number of emails possible in its cost calculation.
23. If the time to consider each email is lowered to one minute rather than two, using the lower number of 2060 it would still come to 34 hours of

time at a cost of £850. This is above the appropriate limit so the DfE would not have fulfilled the request under FOIA.

24. Considering the above, the Commissioner has determined the DfE estimate was reasonable and that it would cost more than the £600 limit to respond to the request. The DfE was therefore correct in its application of section 12(1).

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

25. Section 16(1) of 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).
26. The DfE gave the complainant broad advice in its first response to them on ways that the cost may be lowered. It advised refining the request by covering one topic or a particular timeframe.
27. Whilst this may seem broad, the Commissioner recognises that it was not possible to give more specific advice and assistance in this case. This is due to the sheer volume of emails that were identified in reference to the focus of the request; Black Lives Matter.
28. The Commissioner is therefore satisfied the DfE met its obligations under section 16 of FOIA.

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

Right of appeal

29. 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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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