

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2012

Public Authority: Department of Health (DOH)

Address: Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Health ("DOH") on the plain packaging of tobacco products. After initially refusing this request on the basis that any information would relate to the formulation of government policy the DOH then, at the internal review, sought to withhold the information as to provide it would exceed the cost limit (section 12 of the FOIA). The complainant asked the Commissioner to consider whether the DOH was able to rely on the section 12 exemption at such a late stage in the investigation.
2. The Commissioner's decision is that the DOH can rely on section 12, despite the late claiming of this exemption, and the cost estimates provided confirm that to provide the information would exceed the appropriate limit. The Commissioner has also determined that the DOH breached section 16 of the FOIA in handling the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance to allow the complainant to refine their request to bring it within the cost limit.
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 (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 17 December 2010, the complainant wrote to the DOH for information in relation to comments and statements made by the Secretary of State for Health about the plain packaging of cigarettes. The request was for the following:

"If you could now confirm whether any of the following information has been held by the Department of Health or on its behalf since the formation of the Coalition Government on 12 May 2010:

- *Information which could be treated as being of evidential relevance to the development of regulation concerning plain packaging of tobacco products, including but not limited to the information referred to in your statements quoted above;*
 - *Information which could be treated as evidencing a link between the packaging of tobacco products and "the initiation of smoking among young people";*
 - *Information on the extent to which the Department of Health has funded (in whole or in part) research or analysis in respect of the packaging of tobacco products and/or plain packaging for tobacco product; and*
 - *Correspondence entered into between the Department of Health and any third party (including other Government Departments) relating to the packaging of tobacco products and/or plain packaging for tobacco products."*
6. The DOH responded on 11 January 2011. It stated that information was held in relation to the request but as it related to the formulation and development of government policy it was being withheld under section 35(1)(a) of the FOIA. The DOH explained it had considered the public interest test in relation to this exemption and concluded that the need for government to have a 'safe space' in which to debate matters away from public scrutiny outweighed any general public interest there may be in disclosing the requested information.
7. The complainant wrote to the DOH on 14 February 2011 requesting an internal review of this decision. In particular the complainant requested that the DOH confirm if information was held in relation to each of the limbs of the request and disputed that the public interest favoured withholding the information.
8. Following an internal review the DOH wrote to the complainant on 14 June 2011. The DOH firstly acknowledged the delay in providing the

internal review and explained it had been awaiting the Commissioner's decision notice¹ in relation to a similar complaint to the DOH. The DOH further explained that having reviewed the request it now considered that to comply would exceed the appropriate costs limit for identifying, locating, extracting and retrieving the information. As the DOH are required under section 16 of the FOIA to provide advice and assistance for any further requests, the DOH suggested the complainant could ask for information over a shorter time period.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way their request for information had been handled. In their submissions to the Commissioner the complainant questioned whether it was appropriate for the DOH to rely on the section 12 exemption at such a late stage, firstly because section 35 had initially been claimed suggesting information may have already been identified and collated and secondly because of recent case law² regarding the late claiming of the section 12 exemption. The complainant also raised concerns about the time taken from requesting an internal review to receiving an outcome falling outside of the recommended time limits set out in the FOIA.
10. The Commissioner considers the scope of his investigation to be the late application of section 12 to the requested information and the advice and assistance offered to the complainant as required by section 16 of the FOIA.

Reasons for decision

Section 12 – cost limits

11. Section 12(1) of the FOIA states that:
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¹ Decision notice FS50312407 accessible via www.ico.gov.uk

² *All Party Parliamentary Group on Extraordinary Rendition (APPGER) v The Information Commissioner & the Ministry of Defence* (<http://www.osscc.gov.uk/judgmentfiles/j3247/GI%20150%202011.doc>)

“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”.

12. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”) sets the appropriate limit at £600 for this public authority. A public authority can charge a maximum of £25 per hour for work undertaken to comply with a request which amounts to 24 hours work in accordance with the appropriate limit of £600. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken in:
 - i. Determining whether it holds the information;
 - ii. Locating the information, or a document which may contain the information;
 - iii. Retrieving the information, or a document which may contain the information; and
 - iv. Extracting the information from a document containing it.
13. To determine whether the DOH applied section 12 of the FOIA correctly the Commissioner has considered the submissions provided by the DOH and the counter-arguments presented by the complainant regarding the late application of section 12.
14. The Commissioner has also considered the similarity of the requests made in FS50312407. In this the information requested was information held by the DOH which could be of evidential relevance to the development of plain packaging of tobacco products, information on the extent to which the DOH had funded any research on this and correspondence between the DOH and organisations supporting plain packaging. In this case the time period between which the information was requested was June 2009 to December 2009 and information was not withheld under section 12 but it was determined by the Commissioner that although the section 35(1) exemption was engaged the public interest favoured disclosure.
15. This is only a marginally shorter time period than the current request so the Commissioner has considered why the current request would engage section 12 when the previous request did not. When considering this the Commissioner has taken into account the cost estimate provided by the DOH, the additional limb of the current request and the fact that there is

likely to be more information held now as the previous request was made in 2009 before the government published "*A Smokefree Future: A Comprehensive Tobacco Control Strategy for England*"³. This strategy considered the option of plain packaging and concluded that the evidence base regarding the link between plain packaging and reductions in the attractiveness of tobacco products needed further examination and research.

16. The Commissioner, despite the similarity of the current request with previous requests, considers the timing of the current request and the additional limb to this request does make a difference and whilst section 12 was not previously considered this does not mean it cannot be applied to this request. However, the Commissioner must consider in light of the *APPGER* case whether to exercise his discretion to allow the late application of section 12 in this case.
17. The complainant has argued that as the initial refusal notice sought to rely on section 35 as a basis for withholding the information, this would suggest that information relevant to the request had been identified, located, extracted and collated. The complainant has highlighted the *APPGER* case where the public authority sought to rely on section 12 for the first time in its internal review response having previously relied on other substantive exemptions. The Upper Tribunal in this case noted that section 12 only has meaning if it is taken early on in the process before substantial costs are incurred in searching for or retrieving the information.
18. The complainant has also argued that in the event that the DOH can rely on section 12 because it is found they hadn't already identified and collated any information at the point of the refusal notice, it is still questionable whether the Commissioner should allow the late application of section 12 following the *APPGER* ruling.
19. The Commissioner noted that in its internal review response the DOH provided little explanation as to how it had estimated that the cost of compliance would exceed £600. The Commissioner therefore required the DOH to provide further explanations and a detailed estimate to justify its reliance on the section 12 exemption.

20. The DOH has explained that section 35 was initially applied based on the type of information requested but at the internal review stage it was decided it was necessary to comprehensively search all official documents to determine exactly what information was held based on the specific wording of the request. The DOH therefore conducted a sampling exercise and concluded that to comply with the request would exceed the cost limit.
21. The DOH explained that it uses an electronic filing system, split into components 'owned' by different teams across the DOH. Each team has its own dedicated filing system containing documents relevant to their area of work. The department responsible for Tobacco Control Policy file key documents into their filing systems from external and internal sources on a daily basis.
22. The DOH undertook a sampling exercise to estimate how long it would take to search the electronic filing system for the requested information. In conducting this sampling exercise the DOH searched for the keyword "packaging" between the dates of 12 May and 17 December 2010 within the Tobacco Control sections of the electronic filing system. This search along resulted in over 2,000 emails being returned. The DOH had estimated that whilst some of these emails will not be relevant, others will be and each one would have to be looked at to establish if it fell within the scope of the request. The DOH stated that it would take on average one minute to look at each email and this alone would exceed the 3.5 working day limit and therefore the cost limit for complying.
23. The Commissioner questioned the DOH on their estimate that it would take one minute to look at each email and the DOH accepted that some emails may take half that time or less to view and establish if they are within the scope of the request. However, the DOH maintained that some emails would take significantly longer than one minute to view and decide on and therefore one minute was provided as an average.
24. The DOH has further explained that searches would also have to be carried out on files held within branches other than the Tobacco Control branch as other departments within the DOH will have had some involvement in policy development in this area. The DOH is also aware there may be a number of working documents which may contain information relevant to the request and the time taken to interrogate these documents also has to be factored into any estimate.
25. The Commissioner having considered the estimate and explanations provided by the DOH has determined that the cost of complying with the request would exceed the cost limit. However, he has then considered whether to exercise his discretion to allow the claiming of section 12 in light of its late application.

26. The Commissioner is mindful of the fact that in the *APPGER* case the Upper Tribunal disallowed the late claim of section 12 on the grounds that it was “very late” and “its lateness is likely to cause unfairness to the applicant”. In addition to this the Upper Tribunal also commented at paragraph 43 that:

“If the raising of a new exemption before the Commissioner is subject to the Commissioner’s discretion, to be exercised fairly and in light of statutory purposes, this both restores some meaning to the time limits and avoids potential unfairness to requesters”.

In light of the Upper Tribunal’s comments the Commissioner’s position is that he has discretion as to whether to accept a late claim of section 12 and if he exercises his discretion to allow a late claim then he must consider the cost estimates provided by the public authority in the same way as he would had section 12 been applied from the start.

27. In deciding whether to exercise his discretion the Commissioner notes that in the *APPGER* case one of the key points was not only the lateness of the application but also the fact that information had already been collated irrespective of the request. Whilst the DOH did initially rely on section 35 to refuse the request it has since explained that no information had been located or collated when applying section 35 to the requested information.
28. The Commissioner’s view is that exemptions should not be applied without having sight of the requested information and by basing decisions solely on the nature of the requested information. Exemptions, such as the section 35 exemption, should only be applied after consideration of the specific substance of the information contained within any documents. That being said, the Commissioner does accept the DOH’s explanation as to why section 35 was applied without having sight of the specific information but he would like to remind the DOH that exemptions should only be applied once information has been identified and examined.
29. As the Commissioner has determined that no information was collated at the time section 12 was applied he does not consider that the circumstances are the same as in the *APPGER* case and, although recognising the time that has elapsed since the request was first made, he considers that section 12 can be applied in this case as the cost estimates are reasonable and clearly demonstrate that complying with the request would exceed the appropriate limit.

Section 16 – Advice and assistance

30. Section 16(1) of the FOIA deals with the duty of a public authority to provide advice and assistance to a person making a request, where it is reasonable to do so.
31. The Commissioner is clear that where an authority refuses a request because the appropriate limit has been exceeded, it should, bearing in mind the duty under section 16 of the FOIA to advise and assist an applicant, provide information on how the estimate has been arrived at and provide advice to the applicant as to how the request could be refined or limited to come within the cost limit.
32. The complainant raised concerns about the DOH's compliance with section 16 of the FOIA. The DOH had advised the complainant that for a request to be below the cost limit the complainant may want to consider narrowing the timescale the request covers. However, the DOH has not been any more prescriptive than this and the complainant argues that this is contrary to the section 45 Code of Practice issued by the Ministry of Justice.
33. The section 45 code of practice⁴ sets out the practices public authorities should follow when dealing with requests. It makes clear that where a public authority cites section 12 it should consider providing an indication of what, if any, information could be provided within the cost limits. This is to ensure that the requester can understand the limits of what information can be provided and may prevent further unsuccessful attempts to refine the request to bring it under the cost limit. The Commissioner takes the view that when a requester has a full understanding of the way in which the decision has been reached it would allow them to better make any challenge or appeal of that decision.
34. In light of the evidence available, the Commissioner considers that the DOH breached section 16 and therefore did not comply with the section 45 code of practice, as it did not provide sufficient advice or assistance to enable the complainant to narrow or refine the request.

⁴ <http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/code-of-practice.htm>

Other matters

35. The Commissioner notes that the DOH took over 70 working days to conduct an internal review and provide the outcome to the complainant. 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. As he has made clear in his guidance on time limits for internal reviews⁵, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. The Commissioner's view is that unless there are exceptional circumstances internal reviews should be completed within 20 working days and in one response. The Commissioner reminds the DOH of its obligations to deal with internal reviews in a timely manner.

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Right of appeal

36. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

Pamela Clements
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