

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

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

Decision (including any steps ordered)

The complainant requested information on the Prince's Consent to the Department for Education (DfE). The DfE refused to comply with the request on the basis that to do so would exceed the appropriate limit in costs set by section 12(1) of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner's decision is that the DfE correctly applied section 12(1) and found that there is no breach of section 16(1). As the DfE provided its responses outside the statutory 20 working days, the Commissioner finds that the DfE breached section 10(1) of the FOIA.

Request and response

1. On 20 August 2013 the complainant made a request for information under the FOIA on the Prince's Consent. There were 4 questions concerning contact between the Ministerial team (and/or any member of staff from the Minister's private office) and the Prince of Wales (and any representative and/or employee of the Prince of Wales or any legal firm acting on behalf of the Duchy of Cornwall estate) to discuss any bill, government policy and statutory issues which have come under consideration due to the issue of Prince's Consent for the period 1 January 2013 to 20 August 2013. (See the annex at the end of the decision notice for the full request.)
2. On 8 October 2013 the DfE refused to provide the requested information citing Section 12 of FOIA as it estimated that the cost of determining

whether it held the information would exceed the cost threshold of £600.

3. The DfE stated that *'to undertake a comprehensive search for this information without named individuals, a large number of search items would need to be applied to a number of email accounts. This would result in a very large quantity of emails being retrieved, the majority of which would not fall within the scope of this request.'* The DfE suggested that the complainant make a new request for a narrower category of information (for example, specifying named individuals).
4. The complainant requested an internal review on 8 October 2013.
5. The DfE completed its internal review on 5 November 2013 and stated that it maintained its position citing section 12 of FOIA and apologised for the time taken to respond to the original request. The DfE again suggested that the complainant make a new request for a narrower category of information (for example, meetings between specific individuals or law firms)

Scope of the case

6. The complainant asked the Commissioner to consider whether the DfE had correctly relied on section 12 of the FOIA and to consider the time taken to process the request.
7. The Commissioner also considered whether the DfE provided appropriate advice and assistance under section 16 of the FOIA.

Reasons for decision

Section 12 – The cost of compliance

8. Section 12(1) of the 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. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £600 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work

undertaken to comply with a request. This equates to 24 hours work in accordance with the appropriate limit set out above.

10. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - determining whether it holds the information;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.

Would the cost of compliance exceed the appropriate limit?

11. As is the practice in a case such as this, the Commissioner asked the DfE for a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
12. Therefore, in his assessment of whether the DfE has correctly relied upon section 12 of the FOIA, the Commissioner has considered the submission provided by the DfE to him on 5 February 2014, as well as the refusal notice and subsequent internal review provided by the DfE to the complainant.
13. The DfE has explained to the Commissioner that complying with the complainant's request without refinement is difficult as the subject of discussion outlined in the request is very large in scope and no policy areas that could serve as search terms provided. For example, question 4:

'...has any Minister and or any member of staff in the Minister's private office exchanged communications and or correspondence with any law firm and or legal firm acting on behalf of the Duke of Cornwall and or the Duchy of Cornwall estate. I am interested in those correspondence and communications which relate to bills, government policies and statutory issues which have come under consideration due to the issue of Prince's Consent. If the answer to this question is yes. Could you please provide copies of all this correspondence and communications including emails.'

14. The DfE has stated that for question 4 it has been difficult to determine any possible search terms from the request and therefore *'any results would either yield a very large number of returns or would not capture emails that would fall within scope of the request.'* Although asked to consider revising the request (for example to meetings where specific

individuals or law firms were present), the complainant has not revised his request.

16. The DfE undertook a sampling exercise based on the assumption that information about meetings and correspondence could be found in email boxes. They searched using a number of search terms to ensure that all relevant correspondence would be retrieved, for example 'the Prince of Wales'.
17. Two officers conducted the relevant sample searches for two months data in two ministers' offices, logging the time taken to do so. They noted the number of emails retrieved and then read through each email once to assess whether any information would fall within the scope of the request. The times were noted and provided an average estimated time to look over an email box.
18. The searches covered up to 3 email boxes per minister and included a search of the inbox, sent items and archives where appropriate. The time taken to search the main email box was 53 minutes with 101 minutes to read and assess the emails. The time taken to read and assess the emails in the smaller email boxes was 13 plus 1.5 minutes and 20 plus 9.7 minutes.
19. The total time taken to search and retrieve information for the two-month period in the sample exercise, multiplied by the number of ministers was 1130 minutes. This was multiplied by 4 for the full eight-month period – 4519 minutes. This equates to 75.3 hours and at £25 per hour, a total cost of £1,883 for the period. This exceeds the threshold of £600.
20. Given the DfE's explanation in the difficulty of searching email boxes without specific search terms and the above estimated times that would be involved in responding to the complainant's request in its current form, the Commissioner is satisfied that compliance with the request would far exceed the appropriate limit. The DfE was therefore correct to apply section 12 of the FOIA to the complainant's request.

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

21. 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 practice (the "code")¹ in providing advice and assistance, it will have complied with section 16(1).

22. The code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the appropriate limit, it should provide the requester with reasonable advice and assistance.
23. The Commissioner's guidance states that the minimum a public authority should do in order to satisfy section 16 is indicate if it is not able to provide any information at all within the appropriate limit. Communicating this to a complainant may avoid further and futile attempts to refine the request to bring it under the appropriate limit. Also, if the requestor understands the way in which the estimate has been calculated to exceed the appropriate limit, it should help them decide what to do next².
24. In this instance, the DfE's refusal notice confirmed that the information could not be provided within the appropriate limit and explained its difficulties to the complainant about making a comprehensive search without named individuals or named law firms or named policies as possible search terms. The Commissioner notes that the complainant did not take up the DfE's suggestion to narrow his request by reference to specific search terms.
25. The Commissioner has therefore concluded that the DfE provided such advice and assistance as was reasonable, and therefore complied with section 16(1).

¹ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-ofpractice.pdf>

² http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx

Section 10(1) Time for compliance

26. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
27. The DfE did not respond to the request within the statutory time limit. The Commissioner has therefore found that the DfE breached section 10(1) of FOIA.

Right of appeal

28. If 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

29. 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.
30. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

"My request concerns the issue of 'Prince's Consent' which is a process whereby Ministers consult the Prince of Wales on bills and aspects of policy which are likely to have implications for him as the Duke of Cornwall and or his Duchy of Cornwall estate (including its holdings and assets).

Please note that I am only interested in information which relates to the period 1 January 2013 to the present day. Please note that I am interested in receiving all information relating to bills and or policies and or other statutory instruments irrespective of whether they were implicated and or acted upon. But please note that I am only interested in those bills and policies which were the subject of discussions because of the issue of Prince's Consent.

Please note the reference to Minister in the following questions should include the relevant Minister and or Secretary of State as well as any individual working in their private office.

1...During the aforementioned period has any member of the Ministerial team and or any member of staff from the Minister's private office met with the Duke of Cornwall to discuss any bill and or Government policy and or piece of legislation which could have implications either for him as the Duke of Cornwall and or the Duchy of Cornwall estate and its holdings and assets. If the answer is yes could you please state the date, time and venue of the meeting. Could you also provide a full list of those present. If relevant could you please identify the relevant bill and or piece of proposed legislation. Could you please detail any other issues under discussion.

2...During the aforementioned has any member of the Ministerial team met with any representative and or employee of the Prince of Wales/Duke of Cornwall to discuss bills and or policies and or pieces of legislation which could have implications for either the Duke of Cornwall and or the Duchy of Cornwall estate, its holdings, assets and employees. If the answer is yes could you please state the date, time and venue of the meeting. Could you also provide a full list of those present. If relevant could you please identify the relevant bill and or piece of proposed legislation. Could you please identify any other issues under discussion.

3...During the aforementioned period has any Minister and or any member of staff in the Minister's private office exchanged communications and or correspondence with the Prince of Wales and or his Principal Private Secretary. I am only interested in correspondence and communications which in any way relates to the issue of Prince's Consent. This correspondence could relate to a particular bill and or policy and or other legislative instrument which might have implications for the Duke and or his Estate. Similarly it could relate to another aspect of Government policy. Alternatively it could relate to the overall issue of Prince's Consent. If the

answer to the above question is yes can you please provide copies of all correspondence and communications including emails.

4...During the aforementioned period has any Minister and or any member of staff in the Minister's private office exchanged communications and or correspondence with any law firm and or legal firm acting on behalf of the Duke of Cornwall and or the Duchy of Cornwall estate. I am interested in those correspondence and communications which relate to bills, government policies and statutory issues which have come under consideration due to the issue of Prince's Consent. If the answer to this question is yes. Could you please provide copies of all this correspondence and communications including emails.".