

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2019

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 an audit which followed an investigation at a Birmingham primary school. The DfE refused the request under section 12(1) of the FOIA, stating that compliance with the request would exceed the appropriate limit.
2. The Commissioner's decision is that the DfE correctly refused the request under section 12(1) of the FOIA, and complied with its duty to provide advice and assistance under section 16.
3. The Commissioner does not require the DfE to take any steps.

Request and response

4. On 6 December 2018, the complainant wrote to the DfE to request information of the following description:

"I am writing in reference to a document titled Final Audit Report: CY20001353R01(v2) Adderley Primary School Alleged Falsification of Documents. This document was produced by Birmingham City Council dated 3rd October 2013; it summarizes an investigation carried out by the Birmingham Audit in response to whistleblower allegations that the

head teacher at Adderley Primary School falsified resignation letters on behalf of four employees.

- 1) I would like to confirm whether the Department for Education holds (or at any point did hold) this document.*
- 2) If so, I am requesting the audit report.*
- 3) Independent of the answers to points 1 and 2, I am requesting any information the Department holds that references this document or the audit investigation it summarizes. If the Department does (or did) hold the document, I am requesting all information regarding how it was received and processed, including but not limited to who sent it from the Birmingham City Council, and to whom at the DfE; when this happened; any emails, correspondence, or notes that accompanied it; and any information that was generated in response to the audit.*

If the Department does not hold the audit report, I am still requesting any information the Department holds that refers to the document or the audit investigation of Adderley Primary School. The names of the people involved in allegations that were being investigated are: [five names redacted]. The author of the report is auditor [redacted]; [two names redacted] were also involved in this audit. [Redacted name and job title] was involved in processing it for the Council.

I'm also requesting any record or material related to this audit that I have not explicitly named. Should any of the aforementioned information be held in non-work personal email accounts (e.g. Yahoo, Hotmail or Gmail) or on a mobile device as a text message or any other media, I would like a copy of those too as my right according to the ICO guideline on official information held in private email accounts: [link provided].

Please send all records pertinent to this request to my email: [email provided]."

5. On 8 January 2019, the DfE responded and stated that some of the information requested was held. It refused the request under section 12(1) of the FOIA – cost of compliance exceeds appropriate limit. It invited the complainant to narrow the scope of his request, but advised him that exemptions may still apply to some of the requested information.
6. On 9 January 2019, the complainant requested an internal review. He stated that he would like the DfE to address the three parts of his request separately, since he considered that points 1 and 2 could be responded to within a short space of time. He also challenged the DfE's application of section 12(1) to part 3 of his request.

7. The DfE sent him the outcome of its internal review on 6 February 2019. With regard to points 1 and 2 of the request, it confirmed that the audit report was held, but stated that it was exempt from disclosure under the following sections of the FOIA: section 36(2) - prejudicial to the effective conduct of public affairs, section 40(2) - third party personal data, and section 41 - information provided in confidence.
8. With regard to part 3 of the request, the DfE upheld its original position and stated that this was refused under section 12(1).

Scope of the case

9. The complainant contacted the Commissioner on 6 February 2019 to complain about the way his request for information had been handled. Specifically, he wished to challenge the DfE's refusal to respond to part 3 of his request under section 12(1) of the FOIA, as he disagreed that the cost of compliance would exceed the appropriate limit.
10. The following analysis considers whether the DfE correctly refused part 3 of the request under section 12(1) of the FOIA, and whether it complied with its duty to provide advice and assistance to the complainant under section 16 of the FOIA.

Reasons for decision

Section 12(1) – cost of compliance exceeds appropriate limit

11. Section 12(1) of the FOIA states that a public authority is exempted from its duty to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit.
12. The "appropriate limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"), and is set at £600 for a public authority which is a government department, such as the DfE. The Fees Regulations also state that staff time should notionally be charged at a flat rate of £25 per hour, giving an effective time limit of 24 hours as the appropriate time to be spent in complying with a request.
13. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:
 - 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.
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 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.
15. In this case, the DfE has explained that the information requested by the complainant is managed by a contracted specialist company. The DfE has provided evidence that it contacted the company in December 2018, asking for searches of its database to be carried out, using various search terms, to identify potentially relevant information.
16. The DfE has provided the Commissioner with the outcome of the electronic searches carried out by the specialist company.
17. An initial search using the term "*Adderley Primary School*" identified 4577 items of information. Once duplicates were removed, this number fell to 3216 items; however, including what the specialist company terms "family items" (that is, attachments to the emails and associated documents such as those referenced in the body of an email), the number of documents rose to 9,794 items.
18. A narrower search was also carried out, using the search terms "*Adderley Primary School*" and "*audit*". This search identified 1215 pieces of information, of which 835 remained once duplicates were removed. However, including "family items" this number rose to 2,795.
19. The DfE initially focused its arguments on the broader search and explained that it would need to review all of the information to check whether it fell within the scope of the request. By way of explanation, it provided an example of two pieces of information that were retrieved,

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

one of which, it considers, falls within scope, and one which, as the Commissioner agrees, does not.

20. The DfE estimated that it would need to spend, on average, five minutes reviewing each piece of information. This means that the time taken reviewing the information, including the family items, would be an estimated 5 x 9794, which is 48,970 minutes or 816 hours. At a rate of £25 per hour, this equates to £20,400 which is far in excess of the appropriate limit of £600 for central government departments.
21. The complainant considers that it was unnecessary for the DfE to search for everything which referenced "*Adderley Primary School*", and he has pointed out that he provided a number of very specific search terms which could be used to narrow down the search, including the names of individuals involved, and the reference number of the audit report.
22. The Commissioner has reviewed the wording of the request. The DfE has confirmed that it holds a copy of the audit report, and so she has focused on the following wording:

"all information regarding how it was received and processed, including but not limited to who sent it from the Birmingham City Council, and to whom at the DFE; when this happened; any emails, correspondence, or notes that accompanied it; and any information that was generated in response to the audit".
23. The Commissioner has considered whether, in order to capture all of the information falling within the scope of the request, it would have been possible for the DfE to narrow its search. She has considered the narrower search that was carried out using both search terms "*Adderley Primary School*" and "*audit*", as described in paragraph 18 above.
24. In her view, while the DfE could perhaps not be absolutely certain that this would cover all parts of the request, particularly "*any information that was generated in response to the audit*", it is very likely that this search would identify the vast majority of the information requested.
25. However, the Commissioner does not consider that it would have been possible to narrow the scope further than the inclusion of these two terms. For example, if the search had included the name of the headteacher, this may not have located items where that name had been redacted, or where the headteacher had not been named specifically, but which would still fall within the scope of the request.
26. The Commissioner asked the DfE to provide further submissions based on the outcome of the search which included the terms "*Adderley Primary School*" and "*audit*". This search identified 835 items; however, including "family items" the total number of documents identified was 2,795.

27. The Commissioner asked the DfE to reconsider how much time it would need to take reviewing the documents identified by this search for relevance. She considered that five minutes per item was excessive, in view of the fact that the items were already very likely to fall within the scope, due to the inclusion of the two search terms.
28. The DfE responded that, even allowing what it considered to be a conservative one minute per item, the total time would be 2,795 minutes which equates to 46.5 hours. This equates to £1,162.50 in staff time (46.5 x £25) which is still in excess of the appropriate limit of £600.
29. The Commissioner agrees that it would be necessary to review the items, including the email attachments and other associated documents, for relevance, albeit briefly.
30. A further issue considered by the Commissioner is that the DfE has also explained that it would need to pay a fee before being able to review the documents. Since they are managed by a contracted specialist company, it is required to pay the company to retrieve the information identified by the search and move it into an accessible folder for review. The DfE has informed the Commissioner that it has been advised that the fee would be an estimated £250.
31. The Commissioner asked the DfE whether it could access the information without paying a fee. The DfE explained that all of the relevant information had been uploaded to the company. While it could undertake a search of its own electronic, departmental shared folders, and a hard-copy search, it would still be necessary to liaise with the company to ensure that all relevant information had been retrieved. It explained that the information relating to this matter amounted to "*tens of thousands of pieces of information*" and the reason for uploading it to the specialist company was to ensure that it was catalogued and stored appropriately to make it "*easier to store and review for the investigation*".
32. The Commissioner's guidance on refusing a request where the cost of compliance exceeds the appropriate limit² addresses the matter of costs other than staff time. Paragraph 18 states:

"Sometimes, a public authority may expect to incur costs other than those relating to staff time when carrying out the permitted activities.

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

The key to deciding whether or not these costs can be included in the estimate is whether it would be reasonable to include these charges."

33. In some circumstances, the Commissioner may accept that it is reasonable for a public authority to take into account a charge made by a third party under a contractual term. She may accept this as reasonable if the activity forms part of the location, retrieval or extraction of information which is necessary for the purposes of complying with a request, as in this case.
34. However, the guidance also addresses what work to be undertaken by the third party it would be reasonable to include in an estimate. Paragraph 13 of the guidance states:

"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."
35. The Commissioner does not have evidence that the estimated fee of £250 for extracting the information into an accessible folder is based on the time to be taken by the specialist company, and calculated at the rate of £25 per hour. The informal quote of £250 by the company therefore cannot reasonably be included in the DfE's cost estimate for complying with this request.
36. The Commissioner's decision has therefore focused on the evidence provided by the DfE regarding the *time* that would need to be taken in locating, retrieving and extracting the information falling within the scope of the request.
37. She is satisfied that, due to the need to review the documents and family items identified, due to the broad nature of the information requested, the estimate provided by the DfE demonstrates that the appropriate limit would be exceeded. She is also satisfied that the estimate is reasonable and supported by the cogent evidence of the search results. She has therefore determined that the DfE correctly refused the request under section 12(1) of the FOIA.

Section 16 – duty to provide advice and assistance

38. Section 16 of the FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to 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."

39. The Commissioner's view, therefore, is that where a public authority refuses a request under section 12(1) of the FOIA, complying with the section 45 Code of Practice³ will fulfil its duty under section 16(1).

40. Paragraph 2.10 of the section 45 Code of Practice states:

"Where it is estimated the cost of answering a request would exceed the "cost limit" beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit".

41. In addition, paragraph 6.9 states that *"public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit"*.

42. In this case, the DfE suggested to the complainant in its response that he may wish to limit his request to a specific date range. Its Press Office also met with the complainant in person and advised him that he could consider providing a specific timeframe within which to search.

43. It appears that the complainant considered that he had provided enough identifying details to enable a more specific search to be carried out. However, the Commissioner is mindful of the wording of the request. In particular, she notes that the complainant asked for *"all information regarding how [the audit report] was received and processed"*. He also asked for *"any information that was generated in response to the audit"*.

44. In the Commissioner's view, these requests are broad in nature, the second part especially, in terms of identifying the information that is being requested. While she is aware that the complainant stated in correspondence with the ICO that he may be prepared to excise *"any information that was generated in response to the audit"* from his request going forward, the Commissioner's remit is to determine a public authority's compliance with a request at the time and she is not

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

required to ask the DfE to consider a re-worded request during the course of the investigation.

45. In the circumstances of this case, she considers that it was appropriate for the DfE to suggest refining the request to cover a shorter period, which may have brought the request within the appropriate limit. She therefore considers that the DfE offered advice and assistance that was sufficient to meet the requirements of section 16 of the FOIA.
46. The Commissioner is satisfied that the DfE complied with its statutory obligation under section 16 to provide advice and assistance.

Right of appeal

47. 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

48. 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.
49. 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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