

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 8 July 2020

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information on staff promotions at the Department of Health and Social Care (DHSC). The DHSC refused the request as to comply would exceed the cost limit under section 12(1) of the FOIA.
2. The Commissioner's decision is that the DHSC has incorrectly applied the provisions of section 12 to refuse the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response that does not rely on section 12.

Request and response

4. On 5 February 2018 the complainant made a refined request to the DHSC in the following terms:

"The year in question is 2017, apologies for this omission.

Question 1: How many staff have been promoted from 1st February to date, broken down by grade and month?"

5. The request had originally been made on 2 February 2018 without including the year for question 1). It also contained two further questions:

"2) Can you send me a list of all Information Technology posts broken down by grade and what posts are deemed to be 'Specialist?'

3) When did pay scales change (minimum/maximum for grades and regions) and were Department of Health recognised unions consulted about pay scale changes?"
6. The DHSC initially refused this request on 2 March 2018 citing section 14 of the FOIA and aggregating it with two other requests received at similar times. In October 2019, following an investigation, the Commissioner issued a decision notice regarding this response finding that section 14 had not been correctly applied and requiring the DHSC to issue a fresh response.
7. A new response was provided to the complainant on 14 November 2019 refusing the request under section 12(1) of the FOIA.
8. Due to the ongoing nature of the issues, the Commissioner agreed to proceed with the complaint without requiring the complainant to go through the internal review process.

Scope of the case

9. The complainant contacted the Commissioner following the refusal notice on 21 November 2019 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if the DHSC has correctly refused the request on the basis of section 12 of the FOIA.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

11. Section 12(1) 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.
12. When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of

Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). These are:

- (a) determining whether it holds the information;
 - (b) locating the information, or a document which may contain the information;
 - (c) retrieving the information, or a document which may contain the information; and
 - (d) extracting the information from a document containing it.
13. The appropriate limit is set in the Fees Regulations at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that a public authority may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.
 14. Section 12 of the FOIA makes it clear that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the DHSC was reasonable; whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, that section 12(1) therefore applied and that it was not obliged to comply with the request.
 15. In its refusal to the complainant, the DHSC advised it did hold the requested information but to comply with the request as it was framed would exceed the cost limit under section 12 as the information is not held centrally and would require manually searching through records. The DHSC explained if the request was refined to a shorter timeframe it may reduce the time required to conduct the relevant searches.
 16. In responding to the Commissioner's enquiries the DHSC explained that the first thing it did was establish whether the requested information would be held and, if so, where it would be held. In doing so, the DHSC Freedom of Information Team spent 90 minutes consulting with the DHSC's HR team to ascertain if the information was held and determining its location.
 17. The DHSC explained that it's HR team holds 159 Pay Change forms submitted in 2017, held in a secure location. The DHSC has advised the Commissioner that each of the 159 forms would have to be examined to determine if the Pay Change related to a promotion and, if so, to extract the information from the form i.e. the grade and month. This

information would then have to be collated to provide the required information.

18. The DHSC provided what it considered to be a conservative estimate of ten minutes per Pay Change form being required to determine if the form contained relevant information and to extract this. DHSC therefore considered it would take a minimum of 26.5 hours at a cost of £662.50.
19. The complainant is of the view the information should be easily retrievable and that the DHSC is deliberately obstructing him accessing the information given the previous decision to refuse the request as vexatious and now the current response that the information cannot be provided within the cost limit.
20. However, when dealing with a complaint to her under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way.
21. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.
22. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. However, the Commissioner considers that the estimate must be reasonable. The Commissioner follows approach the set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004)* which stated that a reasonable estimate is one that is "sensible realistic and supported by cogent evidence."
23. The Commissioner is disappointed and concerned at the quality of the DHSC's submissions. The Commissioner considers that the level of information required to justify a public authority's reliance on section 12(1) is well established. The Commissioner has issued detailed guidance on section 12 and there are currently more than 500 decision notices setting out the Commissioner's position on section 12 on her website. However, the DHSC has simply stated it would take 10 minutes per Pay Change form to locate and extract the relevant information.
24. The Commissioner on occasions can accept, and has accepted, estimates that it would take x amount of time to review and extract information from records where the time estimate is relatively low i.e. one minute per record, as it is reasonable to assume it would take this amount of time to scan a document and find the relevant information. However, 10

minutes seems to be a very large amount of time required to review a form to establish if that form relates to a pay change from a promotion and if so what month it occurred in and at what grade. It is also worth noting that at an estimate of 10 minutes a form the total time needed to review all forms would be 26.5 hours at a cost of £662.50 and therefore if the estimate was even reduced by 1 minute to 9 minutes per record it would be under the cost limit.

25. As already stated, the Tribunal has set out that estimates should be "sensible, realistic and supported by cogent evidence." The DHSC has not provided any information regarding why it would take 10 minutes per form to locate and extract the requested information but insists this would be a manual process as the information is not held centrally, although it has been able to establish there are 159 Pay Change forms likely to hold the relevant information. Without any explanation as to how the DHSC has calculated this estimate, the Commissioner cannot find that this is a reasonable estimate of the time required.
26. The DHSC also failed to provide details of any sampling exercise and the Commissioner therefore finds that she has not been provided with cogent evidence to support the DHSC's reliance on section 12.
27. For the reasons above, the Commissioner is not satisfied that the appropriate limit will be exceeded by complying with the request and the The Commissioner's decision is that the DHSC is not entitled to rely on section 12(1) to refuse to comply with the complainant's request.
28. The Commissioner requires the DHSC to provide the complainant with a fresh response that does not rely on section 12 of the FOIA.

Section 16 – advice and assistance

29. Section 16(1) of the FOIA provides that –

"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."

30. In order to comply with this duty, a public authority should advise the requester as to how their request could be refined to bring it within the appropriate cost limit.
31. In its refusal notice, the DHSC said that "You may wish to refine your request for information by narrowing the timeframe of your request".
32. Accordingly, the Commissioner find that the DHSC complied with section 16(1) of the FOIA in providing advice and assistance to the complainant.

Right of appeal

33. 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

34. 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.
35. 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

Jill Hulley
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