

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2024

Public Authority: Department for Culture, Media & Sport
("DCMS")

Address: 100 Parliament Street,
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information on funding packages and the associated fraud before, during and post the Covid-19 pandemic. DCMS relied on section 12 of FOIA (cost of compliance) to refuse the request.
2. The Commissioner's decision is that DCMS was not entitled to rely on section 12(1) of FOIA to refuse the request. The Commissioner finds that notwithstanding this finding, DCMS complied with its section 16 obligation to offer advice and assistance.
3. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant which does not rely on section 12 FOIA.
4. The public authority must take these steps within 30 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 August 2023, the complainant wrote to DCMS and requested information on funding packages and fraud. The request is set out in full in the Annex at the end of this notice.
6. DCMS responded on 18 September 2023 advising that it was relying on section 12 of FOIA - cost of compliance, to refuse to respond to the request.
7. The complainant requested an internal review on 19 September 2023 arguing that the information they requested should have been readily available within the cost of compliance because DCMS had recently completed its counter- fraud strategy review and implemented it and the information was required for the 2021-22 Annual Report.
8. Following an internal review DCMS wrote to the complainant on 20 October 2023 upholding its initial response.

Scope of the case

9. The complainant contacted the Commissioner on 2 November 2023 to complain about the way their request for information had been handled. They explained:

"In its 2021-2022 Annual Report, DCMS admitted that it had been having serious fraud problems and had now made a significant investment introducing a new counter-fraud regime. My interest had been to offer DCMS counter fraud assistance."
10. The Commissioner considers that the scope of his investigation is to determine whether DCMS is entitled to rely on section 12 as a basis for refusing to provide the withheld information.

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. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for DCMS is therefore £600.
13. 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 for the public authority.
14. 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.
15. 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. 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.
16. 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.
17. 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.

The complainant's position

18. The complainant explained that they wished to know "what lay behind a recent investment in a new counter fraud program". In order to understand the position they sought:

"...a baseline understanding of the scale of the fraud problem; where fraud had principally emanated from; what the cost was to DCMS of the

introduction of the new counter-fraud regime; and what levels of monetary recovery are now anticipated from this counter-fraud investment (i.e. are we getting value for money).”

19. The complainant considers that none of the questions forming their information request were difficult to answer and they allege would be known to the DCMS board.¹ They explained:

“Not only had it just completed its counter-fraud strategy review ... and implemented it ... but most of the FoIA data sets requested were mentioned and their phrasing lifted straight from the 2021-22 Annual Report², using DCMS' own words. I assert that in order to make significant investment decisions on what DCMS should invest in, to counter fraud going forward, the Board will have assessed the problem, in breadth, scale and over time. All this information is - and was - available at its fingertips. Meanwhile the need for the requested information is vital to help taxpayers consider whether the costly counter fraud measures now in place are:

- a) fit for purpose going forward
- b) are fit for purpose, in terms of fraud recoveries
- c) are value for money.”

20. The complainant further added their belief that DCMS had used the section 12 exemption to avoid public scrutiny and assist political leaders and senior managers to “evade having to take public responsibility or accountability for their collective delinquency.”

DCMS' position

21. DCMS provided the Commissioner with the following estimates for the time required to respond to the complainant's questions:

Q1 - 1 hour, Q2 - 6 hours, Q3 - 1 hour, Q4 - 3 hours, Q5 - 8 hours, Q6 - 1 hour, Q7 - 12 hours, Q12 - 1 hour, Q13- 1 hour, Q14 - 4 hours, Q15 - 2 hours, Q16 - 12 hours.

¹ Information on government departments' boards which provide advice to departments' leaders and challenges them on their performance can be found here:
<https://www.instituteforgovernment.org.uk/explainer/government-departments-boards-non-executive-directors>

²

https://assets.publishing.service.gov.uk/media/638883e6d3bf7f3282be4061/DCMS_Annual_Report_and_Accounts_2021-22_-_web_accessible_version.pdf

22. DCMS advised the Commissioner that the cost limits had been reached "largely due to data being held in different formats than expected by the applicant".

23. It further explained:

"This means that we would have to locate, analyse and re-categorise data. For several of the questions, it is not immediately apparent if we hold the data but a possibility that we do. This means we would need to locate and search various Board papers and minutes, just to establish whether or not we can answer the questions. For other questions, we hold some data but it is not categorised in the way that the applicant has requested. All re-cut data that we would be sharing publicly would require quality assurance before release, adding to the time taken to fulfil this request.

We have a decentralised delivery model in DCMS which means that most of our funding is delivered via Arms Length Bodies who then provide reporting and assurance to the Core Department. The applicant may be better placed asking some of the questions to the Arms Length Bodies directly. Alternatively, the applicant could re-submit a shorter FOI, containing just the key questions and see if this is more manageable. To respond to the complainant's point that we must have had this data for preparing our Annual Report and Accounts, we would again point out that these are consolidated from our many public bodies and although we hold some data, it is not in a format that makes it easy to answer the granular nature of some of the questions."

24. DCMS went on to provide a breakdown of the actions required to respond to the request. This excluded any time allocated to questions 8, 9 and 10 with the explanation given: "Unclear whether this would be answered by Q7." No time was allocated for responding to question 11. With regard to question 11 DCMS explained:

"We do not hold this information - introducing the Functional Standard was not a one off event, rather a process of continuous improvement. We would not have logged the staff costs for updating documents and to calculate these retrospectively would mean locating previous versions of key documents, comparing with updated versions and making an estimate of the time it would have taken (including clearance procedures). We could not quantify how long it has taken to implement the Functional Standard as this is an ongoing process, particularly as the Functional Standard and its associated guidance is regularly updated, creating new requirements."

25. No sampling exercise was undertaken to provide an actual example of time taken in regard to any question. The estimated total number of hours required to answer the request excluding questions 8, 9, 10 and

11 is stated as 52, which exceeds the 24 hours appropriate limit explained above at paragraph 14.

26. However, DCMS qualified its estimates in regard to question 7 and question 16 of the request. It explained that it would need to contact ALBs for information in respect of these two questions. For question 7 DCMS explained:

"Requires engagement with various Arms Length Bodies that delivered COVID-19 funding and a review of Post Event Assurance activity across DCMS Group. Counter Fraud team receives data on fraud losses from ALBs but it is not categorised in this way, it is aggregated per quarter at an organisational level rather than per funding package."

And for question 16:

"This would require engagement with the Arms Length Bodies that delivered the funding packages and/or their sponsorship teams. They should hold data on recoveries to date, but unclear whether they would have projections for all funding packages."

27. DCMS went on to state:

"...the Q7 time couldn't be taken into consideration as we would have to say we did not hold the information at the time the request was made. We would also have to take away some of the hours listed for Q16, whatever information couldn't be gathered from the sponsorship teams. However, even with the removal of these hours. [sic] It is still clear from the amount of work to be done that the cost limit threshold would be more than met in any attempt to answer all the questions as currently laid out."

28. The Commissioner asked DCMS to clarify whether the estimates of 12 hours work to respond to question 7 and a further 12 hours to respond to question 16 had been determined in consultation with the ALBs. DCMS explained:

"DCMS does not hold this information. The estimates have not been created in consultation with ALBs, rather it is an estimate of how long it would take to commission them, receive the information in the correct format from them and then quality assure and compile."

29. The Commissioner also asked if the ALBs held the information on behalf of DCMS. DCMS advised:

"The information is management information that the ALBs will have collected as part of their delivery of the Covid-19 schemes. It is not held on our behalf but would form part of the data that we hold at a higher level on fraud and error in the central department."

30. DCMS suggested that the complainant would be best served by contacting the ALBs directly to request the information sought by these questions because DCMS does not hold the information in the format/granularity set out in the questions and to respond DCMS would "need to commission and quality assure any response".

The Commissioner's view

31. From the explanations provided by DCMS the Commissioner considers that DCMS does not hold the information requested at questions 7, 8, 9, 10, 11 and 16. The Commissioner notes that ALBs are not considered part of the department sponsoring them, in this case DCMS, and they are listed individually in FOIA Part VI of Schedule 1. They are separate public authorities for the purposes of FOIA and hold information on their own behalf. The Commissioner is satisfied that the information held by the ALBs is not held on behalf of DCMS. The ALBs hold the information required to answer questions 7 and 16. DCMS is "unclear" whether by using information held by the ALBs to respond to question 7 would enable it to respond to questions 8, 9 and 10. However, as DCMS does not hold the question 7 information it cannot respond to any of the four questions. The information is not held for question 11 as explained above in paragraph 24. Similarly to question 7 the information required to respond to question 16 is not held by DCMS but by the ALBs.
32. The Commissioner is not satisfied that complying with this request would exceed the appropriate limit. The Commissioner was not provided with any information on a sampling exercise with respect to any question. For the estimates provided with respect to information held by DCMS he finds that he has insufficient explanations on which to decide whether the estimates provided are realistic.
33. The Commissioner considers that any estimate provided must be reasonable. That is, it must be "...sensible, realistic and supported by cogent evidence", as explained by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2007/0004, 30 October 2007). A number of Upper Tribunals have accepted this approach.
34. For example, in regard to question 2 ["During this period (1 April 2018-31 March 2020) what were the FIVE biggest sources of fraud across DCMS activities?"] DCMS allocated 6 hours to respond to this with the explanation:

"Analysis of CDR spreadsheets after assumption about what "sources" means in this question - i.e. that it means type of fraud rather than funding package."

35. In the first instance the Commissioner is surprised that DCMS did not clarify the meaning of this question with the complainant rather than make assumptions. He notes that DCMS had asked for clarification of questions 5 and 6 because it considered these questions to be ambiguous. It advised the complainant:

"Regarding these questions, 'exposure to fraud' is not a measurable or tangible factor, so we recommend that you clarify this question for us to consider your request."

DCMS did not ask for clarification of question 2.

36. The complainant responded to the request for clarification of questions 5 and 6 as follows:

"...you wrongly claim that our QS 5 & 6 are ambiguous, and yet your own statements in the Annual Report cite the exact same phrasing that we used (and deliberately took from your report in order that you could not claim that we were asking for new information against metrics that DCMS itself was not already collecting and monitoring.

... DCMS knows what the funding packages are. DCMS knows what its baseline exposure to fraud was and how the funding packages increased the department's exposure to fraud.

... if our use of your phrasing is ambiguous, then most certainly your use of those same phrases is deliberately ambiguous. Or are you saying that the DCMS Executive Board makes decisions on information that has never been collated or assessed?"

37. In providing its internal review DCMS acknowledged that the wording of questions 5 and 6 had been taken from the Annual Report and Accounts and that it was not ambiguous.

38. With regard to considering the 6 hours allocated by DCMS to question 2 the explanation, "Analysis of CDR spreadsheets", does not allow the Commissioner to determine whether this is reasonable or not.

39. With regard to questions 5 and 6 the hours allocated by DCMS amounts to 9 hours for both. The explanation provided is as follows:

"Locating fraud risk assessments for COVID-19 schemes and analysing them (they are held by policy teams rather than centrally by the Counter Fraud team). Review of relevant governance forums to see if a summary was produced and this matter was discussed as an agenda item (e.g. Executive Board, Audit and Risk Committee, any temporary COVID-19 boards).

Calculation building on analysis in Q6."

40. The Commissioner's view is that this seems a generous estimate particularly in the light of the Annual Report and Accounts referencing information relating to these questions.
41. At paragraphs 26-29 above DCMS explained the involvement of ALBs with regard to its ability to respond to questions 7 and 16. The Commissioner is surprised that DCMS does not hold this information, with regard to the production of the Annual Report and Accounts. However, if he accepts this to be the case the time allocated to these questions cannot be included because the information is not held. As a result the information for questions 8 – 10 similarly is not held. Therefore the total amount of time estimated by DCMS to respond to the questions for which information is held totals 28 hours. As the Commissioner considers the estimates to be generous and unsubstantiated his decision is that the information could have been provided within the 24 hour limit.
42. The Commissioner therefore finds that DCMS was not entitled to rely on section 12 FOIA to refuse to comply with the request.

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

43. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request if it is reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice in providing advice and assistance, it will have complied with section 16(1).
44. The Commissioner notes that, in its initial response, DCMS suggested refinements to the request such as limiting the number of questions or the timeframe. The complainant refused to accept these suggestions. DCMS revisited this at internal review.
45. Notwithstanding his finding on section 12 the Commissioner is satisfied that DCMS did comply with section 16 of FOIA when dealing with this request.

Right of appeal

46. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

The complainant's request in full:

Q1. What was the annual £ level of fraud witnessed by DCMS for the period 1st April 2018 - 31st March 2020 (i.e. pre-pandemic)

Q2. During this period (1st April 2018 - 31st March 2020) what were the FIVE biggest sources of fraud across DCMS activities?

Q3. During this period (1st April 2018 - 31st March 2020) what was their respective contribution to the overall losses to fraud suffered by DCMS?

Q4. From 23rd March 2020, please confirm that DCMS did NOT contribute any funds towards central government Covid-19 schemes, namely:

CBILS Coronavirus Business Interruption Loan Scheme

CLBILS Coronavirus Large Business Interruption Loan Scheme

Coronavirus Job Retention Scheme

Business Rates Relief

Bounce Back Loans Scheme

Recovery Loan Scheme

Omicron Hospitality and Leisure Grant

Additional Restrictions Support Grant

Restart Grant Small Business Grants Fund

Q5. What funding packages developed to support DCMS client sectors through COVID-19 have increased the department's exposure to fraud?

Q5. What funding packages developed to support DCMS client sectors through COVID-19 have increased the department's exposure to fraud?

Q6. Identify the top FIVE funding packages that have increased the department's exposure to fraud the greatest since 1st April 2020.

Q7. Provide an absolute £ figure for the fraud losses across each identified funding package for the periods:

1st April 2020 - 31st March 2021

1st April 2021 - 31st March 2022

1st April 2022 - 31st March 2023

Q8. If not mentioned or identified above, provide an absolute £ figure for the fraud losses under Cultural Recovery Fund (CRF) for the periods:

1st April 2020 - 31st March 2021

1st April 2021 - 31st March 2022

1st April 2022 - 31st March 2023

Q9. If not mentioned or identified above, provide an absolute £ figure for the fraud losses under Sports Survival Package (SSP) for the periods:

1st April 2020 - 31st March 2021

1st April 2021 - 31st March 2022

1st April 2022 - 31st March 2023

Q10. If not mentioned or identified above, provide an absolute £ figure for the fraud losses under Building Digital UK voucher scheme for the rollout of gigabit for the periods:

1st April 2020 - 31st March 2021

1st April 2021 - 31st March 2022

1st April 2022 - 31st March 2023

Q11. What has been the cost to DCMS of introducing and implementing Government Functional Standard [Gov 013: Counter Fraud] in August 2021, updating its procedures and integral policy documents (including its Counter Fraud Strategy, its Counter Fraud Policy and its Counter Fraud Response Plan) to ensure they align with the functional standard?

Q12. Who is currently the DCMS Counter Fraud Responsible Officer at Executive Board level who is responsible for ensuring that the department's overall arrangements for managing the risk of fraud are appropriate?

Q13. Is his/her remuneration package e.g. bonuses, linked to decreases in annual fraud levels? If so, what reported performance metrics will justify a bonus?

Q14. How many DCMS staff annually were employed on a dedicated basis to counter fraud in 2019, 2020, 2021, 2022, 2023?

Q15. What absolute £ amount of financial loss was deemed acceptable and was tolerated by DCMS during the pandemic?

Reference: IC-268038-H8J8

Q16. What proportion of that absolute £ financial loss through fraud or error is expected to be recovered through remedial/post-event recovery and over what time frame?"