

# FOI, practically speaking Part 4 — take it to the (appropriate) limit

**Paul Gibbons, FOI Man and Information Compliance Manager, SOAS, University of London, discusses what can be included within the costs limit set out in the Fees Regulations, the matter of aggregation, and what changes to expect in this area**

**I**t's a real problem. How do you balance the right to know with the need to ensure that public services do not grind to a halt under the onslaught of unlimited freedom of information requests? Of course, it is possible to weed out the more excessive and extreme FOI requests through the use of the vexatious provision at section 14 of the Freedom of Information Act ('FOIA'). But as we have seen, this has its limits.

What is needed is some way to manage the flow of requests and a ceiling on how much effort public authorities are expected to expend on meeting their FOI obligations. This is what section 12 and its associated regulations are for.

## What does section 12 say?

Public authorities are not obliged to comply with a request for information if they 'estimate that the cost of complying with the request would exceed the appropriate limit'. They must still state whether information is held, unless to do so would similarly exceed that limit.

The 'appropriate limit' is set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 SI 2004 No 3244 ('the Fees Regulations'). The most important sections of the Fees Regulations for the purposes of this article are Regulations 3 to 5. Regulation 3 sets the appropriate limit as £600 for central government, and £450 for all other public authorities. Regulation 4 explains how that estimate must be arrived at, and what can be included within it. Regulation 5 allows public bodies to aggregate the cost of multiple requests from the same person or from individuals acting in concert when considering whether the appropriate limit would be exceeded.

## Estimating the cost

It is well known that Regulation 4 only allows public authorities to include the following when estimating the cost of complying with a request:

- establishing whether the infor-

mation is held;

- locating the information;
- retrieving the information; and
- extracting the information.

Consideration or reading time, or time spent consulting with third parties, cannot be taken into account. The High Court has confirmed that redaction time also cannot be included within the estimate (*Chief Constable of South Yorkshire Police v Information Commissioner* [2011] EWHC 44 (Admin)).

Staff time must be calculated at £25 an hour, no matter who works on the request. This is necessary, of course, as otherwise public bodies could very easily limit the extent of their obligation to answer requests simply by giving responsibility for FOI compliance to the most well-paid employees. This is the basis of the oft-quoted 18 and 24 hour time limits for FOI requests. There is no time limit specified within FOIA or the Fees Regulations, but simple mathematics leads to these figures: £600/£25 = 24 hours; and £450/£25 = 18 hours.

FOI Officers should not forget that the estimated cost can include costs other than staff time. The Information Commissioner ('Commissioner') suggests that the cost of retrieving files from commercial storage, for example, can be included in an estimate of costs, as long as only the costs directly attributable to the FOI request are considered (i.e. if several boxes of files are retrieved every day, but only one would be retrieved to answer the FOI request, only the proportion of the charge relating to that box can be included in the estimate).

Several Tribunal decisions have made it clear that estimates need to be 'sensible, realistic and supported by cogent evidence' (*Randall v Information Commissioner and MHRA*, EA/2007/0004). However, estimates do not have to be precise. An example might be where the information requested can only be found in manual files, so it is possible to estimate how long it would take to extract the information from one file, and then multiply that by the number of files that would

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need to be examined.

The FOI Officer must take care though. In *Urmenyi v IC and London Borough of Sutton* (EA/2006/0093), Mr Urmenyi had asked for the number of appeals against Penalty Charge Notices ('PCNs') issued for parking by the Council over a 6 month period. The Council had refused under section 12, arguing that it would need to look at all 4,704 records of PCNs issued during that period in order to identify the PCNs that had been appealed.

The Council had estimated that it would take approximately 30 seconds to read each record.

The Tribunal interrogated the Council officers extensively on this, and eventually concluded that 15 seconds was more realistic. The end result was that the Tribunal still supported the Council's use of section 12. However, it is worth bearing in mind that an FOI Officer applying section 12 had better be able to justify the reasoning used, in some cases to the very second.

Given that one aim of the appropriate limit is to prevent FOI requests from taking up too much time, perhaps we should turn to everybody's favourite Time Lord to illustrate a point.

As many will know, the television programme, *Doctor Who*, is made in Cardiff, and Cardiff City Council had been asked for all correspondence between themselves and the BBC relating to the programme. The request was refused, effectively on the basis that if every member of staff was asked to check their correspondence to see if they had been in dialogue with the BBC on this subject, this would exceed the appropriate

limit.

However, when the Tribunal questioned the Council's officers (*Cardiff City Council v Information Commissioner* (EA/2011/0215)), it became apparent that there were, in practice, only a few departments that would have good cause to correspond on this matter. The conclusion was that an estimate made in support of applying section 12 must be based on the work reasonably required to answer the request. Even though it was possible that relevant information was held beyond the departments

identified, it was reasonable to limit the search for information to the departments most likely to hold relevant information.

This approach was confirmed more recently in *Chagos Refugees Group v IC & Foreign and Commonwealth Office* (EA/2011/0300) where it was stated that: "a search should be conducted intelligently and reasonably...this does not mean it should be an exhaustive search conducted in unlikely places: those who request information under FOIA will prefer a good search, delivering most relevant information, to a hypothetical exhaustive search delivering none, because of the cost limit."

On occasion, FOI Officers receive a request which asks that 'if this request is likely to exceed the appropriate limit, please provide all information that can be provided up to the limit', or something to that effect. Quite simply, there is no obligation to do this. In *Randall v Information Commissioner and MHRA* (EA/2007/0004), the Tribunal stated: "The effect of section 12 is not to impose a limit, leaving the authority obliged to carry out work up to that limit; it is to remove the information

from the scope of the section 1 duty to disclose altogether."

There is, of course, an essential link between section 12 and section 16 — the duty to provide advice and assistance. If a request is likely to exceed the appropriate limit, public authorities should go back to the requester to advise them on how they might bring their request within the limit. This is set out in the Section 45 Code of Practice, and Tribunals have been known to rule against public authorities that have failed to do this.

Public authorities should not make assumptions as to which information within the limit should be provided, but should instead refer back to the requester (*Fitzsimmons v IC & BBC*, EA/2008/0043). Despite this, if the public body happens to inadvertently reach the appropriate limit in its attempts to locate requested information, it is acceptable for it to cease all work on the request at the point that it realises this (*Quinn v IC & Home Office*, EA/2006/0010).

## Aggregating costs

Regulation 5 of the Fees Regulations sets out the circumstances under which the cost of multiple FOI requests can be included in an estimate. First of all, it is worth highlighting a quirk of FOIA.

In many — possibly even most — cases, those making requests under FOIA ask several questions in one piece of correspondence. It will be with some irritation that many FOI Officers will learn that, for the purposes of this aspect of the legislation, each of these questions is considered a separate FOI request (*Fitzsimmons v ICO & DCMS*, EA/2007/0124). So in talking about the aggregation of the cost of requests, it may be that we are talking about aggregating the cost of several questions within the same item of correspondence (which most FOI Officers would log as a single request).

This Regulation has the potential to be open to abuse by public authorities. But there are important limits on its use. First of all, the requests must all have been received within 60 working days — effectively 3 months. So after that period, the slate is wiped

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clean. Secondly, the requests must relate to 'the same or similar information'. Recent tribunals have tended to take a broad interpretation of this latter requirement, for example in *IPCC v IC* (EA/2011/0222) where the Tribunal commented that 'only a very loose connection between the two sets of information' was required. But it still means that, where questions relate to substantially different subjects, it is not going to be possible to aggregate the cost of multiple questions or requests (even within the same item of correspondence).

## Environmental information

There is no provision for refusing requests under the Environmental Information Regulations ('EIRs') on grounds of cost. It is possible to extend the period in which the request must be answered from 20 to 40 working days if 'the complexity and volume of the information requested means that it is impracticable...to comply with the request within the earlier period'. However, this does not remove the significant burden that might on occasion be placed on an authority's resources by a single request.

It is now generally accepted by the Commissioner and Tribunals that authorities may also rely on the exception at Regulation 12(4)(b) of the Fees Regulations. This provision allows public bodies to refuse requests that are 'manifestly unreasonable'.

The Commissioner has recently issued new guidance (copy available at: [www.pdpjournals.com/docs/88120](http://www.pdpjournals.com/docs/88120)) on when this exception may be relied upon for burdensome EIRs requests. This has been influenced by the recent decision of the Upper Tribunal in respect of *Craven v IC & DECC* ([2012] UKUT 442 (AAC)) referred to in my previous article, in Volume 9, Issue 5 of *Freedom of Information* (pages 3 – 5). The Commissioner accepts that Regulation 12(4)(b) can apply in these circumstances, but makes the following points:

- just because a similar request would have exceeded the appropriate limit under FOIA, it does not mean that Regulation 12(4)(b) will automatically apply.

Sometimes authorities will be expected to provide more environmental information than if the request had been for other information;

- all of circumstances will need to be looked at and taken into account — for example, the volume of the information, the size of the authority and the purpose and value of the request will all need to be considered;
- it is reasonable to base estimates of staff time on the £25 an hour formula used in the Fees Regulations (though the Regulations don't apply to EIRs requests); and
- remember that Regulation 12(4)(b) is subject to a public interest test. Even if there is a case for arguing that the request is manifestly unreasonable, if there is a strong public interest in disclosure of the requested information, the request may still have to be complied with.

## The future

It is possible that things will change in the near future. The government's response to last year's post-legislative scrutiny of FOIA indicated that it intends to amend the Fees Regulations to:

- reduce the acceptable limit above which FOI requests can be refused;
- include consideration and reading time amongst the factors that can be included when estimating the cost of answering FOI requests; and
- allow aggregation of the cost of multiple FOI requests from the same person or campaign when considering if requests can be refused on cost grounds.

This is not the first attempt to make these amendments. Tony Blair's government made the same proposal in 2006/07. In that case, consultation led to the plans being delayed and eventually abandoned when Gordon Brown became Prime Minister. Whether this government will have the will to push these plans through — potentially offending journalists in

the run up to a general election in 2015 — remains to be seen.

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**Paul Gibbons**  
FOI Man  
[paul@foiman.com](mailto:paul@foiman.com)

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