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## FOI POLICY KNOWLEDGE BASE

Fol or EIR	Section/Regulation	Issue
FOI	All	Time at which to apply provisions of the Act

### Line to Take:

*As part of the guidance review some of the content of this line to take is now covered in external guidance. In some instances new policy positions will be reflected in the guidance and where this is the case this will be highlighted in the existing line. All other sections of this line to take remain effective. The remainder of the line will be incorporated into guidance or caseworker advice notes in due course at which point this line will be withdrawn.*

In relation to sections 1, 12, 14 and the application of the exemptions and the public interest test, a public authority can either consider the circumstances in existence at the date of the request or alternatively at the point it actually deals with the request, provided this is within the time for statutory compliance.

### Further Information:

#### HELD / NOT HELD CASES

The starting position for public authorities when considering section 1 is whether the information is held on the date of the request.

However, the Commissioner accepts that in reality, most public authorities do not deal with a request on the day it is received due to pressures of work, staff absences and because requests are often sent to one point of contact rather than to the individual or department who may actually hold the relevant information. As such, it may be more practical for a public authority to use the date on which it actually deals with the request as the date on which it considers whether the requested information is held because (i) it avoids the need for the authority to have to check document creation dates to exclude information which was created between the date of the request and the date of compiling the response and (ii) in relation to constantly changing information, for example, statistical information or spreadsheets updated daily, it avoids the need to try to recreate information as it stood at the time of the request. *N.B. This point is now covered in external guidance - Determining whether information is held.*

Finally, as the Act provides a 20 working day long-stop for a public authority to respond to a request, the Commissioner will accept an authority considering whether the requested information is held at any point between the date of the request and the date for statutory compliance (as long as this does not prevent the public authority from meeting its duty to respond within the statutory time for compliance, for example because it has not left itself enough time to consider any exemptions it might wish to apply). *N.B. This point is now covered in external guidance - Determining whether information is held.*

The above approach is largely advantageous to the complainant as he/she may get more information than he/she may otherwise have done if the date of the request were strictly adhered to. It is accepted that there may be a small number of cases where the relevant information is destroyed or deleted, during the normal course of business, between the date of the request and the date on which the authority responds but this scenario is covered by the provision at section 1(4) which states that the requested information is the "...information...held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated...being an amendment or deletion that would have been made regardless of the receipt of the request". Where the case officer suspects that the information may have been destroyed to avoid disclosure rather than in the normal course of business, then the usual referral to Investigations should be made.

The Commissioner acknowledges that this approach leaves the flexibility to determine which date to use with the public authority which means that it could use it to its advantage by claiming that the requested information is not held if it was created in the period between the date of the request and the time for compliance. The Commissioner would uphold this technical application of the Act in considering a section 50 complaint. He would however point out to public authorities that this might lead to a waste of public resources (as the complainant may now just make a new request for the information), deterioration in relations between the authority and the complainant, and complaints of poor customer service. Accordingly, in this scenario, public authorities should be encouraged as a matter of good practice to consider what information is held at the time of dealing with the request.

Where a public authority fails to comply with the request within the statutory timeframe, for example, it deals with the request 38 days after it was received, the public authority must still consider the application of section 1 within the period between the date of the request and the date for compliance.

The same general approach should be applied when considering regulation 12(4)(a) of the EIR.

### SECTION 12

#### Single requests (where aggregation is not an issue)

The starting point in section 12 cases will be to consider the request on the day that it is received.

However, the Commissioner accepts that in reality, most public authorities do not deal with a request on the day it is received and it may therefore be more convenient for the authority to consider whether it would exceed the costs limit taking into account the circumstances on the day it properly considers the request. Therefore, the Commissioner will allow a public authority to take into account the costs of determining whether the requested information is held and then locating, retrieving and extracting it in relation to the information and circumstances as they exist at any point between the date of the request and the time for statutory compliance.

#### Aggregation

For cases involving multiple requests in the same piece of correspondence the same principle (of allowing the circumstances to be considered at any date up to the statutory time for compliance) will apply. See LTT145 & LTT138 for details on how similar requests have to be in order to be aggregated).

For cases involving the aggregation of multiple separate requests made on different days, the Commissioner would wish to follow the same general principle (of allowing the circumstances to be considered at any date up to the statutory time for compliance). However, the following points need to be taken into consideration:

- A public authority should claim reliance on any exemption or provision such as section 12 within 20 days of the date of the request in order to comply with section 10.
- However, the Appropriate Limit and Fees Regulations 2004 allow for the aggregation of the costs of dealing with two or more requests which relate, to any extent, to the same or similar information where those requests are received within "any period of sixty consecutive working days". No mention is made of how the Fees Regulations interrelate with an authority's duty to comply with requests within 20 days of receipt.
- The Upper Tribunal in *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC) has ruled that public authorities have the right to make late claims of exemptions, including s12 or s14, for the first time before the Commissioner or the Tribunal.

The Commissioner has set out his approach below which aims to provide a practical way for case officers to apply the above points in their case work:

#### THE GENERAL RULES

The Commissioner will apply the following rules when considering the aggregation of similar requests.

- In relation to section 12 a public authority can either consider the circumstances in existence at the date of the request under consideration, or alternatively at the point it actually deals with the request provided this is within the statutory time for compliance.
- The aggregation period will only ever be able to run up to 20 days "forward" from the date of any single request under consideration. This is in order to take account of the 20 working day long-stop provision in section 10(1). (In theory, if a response given at 20 days would not be considered to be "prompt", then a shorter "forward" aggregation period might apply - but see LTT205 for further detail on the Commissioner's line on promptness).
- The aggregation period will however be able to run up to 60 days "backwards" from the date of any single request under consideration. This takes account of the 60 days aggregation rules in the fees regulations.
- The **total** aggregation period, (running either forwards or backwards or a combination of both) from the date of any single request must never exceed 60 working days.

#### WHERE SECTION 12 IS CLAIMED LATE

Following the binding decision of the Upper Tribunal in the case of *McInerney*, the Commissioner does not have discretion as to whether or not to accept a late claim of section 12. The general rules above will apply in such cases (see also LTT21).

#### SECTION 14

The starting position for public authorities when considering section 14 is whether the request is vexatious on the date of receipt.

However, the Commissioner accepts that in reality, most public authorities do not deal with a request on the day it is received due to pressures of work, staff absences and because requests are often sent to one point of contact rather than to the individual or department who may actually hold the relevant information. As such, it may be more practical for a public authority to use the date on which it actually deals with the request as the date on which it considers whether the request is vexatious.

Finally, as the Act provides a 20 working day long-stop for a public authority to respond to a request, the Commissioner will accept an authority considering whether the request is vexatious at any point between the date of the request and the date for statutory compliance (as long as this doesn't prevent the public authority from meeting its duty to respond within the statutory time for compliance).

The Commissioner accepts that this approach allows public authorities to reference additional requests received between the date of the request and the date of compliance as support for the claim that the request was vexatious at the time of the request which could be said to amount to applying section 14 based on post-request evidence. This in turn may lead to section 14 being upheld in more cases than if the evidence could only be considered up to the point of the date of the request.

However, this approach gives effect to section 10 in allowing a public authority 20 day long-stop to respond and is consistent with the approach taken in response to other sections of the Act. This approach is also the more practical one as it does not require an authority to try to artificially consider the situation at the time of the request and ignore later correspondence and requests. It also allows an authority to point to actual evidence in support of its arguments that section 14 is engaged, for example,

- If an authority is arguing that the request is obsessive, it may support its claim to point to the additional high number of requests and correspondence received just within the short period of time between the request and the date of compliance.
- If an authority is arguing that the request has the effect of harassing its staff, it may be useful to evidence this point where the complainant does not even wait 20 days to receive a response to the material request before submitting other requests on the same topic or where the complainant has submitted a request to one individual but goes onto make the same request to other employees at the public authority, again, without allowing time for a response within the permitted timeframe.

Where a public authority fails to comply with the request within the statutory timeframe, for example, it deals with the request 51 days after it was received, the public authority must still consider the application of section 14 either at the date of the request or at any point between the date of the request and the time for compliance. This also applies where the public authority claims section 14 for the first time in the course of the Commissioner's investigation (see also LTT21).

#### EXEMPTIONS & PUBLIC INTEREST TEST

**(This section is now covered in the following external guidance - The public interest test and How exceptions and the public interest test work in the Environmental Information Regulations)**

The starting point for the application of exemptions and the public interest test is to consider the circumstances at the time of the request.

In reality though, the Commissioner accepts that most public authorities do not deal with requests on the day on which they are received and to compel the authority to consider the application of the exemptions and the public interest test on the date of the request may be an

unhelpful and time consuming process in trying to step back in time to the date of the request and ignore later developments. This approach may also lead to artificial outcomes, for example, the Commissioner would have to issue a decision notice with no steps where an authority could not release the information at the time of the request but where the information could be disclosed as a result of a change of circumstances within the 20 days post request. Also, a public authority would be unable to claim section 21 where the requested information was available on its website but where the website was unavailable due to technical problems on the date of the request (albeit that these types of cases are most likely to be resolved informally anyway).

However, the Commissioner accepts that an authority can consider the application of the exemptions and the public interest test on the date that it deals with the request provided this is within the time for statutory compliance. This is supported by the Tribunal's comment in the case of the Department for Business, Enterprise and Regulatory Reform (DBERR) and the Friends of the Earth, in which it was said that "*the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA*" (para 110).

In addition, this flexible approach should usually benefit the complainant by allowing an authority to make a fuller consideration of whether an exemption applies or where the PIT lies by taking into account events which took place at or just after the date of the request rather than being limited to a consideration which is fixed only on the date of the request.

However, the Commissioner accepts that an authority may use this flexibility to its own advantage, for example, a request is made on 14 March for a government report on climate change. The report is finalised on 20 March. The authority deals with the request on 23 March. At the time of the request, the authority can claim regulation 12(4)(e) (unfinished documents) whereas at the point of dealing with the request, the authority could not. The Commissioner would accept this technical application which could lead to a decision notice upholding the exception. However he would attempt to resolve this matter informally by pointing out that the complainant can simply make a new request for the finalised report and that to deal with the case in this way could lead to a deterioration in the relationship between the public authority and the applicant with the possibility of adverse media coverage.

Where a public authority fails to comply with the request within the statutory timeframe, for example, it deals with the request 44 days after it was received, the public authority must still consider the application of the exemptions (and public interest test, where appropriate) either at the date of the request or at any point between the date of the request and the time for compliance. This also applies where the public authority makes a late claim of an exemption (see also LTT21)

<b>Source of Line to Take</b>	Policy Team	<b>Details</b>	Department for Business, Enterprise and Regulatory Reform (DBERR) and the Friends of the Earth (29 April 2008)  McInerney v IC and Department for Education (29 January 2015)
<b>Related Lines to Take</b>	LTT21, LTT138, LTT145,		
<b>Related Documents</b>	<a href="#">EA/2007/0072</a> (DBERR), <a href="#">GIA 4267/2014</a> (McInerney)		
<b>Contact:</b> CW			
<b>Date:</b> 16/02/2012. Amended 11/05/2015 re late claims		<b>Reference number:</b> LTT92	

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