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FOI/EIR    FOI    Section/Regulation    s12    Issue    Exercising the Commissioner's discretion to accept late claims of section 12

Line to take:

The Commissioner has discretion to decide whether to accept a late claim of section 12 following the binding decision of the Upper Tribunal in the case of the All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & the Ministry of Defence (GIA/150-152/2011).

Further Information:

The Commissioner has discretion to decide whether to accept a late claim of section 12 following the binding decision of the Upper Tribunal in the case of the All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & the Ministry of Defence (GIA/150-152/2011). The Upper Tribunal commented that it could reach a different conclusion to that found in the DEFRA/Home Office case because the "...section 12 cost exemption is somewhat different and raises particular considerations of its own; and we note that this was not the kind of claim that was the subject of Judge Jacobs in DEFRA" (paragraph 45). This allowed this Upper Tribunal to find that:

"...If the raising of a new exemption before the Commissioner is subject to the Commissioner's discretion, to be exercised fairly and in light of the statutory purposes, this both restores some meaning to the time limits and avoids potential unfairness to requesters" (paragraph 43).

In exercising the Commissioner's discretion, case-officers should consider the particular circumstances of the case, including whether the authority has collated the information for the purposes of applying an exemption, as well as any unfairness or disadvantage caused to the requestor in accepting a late claim.

### Example

A public authority receives a single request and issues a refusal notice citing section 43. The requestor does not accept that the exemption is engaged and makes a complaint to the ICO.

As part of the investigation, the authority is informed that the Commissioner is unlikely to find that section 43 is engaged. At this stage, the public authority makes a late claim of section 12 i.e. it is no longer seeking to rely on section 43 in relation to the original request.

The Commissioner has discretion to accept or decline this late claim. In exercising this discretion, case-officers should consider the extent to which the public authority compiled the information in order to apply the exemption.

It is unlikely that the Commissioner would exercise his discretion to accept a late claim of section 12 where:

- the public authority has collated all of the requested information in order to make strong arguments which are focussed on the relevant information in support of its claim of the exemption and the information remained in collated form at the time of the late claim of section 12; or
- where the public authority has collated some rather than all of the requested information but where the remaining costs of collation would be minimal.

This is because there would be no or minimal costs to incur at the time of the claim of section 12 and it would be disadvantageous to the complainant to allow such a late claim.

However, the public authority may have applied the exemption largely based on existing knowledge and without sight of the requested information. Although this is not a practice we would recommend; if none of the requested information has been collated or if the costs still to be incurred in collating the information are significant, then we are more likely to accept the late claim of section 12 in order to give effect to the purpose behind section 12 in avoiding unnecessary and burdensome work.

Similarly, the Commissioner may accept a late claim of section 12 where the authority has not already collated the requested information for other reasons such as:

- where the public authority initially claimed that it did not hold the requested information;
- where the public authority does not engage with the request at all and fails to provide a refusal notice or internal review;
- where the public authority interprets a request narrowly and only later realises later that the complainant is seeking a lot more information than originally thought.

### Environmental Information Regulations:

It should be noted that the above does not apply to the equivalent provision under the Regulations (regulation 12(4)(b) – manifestly unreasonable) as the Court of Appeal (\*) has determined that this provision should be treated as an exception. Accordingly, as the Commissioner has no discretion in deciding whether or not to accept a late claim of an exception, he is obliged to consider a late claim of regulation 12(4)(b).

(\*) – [2011] EWCA Civ 1606 (Birkett / DEFRA)

Source	Details		
Upper Tribunal	All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & the Ministry of Defence		
Related Lines to Take			
Related Documents			
<a href="#">GIA/150-152/2011 (APPGER)</a>			
Contact		HD	
Date	21/03/2012	Policy Reference	<b>CWAN 004</b>

- Information Commissioner's Office intranet